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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

ANNUAL REPORT OF ACTIVITIES FOR 1996

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MEMBERSHIP

At the end of 1996, the Commission totalled 35 full members, 5 associate members and 7 observers.

Members

"The Former Yugoslav Republic of Macedonia", Moldova and Albania acceded to the Partial Agreement establishing the Commission. Mr Ilo Trajkovski, Professor of Sociology at the University of Skopje, Mr Mihai Petrachi, Head of the Legal Department, Parliament of Moldova and Mr Aleks Luarasi, Professor at the University of Tirana were appointed Commission members in respect of "The Former Yugoslav Republic of Macedonia", Moldova and Albania respectively.

Ms Ana Milenkova, Member of the National Assembly, was appointed member in respect of Bulgaria, with Mr Alexandre Djerov, member of the National Assembly, becoming her substitute. Ms Carmen Iglesias Cano, Director of the Centre for Constitutional Studies, was appointed member in respect of Spain and Mr Rune Lavin, Parliamentary Ombudsman, member in respect of Sweden, respectively replacing Mr Luis Aguiar de Luque and Mr Hans Ragnemalm, who have resigned from their functions.

Ukraine, the Russian Federation and Croatia, who were associate members until their accession to the Council of Europe on 9 November 1995, 28 February 1996 and 6 November 1996 respectively, are expected to accede to the Commission shortly.

Associate members

The Committee of Ministers authorised Azerbaijan and Bosnia and Herzegovina to co-operate with the Commission. Mr Khanlar Hajiyev, Chairman of the Supreme Court was appointed associate member in respect of Azerbaijan and Mr Cazim Sadikovic, Dean of the Faculty of Law, University of Sarajevo associate member in respect of Bosnia and Herzegovina.

Observers

Mr Paul Gewirtz, Potter Stewart Professor of Constitutional Law, Yale Law School was appointed observer in respect of the United States of America, replacing Ms Nancy Ely-Raphael who resigned from her functions.

Sub-Commissions

No new Sub-Commissions were created during 1996.

The composition of the Sub-Commissions is set out in Appendix II to this report.

ACTIVITIES

I. Activities of the European Commission for Democracy through Law in the field of democratic reform

During 1996, the Commission continued to co-operate with several countries on matters principally related to constitutional reform. However, its field of action was broadened and its operations became more varied.

Much of the Commission's work was, of course, devoted to the constitutional process. The preparation and adoption of the Constitution of Ukraine was central to this activity. At the same time, the establishment and functioning of the Constitutional Courts of Armenia, Azerbaijan, Georgia, Latvia and Ukraine were areas of fruitful co-operation between the Commission, on the one hand, and the national legislature and judiciary, on the other. The Commission also closely monitored constitutional developments in Albania, Bulgaria, Hungary and Russia.

The implementation of constitutional guarantees in countries which have recently experienced the horrors of war was a challenge to which the Commission responded without hesitation. The establishment of coherent constitutional systems and of institutions and mechanisms designed to restore confidence in the system of justice and the rule of law among populations traumatised by violence is the quintessential duty of a consultative body of independent experts which operates in the field of the "guarantees offered by law in the service of democracy". The Commission's co-operation with the Croatian authorities on the implementation of the Constitutional Law on the Protection of Human Rights and Minorities, and its ongoing activity in Bosnia and Herzegovina bear witness to its commitment.

The constant enlargement of the Commission and the scale of the discussions which take place in the context of its activities show that the Commission has become an ideal forum for the exchange of information, experience, ideas and projects in the constitutional field. This is a vital function for the promotion of a European legal culture based on democratic heritage, the principle of the rule of law and respect for human rights. Beyond merely confirming the need for mutual consultation in the field of democratic reform, which was the initial impetus for the establishment of the Commission, this function is above all the result of a twofold observation: the problems associated with the functioning of democratic institutions are not exclusive to the new democracies and the Commission, in its capacity as a "constitutional laboratory", may be a source of information and inspiration to both new and old democracies. The interest exhibited in its work on federalism is an obvious example of this trend.

A major event left its mark on the European constitutional scene at the end of 1996, namely the revision of the Constitution of Belarus. Shouldering the responsibility entailed by its role as an observatory of democratic institutions, the Commission was confronted for the first time with a reform likely to endanger democracy. This event only underscores the need for constant vigilance in matters of democracy and for active co-operation with regard to legal guarantees for democracy.

Finally, co-operation with countries outside the European continent, particularly South Africa, was stepped up in 1996 as a result of the implementation of the programme "Democracy, from the law book to real life", a joint programme involving the Swiss Federal Ministry of Foreign Affairs, the South African Department of Constitutional Development and the Venice Commission.

A short description of the Commission's work in this area (Chapter A) is followed by the presentation of some opinions which the Commission has decided to make public (Chapter B).

A. Description of the Activities of the Commission

1. Co-operation with Albania

The Commission was informed of constitutional developments in Albania at its 28th plenary meeting.

Work on the adoption of a new constitution has not yet been successfully completed, and the recent legislative elections gave rise to a number of irregularities noted by the OSCE. The Commission took note of this information.

It observes today an undeniable lack of progress in the process of constitutional and legislative reform, which cannot but be harmful to legal stability and to the consolidation of the rule of law.

It reiterates its readiness to assist Albania in its process of constitutional and legislative reform.

2. Co-operation with Armenia

At the request of the Armenian Constitutional Court, a Commission delegation composed of Mr Marques Guedes and Mr Nicolas, members of the Commission, Mrs Nemeth, from the Hungarian Constitutional Court, Mrs Remy-Granger from the French Constitutional Council, Mr Buquicchio, Secretary of the Commission, and Mr Polakiewicz, a Secretariat official, went to Yerevan from 16 to 18 October 1996 to take part in the Seminar on "Monitoring constitutionality and democratic processes in the newly independent States", organised jointly by the Constitutional Court of the Republic of Armenia and the Venice Commission. The seminar was held on the premises of the National Science Academy of the Armenian Republic in Yerevan. About fifty high-level personalities took part in the work of the seminar (including the Minister of Justice, all the members of the Constitutional Court, academics and NGO representatives).

Provision had also been made for contacts with the Armenian authorities in order to identify priority areas in the Commission's future co-operation with Armenia.

The delegation was thus able to hold meetings with Armenian political authorities as well as with all the members of the Constitutional Court. Every one of the delegation's discussion partners emphasised Armenia's genuine interest in co-operation with the Council of Europe and the political importance of that country's accession to membership of the Organisation. At all the meetings in question, the delegation stressed that accession to the Council of Europe presupposed unconditional adherence to the principles of democracy, human rights and political pluralism. In that connection, attention was drawn to the essential need for the doubts expressed about the legality of the presidential elections on 22 September 1996 to be dispelled and for the Constitutional Court to pronounce on the validity of the results of those elections. The President of the Court, Mr Haroutunian, thanked the Commission for its assistance. The Bulletin on Constitutional Case-Law and the CODICES database were extremely useful tools for the Court's work.

3. Co-operation with Azerbaijan

Co-operation between the Commission and Azerbaijan got off to a good start in 1996.

At the 26th plenary meeting of the Commission, Mrs Housseinova, Ambassador of the Republic of Azerbaijan in Paris, pointed out that Azerbaijan had just been granted "special guest" status with the Parliamentary Assembly and wished to be integrated into the European co-operation structures. Although it was difficult to establish a State based on the rule of law in the midst of an armed conflict, the Azerbaijani authorities had made much progress in that direction. A new constitution had already been adopted and a number of new laws, including laws on the protection of the rights and freedoms of citizens, the rights of foreigners and stateless persons, political asylum, local self-government and the legal basis for the transition to a market economy, were currently being drafted. The Commission took note of the information presented and declared its readiness to assist Azerbaijan in drawing up any legislation within its field of competence.

At its 27th meeting, the Commission decided unanimously to grant associate member status to Azerbaijan.

At the 28th plenary meeting, Mr Hajiev, an associate member of the Commission in respect of Azerbaijan, provided information on the reforms under way in his country and on the work relating to the law on the Constitutional Court.

A Commission delegation, composed of MM Russell, Özbudun and Lesage, as well as Mr Buquicchio, Secretary of the Commission and Mr Giakoumopoulos, Deputy Secretary, went to Baku from 16 to 19 September 1996, following an invitation from the Azerbaijani authorities.

The primary purpose of the visit was to meet those responsible for drafting the Bill on the Constitutional Court of Azerbaijan in connection with the preparation of a Commission opinion on that Bill; provision had also been made for contacts with the authorities in order to determine the priority areas of the Commission's future co-operation with Azerbaijan.

The delegation was able to hold meetings with the most senior political leaders in Azerbaijan, as well as with high-level officials in the State legal service. All the people contacted by the delegation laid stress on Azerbaijan's genuine interest in co-operation with the Council of Europe, the political importance of that country becoming a member of the Organisation and, on a more general level, the challenge posed to the country by European integration. Following the discussions concerning the Bill on the Constitutional Court, it was agreed to continue the process of consultation of Commission members by means of opinions which would be forwarded to the competent authorities. In addition, the numerous contacts established in the course of the visit will enable the Commission to set up a programme of sustained co-operation with Azerbaijan.

At its 29th plenary meeting, the Commission adopted its opinion on the Bill on the Constitutional Court of Azerbaijan. It considered that the Bill gave evidence of Azerbaijan's determination to guarantee the supremacy of the Constitution by setting up a Constitutional Court to monitor the protection of human rights and compliance with the principle of the rule of law and to be composed of independent members in accordance with the standards required of a modern democratic State. The Commission's comments had been mainly concerned with the mandate of the constitutional judges, their immunities, the method of appointing the President of the Court, the powers of the Court and the procedure for referring cases to it. The Commission regretted in particular that no provision was made in the Constitution for cases to be referred to the Constitutional Court by a parliamentary minority. It also proposed that citizens who considered that their constitutional rights had been infringed should be able to apply to the Constitutional Court, if only indirectly.

Mr Hajiev informed the Commission that the possibility for citizens to bring cases concerning them before the Constitutional Court was being considered in accordance with the proposals and comments of the Commission rapporteurs. Although direct referral was not provided for in the Constitution, which set out an exhaustive list of bodies with the capacity to approach the Constitutional Court, it was planned to enable the Supreme Court to submit to the Constitutional Court the cases of citizens who so requested. The Commission took note with satisfaction of this information.

The Commission notes that co-operation with Azerbaijan has already borne some fruit. It is convinced that the co-operation in question will be continued in 1997.

4. Co-operation with Belarus

Throughout 1996, the Commission followed constitutional developments in this country closely and with some concern.

Mr Russell and Mr Dürr from the Secretariat participated in the Belarusian-American Conference on "Actual problems of building a Democratic, Law-Abiding State in the Republic of Belarus" organised by the Constitutional Court and the American Bar Association on 7-8 February in Minsk.

The discussions at plenary meetings centred on the activities of the Constitutional Court (which took into account the Commission's opinions on the laws relating to the Supreme Soviet and the President of the Republic (CDL (95) 75 and CDL (95) 76) in its decisions on the constitutionality of those laws), the formation of the parliament, which has embarked on a major process of legislative reform, the country's relations with the CIS and the treaty of 2 April 1996 setting up a community between the Republic of Belarus and the Russian Federation.

The Commission was also informed that, in a speech on 2 September 1996, Mr Lukashenka, President of Belarus, stated that the constitutional provisions on the functioning of the fundamental institutions of State power, which had been criticised by the European Commission for Democracy through Law of the Council of Europe on 14 November 1995, set the stage for an unhealthy rivalry among the different branches of authority with regard to the very nature of State power. At its 28th plenary meeting, the Commission pointed out that it had issued opinions on the Belarusian laws on the Supreme Soviet and on the President, and emphasised that those opinions had no bearing on the Constitution of Belarus nor, in particular, on the provisions relating to the separation of powers. The Commission made it clear that the opinions recommended no change in the distribution of powers provided for by the Constitution. The Commission also pointed to the fundamental importance of the principle of the separation of powers in a State governed by the rule of law.

At its 29th Plenary Meeting, the Commission was informed that both the President and Parliamentary Groups have submitted amendments to the existing Constitution. The Constitutional Court has declared the referenda on both drafts to be only consultative because these texts would amount to new constitutions and not amendments to the existing one. The President decreed that this decision was null and void because it would be "considerably unconstitutional". The Commission was asked by the President of the Supreme Council, Mr Sharetzky, to give an opinion on draft amendments to the current Constitution of Belarus presented by the President of the Republic of Belarus and by Parliamentary Group. Messrs Bartole, Lapinskas, Malinverni, Ms Milenkova, Messrs Özbudun and Russell, Rapporteurs, presented their opinions.

It was generally felt that the presidential draft overstretched the powers of the President (e.g. Article 84.11 empowering the President to dismiss members of several State bodies). The proposed Constitution rather than establishing a strong Presidential system, created conditions for a modified authoritarian regime.

The Commission found that some Articles of the presidential draft were below minimum standards of democracy in European constitutional tradition. This finding, based on comparative legal analysis, did not only rely on political but also legal considerations. The Commission stressed that its opinion should also be an offer for dialogue with the Belarusian authorities.

The Commission adopted the opinion on the amendments to the constitution of Belarus and forwarded it to the Belarusian authorities.

5. Co-operation with Bosnia and Herzegovina

Co-operation with Bosnia and Herzegovina was an ongoing activity for the Commission in 1996.

At its 26th plenary meeting, Mr Hadjimusi_, Representative of Bosnia and Herzegovina to the Council of Europe, expressed the wish of his authorities to receive assistance from the Commission. The latter decided unanimously, at its 27th plenary meeting, to grant associate member status to Bosnia and Herzegovina.

A delegation from Bosnia and Herzegovina, composed of Mr Hadjimusi_, Representative of Bosnia and Herzegovina to the Council of Europe, Mr Sadikovi_, former President of the Constitutional Court of the Republic of Bosnia and Herzegovina, and Mr Hasi_, Vice-Minister of Justice of the Federation of Bosnia and Herzegovina, as well as Mr van Lamoen and Mrs Nystuen, legal advisers to the High Representative, took part in the 27th plenary meeting of the Commission.

Compatibility of the Constitutions of the entities with the Constitution of Bosnia and Herzegovina

The Office of the High Representative requested the Venice Commission, at its 27th meeting, to issue an opinion concerning the compatibility of the Constitutions of the two entities of Bosnia and Herzegovina (BH), namely the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS), with the Constitution of BH as set out in the framework of the Dayton Agreements.

The Commission immediately set up a working group on the question, composed of MM Scholsem, Robert, Bartole, Helgesen and Özbudun, who were joined by Mr Joseph Marko (Austria) and Mr Andreas Auer (Switzerland). The working group held a meeting in Paris, on 27 June 1996, with representatives of the Office of the High Representative and of BH and the FBH. Moreover, a Commission delegation composed of MM Marko, Scholsem and Malinverni held additional exchanges of views with experts from BH, the FBH and the RS in Sarajevo on 27-28 August 1996.

At its 28th plenary meeting, the Commission adopted its opinion on this question, which contained proposals for amendments designed to ensure that the Constitutions of the two entities were compatible with that of Bosnia and Herzegovina. While the amendments to the Constitution of the Federation related primarily to points of detail, the Constitution of the Republika Srpska required a number of fundamental changes, particularly in order to make it clear that it was an entity of the Republic of Bosnia and Herzegovina, not an independent State. The Commission's opinion was transmitted to the Office of the High Representative.

After the meeting the Commission was informed that, on 13 September 1996, the National Assembly of the Republika Srpska had adopted amendments to the Constitution which took account of many of the Commission's recommendations.

The constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms

In a letter of 16 February 1996, the Chairman of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of

Europe asked the Venice Commission to give an opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms.

The Commission held a meeting with representatives of Bosnia and Herzegovina and officials of the Office of the High Representative on 16 May in Venice. At its 27th plenary meeting, it entrusted a working group comprising Mr Jambrek, Mr Malinverni, Mr Matscher and Mr Russell with the task of drawing up, in co-operation with representatives of all interested parties, including the Office of the High Representative, a report on human rights protection mechanisms in Bosnia and Herzegovina. The Working Group held a meeting in Strasbourg on 21 May 1996 to undertake a preliminary examination of the topic. From 28 to 31 May 1996 in Sarajevo, Mr Giakoumopoulos Deputy Secretary of the Commission, met officials from Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska, the Office of the High Representative and the Commission of Human Rights and reported to the members of the Working Group.

In reply to a request by the Working Group, the Republika Srpska and the Federal Ministry of Justice submitted written information on the human rights protection mechanisms in the two entities. The Office of the Human Rights Ombudsperson in Bosnia and Herzegovina supplied information on its activities and on the human rights protection mechanisms in Bosnia and Herzegovina.

On 21 and 22 June 1996 in Paris, the Working Group held a further meeting, chaired by Mr La Pergola, with representatives of Bosnia and Herzegovina, officials from the Office of the High Representative and representatives of bodies acting in the field of human rights in Bosnia and Herzegovina. The Commission held an exchange of views on the question at issue at its 28th plenary meeting (Venice, 13-14 September 1996), with the participation of Mrs Gret Haller, Ombudsperson for Bosnia and Herzegovina. At its 29th meeting (Venice, 15-16 November 1996), it adopted its report which was transmitted to the Assembly.

The Commission observed that the human rights protection mechanism provided for in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The existence side by side of judicial bodies specifically responsible for protecting human rights and tribunals expected to rule on allegations of human rights violations in the context of cases brought before them inevitably leads to a certain amount of duplication. The Commission made a set of proposals concerning, on the one hand, the interpretation of the constitutional instruments in force, and on the other hand, amendments to the constitution of the entities where the establishment of specific human rights bodies appears superfluous from the legal point of view, or where major disparities come to light in the human rights protection systems of the two entities. Lastly, the Commission observed that the merger of the human rights institutions and the Constitutional Courts appears to be a step which should be envisaged in the long term. The integration of Bosnia and Herzegovina, the normalisation of its constitutional situation and the effective development and functioning of its constitutional institutions will probably require total responsibility for human rights protection to be entrusted to the Constitutional Courts of the State and of its entities.

Legislative power during the transitional period

In a letter dated 18 November 1996, the Office of the High Representative requested the Commission to give an opinion on the validity of the legislative acts adopted by the Constituent Assembly of the Federation of Bosnia and Herzegovina and by the Assembly of the Republic of Bosnia and Herzegovina during the period from the date of entry into force of the Constitution of Bosnia and Herzegovina, as reproduced in Annex IV to the Dayton Agreements (14 December 1995), to the elections of 14 September 1996. Mr Scholsem, Mr Bartole and Mr Malinverni issued an opinion on behalf of the Commission, which was transmitted to the High Representative on 10 December 1996.

The Commission considers co-operation with Bosnia and Herzegovina to be a priority activity. The establishment of a coherent federal system and of effective machinery for the protection of individual rights, the co-operation of the Constitutional Courts operating at State level and within the two entities, the preservation of a balance between the legal systems of the two entities and the implementation of constitutional guarantees concerning the protection of property, the home and displaced persons, are all areas in which urgent action is necessary.

Armed with its experience and gratified by the concrete results already yielded by cooperation with the Office of the High Representative and the authorities in Bosnia and Herzegovina, the Commission is determined to spare no effort capable of contributing to the consolidation of peace and stability in this country. Its co-operation activities in 1997, which are already intensive and sustained, testify to its commitment.

6. Co-operation with Bulgaria

At its 26th plenary meeting, and at the request of the Bulgarian authorities and in the presence of Mrs Ananieva, Deputy Speaker of the National Assembly, the Commission examined two draft laws, one on the Supreme Administrative Court, the other on popular consultations.

The Commission considered that the law on the Supreme Administrative Court constituted a sound basis for the future activities of the Court. Certain points needed to be reconsidered, however, such as the general exclusion of the Court's jurisdiction with regard to measures taken in emergency situations, the provision on the supervision of other authorities and the question of the possible use of minority languages in proceedings before the Court.

With regard to the draft law on popular consultations, the Commission emphasised that the wording to the effect that popular consultations may relate to matters within the competence of the National Assembly was too imprecise; that the provision authorising the National Assembly to decide whether or not to hold a referendum was an unusual one; that it would be preferable to empower the Constitutional Court to proclaim the results of a referendum; that the possible effects of a referendum should be made clear; that the draft envisaged the referendum as a possible means of amending the Constitution, whereas the latter said nothing on that subject; and finally, that there was no procedure for challenges to referendum results.

7. Co-operation with Croatia

In connection with Croatia's application for membership of the Council of Europe, the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, on 16 February 1996, requested an opinion from the Venice Commission on the constitutional situation in Croatia, and more particularly on implementation of the Constitutional Law of December 1991 on human rights and freedoms and on the rights of national and ethnic communities or minorities in the Republic of Croatia and human rights protection mechanisms.

The Venice Commission set up a working group at its 26th meeting (1-2 March 1996) and appointed Mr Matscher, Mr Malinverni and Mr Nicolas rapporteurs. The Rapporteurs went to Zagreb from 14 to 16 March 1996 and were able to contact representatives of the Croatian authorities and of minorities.

Their report focused on the question of the suspension of several provisions of the 1991 Constitutional Law. The suspension applies in particular to the provisions concerning the special status granted to districts where the members of ethnic and national communities represent the majority of the population. It also applies to the right to representation and participation in public institutions and the protection of communities or minorities which make up more than 8% of the population according to the 1991 census, and to the international supervision of the implementation of the law and the judicial protection of the rights it enshrines (including the question of the provisional Court of Human Rights in Croatia, as provided for in Article 60 of the law). Having regard to the constitutional situation in Croatia and the 1991 Constitutional Law on human rights and the rights of minorities and their judicial protection, the Rapporteurs recommended:

> **"- that the suspended provisions of the Constitutional Law of 1991 be revised as soon as possible in order to ensure that persons belonging to minorities are guaranteed rights in the field of local autonomy in accordance with the European Charter of Local Self-Government and Recommendation 1201 (1993);**
>
> **- in order to subject the protection of minorities to a certain degree of international supervision on a provisional basis, that an enlargement of the Constitutional Court be provided for such as to allow it, when deciding upon cases concerning the rights of minorities, to comprise international judges. Such a proposal may be considered to be an adequate confidence-building measure;**
>
> **- that a large information campaign for the promotion of the legal and procedural possibilities of protection of human rights and the rights of minorities be launched, in particular through the Croatian Human Rights Institute and with the help of the Council of Europe".**

The implementation of these recommendations is one aspect of the commitments entered into by Croatia when it joined the Council of Europe (see Assembly Opinion No. 195 (1996) on Croatia's request for membership of the Council of Europe, paragraph 9 vii).

Moreover, resolution (96) 31 of the Committee of Ministers lays down co-operation with the Council of Europe as a condition of membership, particularly as regards implementation of the Constitutional Law on human rights and the rights of national or ethnic minorities.

Revision of the Constitutional Law

The suspended provisions of the 1991 law granted specific rights of representation and participation in public institutions (parliament, government and the highest judicial bodies) to all minorities representing 8% or more of the population; their main purpose was to protect large minorities in Croatia, including in particular the Serb minority, by granting them effective representation at the various levels of the legislative, executive and judicial branches of power. Although there are 16 minorities living in Croatia, only the Serb minority was in fact concerned by these provisions. All provisions relating to the rights of minorities of 8% or more have been suspended. Similarly, the provisions granting special status to those districts where the Serb minority was in the majority are no longer applied.

At the meeting of the Commission's Working Group (composed of Mr Matscher, Mr La Pergola, Mr Russell, Mr Nicolas and Mr Nick) with representatives of the Croatian authorities, held in Paris on 20-21 June 1996, the Croatian authorities announced the establishment of a working group on the revision of the Constitutional Law in question. They also announced their intention to invite members of the Venice Commission to take part in the group's work.

On 10 October 1996, the Government of the Republic of Croatia took the decision to set up a commission to consider and make proposals concerning revision of the Constitutional Law. The commission is composed of Mr Vladimir Seks, Deputy Speaker of the Chamber of Deputies, Chairman, Mrs Ljerka Mintas-Hodak, Deputy Prime Minister, Mr Davorin Mlakar, Minister for Public Administration, Mr Miroslav Separovic, Minister of Justice, Mr Marijan Prus, Director of the Governmental Legislation Bureau, Mrs Dubravka Simonovic, Head of the Human Rights Division in the Ministry of Foreign Affairs, Mr Smiljko Sokol, member of parliament and Mr Branko Smerdel, professor in the Zagreb Faculty of Law. In a letter dated 16 October 1996, the Croatian authorities announced the establishment of the commission to review the Constitutional Law and requested assistance from the Council of Europe.

At its 29th plenary meeting, the Venice Commission took note of these developments and appointed Mr Batliner, Mr Helgesen, Mr Maas Geesteranus, Mr Matscher, Mr Özbudun and Mrs Suchocka to take part in the work of the above-mentioned commission. The Commission Secretariat notified the Croatian authorities of this step on 3 December 1996, and requested them to provide it with details of the timetable of the commission's meetings, as well as any proposal concerning a first meeting of the commission with the members of the Venice Commission.

Enlargement of the Constitutional Court

In their report, the Rapporteurs of the Venice Commission suggested that provision could be made for the Constitutional Court to have an enlarged

membership when dealing with questions relating to the rights of minorities. For the examination of such cases, the Constitutional Court would be composed of the Croatian constitutional judges, who would be joined - on a provisional basis - by a number of international judges; with this enlarged bench, the Constitutional Court would deal exclusively with cases concerning alleged violations of the provisions on minority rights.

At the 27th plenary meeting of the Commission, the representatives of Croatia indicated that, in view of the difficult and lengthy procedure that would be required for a constitutional amendment along the lines proposed by the Rapporteurs, it would be preferable to involve international advisers, rather than international judges, in the work of the Court, in accordance with the Court's rules of procedure which authorise the consultation of experts. The Commission considered that this proposal was fully consistent with the Rapporteurs' conclusions and instructed the latter to continue their work, in co-operation with the Croatian authorities, with a view to examining the technical aspects of the proposal.

At successive meetings concerned with the question of participation by international advisers in the work of the Constitutional Court (Paris 20-21 June 1996, Venice 12 September 1996), the Venice Commission and the representatives of the Croatian authorities reached agreement on the legal basis for the participation of international advisers, the procedures for their appointment, their responsibilities and the publication of their opinions. Furthermore, in order to ensure their independence, it was suggested that the cost of their participation in the work of the Croatian Constitutional Court should be borne by the Council of Europe.

On 12 September 1996, the Croatian authorities submitted to the Venice Commission draft rules governing the participation of international advisers in the work of the Constitutional Court. After studying the draft, at its 28th plenary meeting (Venice, 13-14 September 1996) the Commission concluded:

- that the participation of international advisers in the work of the Constitutional Court should be brought about through the appointment, by the Committee of Ministers of the Council of Europe, of two advisers and two or three substitutes, on the basis of proposals made by the President of the Croatian Constitutional Court and the President of the Venice Commission;

- that the advisers should be authorised to take part in the deliberations of the Constitutional Court, without the right to vote, that judgements should mention their participation and that their opinions should be published;

- that the necessary arrangements would have to be made to institute the planned participation by international advisers in the near future;

- that the participation of international advisers should be a transitional measure which, in principle, should remain in force until Croatia ratified the European Convention on Human Rights, but not beyond 1999, with a possible extension of the advisers' terms of office at the end of the above-mentioned period.

On 22 October 1996, in accordance with Article 21, paragraph 1, point 4 of its Rules of Procedure, the Constitutional Court adopted the decision which governs the participation of international advisers in its work.

The Venice Commission was informed of this decision on 17 January 1997.

Information campaign on the possibilities for protection of human rights and minorities in Croatia

The Commission had suggested that, in order to restore the confidence of the minority populations concerned, a large-scale information campaign on human rights and minorities should be organised.

This proposal was favourably received by the Croatian authorities.

At the 28th plenary meeting of the Commission, the Croatian delegation announced that a translation of the European Convention on Human Rights had been widely distributed among the population. The Commission welcomed that initiative, while emphasising that the campaign should also be centred on the legal and procedural possibilities for protection of human rights and minorities offered by Croatian domestic law.

The Commission welcomes its co-operation with the Republic of Croatia, which has already produced a number of satisfactory results. This co-operation, which bears witness to Croatia's attachment to the values that are the hallmark of contemporary Europe, would not have been possible without the competence and efficiency displayed by the delegation of the Republic of Croatia at a string of Commission meetings and without the whole-hearted collaboration of the Croatian Constitutional Court. The Commission hopes that this collaboration will be even closer in future months and that its results will begin to have an effective impact in the field of human rights and minorities.

8. Co-operation with Georgia

The Commission closely followed the establishment of the Georgian Constitutional Court. At the plenary meetings of the Commission, Mr Demetrashvili described the stages in the process of the Court's establishment, from the adoption on 31 January 1996 of the Law on the Constitutional Court, which takes many of the Commission's comments into account, to the appointment of its members. Mr Demetrashvili was elected President of the Court.

The Constitutional Court of the Republic of Georgia was set up under the new Constitution of 24 August 1995. The law establishing the Court was passed on 31 January 1996; it has been supplemented by a law on constitutional procedures and a law on the social protection of members of the Constitutional Court. The powers of the Court are defined in the new Constitution (Articles 88 and 89) as well as in the implementing legislation. The Court has extensive powers; among other things, it is called upon to decide on the constitutionality of individual regulatory acts. It also deals with disputes concerning jurisdiction between State bodies, issues relating to the constitutionality of the establishment and activities of political parties,

disputes concerning the constitutionality of referendums and elections, and disputes regarding the constitutionality of international treaties and agreements. Under the terms of the Constitution, the Constitutional Court may have matters referred to it by the President of the Republic, by not less than one fifth of the members of parliament, by the courts, the supreme State bodies of Abkhazia and Adjaria, the ombudsmen and private individuals.

A delegation from the Venice Commission went to Tbilisi from 30 November to 4 December 1996 to take part in the seminar on the "Contemporary problems of constitutional supervision", organised jointly by the Constitutional Court of the Republic of Georgia and the Venice Commission.

Fifty or so prominent personalities took part in the work of the seminar (the Presidents of the Constitutional Courts of Armenia and Georgia, the Presidents of the Supreme Courts of Azerbaijan and Georgia, all the members and staff of the Georgian Constitutional Court, the Principal State Prosecutor, academics and representatives of the OSCE and NGOs. The Constitutional Court, which has already had a number of individual petitions submitted to it, will have the delicate task of striking a fair balance between compliance with applicable legislation and the requirements of effective protection for fundamental rights. The experience of other Constitutional Courts will be of great value to it in that regard. The seminar, which was followed by a press conference, served to promote awareness in Georgia of the functions and powers of the Constitutional Court. The proceedings of the seminar will be the subject of a publication.

9. Co-operation with Italy

On a proposal by Mr Galan, President of the Veneto Region, the Sub-Commission on the Federal State and Regional State met on 11 September in Vicenza to join a number of Italian politicians and senior officials in considering the fundamental aspects of federalism and the question of transition from a unitary to a federal system of government.

At the 28th plenary meeting, Mr Mauro Ferri, President of the Italian Constitutional Court, stressed that the problems associated with the functioning of democratic institutions were not exclusive to the emerging democracies. They were also present in the old democracies. The choice of a federal model for a State concerned an area of institutional reform which had given rise to much discussion in several countries, including Italy. Could federalism be the model for reconciling the centrifugal and centripetal forces present in the State? It could, provided that it maintained or indeed strengthened national unity, which was one of the principles of the Italian Constitution. The Commission, as a European constitutional laboratory, could no doubt help identify the ways in which the principle of a "single and indivisible republic" could be reconciled with the federal model. Mr Ferri expressed satisfaction at the fact that the Commission was dealing with this topic.

10. Co-operation with Latvia

At the 28th plenary meeting, Mr Endzins informed the Commission that the Latvian Constitution had been revised with a view to setting up the Constitutional Court, and that the Law on the Constitutional Court, which had already been examined by the Commission at the drafting stage, had recently been adopted. Parliament was due to begin considering the second part of the Constitution, relating to human rights, at the end of 1996. The Commission took note of the information provided and confirmed its willingness to assist Latvia in its process of constitutional reform.

11. Co-operation with Moldova

On a proposal by the Vice-President of the Parliament of the Republic of Moldova, Mr Dumitru Diacov, the Commission initiated a study on the practice followed by Council of Europe member States with regard to the referral of a law back to parliament by the Head of State. Mr Diacov's proposal stemmed from a decision by the Constitutional Court of the Republic of Moldova on the interpretation of article 93 of that country's Constitution, which provides that: "1. The President of the Republic of Moldova promulgates the laws. 2. The President of the Republic of Moldova has the right, if he objects to a given law, to submit it within two weeks to parliament for re-examination. If parliament upholds its previously adopted decision, the President must promulgate the law".

At its 29th plenary meeting, the Commission adopted a report on the referral of a law back to parliament by the Head of State, on the basis of a draft prepared by Mr Nicolas and Mr Zlinszky, with the assistance of the secretariat (see Appendix to this report). The report was transmitted to the Moldovan authorities on 2 December 1996.

12. Co-operation with Russia

The Commission took an active part in the programme of seminars on the establishment and functioning of federal structures in Russia provided for in the joint programme of the Council of Europe and the European Union. The programme will continue in 1997.

Mr Tumanov, President of the Constitutional Court of the Russian Federation, briefed the Commission, at its 27th meeting, on that distinguished court's activities. He referred first of all to its work of reviewing the constitutionality of legislative texts and, in particular, to the decision of the Constitutional Court not to declare unconstitutional the 5% threshold for the election of parliamentarians. He pointed out that Constitutional Courts had been set up in more than ten republics of the Russian Federation. The relations between the different courts have not yet been regulated by law.

At the 29th plenary meeting, Mr Vitruk reported that the Constitutional Law on the judicial system in the Russian Federation had been promulgated.

He drew the Commission's attention to the critical financial situation of the courts in Russia. A substantial proportion of the budget earmarked for the judicial system had not been made available, and this was creating major difficulties likely to affect the independence of judicial institutions. The State Duma had lodged an appeal with the Constitutional Court based on Article 124 of the Federal Constitution, which governs the operation of the judicial

system under State responsibility.

The Commission took note with concern of this information.

13. Co-operation with South Africa

The Commission closely followed constitutional developments in South Africa during 1996. Representatives from South Africa participated at the 27th, 28th and 29th Plenary Meetings as well as at the 9th meeting of the Sub-Commission on Constitutional Justice with the Liaison Officers from Constitutional Courts in Madrid and at the UniDem Seminar on "human rights and the functioning of democratic institutions in emergency situations" in Wroclaw.

The South African Constitution adopted on 8 May 1996 following a long process of negotiation has clearly a compromise character. Its effective implementation will be of utmost importance for the future of the country.

During the 27th Plenary Meeting Messrs Barnard, Christen and Buquicchio signed the joint agreement between the Swiss Federal Department of Foreign Affairs, the South African Department of Constitutional Development and the Venice Commission on the programme "Democracy from the law book to real life". This programme came into effect on 1 June 1996.

The following activities were implemented within the framework of the programme in 1996.

- Planning meeting in Pretoria, 15-16 August 1996

A delegation from the Commission composed of Mr La Pergola and Mr Maas Geesteranus visited South Africa for a two day planning meeting in order to assess needs and a calendar for the programme.

The delegation met with representatives from all the South African authorities involved in implementing the programme.

- Workshop on intergovernmental relations, Dikhololo, 28-29 October 1996

The two main objectives of this workshop were to provide initial input for a white paper on intergovernmental relations as required by the new Constitution and to establish contacts between the participants responsible for intergovernmental relations in the national, provincial and local governments.

The international participants shared experiences of intergovernmental relations from the viewpoint of their federally or regionally organised country of origin.

- Local Government Summit, Durban, 21-23 November 1996

This Summit was an important event for local government in South Africa, attended by over two thousand local delegates from all nine provinces.

Apart from being the forum for launching - in the presence of President Mandela - the South African Local Government Association (SALGA) as the national body representing local government in South Africa, the Summit also aimed to discuss issues relevant to the White Paper on Local Government, due to be completed in July 1997.

Mr Russell and Baroness Farrington from Lancashire County Council in the UK addressed the Summit on behalf of the Commission and the Council of Europe's Congress of Local and Regional Authorities in Europe (CLRAE) respectively.

- Fellowship to conduct research in Europe for the School of Government, Administration and Development of the University of South Africa (UNISA)

A fellowship was attributed to the Department of Development Administration for research on the topic "Evaluation of international donor assistance by the administration".

14. Co-operation with Ukraine

The Commission took an active part in the process of drafting a new constitution for Ukraine. From 1993, members of the Commission submitted comments on the draft proposed at the time and held an exchange of views with its authors. At its 24th meeting, on 8 and 9 September 1995, the Commission adopted an opinion on the current constitutional situation in Ukraine following the adoption of the constitutional accord between the Ukrainian Supreme Council and the President of Ukraine on the fundamental principles for the organisation and functioning of central government and local self-government, pending the adoption of the new Ukrainian Constitution. Members of the Commission also commented on the preliminary draft of a new constitution submitted in 1995 and held two exchanges of views with the group of legal experts mandated by the Constitutional Commission to draw up a revised draft.

Mr Markert, of the Commission Secretariat, took part in the international legal forum held from 11 to 13 January 1996 at Ivano-Frankivsk Oblast,

where he put forward the Commission's views on several aspects of the draft, particularly as regards the constitutional position of the Prokuratura.

At the 26th plenary meeting, Mr Holovaty informed the Commission that a new version of the draft Constitution was to be adopted shortly. He pointed out that a new constitution should be adopted urgently since the validity of the constitutional accord expired on 8 June. However, some political forces were strongly opposed to the draft and it appeared unlikely that the text could be adopted by parliament. The new draft contained several substantial amendments to the previous one. The chapter on human rights had been brought more into line with European standards and was based on the European Convention on Human Rights; the Ukrainian State was defined as a unitary State, despite the autonomy of Crimea; in accordance with one of the commitments entered into by Ukraine when it joined the Council of Europe, the chapter on the Prokuratura had been amended and the Prokuratura no longer had responsibility for overall supervision of the legality of the acts which it considered; the provisions on local self-government had been recast in the light of the European Charter of Local Self-Government. The main issues discussed were the role of local self-government, the establishment of a two-chamber parliament and the adoption of the new Constitution by referendum.

At its 27th plenary meeting, the Commission again took up the new draft Constitution of Ukraine on the basis of contributions by Mr Aguiar de Luque, Mr Bartole, Mr Batliner, Mr Klucka, Ms Milenkova, Mr Steinberger and Mr Svoboda and observations by Mr Holovaty and Ms Suchocka, as well as Mr Delcamp, representative of the Congress of Local and Regional Authorities of Europe (CLRAE). In the ensuing discussion, the Rapporteurs on Ukraine concluded that the text of the new draft represented a considerable improvement over previous drafts. Some issues, such as the powers and responsibilities of Crimea, the protection of the fundamental rights of legal persons, the death penalty, the scope of social guarantees and the extent of presidential powers, required further clarification. The Commission adopted its opinion on the draft Constitution of Ukraine, as it appears in Part B of this report (see also document CDL-Inf (96) 6).

The new Constitution of Ukraine was adopted on 28 June 1996.

On 10 July 1996, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly asked the Commission to give an opinion on this text. Mr Bartole, Mr Batliner, Mr Klucka, Ms Milenkova, Mr Steinberger and Mr Delcamp were appointed Rapporteurs.

The Commission examined the text of the new Constitution at its 28th and 29th plenary meetings. Stress was laid on a number of positive aspects of that fundamental text, particularly the rules on the Prokuratura, which conformed to European standards, and the improvements to the rules on referendums. The Commission also noted that, although the first chapter of the Constitution had been improved, the weaknesses in the chapter on human rights remained. The Commission did not lose sight of the fact that the Constitution had been adopted at a difficult point in time and that several sensitive matters, such as linguistic questions in relation to minorities, the constitutional situation in Crimea and the status of foreign troops, had been resolved on the basis of compromise.

Mr Holovaty referred in particular to the contribution made by the Venice Commission in the drafting of the Constitution.

The adoption of the Ukrainian Constitution on 28 June 1996 was a major event in the sphere of European Constitutional Law. The Commission welcomed the high level and standard of its co-operation with the Ukrainian authorities. It was particularly gratified to have been able to make an effective contribution to that important development, which provided an enduring foundation for the development of democracy in that country.

In addition, at the 28th plenary meeting, Mr Nemeth, on behalf of the Parliamentary Assembly, called for an expert opinion to be issued on the draft law on the Constitutional Court. Mr Bartole and Mr Klucka were appointed Rapporteurs.

B. Opinions of the Commission

i. Opinion on the draft Constitution of Ukraine

Adopted at the 27th Meeting of the Venice Commission on 17-18 May 1996 on the basis of contributions from: Mr Luis Aguiar de Luque (Spain), Mr Sergio Bartole (Italy), Mr Gérard Batliner (Liechtenstein), Mr Ján Klucka (Slovakia), Ms Anna Milenkova (Bulgaria), Mr Helmut Steinberger (Germany), Mr Cyril Svoboda (Czech Republic).

Introduction

The European Commission for Democracy through Law has for a considerable period been actively involved in the process of drafting a new Ukrainian Constitution. Already in 1993 members of the Commission submitted written comments on the draft proposed at that time and held an exchange of views with its authors. At its 24th meeting on 8-9 September 1995 the Commission adopted an Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the President of Ukraine on the basic principles of the organisation and functioning of State power and local self-government pending the adoption of the new Constitution of Ukraine.

Members of the Commission also commented on the preliminary draft for a new Constitution submitted in 1995 and held two exchanges of views with the group of legal experts entrusted by the Constitutional Commission with the task of drawing up a revised draft. The present draft therefore partly already reflects previous efforts of the Commission.

This opinion was adopted by the Commission at its 27th meeting in Venice on 17-18 May 1996. On this occasion the Commission also endorsed the comments made by Ms Hanna Suchocka (Poland) in document CDL (96) 25. These comments were received too late to be integrated into the present

opinion.

Section I

General Principles

General Comments

The general principles are in line with international standards and show the willingness of Ukraine to become a democratic European State protecting Human Rights. The Constitution is the highest legal norm (Article 8) and the bodies of legislative, executive and judicial power exercise their functions within the limits established by the Constitution (Article 6, paragraph 2).

A weakness of the draft, which does not specifically concern the general provisions but may be mentioned here, is that there is no coherent set of rules on the state of emergency. There are some provisions, in particular Article 38, paragraph 3, Article 60, paragraph 3, Article 87, No 10, Article 92, No 26, Article 105, paragraph 1, No 18 and Article 155, paragraph 2. The conditions for proclaiming a state of emergency are however not defined in the Constitution itself and this task in entirely left to the ordinary legislator (Article 92, No 26). It would also seem useful to expressly give to the Constitutional Court control of the acts proclaiming the state of emergency and its extent. On the other hand the list of rights and liberties which cannot be restricted in a state of emergency is extremely long: eg. Articles 27, 30, 42, 51. This seems unrealistic.

Comments on specific articles

Article 6

Article 6 provides for a division of power between the legislative, executive and judicial branches. This approach is however not consistently maintained throughout the text. The Constitutional Court has a separate section which is not even placed after the section on the system of justice.

Article 3

The formulation of Article 3, paragraph 1 the human being ... is recognised in Ukraine as the highest social value gives, at least in translation, the impression that the individual is seen in function of society and not in its inherent value and dignity, which precedes the state, is unique, irreplaceable, and incomparable.

Article 9

International treaties ratified by Ukraine are incorporated by this provision into the internal legal order, apparently at the level of ordinary law. It would be logical to equally incorporate customary international law and generally accepted principles of international law.

Section II

Rights and freedoms of the person and the citizen

General Comments

General assessment of the Section

This section of 49 Articles is very long. The catalogue of rights and freedoms protected is vast and exhaustive and the text shows the willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are implemented in practice.

Nevertheless the Section has also a number of weaknesses:

- there is a lack of structure within the Section, which contains 49 Articles but no subdivisions;
- the very exhaustive character of the list including rights of a social, economic and environmental character poses problems for their guarantee by the courts;
- the possible restrictions and limitations of fundamental rights often seem to go too far.

The lack of structure in the Section

This question is not a purely theoretical and systematic one but it may have repercussions on the level of implementation of the rights guaranteed.

In effect, necessarily the 49 Articles of the Section contain legal provisions of a varied character:

- some provisions have the character of a programme for the Ukrainian legislature without guaranteeing specific rights, like, for example, Article 48, paragraph 2: basic secondary education is compulsory.

- certain provisions contain structural principles for the functioning of the legal order which have to orient the legal life in the future but which cannot be considered as individual rights in a strict sense, *inter alia* the principle that norms have to be published, the principle of non-retroactivity of norms and the principle *ne bis in idem* (Articles 52, 53 and 56);

- there are certain provisions containing what has been defined in legal science as institutional guarantees protecting certain institutions from future intervention of the ordinary legislature, the definition of marriage in Articles 46 of the draft is an example;

- certain provisions like Article 31 on the freedom of association allow far-reaching restrictions putting into question their character as individual rights;

- Article 61 to 64 contain duties;

- even though most Articles of the Section are formulated as true subjective rights (has the right to....), these rights have a different structure and content as some of them correspond to traditional fundamental rights and liberties, whereas others have the character of social rights where the active intervention of the State is indispensable to fully realise the right (eg. the right to housing in Article 42) or are new fundamental rights associated with new technological developments (eg Article 27, paragraphs 2-4 concerning self-determination with respect to information and the environmental rights in Article 45).

Since these rights have a different character it would seem advisable to classify and systemise them in a way making it possible to foresee different types of protection for each of them, the efficiency of which may vary in function from the content of the right concerned. The lack of such a structuring in the Section may be to the detriment of the traditional fundamental rights and liberties which provide true individual subjective rights and the protection of which has to appear clearly in the text of the Constitution.

Section II should therefore be divided into different subsections and varying rules for the protection by the courts should be introduced into these subsections.

The range of the rights protected

This issue is closely related to the preceding issue. Article 150 of the draft enables the Constitutional Court to resolve issues of the constitutionality of laws and other legal acts the constitutionality of which will also depend on the respect for the fundamental freedoms contained in this section. In addition, Article 50 gives the task to protect all human rights and freedoms to the courts in general. However the catalogue of rights is so rich and vast that this risks being unrealistic. As set out above, for different categories of rights the same wording every person has the right... is used, but for many of these rights it will be impossible for a court to apply them directly. This concerns for instance Article 43 (everyone has the right to a standard of living sufficient for himself or herself and his or her family, including sufficient nutrition, clothing and housing) or Article 45, paragraph 1 (everyone has the right to an environment which is safe for life and health, and to the recovery of damages inflicted through violation of this right.)

In some instances, for example in Article 27, paragraph 4, the right to judicial protection of a certain right is specifically guaranteed. However this should not mean that judicial protection exists only for the rights where this is expressly mentioned as this would exclude the main part of traditional fundamental freedoms.

Therefore, a specific mention of the rights the protection of which is ensured by the ordinary courts should be introduced into the Constitution. The general formulation contained in Article 50, paragraph 1 is too wide and therefore insufficient.

The possible restrictions of fundamental rights

It is appreciated that the Constitution protects constitutional rights and freedoms from being abolished (Article 17, paragraph 2 and Article 155, paragraph 1, see below). The existence of the rights as such is therefore protected and this might be reinforced by introducing a clause on the protection of the essence of the right similar to Article 19, paragraph 2 of the German *Grundgesetz*: in no case may the essence of a basic right be encroached upon.

As regards restrictions of fundamental rights, Article 60, paragraph 2, proclaims that such restrictions shall be minimal and correspond with the principles of the democratic state. This means that all legal restrictions may not go further than necessary (principle of proportionality) but also that they should not lead to the abolishment of the right (Article 17, paragraph 2 alone and together with Article 60 paragraph 2). There is however a large number of articles containing specific conditions for the restriction of rights by the legislature and the circumstances allowing the legislature to restrict the rights are often extremely ambiguous and wide and give him a free hand to interfere to a very large degree. This concerns in particular Article 27, paragraph 2 where the link between the circumstances allowing the restriction (interests of national security, economic well-being and human rights) and the right itself (protection against the use of confidential information concerning a person without his or her knowledge) seems questionable, Article 28 where the restrictions are very general (for the protection of national security, public order, health and morality of the populations, or the rights and freedoms of others) and Article 31 (interests of national and social security, the protection of health and morals of the population or the protection of the rights and freedoms of other people).

To this vast array of possible restrictions concerning specific articles, Article 60, paragraph 1 adds a general clause allowing restrictions of rights and freedoms in order to protect the rights and freedoms of other persons, national security, and the protection of the health and morality of the population. It is not quite clear in the various translations whether only the legislator or also the executive is empowered to proceed to restrictions of fundamental rights by virtue of this provision.

In any case, such a provision is problematic since a number of rights should be guaranteed without any restriction, in particular those included in Articles 22, 23, 50, 53, 55, 56, 57.

It is therefore proposed to delete the last phrase of Article 60 and to replace the provision by the following text: constitutional rights and freedoms may not be restricted except in cases prescribed by the Constitution and laws adopted in accordance with it. The circumstances allowing restrictions should be spelled out in the various articles.

Legal persons

It would be useful to include in the text a provision on the rights of legal persons. Such a provision might be inspired by Article 19, paragraph 3, of the German *Grundgesetz* - The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

Section III

Elections. Referendum

General Comments

It is to be welcomed that the present text no longer contains provisions inspired by too radical a concept of direct democracy, like for example the possibility of dissolving Parliament or expressing non-confidence in the President through a referendum. This shows that the text is moving in the right direction by providing stability for the main institutions.

Comments on specific articles

Article 68, paragraph 1

According to this provision both the National Assembly and the President can call a referendum. This may lead to useless competition between both institutions and referendums may become arms in the political struggle between them. It is recommended that only one organ should have the right to organise referendums, and the most appropriate organ seems to be the Head of State who, as a single person, receives his powers directly from the people. The National Assembly being the legislature, it seems unlikely that it will be disposed to submit questions to a referendum which it might resolve within the limits of its own competence.

As regards the dates of the referendum, it might be considered whether the President should have the sole authority to fix the dates for referendums or whether he should be obliged to consult the government and the Presidents of both Chambers of the National Assembly. If the President alone calls the referendum and fixes its dates, it may easily assume an authoritarian character within the framework of the so-called plebiscitarian democracy.

Article 68, paragraph 2

The so-called popular or people's initiative creates many problems both from a pratical and theoretical point of view. The text does not make it very clear under which circumstances such popular initiatives could take place. It is in particular recommended to avoid the possibility of amending the constitution through a referendum, since this apparently democratic procedure may easily be abused for populist purposes. The possible subject matters of a peopole's initiative should therefore be clearly defined excluding the possibility of constitutional amendments.

A more restrictive alternative version of popular initiative would be to provide for the possibility of submitting draft bills to the National Assembly which would be obliged to discuss these bills and decide on them. A popular initiative according to this model opens up to citizens the possibility to participate in the legislative process while leaving the final word to the legislature.

Section IV

The National Assembly of Ukraine

General Comments

The balance of powers

The present text clearly marks a step forward in the development of the constitution making process in Ukraine. It provides for a fairly good balance of power between the various State organs. Even though it is clear that the drafters of the Constitution are oriented towards a semi-presidential form of government, not all questions on the form of government are clearly settled. In addition, it would seem appropriate to strengthen the parliamentary element in the relations between the National Assembly and the executive. The excessive strengthening of the executive power can become self-defeating. If, on the one hand, a strong executive is necessary for governing effectively and implementing reforms, on the other hand, if not successful, the persons exercising these wide powers may lose all capacity for effective action. It should also not be forgotten that the national representative body also has purely political functions, in particular to integrate political and social forces and to mobilise support and legitimise the policy pursued in practice. Therefore it is recommended to provide for more numerous and varied procedures of parliamentary control on the actions and intentions of the government and the various ministries.

The introduction of a second chamber

The setting up of a bicameral legislature - the National Assembly is composed of the Chamber of Deputies and the Senate - divides the legislature into two parts and provides an internal balance of powers. This will without doubt contribute to the quality of legislative action and to a more moderate political climate within the country. However it is necessary to define more precisely the tasks of both chambers. Otherwise the result will be a simple

duplication of their functions, especially when the balance between the political forces is similar in both chambers.

The hierarchy of norms

The Constitution is the supreme norm (see last paragraph of the preamble, Article 6, paragraph 2 and Article 8, paragraph 2). Below this level the situation is less clear. The technique of enumerating the fields to be determined by ordinary legislation (Article 92) raises several questions: are matters not mentioned here outside the powers of the ordinary legislator (Article 71 and Article 84, paragraph 1, No. 4)? Who is competent to legislate in the field not covered: the president (Article 105, paragraph 1, No. 26 and paragraph 2), the Cabinet of Ministers (Article 114) or nobody?

In the fields to be determined exclusively by the ordinary legislator, may there be infralegal norms adopted by another organ? What is the position of the universals, decrees and directives of the President (Article 105, paragraph 2) in the hierarchy of norms? The President exercises other powers provided by the Constitution (Article 105, paragraph 1 No. 26), protects "rights and freedoms of citizens" (Article 103, paragraph 3) and has extensive powers to organise the executive branch (see Article 105, paragraph 1, No. 13, but also Article 118).

The Sessions of the National Assembly

Articles 81 and 82 of the draft provide for a working of the National Assembly on a sessional basis with two regular sessions of undefined length and extraordinary sessions held upon request. This seems not the best way to organise the functioning of the national legislature during a period of political instability and radical reform of the legal system. Sessions of short duration were typical of the Soviet system of government. The effect is well known: it deprived the national representative body of real power and influence in the political life of the country. Therefore it is preferable to clearly define the length of the sessions of the National Assembly by fixing the duration of the two ordinary sessions or even accepting one longer session (for example nine months), as envisaged in the French reform of 5 August 1995. On the other hand, the extreme alternative adopted in Bulgaria in 1991, to foresee one permanent session should also be avoided since continuous political activity leads to a bad quality of parliamentary work.

Comments on specific articles

Article 74, paragraph 2

According to this provision Senators are elected through direct elections in multi-member constituencies. This leads to the assumption that a system of proportional representation, pehaps based on party lists, is envisaged. As a result the strength of the political forces in the Senate might be equivalent to their strength in the Chamber of Deputies and therefore both Chambers might in a certain way duplicate each other. Therefore the alternative of providing for one member constituencies merits consideration. The advantage would be to establish a more distinct basis for territorial representation of the regions and to make the Senators themselves more independent from the political forces having proposed them as candidates and supported them during the election campaign.

Article 80, paragraph 3 and 4

The text provides that the respective chamber may terminate the mandate of a Parliamentarian if he violates the provisions on incompatibility and that such a decision will be subject to appeal in court. It is however difficult to accept that the decisions of a chamber of the National Assembly should be subject to control by an ordinary court and it its preferable to provide for judicial review by the Constitutional Court.

Article 81, paragraph 4

The role of the dean of age should be defined more precisely. It should be provided that under his chairmanship the deputies swear their oath and elect the presidents of the two chambers.

Article 82 paragraph 1

As mentioned above, it should be constitutionally guaranteed that parliamentary sessions are long enough to enable the legislature to function well.

Article 83, paragraph 1

According to this provision a majority of at least two thirds of deputies or senators present at the meeting is required if the public is to be excluded from a session of the chamber. This requirement seems excessive. A simple majority would seem sufficient, accompanied by an obligation to publish the decisions taken at the session *in camera*.

Article 84, paragraph 1, No 2

As mentioned above, it would be preferable to reserve the possibility to call a referendum to the President, with the exception of the referendums on issues of altering Ukraine's territory as foreseen under Article 69.

Article 84, paragraph 1, No 9

It would be preferable to give a decisive role in impeachment procedures to the Consitutional Court. See the remarks below concerning Article 109.

Article 85, No 1 and 2 in conjunction with Article 90, paragraph 2

Under Article 85, No 1, the Chamber of Deputies has the power to ratify the appointment of the Prime Minister. Under Article 85, No 2, it has the power to consider and adopt decisions on the programme of activity of the Cabinet of Ministers. The appointment of the Prime Minister and the

approval of the government programme are closely linked and therefore it would be preferable to have one sole procedure combining both decisions. This would also influence the scope of Article 90, paragraph 2, which provides that the Chamber of Deputies may be dismissed by the President if it rejects twice the government programme.

Article 86

Article 86 concerns the parliamentary control of government. Under present circumstances this control has to be continuous and comprise a number of different forms. In the draft it is foreseen that a simple enquiry may be transformed after discussion of the response into a vote of no-confidence. This entails a danger of artificial escalation of conflicts and it would be preferable to separate the various procedures.

Article 93, paragraph 1

This article gives the right of legislative initiative also to the President. This should be avoided since the President is not politically responsible before Parliament and since laws are legal means to implement concrete policy. Therefore the right of legislative iniative, as concerns the executive, should be reserved to the government and not be given to the President. If the government presents a bill, it thereby expresses its wish to implement its programme.

Article 94

The requirement of a two**l**thirds majority in the Chamber of Deputies in the event of contradictions between it and the Senate concerning a draft law is excessive. Such a high requirement may hamper the legislative process in a period of dramatic political and economic reforms.

Article 95, paragraph 4

The required majority of two-thirds of the members of both chambers to overcome a suspensive veto of the President is again excessive and may hamper legislative activity. The absolute majority of members of both chambers would seem sufficient.

Section V

President of Ukraine

General remarks

As far as this section is concerned, the draft provides for considerable improvements as compared to earlier texts.

In particular it is to be welcomed that the provision requiring a quorum of at least 50% of electors participating in the election of the President in order that the election shall be deemed valid, has been dropped in the present draft. This avoids unforseeable prolongations in the election of the President.

It is a further improvement that the present draft no longer provides for a vote of no-confidence in the President by popular referendum (see also the remarks above concerning Section 3) or parliamentary vote. This would have introduced a serious permanent element of instability into the system of government.

It has already been set out in the comments on Article 95, that the majority of two-thirds of the members of each Chamber required to overrule the President's veto against a law passed by the National Assembly appears rather high.

Comments on specific Articles

Article 105, paragraph 2

It is to be appreciated that the power of the President to issue universals, decrees and directives that are mandatory for execution in the territory of Ukraine must have a basis in the constitution or laws and must serve the purpose of implementing the Constitution and laws. While it is rather rare to provide for normative powers of a President in the constitution itself, his powers in the draft Constitution of Ukraine are very broad, which in a difficult period of transition may be acceptable. It is, nevertheless, worth discussing whether normative acts of the President under Article 105 should be binding only on the executive branch, while normative acts touching upon the rights or duties of private individuals should only be issued in the form of a law or in the form of decrees authorised by a specific law providing expressly for the issue of such decrees, and determining their purpose and limits. In US American, German and other legal orders, it is a constitutional principle contained in the principle of the functional separation of powers, that essential normative determinations over a subject matter must be made by the legislature itself and must not be left to the implementing normative power of an executive organ.

Article 109

It has already been pointed out in the comments concerning Article 84, paragraph 1, No 9 that the procedure of impeachment has a largely legal and constitutional character making it appropriate to give decision making power to the Constitutional Court. Nevertheless it has to be acknowledged that the procedure has been considerably improved with respect to previous drafts by providing, prior to the decision of the National Assembly, for an examination of the case by the Constitutional Court and receipt of its conclusion about the observance of the procedure of investigation and consideration provided for by the Constitution, as well as for a prior decision of the Supreme Court of Ukraine whether the charges brought constitute a serious crime.

Section VI

The Cabinet of Ministers of Ukraine and other bodies of the executive branch.

General Comments

It is an improvement that the present draft no longer provides for "approving the personal membership of the government of Ukraine" by the Supreme Rada, as the prior draft did, but only provides for the power of the Chamber of Deputies to ratify the appointment of the Prime Minister of Ukraine on the proposal of the President of Ukraine. The former draft might have seriously paralysed the President in forming a Cabinet of Ministers composed of persons he considers to be the most competent in carrying out his political programme.

The present draft leaves open what the consequences would be if the Chamber of Deputies (whose majority may well be in political opposition to the President) repeatedly refuses to ratify the President's proposals for appointment of the Prime Minister. Therefore the danger of a stalemate between President and Chamber of Deputies cannot be excluded. A solution might be, as suggested in the comments on Articles 85 No 1 and 2 and 90, paragraph 2, to establish a link between the decisions of the Chamber of Deputies on the person of the Prime Minister and on the programme of the government. The power of the President to dissolve the Chamber of Deputies would then also exist in the case of its repeated refusal to approve the appointment of the Prime Minister.

Comments on specific articles

Article 114, paragraph 2

The power of the Cabinet of Ministers to pass binding orders provided for by Article 114, paragraph 2, of the draft should be subject to certain express limitations: their binding force should be restricted to executive authorities or if going beyond, for instance touching upon rights and obligations of private individuals, should require an authorisation by a law determining the essential contents and scope of such orders. Otherwise the normative powers of the legislature might be circumvented or undermined.

Section VII

The Procuracy

General Comments

The draft is encouraging, especially by contrast to previous drafts. The powers and competences of the procuracy are defined in a way indicating a fundamental transformation of the former so-called prokuratura. This is a crucial step towards democracy in Ukraine. The procuracy acts on behalf of the State in court and plays a dominant role in pre-trial investigations.

Comments on specific articles

Article 119, No 5

According to this provision the procuracy has to represent the interests of the State or a citizen in court in cases that are determined by law. It is recommended that this representation should be limited to cases where the public interest is involved and where there is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask for State assistance or not.

Article 121

The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence.

Section VIII

The System of Justice

General Comments

This section should be examined in the light of Article 50 of the draft Constitution. Article 50, paragraph 1, provides that all human rights and freedoms shall be protected by the courts and paragraph 4 gives the right to everyone to appeal for the protection of his or her rights and freedoms to judicial and other institutions of the United Nations and the Council of Europe.

Article 50, paragraph 2, guarantees everyone the right of appeal to a court against decisions, actions or inactions of the bodies of state power, bodies of local self-government or public officials. It is to be welcomed that in this way the judicial control of administrative authorities is established and a constitutional basis for administrative jurisdiction is provided. In civil and partly in criminal matters, there will, however, be no such previous decisions of a public body. It is nevertheless indispensable to provide also for civil and criminal matters a constitutional right to have access to independent and

impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.

It does not seem necessary to get rid of the inquisitory principle completely but the stress should be put on the adversarial principle.

Comments on specific articles

Article 122

To avoid any ambiguity concerning the relationship between the judiciary and the executive, one might add in the first sentence of Article 122 the words and exclusively.

Article 124, paragraph 3

According to this fundamental provision, the first appointment of a judge shall be for a term of five years. The process of the transformation of the judiciary means that people with very limited professional experience will be appointed.

Section IX

Territorial Structure of Ukraine

Article 130

Article 130 looks like a kind of political programme and its normative content is very poor. The relationship between centralisation and decentralisation is not clearly determined and it is left to the legislator to establish a balance between these two different purposes in the absence of clear criteria for this balance, especially whether one or the other purpose should prevail.

Article 131

This article shows a preference for decentralisation when it states that the system of administrative and territorial structure of Ukraine is composed of the Crimean Autonomy, oblasts, raions, cities, municipalities and villages. But Articles 116 and 117 imply the existence of a local organisation of the state executive power, chaired by the heads of the appropriate state administrations who obviously are accountable to the central state bodies.

As regards the methods of decentralisation, it has to be borne in mind that it can be implemented in two different ways: either in the form of autonomous self-governing communities or in the form of decentralised state bodies. Although both of these solutions are mentioned in the Constitution, the question of co-existence of decentralisation and centralisation is not clearly settled in the same way as it is settled, for instance, in Article 5 of the Italian Constitution where the preference for local self-government is evident.

It could be advisable to transfer Article 130 to Section I of the draft and connect it to Article 7, while Section IX could be enriched with more precise and clear provisions.

Section X

The Crimean Autonomy

Section X of the draft Constitution does not offer a clear blueprint of the Crimean Autonomy.

The Statute of the Crimean Autonomy

According to Article 132, paragraph 2, the Statute of the Crimean Autonomy shall be approved by the National Assembly of Ukraine in accordance with the order determined for the adoption of the laws of Ukraine. It results from press releases, but the text of the decision is not available to the Commission, that the Parliament of Ukraine has in principle approved a Constitution of the Autonomous Republic of Crimea but has sent back certain provisions to the *Verkhovna Rada* of Crimea for reconsideration. It is therefore not quite clear whether this text has really entered into force. In addition, it seems that the text was approved by a simple majority of the deputies and not by the majority required for constitutional laws. It would therefore seem that this Constitution of the Autonomous Republic of Crimea corresponds to the Statute of Crimean Autonomy provided for in Article 132 of the draft Constitution.

The only formal constitutional basis of the Crimean Autonomy is therefore the text of the Ukrainian Constitution itself, which does not have many provisions on the matter and leaves a large space of discretion to the Ukrainian legislator. Since approval of the Statute is given in accordance with the order determined for the adoption of ordinary laws, the Ukrainian legislator will have a free hand dealing with the implementation of the provisions of the Ukrainian Constitution concerning the Crimean Autonomy and it will be able to modify the Crimean Constitution at any time, extending or curtailing the content of the Crimean Autonomy without the participation of the Crimean institutions.

The protection of the competences of the Crimean institutions

According to Article 150 of the draft, the *Verkhovna Rada* of the Crimean Autonomy can ask the Constitutional Court of Ukraine to review the constitutionality of laws and legal acts of the National Assembly, acts of the President of Ukraine and acts of the Cabinet of Ministers. This is a very important provision because it provides for a jurisdictional guarantee of the Crimean Autonomy, entrusting its most important body with the power of

asking for a decision of the Constitutional Court when acts of the Ukrainian institutions conflict with the Ukrainian Constitution and - specifically - with the constitutional provisions concerning the Crimean Autonomy.

But a constitutional judgment requires the existence of a fixed yardstick according to which the constitutionality of the acts submitted to the review by the Constitutional Court has to be evaluated. In respect to the Crimean Autonomy the Constitutional Court only disposes of a very poor yardstick, because only a few relevant elements of the Crimean Autonomy are provided for in the Ukrainian Constitution and a review by the Court is obviously restricted to the observance of the Ukrainian Constitution by the Ukrainian governing bodies. When the Constitution leaves the hands of the legislator free, the judicial review of legislation is a very limited guarantee. Therefore the Crimean *Verkhovna Rada* could not complain about possible restrictions of the Crimean Autonomy adopted - for instance - by the Ukrainian legislator in exercise of his freedom of choice.

On the other side, according to Article 133 of the draft, Normative legal acts of the Crimean Autonomy shall not contradict the Constitution and the laws of Ukraine. This provision implies that Crimean normative acts do not have a previously fixed field of competence with respect to the authority of the Ukrainian legislator. The borders between Ukrainian legislation and Crimean normative acts can always be changed at the discretion of the Ukrainian legislature who will be free to change the competences of the Crimean legislator and overruling the decisions of the Constitutional Court adopted on the basis of the previous Ukrainian legislation.

The mentioned flaws are especially evident if it is kept in mind that the draft does not provide a list of the items or matters which are given to the competence of the Crimean institutions: the Ukrainian legislator is entrusted with the task of providing for that list and may enrich or curtail it on the basis of his own discretion. There is a danger that the Ukrainian legislator will act to promote his own interest, if it is true that, when enriching the competence of the Crimean institutions, he has to curtail his own competence and the other way round.

It would be advisable to list in the Constitution or in a special law, which could not be abrogated by the Ukrainian legislator with the order determined for the adoption of the laws of Ukraine, the items or matters which are given to the competence of the Crimean institutions. Moreover, Article 133 could be modified preventing Crimean normative legal acts only from contradicting the Ukrainian Constitution and the principles of the Ukrainian laws. It would be advisable to have a stronger constitutional guarantee of the Crimean Autonomy: this result could be achieved through a clear constitutional division of the relevant functions between the Ukrainian State and the Crimean Autonomy, binding both on the Ukrainian legislator and the Crimean legislator.

The legal acts of the Crimean Autonomy

The draft does not speak of laws of the Crimean Autonomy, it only mentions normative legal acts of the Crimean Autonomy in Article 133. But these acts can be submitted for judicial review by the Constitutional Court of Ukraine like other Ukrainian laws or legal acts (Article 150).

Article 136 provides that the President of Ukraine may suspend decisions and resolutions of the *Verkhovna Rada* of the Crimean Autonomy which contradict the Constitution while simultaneously applying to the Constitutional Court of Ukraine. The question now is whether the decisions and resolutions mentioned in this Article include normative legal acts of the Crimean institutions. In this case the President's power to suspend would be inappropriate and violate the presumption of constitutionality of legal norms. It might be argued that Article 133 and Article 134 distinguish between normative legal acts on the one hand and decisions and resolutions on the other and that Article 136 therefore does not concern the normative legal acts under Article 133. But in the section on the Constitutional Court Article 150 again uses the term normative legal acts of the Crimean Autonomy and this provision should correspond to Article 136. There is also no positive attribution of competence to any Crimean body to adopt normative legal acts other than the decisions and resolutions mentioned in Article 134. One may therefore come to the conclusion that Article 136 indeed also refers to normative legal acts.

This should be clarified and the possibility for the President to suspend legal acts should be restricted to acts not having a normative character.

Section XI

Local Self-Government

General Comments

This section has been substantially revised in respect to earlier drafts. The text now appears sufficiently clear and precise.

Article 139

According to Article 139, paragraph 3, the Raion and Oblast Councils are formed indirectly, the Raion Council from the village, the municipality and city councils of the raion, and the Oblast Council from the raion and the city (cities of oblast importance) councils of the oblast. This has to be seen in connection with Article 138 which distinguishes between territorial communities (the residents of villages, municipalities and cities) having the right of local self-government and Raion and Oblast Councils representing the common interest of the citizenry of villages, municipalities and cities. It is therefore possible to adopt different electoral systems for both levels requiring direct elections for the territorial communities and indirect elections for the Raion and Oblast Councils which are envisaged as the assemblies of the representatives of the Councils of the territorial communities. Apparently, the Raion and Oblast Councils have under Article 141 no executive functions but only deliberative functions and the implementation of their decisions might be entrusted to the bodies of the territorial communities.

Section XII

The Constitutional Court

General comments

Section XII of the draft sets a permanent Constitutional Court. This fully corresponds to the prevailing practice in new democracies to protect the constitutionality of their own legal order by a specific, permanent and independent judicial body.

Comments on specific articles

Article 146

This Article provides that both the President and the Senate appoint one half of the judges of the Constitutional Court (see also Article 87, no. 1 and Article 105, paragraph 1, no. 19). Could the functioning of the Constitutional Court be blocked in practice by the non-appointment of judges?

Article 147

The independence of the Constitutional Court also depends on the existence of its own budget. It is important that the Court may administrate its own budget without any interference. It would be appropriate to introduce in Article 147 a provision similar to Article 129 of the draft.

Article 149

It should be confirmed *expressis verbis* in the Constitution that the decision on pre-term cessation of office of a judge of the Constitutional Court falls into the exclusive competence of the Court itself. One of the reasons for pre-termination of office being oathbreaking, it would seem useful to insert the text of the oath of the Constitutional Court judges into the Constitution (cf Article 103 for the President).

Article 150

The power to interpret officially

One of the competences entrusted to the Constitutional Court is the official interpretation of the Constitution and the laws. While it is obvious that the Constitutional Court has to interpret the Constitution to arrive at its decisions, it seems outside the usual functions of a judicial body to adopt an official interpretation of the Constitution. What may be provided for is that the Constitutional Court can give advisory opinions, interpreting constitutional provisions with respect to certain specific problems.

For the Constitutional Court to give official interpretations of ordinary laws seems outside the scope of competences of a constitutional court. In order to determine the constitutionality of a law, the Constitutional Court will often have to interpret it. This should, however, not be a specific competence of the Court.

Lack of a provision on concrete norm control

According to Article 50 of the draft, all human rights and freedoms shall be protected by the courts. From the specific competences of the Constitutional Court, it follows *per argumentum e contrario* that the constitutional rights and freedoms have to be guaranteed and applied also by all ordinary courts. Practice in other countries shows that human rights violations are often the consequence of a simple application of laws or other norms which themselves are contrary to the Constitution. If such a violation appears, ordinary courts (which would have to respect the law until it is declared void by the Constitutional Court) should have the power to have the constitutionality of the norm reviewed by the Constitutional Court (concrete norm control, incidental norm control). Article 150, paragraph 2, limits the possibility to seize the Constitutional Court to the Supreme Court. This procedural obstacle would considerably delay and hamper the effective defence of human rights.

Lack of a provision on conflicts of competence

The Constitution contains detailed catalogues of competences of the various State organs which risk not to be always precise and entail conflicts between them. It seems therefore necessary to give to the Constitutional Court a competence to decide in such cases.

Article 151

Article 151 introduces an element of preventive norm control into the draft (see also Article 159 for amendments to the Constitution). It should be clarified in the text of the Constitution if the conclusions adopted by the Constitutional Court under these procedures are legally binding or not.

Article 152, paragraph 2

According to this provision, laws and other legal acts declared to be unconstitutional by the Constitutional Court lose their force and effect from the day the decision about their unconstitutionality was adopted. It would be appropriate to provide that such a decision should be published in the Official Journal.

Section XIII

Introduction of Amendments to the Constitution

General Comments

The procedure for amending the Constitution looks very complex. This impression may be partly due to the fact that the wording of the relevant

provisions is sometimes very clumsy.

Comments on specific articles

Article 155

This provision guarantees the acquis in the Human Rights field by providing that the constitutional rights and freedoms may not be abolished or restricted through amendments to the Constitution but may only be improved, enlarged or reinforced. This is in accordance with the principles enshrined in Article 3, paragraph 2, Article 16, paragraph 2 and Article 17 of the Constitution.

The wording seems appropriate since it also covers the rights guaranteed in Section I and not only the rights guaranteed in Section II.

Article 157

It is extremely restrictive to entrust the President of Ukraine alone with the power to introduce draft laws to amend Sections I, III, and XIII of the Constitution. This contradicts the principles of democracy and gives a lot of discretion to the President in shaping - for instance - the elections and the referendums. It is true that the draft does not mention the electoral systems which have to be adopted for implementing the Constitution. Article 157 would nevertheless inhibit a change in Section III without the initiative of the President even if the political parties agreed to constitutionalise the choice of an electoral system.

Section XV

Transitional provisions

Article 1

Does Article 1 of the transitional provisions imply the abrogation of the previous laws and normative acts which contradict the Constitution? Or does it allow the Constitutional Court to review the constitutionality of legal acts adopted prior to the coming of this constitution into force? Both solutions are possible, but the question arises whether the issue of the constitutionality of old laws and normative acts can be submitted to the Constitutional Court. Since under Article 150 there is no convenient procedure for this purpose, the alternative of abrogation may look preferable. But abrogation may entail problems when the previous law contradicts a principle of the Constitution and this principle is too vague to take the place of that law in providing a legal solution for the problem concerned.

Article 4

Article 4 of the transitional provisions follows a contradictory line dealing with the judiciary. It seems advisable to elect or appoint new judges when the judicial system of Ukraine pursuant to Article 123 of this Constitution is formed, instead of waiting for the end of the term for which they were elected or appointed. Such a solution would guarantee a coherence to the overall functioning of the judicial system.

Conclusions

Having been actively involved in the work leading to the establishment of the present draft, the Commission is pleased to note that this text constitutes a substantive progress with respect to previous drafts, and, on the whole, seems a good basis for establishing Ukraine as a pluralistic and democratic State protecting human rights.

The Commission is aware that any Constitution is a political document and that it will always be the fruit of political compromise. It is therefore natural that such a text contains provisions, partly inspired by previous traditions, which are not satisfactory for a, in particular foreign, lawyer. In respect to the present draft, this is true of the human rights section with its vast and undifferentiated catalogue of social and environmental rights. The institutional sections reflect Ukraine's choice of a semi-presidential system and in general the provisions would seem to contribute to the establishment and functioning of stable democratic institutions though the President's powers in some respects may be regarded as excessive. It is also particularly encouraging that the procuracy has no longer the task of general legal supervision it enjoyed under the Soviet model.

The section of the draft on the Crimean Autonomy provides only little protection of this autonomy. It may have to be adapted in order to meet the aspirations of the Crimean population and may have to be brought in line with the recent decisions concerning a Crimean Constitution.

On the whole the Commission however considers that this draft is a good basis for the good basis for the adoption of the Constitution. This task seems urgent since the consolidation of Ukrainian statehood requires the adoption of the Constitution of the independent Ukrainian State. The Constitutional Agreement between President and Supreme Rada signed on 8 June 1995 provides To recognize as necessary the creation of adequate conditions for acceleration and successful completion of the constitutional process in Ukraine in order to adopt the new Constitution of Ukraine not later than one year after the date of signature of this Constitutional Agreement. The rapid adoption of the Constitution on the basis of the present text seems therefore desirable.

As to the method of adoption, an adoption by referendum should not be excluded. The people as the sovereign could thereby express their opinion and the danger that certain political forces could afterwards try to unilaterally change the rules of the game would be reduced.

ii. Report on the implementation of the Constitutional Law on Human Rights and Freedoms and on the Rights of Ethnic Communities and Minorities in the Republic of Croatia

Adopted at the Commission's 27th Plenary Meeting (Venice 17-18 May 1996)

I. Introduction

1. On 16 February 1996, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission, in view of Croatias request to accede to the Council of Europe, on the constitutional situation in Croatia and more particularly on the implementation of constitutional law on human rights and freedoms and on the rights of national or ethnic communities or minorities in the Republic of Croatia as well as on human rights protection mechanisms.

2. The Venice Commission created a working group at its 26th meeting (1-2 March 1996) and appointed Messrs. Matscher, Malinverni and Nicolas as Rapporteurs.

3. The Rapporteurs, assisted by Mr Giakoumopoulos and Miss Martin of the Secretariat of the Council of Europe, went to Zagreb from 14 to 16 March (the programme of the mission is appended to this report). The persons participating in the mission wish to thank the Croatian authorities for their assistance.

4. In their analysis the Rapporteurs took into account *inter alia* the report on the legislation of the Republic of Croatia drawn by Mr Franz Matscher and Mme Gro Hillestad Thune, dated 8 December 1994 (Doc AS/Bur/Croatia (1994)2).

5. Having regard to the urgency of the request of the Committee on Legal Affairs and Human Rights, the Rapporteurs had focused on questions concerning human rights and the rights of minorities and in particular on the implementation of the constitutional law of 1991 on human rights and freedoms and the rights of ethnic or national groups or minorities in the Republic of Croatia (hereafter the constitutional law of 1991).

6. As regards the general constitutional situation, the Rapporteurs wish to state simply that they share the worries of the Parliamentary Assembly and of the Congress of Local and Regional Authorities of Europe in respect of the recent election of the Mayor of Zagreb. They note that the law presently in force made it possible on two occasions for the President of the Republic to refuse the nomination of the person elected, to the detriment of fundamental principles of democracy.

7. Apart from this regrettable incident, the Rapporteurs found that the general situation in Croatia indicates that the system is functioning adequately, with due respect for the rule of law and democracy, and that the authorities apparently are making all possible efforts to lead the country out of its difficult situation due in particular to the period of conflict, and to bring Croatia to the level of the standards of the Council of Europe and to a rapid accession to the organisation. This was the unanimous wish of all persons met by the Rapporteurs, including members of the opposition and representatives of minorities.

II. The suspension of certain provisions of the Constitutional Law of 1991

8. Several provisions of the Constitutional Law of 1991, which had been adopted in the context of Croatia's independence, have been temporarily suspended by a constitutional law dated 20 September 1995. Under this law, the suspension of these provisions (Articles 13, 18 paragraphs 1 and 5, 21 to 51, 52 to 57, 58, 60, and 61) will continue until the next census in the Republic of Croatia. The suspension mainly concerns three points:

1. the special status granted to districts where members of ethnic and national communities represent the majority of the population in accordance with the census of 1991;

2. the right to representation and participation in public institutions of communities and minorities which make up more than 8% of the population, also in accordance with the census of 1991; and

3. the international supervision of the implementation of this law, including the question of the provisional Court of Human Rights in Croatia provided for in Article 60 of this law).

As regards points 1 and 2, the reason advanced for the temporary suspension was that these provisions were no longer pertinent since the number of Serbs, the only minority concerned, had considerably decreased since 1991.

9. However, the Rapporteurs of the Venice Commission are of the opinion that the suspension of the law was not indispensable. The provisions could validly have continued in force, although in that case they would not for the moment have any practical application because of the demographic changes which have occurred.

10. Moreover, the Rapporteurs remain concerned at the discouraging psychological effect that the suspension would certainly have on minorities and displaced populations which would like to remain in or return to Croatia.

11. In the opinion of the Rapporteurs, the Constitutional Law of 1991 deprived of its above provisions cannot be said to constitute an adequate response to the new situation. A revision of the suspended provisions is necessary (see below point 4) irrespective of the results of the census.

III. The Census

12. The census was initially scheduled for April 1996. However this schedule has proved unachievable and none of the persons met by the Rapporteurs was able to indicate the date which is now envisaged for the next census.

13. In the opinion of the Rapporteurs it seems preferable to wait until the situation has calmed down on the territory of Croatia and for the conditions for the return and the peaceful settlement of displaced populations to be plainly met before organising, in co-operation with the international community,

the next census. This was also the view of all persons met by the Rapporteurs who expressed an opinion on the point.

IV. The Content of the Constitutional Law of 1991

14. The provisions in force of the constitutional law of 1991 guarantee the protection of human rights as they are enshrined in several international instruments including the European Convention on Human Rights (Articles 1 and 2 of the Law). Moreover, they guarantee certain rights to or ethnic or national minorities or communities, in particular the right to participate in public affairs (Article 6 d), the right to use freely their language and their alphabet in public or in private (Articles 7, 8 and 10), the right to use their national and ethnic emblems and symbols (Article 9), the freedom to create cultural institutions with a view to preserving their national and cultural identity (Article 11), and the right to education in their mother tongue (Articles 14 to 17). These provisions determine specifically the requirements of the constitutional provision of Article 15 which guarantees the equality of rights of all members of nations and minorities as well as their rights to freely express their identity and to freely use their own languages and scripts, writing, and their right to cultural autonomy.

15. As a whole the above provisions are compatible with international standards and in particular with the Framework Convention for the Protection of National Minorities - to which Croatia has declared that it wishes to become a party - and are inspired also by the principles set out in the European Charter of Regional and Minority Languages and in the proposal of the Venice Commission for a European Convention for the Protection of Minorities (Articles 8 to 12).

16. Moreover, the Rapporteurs note that the protection of minorities in Croatia is also based on international instruments. They note with satisfaction that Croatia signed and ratified in February 1996 the International Covenant on Civil and Political Rights (whose Article 27 guarantees the right to cultural identity for persons belonging to minorities) as well as its Optional Protocol. They also note that Croatia has concluded bilateral agreements with Hungary, Slovenia and Romania which include provisions concerning the protection of minorities.

17. The suspended provisions of the law of 1991 gave specific rights of representation and participation in public institutions (Parliament, government and higher judicial bodies) to minorities representing at least 8% of the population. These provisions aimed mainly at protecting the most important minorities in Croatia and in particular the Serb minority by granting them an effective representation at the various levels of the legislative, executive and judicial powers. In effect, whereas 16 minorities are present in Croatia, only the Serb minority was concerned by these provisions.

18. Moreover, in accordance with the provisions of Article 18 paragraphs 2 to 4, which remain in force, the minorities which represent less than 8% of the whole population are represented by 5 deputies in Parliament which are deemed to represent the interests of all minorities recognised on the territory of Croatia.

19. All provisions relating to the rights of minorities representing 8% have been suspended. Thus, while before the suspension the Serb minority had 12 representatives in Parliament it is now only represented by 3 representatives. In addition, the provisions granting a special status to those districts where the Serb minority was a majority are no longer applied.

20. Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them, the Rapporteurs recall Article 11 of Recommendation 1201 (to which reference is also made in the Croato-Hungarian Treaty of 5 April 1995): "in the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching their specific historical and territorial situation and in accordance with domestic legislation of the State".

21. Therefore, although recent events are capable of justifying a revision of certain provisions of the Constitutional Law of 1991 - in particular those concerning the special status of districts mainly populated by persons belonging to minorities - the Rapporteurs stress that this revision should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime. However the new provisions should, in line with Recommendation 1201 (1993) and with the European Charter of Local Autonomy, guarantee that concentrated minorities will enjoy the right to regulate and manage an important part of public affairs. The Rapporteurs refer in this respect to the opinion of the European Commission for Democracy Through Law on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly (Document CD-INF (96)4).

22. In the opinion of the Rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations.

V. The human rights protection mechanisms

23. Under Article 58 of the Constitutional Law of 1991, it was provided that an international body was to supervise the implementation of those provisions governing special status districts. This body would have the power to issue recommendations that the Republic of Croatia should implement. Moreover the Constitutional Law of 1991 envisaged, in its Articles 60 and 61, the establishment of a provisional Court of Human Rights partly composed of non-nationals, to which every citizen of the Republic of Croatia could appeal. The Court in question was provisionally established pending the establishment of a special Tribunal on Human Rights composed of members nominated by the European Union and by the Republics of the former Yugoslavia under an arrangement contemplated at the Hague Conference.

24. To date, this Court has not been created and those provisions relating to international supervision and co-operation as well as those concerning judicial protection (Article 60 and 61 of the Constitutional Law of 1991) have been suspended. Furthermore, the idea of creating a Court of Human Rights for the Republics of the former Yugoslavia seems to have been abandoned.

25. During the course of their mission, the Rapporteurs applied themselves to evaluating, after consultation with all persons met, the present viability

of the establishment of such a Court.

26. The Constitution of the Republic of Croatia contains several provisions on Human Rights (Fundamental Principles, Chapter III: Fundamental Rights and Rights of Citizens), and Article 15 of the Constitution refers specifically to the rights of minorities. All these constitutional provisions and the rights included in international treaties which are incorporated into the domestic legal order as soon as they are ratified and published (Article 134 of the Constitution) can be invoked before any tribunal and before the Constitutional Court. The latter can be seized by means of an individual application, and this possibility has allowed the Court to establish since its creation an important corpus of human rights case law (see in particular the reports published in the Bulletin of Constitutional Case Law of the Venice Commission). The proper functioning of the Constitutional Court and the full confidence which it enjoys were unanimously recognised by all persons met by the Rapporteurs.

27. The work carried out by the Constitutional Court has already been considered in Mr Matscher's and Mme Thune's report of 1994 (see Chapter III:4/a). In 1995, the Constitutional Court was seized of 642 applications.

28. The establishment of a provisional Court of Human Rights could have a negative effect on the process of introducing applications before the Strasbourg organs:

To the extent that it might be considered as an international court detached from the Croatian legal order, proceeding before the provisional Court of Human Rights could deprive Croatian citizens of the right to seize the Commission on Human Rights, Article 27 ECHR prohibiting the Commission from examining a request "already submitted to another procedure of international investigation or settlement."

In addition, if it were to be considered as an integral part of the Croatian legal order, it would be included in the domestic remedies which must be exhausted in accordance with Article 26 ECHR. This would render the road to Strasbourg even longer, as such remedies would then include an ordinary appeal, an appeal to the Supreme Court, a constitutional appeal to the Constitutional Court and, finally, an appeal before the provisional Court of Human Rights.

29. Moreover the accession of Croatia to the Council of Europe, the undertaking of certain commitments comprising *inter alia* the ratification of the European Convention of Human Rights and its additional Protocols, the recognition of the Commission's competence to deal with individual applications (Article 25 of the Convention) and of the competence of the European Court of Human Rights (Article 46) also constitute means for the protection of human rights and to a certain extent of the rights of minorities.

30. Having regard to these considerations, the Rapporteurs have reached the conclusion that the establishment of a provisional Court of Human Rights as it is provided for in Article 60 of the Constitutional Law of 1991 is not now an apposite or necessary means of protection.

31. Nevertheless, the Rapporteurs recognise also that the European Convention on Human Rights (which does not contain any provisions guaranteeing rights of minorities as such) and the Framework Convention for the Protection of National Minorities (whose mechanism is not very strict) are not in themselves adequate for the purposes of reestablishing as soon as possible the confidence of minorities and of the populations of those territories presently under international control (UNTAES) as well as the confidence of displaced populations. The Rapporteurs thus place particular emphasis on the right of refugees and displaced persons throughout the whole territory of former Yugoslavia to return to their original homes, to recover their property or to receive compensation for the loss of it (Recommendation 1287 (1996) of the Parliamentary Assembly on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia).

32. In these circumstances the Rapporteurs strongly recommend the creation of a body with a partially international composition integrated into the Croatian domestic legal order.

33. The idea of an Ombudsman has been put forward. However, the Rapporteurs consider that this institution would not bring about sufficient confidence, having regard to the lack of any decision-making power of the Ombudsman (who can issue only recommendations).

34. In consequence, the Rapporteurs have envisaged the possibility of allowing for the Constitutional Court to sit as an enlarged body in circumstances where it is seized of questions concerning minority rights. For the examination of such cases, the Constitutional Court would be composed of the Croatian constitutional judges supplemented on a provisional basis by a number of international judges. Its jurisdiction would be limited to cases concerning an alleged violation of constitutional or other provisions on minorities.

35. Although this proposal requires an amendment of the Constitution and of the Constitutional Law on the Constitutional Court (which requires a 2/3 majority in Parliament), the institution of such a Chamber would have the advantage of not creating an additional degree of jurisdiction and of being a purely internal court which would develop Croatian case law. It would also have the advantage of not posing problems in respect of Article 27 ECHR.

36. The Venice Commission declares that it is ready to co-operate with the Croatian authorities in order to define the competence, the composition and the functioning of this enlarged Chamber. It also invites the Croatian authorities to formulate, in the light of Resolution (93) 6, any other proposal.

37. In addition, despite the evident confidence that the functioning of the Constitutional Court unanimously inspires, the Rapporteurs have noted that among the high number of applications brought before the Constitutional Court only a few relate to rights of minorities and that these are all tied to questions of constitutional rights. As a result, the Rapporteurs consider that the reestablishment of the confidence of the populations concerned and of those on the territories which are now under international administration requires the implementation of a large-scale information campaign on human rights and the rights of minorities.

38. This campaign could be led by the recently created Croatian Institute of Human Rights and presided by a judge of the Constitutional Court, which with the help of financial and supplementary support could be entrusted to promote the legal and procedural possibilities for protecting human rights and the rights of minorities, under present law before the ordinary courts, the Constitutional Court, the UNTAES committees and the Human

Rights Committee of the United Nations, as well as those which will exist in the future, notably when Croatia will have ratified the European Convention on Human Rights and have recognised the competence of the European Commission and the European Court of Human Rights.

39. The Rapporteurs are of the view, in effect, that notwithstanding certain legal lacunae and certain weak points as to their implementation (for instance inadequate provision for civil compensation, or for the prosecution of certain terrorist acts against minorities), the laws in force warrant being widely disseminated, will contribute to the protection of and respect for human rights and the rights of minorities, and will allow for the integration and the peaceful return of members of the minorities concerned to the Republic of Croatia.

VI. Conclusions

Having regard to the constitutional situation as a whole in Croatia and to the Constitutional Law of 1991 on human rights and the rights of minorities and their judicial protection, the Venice Commission Rapporteurs recommend:

- that the suspended provisions of the Constitutional Law of 1991 be revised as soon as possible in order to ensure that persons belonging to minorities are guaranteed rights in the field of local autonomy in accordance with the European Charter of Local Self-Government and Recommendation 1201(1993);

- in order to subject the protection of minorities to a certain degree of international supervision on a provisional basis, that an enlargement of the Constitutional Court be provided for such as to allow it, when deciding upon cases concerning the rights of minorities, to comprise international judges. Such a proposal may be considered to be an adequate confidence-building measure;

- that a large information campaign for the promotion of the legal and procedural possibilities of protection of human rights and the rights of minorities be launched, in particular through the Croatian Human Rights Institute and with the help of the Council of Europe;

The Rapporteurs reiterate, finally, their readiness to assist, within the fields of their competence, any institution concerned in the process of the elaboration and of the implementation of the above measures as well as of any other measure aiming at reinforcing the confidence of the populations concerned and at promoting human rights and the rights of minorities in Croatia.

iii. Opinion on the Constitutional Situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms

Adopted by the Commission at its 29th Plenary Meeting (Venice 15-16 November 1996) on the basis of the report prepared by the Commission's Working Group composed of: Messrs Jambrek (Slovenia), La Pergola (Italy), Malinverni (Switzerland), Matscher (Austria) and Russell (Ireland).

1. INTRODUCTION

By letter of 16 February 1996 the President of the Parliamentary Assembly's Commission on Legal Affairs and Human Rights of the Council of Europe requested the Venice Commission to give an opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms.

The Commission held a meeting with representatives of Bosnia and Herzegovina and officials of the Office of the High Representative on 16 May in Venice. At its 27th Plenary meeting it entrusted a working Group composed of Messrs Jambrek, Malinverni, Matscher and Russell with the task of drawing up, in co-operation with representatives of all interested parties including the Office of the High Representative, a report on the Human Rights Protection mechanisms in Bosnia and Herzegovina. The Working Group held a meeting in Strasbourg on 21 May 1996 to make a preliminary examination of the topic. On 28-31 May 1996, the Secretariat of the Commission met officials from Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska, the Office of the High Representative and the Commission of Human Rights in Sarajevo and reported to the members of the Working Party.

In reply to a request by the Working Group, the Republika Srpska and the Federal Ministry of Justice submitted in writing information on the human rights protection systems in the two Entities. The Office of the Human Rights Ombudsperson in Bosnia and Herzegovina submitted information on its activities and on the human rights protection system in Bosnia and Herzegovina.

The Working Group held a further meeting, presided by Mr. La Pergola, with representatives of Bosnia and Herzegovina, officials from the Office of the High Representative and representatives of bodies acting in the field of Human Rights in Bosnia and Herzegovina, in Paris on 21-22 June 1996.

The Commission held an exchange of views on the topic at its 28th Plenary meeting (Venice, 13-14 September 1996) in which the Ombudsperson of Bosnia and Herzegovina, Mrs Gret Haller, took part. At its 29th meeting (Venice, 15-16 November 1996) the Commission adopted the present report.

2. HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA - GENERAL APPROACH

In accordance with the Dayton Agreement (Annex 4, Constitution of Bosnia and Herzegovina) the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina" (hereafter "BH") shall continue its legal existence under international law as a State, with its internal structure modified and with its presently recognised borders. It shall consist of the two entities, the Federation of Bosnia and Herzegovina (hereafter "FBH") and the Republika Srpska (hereafter "RS").

Human Rights - along with the right to free elections and freedom of movement of persons, goods, services and capital throughout the country (Article I, paras 2 and 4) - are at the centre of the Dayton Agreement. Article II of the Constitution of BH provides that "Bosnia and Herzegovina and the two entities shall provide the highest level of internationally recognised human rights and fundamental freedoms". In particular, "the Rights and freedoms set forth in the European Convention of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law". Particular care has been taken in the Constitution in order to stress the principle of non discrimination and the rights of refugees and displaced persons to freely return to their homes and to have restored to them property of which they were deprived in the course of hostilities since 1991 (Article II, paras 4 and 5).

All institutions in Bosnia and Herzegovina and "all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and freedoms" referred to in the Constitution (Article II, para 6).

In these circumstances it is quite natural that each legal order in Bosnia and Herzegovina, i.e. the legal order of BH, the legal order of the FBH, possibly also the legal order of the cantons in the FBH, and the legal order of the RS, and the more or less provisional institutions created by the international community within the legal order of Bosnia and Herzegovina, all provide for human rights monitoring organs.

The Commission finds that protection of human rights is not only a constitutional requirement but also a prerequisite and an instrument for long standing peace in the country. Its effectiveness depends on the coherence of the protection machinery and on the credibility of the bodies which will monitor human rights implementation throughout the country, in particular the specialised bodies provided for in Annex 6 to the Dayton Agreement and in the Constitution of the FBH as well as the Supreme and Constitutional courts.

Conflicts of competence between bodies entrusted with protection of human rights should in principle be avoided, as well as situations whereby two highest judicial bodies would give contradictory answers to the same legal problem. Such situations, which are in general undesirable, could in the present circumstances of this region, affect the very essence of the constitutional order and thus the State as such.

The Commission has thus examined the competence of the most important human rights protection bodies in the legal orders of BH, FBH and RS (Chapter 3) in order to define the areas of possible conflicts of competence ; it has also made some proposals which may facilitate the resolution of these conflicts and the achievement of greater effectiveness in the human rights machinery (Chapter 4).

3. BODIES ACTING IN THE FIELD OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA

3.1. Bodies created under the Dayton Agreement

3.1.1. The Constitutional Court

Annex 4, Article VI

Following the general elections of 15 September 1996, the Constitutional Court of BH, has to be established. It will be composed of nine members, four members from the FBH, two from the RS and three non-citizens of Bosnia and Herzegovina or of neighbouring States, selected by the President of the European Court of Human Rights.

The Constitutional Court has jurisdiction to decide any dispute that arises under the Constitution between the Entities and the central Government and between the Entities themselves or between institutions of Bosnia and Herzegovina including the question of compatibility of an Entity's Constitution with the Constitution of Bosnia and Herzegovina. (Article VI, para. 3 (a)).

The Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)).

It shall also have appellate jurisdiction over constitutionality issues arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI para 3 (b). This may of course include human rights disputes (cf. Article II).

3.1.2. The Commission on Human Rights

Article II, para 1 of the Dayton Constitution; Annex 6 to the Dayton Agreement, Chapter Two, Part A

The Commission consists of two bodies: the Office of the Ombudsman and the Human Rights Chamber. They are jointly in charge of examining alleged or apparent violations of human rights as guaranteed in the European Convention for the Protection of Human rights and Fundamental Freedoms and its Protocols, but also discrimination as regards the enjoyment of fundamental rights guaranteed in other specified human rights instruments. The human rights protection mechanism is scheduled to last for five years after the entry into force of the Dayton Agreement, (14 December 1995). After that period of time, the responsibility for the continued operation of the Commission of Human Rights is to be transferred to the institutions of Bosnia and Herzegovina unless the Parties agree otherwise, in which case the Commission will continue its operation.

The organisation of the Commission on Human Rights has several similarities to that of the Strasbourg mechanism, the Human Rights Ombudsman being equivalent to the European Commission of Human Rights and the Human Rights Chamber mirroring the European Court of Human Rights.

Although Article VIII para 1 seems to allow for the introduction of applications directly to the Human Rights Chamber, in principle all cases shall be brought before the Ombudsman (Article V, para 1). The Ombudsman may refer to the Human Rights Chamber cases where he/she finds a breach of human rights. Moreover, when dealing with an application the Ombudsman takes into account whether the applicant has exhausted the effective domestic remedies.

The competence of the Human Rights Commission extends to all acts or decisions occurring after 14 December 1995 (date of the signature of the Dayton Agreement).

a. The Human Rights Ombudsman
Annex 6, Part B (Articles IV to VI)

Ambassador Gret Haller, Switzerland, has been appointed for a non renewable term of five years by the Organisation for Security and Cooperation in Europe (OSCE). The Office of the Ombudsman is an independent agency.

The Ombudsman has the power to investigate alleged or apparent violations of human rights. Upon receipt of a complaint he/she may communicate it to the respondent party and request its observations. After having received the applicant's observations in reply, he/she may invite the parties to reach a friendly settlement. If no settlement is achieved, the Ombudsman draws up a report on whether there has been a violation of human rights in the case and, where such a violation has occurred, he/she can make recommendations for just satisfaction. The respondent party has to reply on how it shall comply with the Ombudsman's conclusions. If the respondent party does not reply or refuses to comply with the conclusions, the Ombudsman shall publish the report and forward it to the High Representative and the Presidency. He/she may also refer the case to the Human Rights Chamber.

For his/her investigation, the Ombudsman must have access to all official documents, including confidential ones.

The Ombudsman may also investigate on his/her own initiative (Annex 6, Article V para 2). On 2 May 1995, the Ombudsman decided ex officio to investigate a case concerning the right to liberty of a person detained in the RS (Decision of 3 May 1996, Case 14/96).

The Ombudsman has some discretionary power as to the priority in which he/she should address the applications. Although not expressly required to do so, he/she takes into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

In accordance with Rule 37 of the Rules of Procedure of the Office of the Human Rights Ombudsman, the latter may at any time during the investigation decide to refer a case to the Chamber. In accordance with Rule 37 b), adopted in September 1996, he/she may also refer to the Chamber "cases which are communicated for this purpose by the Ombudsmen of the Federation of Bosnia and Herzegovina or any equivalent institution in the Republika Srpska".

Between 28 March and 31 October 1996, more than 980 complaints were lodged with the Office of the Ombudsman, 256 of which were registered as formal individual applications (41 against Bosnia and Herzegovina, 92 against the Federation, 22 against both Bosnia and Herzegovina and the Federation, 94 against the Republika Srpska, 7 Other). The applications introduced before the Office mostly concern property issues and the right to respect for the home (see Case Summary annexed to this report). The Ombudsperson, Mrs Gret Haller, has declared 20 cases inadmissible and has referred another 19 to the Human Rights Chamber.

b. The Human Rights Chamber
Annex 6, Part C, Articles VII to XIII

The Human Rights Chamber is composed of fourteen members; four are appointed by the Federation of Bosnia and Herzegovina, two by the Republika Srpska and the remaining eight by the Committee of Ministers of the Council of Europe. The members appointed by the Committee of Ministers must not be citizens of Bosnia and Herzegovina or any neighbouring State. Mr Germer has been nominated President of the Chamber.

The Chamber has jurisdiction to receive, by referral from the Ombudsman on behalf of the applicant, applications concerning violations of human rights. It has to decide which applications to accept and in what priority to address them according to whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

The decisions of the Chamber are final and binding.

The Chamber may end a case by friendly settlement.

The Chamber sits in Panels of 7 members. When an application is decided by a Panel, the full Chamber may decide upon motion of a party to the proceedings or of the Ombudsman to review the decision.

The Chamber adopted in November 1996 its Rules of Procedure. Until the end of October 1996, 19 cases were introduced to the Chamber by the Ombudsperson. The Chamber decalared admissible one case against the Republika Srpska (case CH/96/1, *J., B. and T. Matanovic v. Republika Srpska*, decision of 13.09.1996).

3.1.3. The Commission for displaced persons and refugees (renamed "Commission for real property claims") *Article II para 5 of the Dayton Constitution; Annex 7 to the Dayton Agreement, Articles VII to XV*

This Commission has nine members, four of which are appointed by the Federation of Bosnia and Herzegovina, two for a term of three years and two for a term of four years ; two other members are appointed by the Republika Srpska, one for three years and the other for four years. The remaining members are to be appointed by the President of the European Court of Human Rights each for a term of five years. The Chairman is to be designated among the latter by the President of the said Court. Ms Saulle was appointed President. The members of the Commission may be reappointed.

The Commission's mandate is to receive and decide upon any claims for real property in Bosnia and Herzegovina, where, since 1 April 1992, the property has not voluntarily been sold or otherwise transferred. Claims may be for the return of property or for just compensation in lieu of return.

The Commission is empowered to "effect any transaction necessary to transfer or assign title, mortgage, lease or otherwise dispose of property with respect to which a particular claim is made, or which is determined to be abandoned. It may lawfully sell, mortgage or lease real property to any resident or citizen of Bosnia and Herzegovina, where the lawful owner has sought and received compensation in lieu of return, or where the property is determined to be abandoned according to local law.

The Commission's decisions are final, and any title, deed, mortgage, or other legal instrument created or awarded by the Commission must be recognised as lawful in the entire territory of Bosnia and Herzegovina.

3.1.4. The Election Appeals Sub-Commission
created by the Provisional Election Commission (Annex 3 to the Dayton Agreement)

This body was created by the Provisional Election Commission. It will adjudicate upon complaints regarding violations of provisions on elections in the Dayton Agreement and in the Rules adopted by the Provisional Election Commission, concerning additions or deletions in the provisional voters' list; standards of professional conduct of media and journalists; obligations of governments as regards media; conduct of political parties and candidates; registration of political parties and independent candidates; or polling and counting procedures.

The Sub-Commission may prohibit a political party or an independent candidate from running in the elections, remove candidates from the list and impose pecuniary penalties. The Sub-Commission's decisions shall be binding and may not be appealed.

3.1.5. Other bodies

a. The International Police Task Force
Annex 11 to the Dayton Agreement, Article VI

The Agreement on the international Police Task Force stipulates that when IPTF personnel learn of credible information concerning violations of internationally recognised human rights and fundamental freedoms, they must provide the information to the Human Rights Commission, to the International Tribunal for the Former Yugoslavia or to other appropriate organisations.
IPTF is not a judicial or quasi-judicial body

b. The Office of the High Representative
Annex 10 to the Dayton Agreement

The Office of the High Representative is entrusted with the task of establishing political and constitutional institutions in Bosnia and Herzegovina and the promotion and respect of human rights. The High Representative's (Mr Carl Bildt) mandate is to coordinate the activities of the civilian organisations in order to ensure the efficient implementation of the civilian aspects of the agreement. He is equally in charge of monitoring the activities of the Human Rights Task Force.

c. The Human Rights Task Force (HRTF)
Article XIII of the Agreement on Human Rights contained in Annex 6 to the Peace Agreement for Bosnia and Herzegovina and paragraph 33 of the conclusions of the London Peace Implementation Conference of 8-9 December 1995

Chaired by the Office of the High Representative, the HRTF operates in Sarajevo and throughout the territory of Bosnia and Herzegovina. The force operates in accordance with the provisions of Article XIII of the Agreement on Human Rights contained in Annex 6 to the Peace Agreement for Bosnia and Herzegovina and paragraph 33 of the conclusions of the London Peace Implementation Conference of 8-9 December 1995.

3.2. The Constitution of the Federation of Bosnia and Herzegovina (proposed in the Washington Agreement of February 1994)

3.2.1. The Constitutional Court
Chapter IV, Section C, Article 9-13

The Constitutional Court has nine judges, six from FBH (2 Bosniacs, 2 Croats and two "others", in the present composition 2 Serbs) and three non-nationals of Bosnia and Herzegovina (Judge Ajibola (Nigeria), Judge El Khani (Syria) and Judge Rigaux (Belgium)), designated by the President of the International Court of Justice[4]. The Court is presided over by Judge Ibrahimagic. The Constitutional Court was created in 1995 but it only became operational in January 1996.

The primary functions of the Constitutional Court are to resolve disputes between Cantons; between any Canton and the Federation Government; between any Municipality and its Canton or the Federation Government; and between or within any of the institutions of the Federation Government.

The Court also determines, on request, whether a law or a regulation is in accordance with the Constitution of the Federation. The Supreme Court, the Human Rights Court or a cantonal court have an obligation to submit any doubt as to whether an applicable law is in accord with the Constitution to the Constitutional Court. Its decisions are final and binding.

The Constitutional Court has not been seized with any case since its creation.

3.2.2. The Supreme Court
Chapter IV, Section C, Article 14-17

Composed of nine judges, the Supreme Court is the highest court of appeals of the FBH. It can receive appeals from cantonal courts in respect of

matters involving questions concerning the Constitution, laws or regulations of the Federation and concerning other matters as provided for in Federation legislation, except those within the jurisdiction of the Constitutional Court or of the Human Rights Court (this is expressly provided by Article 15 para. 1 in fine). It shall also have such original jurisdiction as is provided for by Federation legislation. Judgments are final and binding.

3.2.3. The Federation Ombudsmen

Chapter II, Article 1-9

Three Ombudsmen are appointed for the same terms of service as those of the President and of the judges of the Supreme Court ; one Bosnian, one Croat and one "other", presently a Serb. Each of the Ombudsmen shall, with the approval of the President, appoint one or more Deputies. They shall in particular seek to appoint Deputies in Municipalities with populations that do not reflect the composition of the Canton as a whole.

The Office of the Ombudsmen is an independent agency. The Ombudsmen have the power to examine the activities of any institution of the Federation, Canton, or Municipality as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects. In so doing, the Ombudsman must have access to all official documents, including confidential ones. An Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings, including any in the Human Rights Court. Each Ombudsman shall present an annual report to the Prime Minister and the Deputy Prime Minister of the Federation, to each cantonal President and to the OSCE. In addition, he/she may at any time present special reports and oblige domestic institutions to reply. The Ombudsman may initiate proceedings before the Human Rights Court.

The first Ombudsmen of FBH (Ms Jovanovic, Mr Muhibic and Ms Raguz) were appointed by the OSCE in 1994. They started working in January 1995. Their report of activities for 1995 was issued in February 1996 (see CDL (96) 38). It is clear from the report that most of the cases examined by the Ombudsmen relate to the protection of the right to property (numerous cases of the so-called "abandoned apartments") as well as to freedom of movement, missing persons and the right to life.

The Ombudsmen addressed the authorities in FBH on several occasions requesting that measures be adopted. The U.S. State Department Report on Human Rights indicates in this respect that "the Ombudsmen have done impressive work monitoring the human rights situation and bringing cases of abuse to the Bosniac and Croat Governments. However, the Ombudsmen have no enforcement power and authorities treat them with varying degrees of indifference and hostility. The Ombudsmen say that were it not for the international backing, Federation authorities would disband them immediately."

In a report concernig the Work of the Federation Ombudsmen in the period 1 January - 30 June 1996, the Ombudsmen state that "the six-month period after the signing of ther Dayton Peace Accords did not mark an improvement in its civilian implementation, while the human rights situation worsened. (...) The authorities resisted (the Ombudsmen's) efforts to monitor human rights compliance despite repeated assurances to the contrary".

3.2.4. The Human Rights Court

Chapter IV, Section C, Article 18-23

This Court has 7 members: 3 Judges from BH (one Bosnian, one Croat and one Other) and 4 members to be appointed by the Committee of Ministers of the Council of Europe in accordance with Resolution (93) 6[5].

The Court's competence covers any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the instruments listed in the annex to the Constitution of the Federation of Bosnia and Herzegovina. After having exhausted the remedies before the other courts of the Federation, one may appeal to the HR Court on the basis of any question within its competence. An appeal may also be taken to the Court if proceedings are pending for an unduly long time in any other court of the Federation or any Canton.

The Human Rights Court may also, on request, give binding opinions for the Constitutional Court, the Supreme Court or a cantonal court on matters falling within its competence.

The Human Rights Court has jurisdiction over cases commenced after 1 January 1991.

The decision of the Court shall be final and binding.

So far the Human Rights Court has not been established.

3.2.5. The Federation Implementation Council

In May 1996 the FBH established this body, which is composed of the President and Vice-President of the FBH, the Principal Deputy of the High Representative and two other representatives of the international community. Its task is to overcome problems created by officials at the municipal, cantonal or federal level in the implementation of the Dayton Agreement. The Prime-Minister of FBH, the Ombudsman of BH, any of the three Ombudsmen in the FBH and any member of the Council may refer to this body cases whereby it is alleged that any person holding public office has violated obligations under the Constitution or the law, has engaged in substantial violations of international human rights law or has obstructed co-operation with the International Criminal Tribunal for the former Yugoslavia. The Council has the power to remove the person concerned from his/her functions.

3.3. The Constitution of the Republika Srpska

The human rights protection system established under the Constitution of the Republika Srpska is based on the ordinary judiciary and the Constitutional Court.

3.3.1. The Constitutional Court

Article 120 - Article 125

The Constitutional Court has 7 members with a tenure of 8 years, after which they cannot be re-elected. The President of the Constitutional Court is elected by the National Assembly for a three-year term, after which he cannot be re-elected. Prof. G. Miljanovic is the current President.

The Constitutional Court shall decide on:

- conformity of laws, other regulations and general enactments with the Constitution;
- conformity of regulations and general enactments with the law;
- conflict of jurisdiction between agencies of legislative, executive and judicial authorities;
- conflict of jurisdiction between agencies of the Republic, region, city and municipality;
- conformity of programmes, statutes and other general enactments of political organisations with the Constitution and the law.

In accordance with amendment XLII (Article 115 in fine), the Constitutional Court monitors constitutionality and legality by providing the constitutional bodies with opinions and proposals for enacting laws to ensure "protection of freedoms and rights of citizens".

Proceedings before the Constitutional Court can be instituted by the President of the Republic, by the National Assembly and by the government. The Constitution enables the legislator to authorise other bodies or organs of the State to bring a case before the Court.

The Constitutional Court may itself initiate proceedings on constitutionality and legality.

There is no individual application before the Constitutional Court but anyone "can give an initiative" for constitutional proceedings. In practice, the majority of cases brought before the Constitutional court have their origin in individual initiatives.

Proceedings against legislative or other provisions can be brought within a period of one year from the entry into force of the challenged provisions.

If the Constitutional Court finds that a law or a regulation is not in accordance with the Constitution, this law or regulation shall become void at the date of the Court's judgment.

Article 124 of the Constitution states that the decisions of the Constitutional Court are universally binding and final, but there is no specification as to the scope of the binding character of the decisions of the Court. Under the Dayton Constitution, it can reasonably be argued that the decisions of this Court (as of any other court) are liable to be challenged as to their constitutionality before the Constitutional Court of BH, which has appellate jurisdiction in respect of decisions of the Constitutional Court.

The Constitution of the Republika Srpska contains no provision as to the place of international human rights instruments in the hierarchy of norms. Normally, the international human rights instruments listed in the Dayton Agreement, including the ECHR, should also apply in the Republika Srpska (Article II paras 1 and 6 of the Constitution of BH : Bosnia and Herzegovina and both Entities, all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights referred to in the Constitution). However, the Constitution of RS does not allow the Constitutional Court to control the compatibility of laws with these international instruments.

The Constitutional Court has not developed any particular human rights case-law. In its judgments it takes into account the jurisprudence of the Constitutional Courts of Yugoslavia and of the former federated Republics.

3.3.2. The Supreme Court and the other courts of law

Article 126 - Article 132

The Supreme Court of the Republic has functioned since 1992 with an interruption of some months. Being the highest court of law, it provides for the unique and universal enforcement of the law. The court protects the established rights and interests of all persons and ensures legality. It protects human rights and freedoms *in concreto*, within the framework of civil or criminal cases brought before it. A special chamber of the Supreme Court deals with administrative actions.

The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law.

4. AREAS OF CONFLICTS OF COMPETENCE AND PROPOSALS FOR THEIR SOLUTION

4.1. Preliminary remarks

The above description of the human rights protection machinery calls for two preliminary remarks:

First, there exists in the legal system of BH and FBH a multitude of bodies which may be competent to deal with human rights violations either in abstracto or in concreto, by means of individual petitions. This impressive machinery is not yet fully operational since several of these bodies have not yet been set up. However, when these bodies are established a risk of overlapping competences will certainly arise, and it is therefore necessary to identify

as a matter of urgency such procedural rules as will help avoid the risk of contradictory decisions or judgments. This is all the more important since contradictory decisions may affect the credibility of the institutions, with detrimental consequences for the peace and integration process.

Secondly, the role of the bodies established under the Dayton Agreement Constitution will largely depend on the effectiveness of the protection granted by the bodies of the Entities. As long as an Entity's law provides for complete and effective protection, the Dayton bodies can only have a mere supervisory task ; this task could in principle be carried out by a single instance judicial body. On the contrary, where an Entity's system offers less opportunities for judicial protection of human rights, the role of the Dayton bodies should be much more active ; this may require a more complex intervention, with two degrees of jurisdiction combined with procedures to facilitate a friendly settlement of the dispute. In this respect, one may observe that the judicial system of the RS contrasts with the complexity of the system of FBH. A complex and developed system of human rights protection at the level of BH will certainly contribute to improving the protection afforded in the RS, but it may render too elaborate and lengthy - and consequently less effective - the protection afforded as regards FBH.

These remarks have been borne in mind throughout the deliberations of the Commission's Working Group which has identified the following areas of possible conflict of competence.

4.2. As regards the Entities (FBH and RS)

4.2.1. In the Republika Srpska

The system provided for in the law of RS is a classical system where judicial protection of human rights is afforded by ordinary courts. The Supreme Court of RS will be the main instrument for human rights protection since all types of litigation (civil, criminal and administrative) will be brought before it, whereby the Court shall "protect human rights and freedoms" in accordance with Article 121 of the Constitution. The Constitutional Court cannot be seized with individual applications ; it will examine the compatibility of a law or a regulation with the human rights guaranteed in the Constitution in abstracto, at the request of other State organs or at its own initiative.

The system created thus has similarities with certain continental legal systems where it is for the courts and in particular for the Supreme Courts to deal with human rights cases and where no individual application can be brought before the Constitutional Court (Bulgaria, France, Romania).

However, having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established, giving the individual locus standi before the Constitutional Court in addition to or in substitution for the system of "individual initiatives". At the same time, some remnants of the constitutional order of the former Yugoslavia, such as the capacity to initiate proceedings ex officio and the competence to make "proposals", could be abandoned. This would strengthen the judicial character of the Court and bring the system closer to the recent evolution in several new democracies in Europe.

Moreover, the creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the FBH, will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in BH in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of BH, as provided by Rule 37 b) of the Office's Rules of Procedure (this Rule already mentions that the Ombudsman of BH will refer to the Chamber cases communicated for this purpose by the Ombudsmen of the FBH or "any equivalent institution in the Republika Srpska"). Of course, in order to ensure the necessary impartiality of the institution in a post conflict situation, one should seriously consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation (e.g. the OSCE may nominate the three Ombudsmen and support substantially the functioning of their office).

4.2.2. In the Federation of Bosnia and Herzegovina

a. General remarks on the simultaneous operation of the Supreme Court, the Constitutional Court and the Human Rights Court

One of the particularities of the judicial system of the Federation is that it has three supreme judicial bodies, namely the Supreme Court, the Constitutional Court and the Court of Human Rights. A number of provisions in the Constitution seek to define the respective competences of these Courts in order to avoid overlapping.

The Commission's observations aim at making the distinction between these courts' respective competences clearer. Admittedly, this is a difficult exercise and one of the difficulties raised is that the main human rights protection body, the Court of Human Rights, has not been established.

It is, at the same time, a short term exercise, because, in the Commission's view, this distribution of competences between three high courts is only justified by the particular will of the drafters of the Constitution in the Washington Agreement to create a body with the exclusive task of monitoring respect for human rights in FBH. After the Dayton Agreement and the establishment of the Human Rights Commission, setting up a specific human rights court with partial international composition at the level of an entity may no longer be advisable (see below the Commission's remarks under 4.3.2).

Be that as it may, one should examine whether the tasks entrusted to the Human Rights Court (if it had to be set up) could not be transferred in the long run to the Constitutional Court, whose competence could then be extended in order to comprise the examination of individual applications alleging human rights violations. This would bring the legal system of the FBH into line with other European legal systems where, by means of individual applications (Individualbeschwerde), human rights issues are dealt with by the Constitutional Court. Moreover, such a development would be in line with the tendency in most European States to entrust Constitutional Courts with the task of human rights protection.[6]

b) Relations between the Human Rights Court and the Supreme Court

Since the Constitutional Court has no appellate jurisdiction but can only be seized by other courts or State institutions, appeals from the cantonal courts can be made in theory either to the Supreme Court or to the Human Rights Court : allegations as to non-observance of domestic law will be introduced in an appeal to the Supreme Court, while violations of human rights provisions will be introduced to the Human Rights Court. However, in practice, it will be difficult to distinguish human rights cases from normal domestic litigation. For example, a dispute as to the custody of children in divorce proceedings will probably be at the same time a litigation under civil law (family law) and under human rights law (right to respect for family life). It is therefore necessary to determine which court will have the final say in the dispute.

In this respect, Chapter IV C, Article 22, has a particular importance. This provides that the Supreme Court may at the request of any party to an appeal or on its own motion address to the Human Rights Court a question arising out of the appeal which is within the competence of the Human Rights Court. In this case the response of the Human Rights Court will be binding for the Supreme Court.

Moreover, an application can be lodged with the Human Rights Court only after other remedies have been exhausted (Chapter IV C, Article 20).

This leads to the following conclusions:

- appeals from cantonal courts in civil, criminal or administrative cases will be introduced, as a general rule, before the Supreme Court ;
- the Supreme Court shall ask the Human Rights Court for a binding answer on human rights questions raised in the appeal ;
- appeals from the Supreme Court can be lodged with the Human Rights Court on human rights points only.

c) Relations between the Human Rights Court and the Constitutional Court

The delimitation of the respective competences of the Constitutional Court and the Human Rights Court may also create difficulties. The Constitutional Court has competence for constitutional matters : whenever a question of constitutionality is raised in proceedings before the Supreme Court or the Human Rights Court, these courts will have to stay the proceedings and submit the question to the Constitutional Court. The latter's judgment will be binding for the Supreme Court and the Human Rights Court (Chapter IV C, Articles 10 (3), 11 and 12). However, the competence of the Constitutional Court does not extend to human rights issues. For those, the Constitutional Court may refer to the Human Rights Court, whose judgment is binding on the Constitutional Court (Chapter IV C, Article 22). Of course, in practice, the distinction between human rights questions and constitutional questions will be again difficult. For example, a question concerning the independence of the judiciary will be a question of constitutional law but it also refers to the individual right to fair proceedings before an independent and impartial tribunal.

One of the elements that the courts could take into consideration when deciding these matters, either in their Rules of Procedure or in casu, is the fact that the drafters of the Constitution of FBH clearly intended to give the Human Rights Court general and final jurisdiction over all cases which present a human rights aspect in the legal order of FBH. For this reason, Article 22 must be interpreted in such a way as to give a presumption of competence to the Human Rights Court.

In other words, when a question presents both constitutional and human rights aspects, the Constitutional Court should, in accordance with Chapter IV C, Article 22 of the Constitution, refer the question to the Human Rights Court whose response will be binding on it.

d) The Federation Ombudsmen

The Venice Commission had already described in 1994 the institution of the Federation Ombudsmen as a particularly positive feature[7]. The activities of the Ombudsmen in 1995 confirm this opinion.

The Commission had expressed the view that the Ombudsmen's power to make recommendations to the administration should be expressly provided and that some clarification of the administration's obligations in respect of the Ombudsmen recommendation would have been desirable. The Commission had indicated that the text of the Constitution "allows for a wide range of different practices by both the Ombudsmen and the administration". One year later, the lacunae indicated by the Commission seem to have weakened the effectiveness of the Ombudsmen's work[8].

An institution which is likely to strengthen the Ombudsmen's position is the establishment of the Federation Implementation Council, whose creation was recently decided. However, this body (whose functioning should be very carefully (re)examined in order to make sure that it meets the requirements of Article 6 of the ECHR) should be regarded as very provisional and even exceptional. Therefore, other solutions should also be explored.

In accordance with Chapter II B, Article 6 of the Constitution of FBH, the Ombudsmen are entitled to initiate and to intervene in proceedings before all courts, including the Human Rights Court. In its above mentioned opinion, the Commission had called for prudence in the use of this provision, considering the Ombudsmen's unlimited power to intervene in pending proceedings as a threat to the principle of separation of powers and equality of arms.

The possibilities offered in Article 37 of the Rules of procedure of the Office of the Ombudsperson (referal to the Human Rights Chamber of cases presented for this purpose to the Ombudsperson by the Federation Ombudsmen) should be regarded as more compatible with international standards of fair trial. In addition, it has the advantage of simplifying and shortening the complex and lengthy remedies for human rights violations in the FBH.

4.3. As regards relations between the institutions of the Entities and the institutions of BH

4.3.1. The simultaneous existence of three Constitutional Courts

In general, the simultaneous existence of three Constitutional courts should not raise particular problems, since each one of them functions within the framework of a specific Constitution. Thus, the Constitutional Court of FBH is competent for the examination of constitutional issues under the Constitution of FBH, while the Constitutional Court of RS shall deal with constitutional questions under the Constitution of RS. The Constitutional Court of BH is competent inter alia to decide the question of compatibility of an Entity's Constitution with the Constitution of BH (Article VI, para 3 (a)), which takes precedence over the Constitutions of the Entities.

The provisions in the Constitutions of the Entities providing that judgments of their highest courts are "binding and final" should be either revised or interpreted in such a way as to mean "binding and final in the legal order of the Entity, as long as it is not declared inconsistent with the Constitution of BH".

4.3.2. The simultaneous functioning of two Human Rights jurisdictional bodies

The simultaneous functioning of two international Human Rights jurisdictional bodies raises particular problems.

Unlike to the three Constitutional Courts which are requested to make their decisions on the basis of different legal instruments, the Human Rights Court of FBH and the Commission of Human Rights of BH shall apply mainly the same basic human rights instruments and above all the European Convention of Human Rights and the case-law of its organs. In this way, the Commission of Human Rights of BH will actually have appellate jurisdiction over cases decided by the Human Rights Court of FBH.

Admittedly, ratione materiae and ratione temporis, the competences of the Human Rights Chamber of FBH and that of the Commission of Human Rights of BH are not exactly the same. The Human Rights Commission may only deal with allegations of violations of the European Convention of Human Rights ; it can also deal with alleged discrimination as regards the enjoyment of the rights guaranteed by the other international instruments listed in the Appendix to Annex 6. The Human Rights Court, on the contrary, shall deal in addition to the above with alleged violations of any right (not only discrimination) guaranteed in the international instruments listed in the Annex to the Constitution of FBH. Moreover, the competence ratione temporis of the Commission of Human Rights of BH starts on 14 December 1995. The ratione temporis competence of the Court of Human Rights of FBH starts - in theory - on 1 January 1991 (Chapter IV C, Article 19 of the Constitution of FBH).

However, the actual ratione materiae competence of the Commission of Human Rights will depend on its jurisprudence on "discrimination"; a wide interpretation of the concept of interpretation will bring within the scope of control exercised by the Commission of Human Rights most of the cases whereby a violation of rights guaranteed by the international instruments listed in the Appendix to Annex 6 is alleged. The same applies as regards the ratione temporis competence of the Commission of Human Rights which will much depend upon its jurisprudence on "continuing violations" (i.e. cases originating before 14 December 1995 but whose effects are continuing after that date). From a practical point of view, the difference of competence between the two institutions may not be significant.

On the other hand the co-existence of the two human rights jurisdictional bodies may create several problems:

The exhaustion of the domestic remedies available to a citizen of FBH becomes extremely lengthy. It involves the (eventual) successive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of FBH) and then of the Ombudsman of BH before reaching, finally, the Constitutional Court of BH or the Human Rights Chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from FBH from applying to the European Commission of Human Rights in Strasbourg when BH becomes party to the European Convention on Human Rights.

In addition, it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of FBH and of the Human Rights Chamber of BH (both composed of a majority of international judges) might affect the authority of those Courts.

One possible solution to these problems would be to amend the Constitution of FBH in such a way as to do away with the Court of Human Rights. The lacuna which might result from such an amendment in the judicial system of FBH would be easily covered by the Supreme Court and the Constitutional Court of the Federation and by the possibility offered to the Federation Ombudsmen to refer cases to the Ombudsperson of BH and to the Human Rights Chamber. In addition, this solution will simplify the judicial system of protection of human rights in FBH and will consequently shorten the legal avenues of exhaustion of domestic remedies. It will also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, i.e. the Human Rights Commission.

The Commission finds that this solution would not be contrary to the international agreements which are at the basis of the judicial system of BH. Actually, one could argue that the Washington Agreement, which includes the Constitution of FBH and which foresees the creation of the Human Rights Court, has been politically (if not legally) superseded by the Dayton Agreement.

In any event, the merger of the Human Rights Court, if it had to be created, with the Constitutional Court of FBH should be envisaged at a later stage, as suggested above (4.2.2.).

4.4. As regards the Dayton Institutions

4.4.1. Human Rights Commission and other institutions created under the Annexes to the Dayton Agreement

a. Human Rights Commission and the Commission for real property claims

The Commission for real property claims receives and decides upon any claims for real property in Bosnia and Herzegovina, where, since 1 April 1992,

the property has not voluntarily been sold or otherwise transferred. Claims may be for the return of property or for just compensation in lieu of return. Its decisions are final and any title, deed, mortgage, or other legal instrument created or awarded by the Commission must be recognised as lawful in the entire territory of Bosnia and Herzegovina.

There may be a conflict of competence between the Human Rights Commission and the Commission for real property claims when the same case is presented to both bodies as a real property case and simultaneously as a human rights case (right to property, right of access to property, right to respect for one's home, right to free movement within one's State). In fact, several applications concerning property issues have been lodged with the Office of the Ombudsperson.

In order to avoid conflict, it is suggested that all applications relating to real property be dealt with exclusively by the Commission on real property claims. Remaining property rights issues should be dealt with by the Commission on Human Rights.

b. Human Rights Commission and the Election Appeals Sub-Commission

A similar conflict of competence may occur between the Commission on Human Rights and the Election Appeals Sub-Commission. For instance, a case concerning access to media during the electoral campaign may be simultaneously brought before both organs as an electoral law case and as a case concerning the right to free and fair elections for the legislature (Article 3 of Protocol 1 ECHR) or a case of non-discrimination as regards freedom of speech (Articles 10 and 14 ECHR).

A similar solution can be suggested : in order to avoid conflict, all applications relating to elections should be dealt with exclusively by the Election Appeals Sub-Commission.

The solutions proposed above are compatible with the Dayton Agreement which, by establishing specialised institutions to deal with real property and elections issues, provided that these institutions' decisions will be final and binding.

4.4.2. Human Rights Commission and Constitutional Court

Among other competences, the Constitutional Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)). It shall also have appellate jurisdiction over constitutionality issues arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI para 3 (b). It follows from the latter provision that the Constitutional Court may receive appeals against decisions from any court whereby it is alleged that they violate the Constitution, including the provisions on Human Rights (cf. Article II). In accordance with Article VI para 4 of the Constitution of BH, the decisions of the Constitutional Court "are final and binding".

Similarly, the Commission on Human Rights - and in particular the Human Rights Chamber -has jurisdiction to receive applications concerning violations of human rights. The decisions of the Chamber are also "final and binding".

Whatever the intention of the drafters of the Constitution may have been, there is an overlapping between the competences of the Constitutional Court and those of the Commission of Human Rights. Both shall deal with human rights issues, mainly under the European Convention on Human Rights.

Of course, having regard to the difference in nature of the two institutions, one may assume that their decisions would have different effects. Thus, the decisions of the Human Rights Chamber will simply establish that a violation of human rights has occurred, while the judgments of the Constitutional Court may directly result in the abolition of legislative provisions and the annulment of court judgments or of administrative decisions. But in practice this difference does not resolve the problem of overlapping competence. This is all the more so since the Human Rights Chamber shall in its decisions "address what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non pecuniary injuries) and provisional measures" (Article XI, para 1 (b) of Annex 6).

One suggestion for avoiding such overlapping would be to place one of these two judicial bodies in a hierarchically superior position to the other, allowing appeals from one jurisdiction to the other.

Indeed, it could be assumed that the Commission on Human Rights should only be involved after the Constitutional Court. Appeal to the latter would then be regarded as a "domestic remedy" to be exhausted before applying to the Commission of Human Rights. An argument in favour of this solution would be the particular international character of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina). In this perspective the Human Rights Commission would appear as a kind of international body integrated into the legal order of Bosnia and Herzegovina for a transitional period, namely until the effective integration of this State and until its accession to the Council of Europe, the ratification of the European Convention on Human Rights and the recognition of the human rights protection mechanism of the Strasbourg organs[9]. The provisions on jurisdiction of the Human Rights Commission do not exclude appeals from the Constitutional Court but rather underline this quasi-international character of the mechanism established under Annex 6: Article 2 of Annex 6 indicates that the Commission on Human Rights is established "to assist the parties (namely the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in honouring their obligations" to secure to all persons within their jurisdiction the highest level of internationally recognised human rights standards. Therefore, the State of Bosnia and Herzegovina is a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement also.

The opposite solution, namely to allow appeals from the Human Rights Chamber to the Constitutional Court, could also be envisaged. Since the Human Rights Chamber is somehow integrated in the domestic legal order of Bosnia and Herzegovina, allowing such an appeal would be in accordance with the constitutional provision empowering the Constitutional Court to deal with constitutional appeals against judgments "of any other court in Bosnia and

Herzegovina". It would also be consistent with the role normally attributed to Constitutional Courts in modern European constitutional systems.

However, both solutions presented above disregard the fact that the decisions of both the Constitutional Court and the Human Rights Chamber have to be regarded as "final and binding" under the Dayton Agreement. In these circumstances, a decision of the Human Rights Chamber finding a violation of the European Convention on Human Rights cannot be reviewed by the Constitutional Court and vice-versa. Moreover, the above solutions are not entirely satisfactory since they add a level of jurisdiction to the already long process of exhaustion of domestic remedies.

Having regard to the fact that the Human Rights Commission is a provisional institution designed to last 5 years, and taking into account the need to ensure legal safety as to respect for human rights within a relatively short time[10] by avoiding prolongation of human rights litigation, a third solution could be envisaged: the jurisdiction of either court would not extend to matters already dealt with by the other. Potential applicants will thus have the choice between appealing to the Constitutional Court of BH and lodging a complaint with the Human Rights Commission. A case dealt with by any of these institutions should no longer be subject to review by any other court in Bosnia and Herzegovina. The risk of the two institutions producing diverging case-law could be reduced if human rights litigation were attributed, as a matter of principle, to the Human Rights Commission as long as it is in operation, through the adoption of a system of appropriate legal information, consultation and assistance dispatched to potential applicants. This solution also respects the spirit of the Dayton Agreement which apparently aimed at creating during the transitional period a number of specialised institutions giving final and binding judgments on matters within their competence (Human Rights Commission, Commission on Real Property Claims, Electoral Appeals Sub-Commission). During this transitional period one could reasonably expect the Constitutional Court to be released of the burden of cases already dealt with by these bodies.

Of course, all the above solutions are not entirely satisfactory and can only be implemented as transitional arrangements. With the end of the transitional period, i.e. when the specialised institutions will cease their operation, the appeal to the Constitutional Court will be the only and final remedy in human rights litigation in BH.

4.4.3. Concluding remarks

The Commission observes that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

Interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina will have to take into account the complexity of the constitutional order and the need for speedy and effective judicial protection of individual human rights. When deciding which case falls within their competence, they should take into account not only laws and regulations but also the case-law of other institutions. Co-ordination of their practice by disseminating information on the cases which are introduced, are pending or those decided by either institution will be of outmost importance and should be ensured already in the first months of operation of the institutions concerned.

The Commission understands that the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina. Respect for human rights is the cornerstone of the Dayton and Washington peace agreements. However, duplication should be avoided since it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with amendments of the entities' Constitutions where the creation of specific human rights bodies may appear unnecessary from a legal point of view.
Similarly, important disparities in the human rights protection systems of the two entities may also be detrimental to the effectiveness of protection. Ensuring a balanced and coherent judicial system for the protection of human rights in BH in its entirety may require a certain parallelism in the protection afforded under the legal orders of the two entities and possibly the establishment of equivalent bodies.

In any event, the merger of human rights bodies and the constitutional courts appears to be the step which should be envisaged at the next stage. The integration of Bosnia and Herzegovina, the normalisation of its constitutional situation and the effective development and functioning of its constitutional institutions will probably require that human rights protection be entirely entrusted to the Constitutional Courts of the State and of its Entities.

iv. Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina

Approved by the working party on the basis of contributions by Mr Joseph Marko (Austria) Mr Jean-Claude Scholsem (Belgium), Mr Jacques Robert (France), Mr Sergio Bartole (Italy), Mr Jan Helgesen (Norway), Mr Andreas Auer (Switzerland), Mr Ergun Özbudun (Turkey) following discussions at the meeting on 27 June 1996 with representatives of the Office of the High Representative, Bosnia and Herzegovina, and the Federation of Bosnia and Herzegovina and revised following discussions with experts from the Federation of Bosnia and Herzegovina and the Republika Srpska on 27 and 28 August 1996 in Sarajevo.

Introduction

The Venice Commission has been requested by the Office of the High Representative to give an opinion on the compatibility of the Constitutions of the two Entities of Bosnia and Herzegovina (hereafter referred to as B.H.), ie. the Federation of Bosnia and Herzegovina (hereafter referred to as F.B.H.) and the Republika Srpska (hereafter referred to as R.S.), with the Constitution of B.H. as established as part of the Dayton Agreements. The present text was prepared on the basis of written contributions by the rapporteurs, given preliminary approval by the Working Party following discussions at a meeting in Paris on 27 June 1996 between the rapporteurs and representatives of the Office of the High Representative, of B.H., and F.B.H. and revised following further discussions between a delegation of the Commission, consisting of Prof. Marko, Prof. Scholsem and Prof. Malinverni, and experts from B.H., F.B.H. and R.S. in Sarajevo on 27-28 August 1996.

The following documents in particular have been used as a basis for the opinion:

- the Dayton Agreements, in particular Annex IV containing the Constitution of B.H.;

- the Constitution of F.B.H., being part of the Washington Agreements (Document CDL(94)28);

- the amendments to the Constitution of F.B.H. adopted on 5 June 1996 (CDL(96)50), as well as some amendments appended to document CDL(96)50 on which no agreement has yet been reached;

- the Constitution of the R.S. as amended (document CDL(96)48).

The Working Party noted that in the documents put at its disposal there was a number of discrepancies. The translation did not always seem reliable and it was not always clear which text is in fact in force. With respect to F.B.H., most of the problems could be settled at the meeting of 27 June 1996 with representatives of F.B.H and B.H. The exchange of views with representatives of RS on 28 August 1996 permitted a clarification of most of the issues concerning the text of the constitution of RS.

General Comments

The Constitution of B.H. as part of the Dayton Agreements is, like the Constitution of F.B.H. as part of the Washington Agreements, in its origin more a public international law than a constitutional law text. Its character seems more contractual than normative. In order to become fully operational as the legal basis of B.H., the institutions established by the Agreements still need to acquire that degree of democratic legitimacy which can be conveyed only by free elections as foreseen in Annex 3 of the Dayton Agreements.

The Constitution of B.H., without expressly saying so, establishes a federal State. It defines two Entities, F.B.H. and R.S., as constituent parts of B.H. and divides rights and owers between the institutions of B.H. and those of the Entities. It establishes a citizenship of B.H., while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present.[11]

B.H. however is an unusually weak federation. All governmental functions and powers not expressly assigned in the Constitutions to B.H. shall be those of the Entities (Article III.3.(a)). There is no clause conferring general implicit competence on B.H., though Article III.5.(a) may in certain respects come close to such a clause.

A decisive weakness of B.H. is that it depends for its resources on contributions from the two Entities (Article VIII.3). This dependency may well threaten the efficient functioning of B.H. There are federal systems in which the federated entities depend for their finances on the central authorities. But there seems to be no precedent for a federal State which solemnly proclaims the supremacy of its norms over the norms of the federated entities while at the same time acknowledging its financial dependency on these.

On the positive side, Article I.4 of the Constitution of B.H., which proclaims the free movement of goods, services, capital, and persons throughout B.H., seems destined to become an important factor for unifying the country.

With more specific reference to the question of compatibility, it should first be noted that Article III.3.(b) of the Constitution of B.H. provides that this Constitution supersedes inconsistent provisions of the constitutions and laws of the Entities. This implies that the Constitution of B.H. has direct abrogatory power with respect to the constitutions and other laws of the Entities, a conclusion supported by Article 2 of Annex II of the Constitution of B.H., which states "all laws, regulations, and judicial rules of procedure in effect within the territory of B.H. when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution".

On the other hand, Article XII.2 of the Constitution of B.H. provides for the obligation for the Entities to amend their respective constitutions to ensure their conformity with this Constitution. Both entities have indeed proceeded to revise their constitutions to this end. It seems in fact necessary, both for political and legal reasons, not to rely simply on the abrogatory power of the Constitution of B.H., but to try to bring the constitutions of the Entities into line with the central constitution. Otherwise this task would have fallen upon the Constitutional Court of B.H. and have threatened to overburden it and to lead to a long period of legal uncertainty.

COMPATIBILITY OF THE CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

The preamble as amended by Amendment II:

In the new wording of the preamble it is clearly stated that the Federation "is a constitutive part of the sovereign state of B.H.". Sovereignty is thereby correctly attributed to the State of B.H. and not to the Federation itself.

Article I.1 as amended by Amendment III:

The reference to Bosniacs and Croats as "constitutive peoples, together with the others" seems realistic under the present circumstances and is not inconsistent with the Dayton Agreement. It should also be seen historically in the light of the constitutions of 1974 and even of 1910. There is a clear political will to be deduced that Muslims/Bosniacs, Croats and Serbs form the constitutive peoples of B.H. Insofar as the R.S. defines itself as a national state of the Serb people, it seems to be quite "natural" that the Federation defines itself to be the component entity for Bosniacs and Croats. A closer

look into the governmental structure then reveals the application of the proportionality principle as far as representation and participation in the decision-making process in the legislative, executive and judicial branches is concerned.

After various discussions in Sarajevo it must be stressed, however, that there is - because of some sort of territorialisation and "nationalisation" of the institutional structures - a dangerous tendency coming from the proportionality principle, at least in practice, that citizens not belonging to the respective constitutive peoples within the entities might be excluded from representation and the decision-making process. Their rights to stand as candidates for public offices on various levels should expressly be improved.

The new wording of paragraph (2) of Article I.1 attributes to the Federation all power, competence and responsibilities which are not, as determined by the Constitution of B.H., within "the responsibility of the B.H. institutions".[12] This correctly reflects the Dayton Agreements.

Article II.A.2:

Paragraph (2) of this article confines the enjoyment of political rights, i.e. the right to form and belong to political parties, to participate in public affairs, to have equal access to public service and to vote and stand for election, to citizens of the Federation. This is problematic and in any case does not apply to the first elections.

The first elections to the House of Representatives of the Federation have to take place in accordance with the Agreement on Elections (Annex III of the Dayton Agreements). Article II paragraph (2) of this Agreement mentions explicitly the elections to the House of Representatives of the F.B.H. Article IV.1 of the Agreement prescribes that any citizen of B.H. has, if he meets the necessary technical conditions, the right to vote. Article I.7(c) defines as citizens of B.H. all persons that were citizens of the Republic of B.H. immediately prior to the entry into force of this Constitution. And finally, in order to avoid the consequences of ethnic cleansing, Article IV.1 of the Agreement on Elections provides that the citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote in person or by absentee ballot in that municipality. Hence, the right to vote for the House of Representatives of the Federation obviously derives from citizenship of B.H. together with the place of residence and cannot be restricted to citizens of the Entity.

That this should apply not only to the first elections but also to all future elections can be concluded from the character of B.H. as a federal State. For examble, Article 43 paragraph 4 of the Swiss Constitution provides that the "established Swiss citizen" shall enjoy at his domicile all the rights of the citizens of that canton, and paragraph 5 expressly states that "in cantonal and communal matters, he shall acquire the right to vote after having settled for three months". It seems also scarcely conceivable that such a large part of the electorate should be disenfranchised between the first and second elections.

Therefore, the words "of Bosnia and Herzegovina" should be added to the text of paragraph 2 after the words "all citizens". For the right to vote it is of course appropriate to introduce a minimum period of residence.

The Working Party noted that in the interpretation of Mr. Hasi_, Vice Minister of Justice of F.B.H., this provision is already applicable to all B.H. citizens. Since the usual rules of legal interpretation would however indicate that in a F.B.H text the word "citizens" without qualification refers to F.B.H citizens, it maintains its recommendation.

With respect to the right to form and belong to political parties, it should also be noted that it is often difficult to distinguish from the freedom of association also enjoyed by non-citizens.

Article II.A.5 as amended by Amendment VII:

In accordance with Article I.7(c) of the Constitution of B.H., this article rightly provides that the citizens of the Federation are citizens of B.H. However, the question how citizens of B.H. obtain citizenship of the Federation is not addressed. It is however clear that each citizen of B.H. must have the possibility to be a citizen of at least one of either of the two Entities, and that the two Entities do not have unlimited discretion in this respect.

Article III.1 as amended by Amendment VIII:

Article III.1 contains the competences of the Federation Government, and Amendment VIII is of particular importance for bringing the Constitution of the Federation into line with the Constitution of B.H.

As required by the Dayton Agreements, the amendment deletes the former competence of the Federation Government to conduct foreign affairs.

A new paragraph (a) on defence provides *inter alia* for co-operation with the standing committee on military matters established by Article V.5(b) of the Constitution of B.H. No details are given on this co-operation, but the word "co-operate" could lead to the assumption of an equal relation between the Federation bodies and the standing committee. Article V.5(b) however entrusts the standing committee with the function of co-ordinating the activities of the armed forces in B.H., which could imply a dependence of the Federation bodies upon the authorities of the Republic. It would seem advisable to include provisions on a necessary decision-making process in this area in the Constitution of the Federation, not least because the provisions of Article V.5 of the Constitution of B.H. are fairly ambiguous.

The various competences in the economic field, in particular concerning economic policy (c), finance (e) and energy policy (h), have to be interpreted in accordance with the overriding principle of the Constitution of B.H. that there shall be free movement of goods, services, capital and persons throughout B.H. (Article I.4). These competences may therefore not be exercised in a manner such as to impede the free circulation of persons, goods, services and capital. For example, the fiscal system of the Entities may not constitute an impediment to free circulation. Similarly, the scope of financial competence under (e) has to be interpreted in the light of these provisions of the Constitution of B.H. which reserve monetary policy and the statute of the central

bank to the institutions of B.H. (Articles III.1(d) and VII). The Entities' regulations may not encroach upon the exercise by the institutions of B.H. of competences necessary to maintain the monetary unity of the country.

It is welcome that in (g), it is expressly recalled that the allocation of frequencies has to be done in accordance with the Constitution of B.H.

With respect to (d), no agreement has yet been reached and there are still two proposals. Insofar as one of them does include a competence of the Federation in the matter of customs within the Federation, this proposal should not be retained. By restricting this competence to customs within the Federation, it avoids violating the exclusive competence of B.H. for customs policy under Article III.1(c). However, it is still in contradiction with the principle of the free circulation of goods contained in Article I.4 of the Constitution. This makes it not only illegal to introduce customs duties between the Entities, but, as the wording "throughout B.H." shows, it rules out the introduction of customs duties within one Entity, for example between the cantons.

At the meeting on 27 June 1996, it has been explained that the proposal does not purport to legitimise customs within the Federation, but only to give the Federation bodies the task of implementing the customs policy adopted at B.H. level. The justification for this proposal is that Art.III.1.(c) speaks only of "customs policy" and not of customs as such.

The Working Party was reticent to accept this distinction between customs policy and implementation. At B.H. level it may of course be decided in the future to entrust implementation of the customs policy to the Entities. In the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. It is essential that customs rules are uniformly applied throughout B.H. since merchandise can then freely circulate within B.H. The lack of other resources of B.H. (see above) is also an argument in favour of B.H. collecting the customs duties on its own behalf.

In Article III.1(f) (fight against crime) it is necessary to avoid any interference with the functions entrusted to B.H. under Article III.1 (g) of the Constitution of B.H. It would be advisable to provide for mixed bodies entrusted with ensuring co-operation between B.H. and the Federation in the field of international and inter-Entity criminal law enforcement.

The provision on energy policy as adopted in (h) no longer contains a reference to the public corporations foreseen by Annex IX of the Dayton Agreements. It seems advisable to explicitly provide in the Constitution for the implementation of Annex IX in the fields of communication and transportation.

Article III.2 as amended by Amendment IX:

The wording of sub-paragraphs (f) and (g) following the adoption of Amendment IX seems somewhat unclear. The new sub-paragraph (g) seems partly to cover the same ground as sub-paragraph (f), and the provision on "foreigners staying and movement" seems to be inconsistent with the responsibility of the B.H. government for foreign policy (Article III.1 (d) and immigration refugees and asylum policy (Article III.1 (f)).

It was explained at the meeting on 27 June 1996 that these provisions have a partly transitory character and are necessary due to the present lack of adequate structures at B.H. level.

Chapter III in general:

The Constitution as amended contains no provision for the implementation of Article III.4 (co-ordination) and III.5 (additional responsibilities) of the Constitution of B.H. or Annex 7 (Agreement on refugees and displaced persons) and Annex 8 (Agreement on commission to preserve national monuments) of the Dayton Agreements.

It is suggested to introduce into the Constitution a clause like "F.B.H. shall co-operate with bodies that may be established by the competent authorities of B.H. to implement the responsibilities of B.H. under the Constitution and other Annexes to the Dayton Agreements."

Article IV.B.7 as amended by Amendment XIII:

With respect to Article IV.B.7(a) (i) and (ii), the text of the amendments to be adopted has not yet been agreed. The various versions agree however on deleting the competence of the President of the Federation to appoint heads of diplomatic missions and to serve as Commander in Chief of the military of the Federation.

Article IV.B.7 III (a) (vii) still says that the President of the Federation shall be responsible for receiving and accrediting Ambassadors. The Working Party was however informed at the meeting on 27 June 1996 that there is consensus not to apply this provision.

Article IV.B.8 in conjunction with the proposed amendment XIV:

Article IV.B.8 in its present form is incompatible with the Constitution of B.H. because, according to Article V.3.B. of this Constitution, the Presidency of B.H. appoints Ambassadors. The appointment of Ambassadors by the President of the Federation therefore cannot be admitted. There are now proposals that the President of F.B.H. "initiates" or "proposes" nominations of Ambassadors from the territory of F.B.H. It is up to B.H. legislation to decide on whether to involve the Entities in the nomination procedure. There is no basis in the B.H. Constitution for requiring a consensus between Entity and B.H. on the nomination. The President of F.B.H. can therefore be at most one of the authorities making proposals.

Articles IV.C.12, 16 and 20:

According to these articles the judgments of the Constitutional Court and of the Supreme Court of the Federation and of the Human Rights Court shall be final. Article VI.3 of the Constitution of B.H., says that the Constitutional Court of B.H. shall have appellate jurisdiction over issues arising under the

B.H. Constitution out of the judgment of any other Court in B.H. The Human Rights Commission established by Annex 6 to the Dayton Agreements may also deal with cases already decided by the highest courts of F.B.H.

The Working Party noted that the word "final" is understood as "final at the level of F.B.H." It nevertheless suggested to qualify this word, eg "final for matters not within the jurisdiction of the B.H. courts".

Article VII.4 as amended by Amendment XX:

According to the new wording of this Article, agreements between the Federation and States or international organisations enter into force following approval by the Parliamentary Assembly of B.H. unless the Parliamentary Assembly has provided by law that such types of agreement do not require its consent. This corresponds to the requirement of approval by the Parliamentary Assembly of B.H. as provided for in Article III.2.(d) of the Constitution of B.H.

The Working Party was informed that this approval is in fact required before signature and/or ratification, and not, as the wording leads to assume, before entry into force.

COMPATIBILITY OF THE CONSTITUTION OF REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

At the meeting on 27th June 1996 in Paris, both the Working Party and the representatives of B.H. and F.B.H. regretted that there was no opportunity to discuss this question with a representative of R.S. since, despite repeated invitations, no R.S. representative participated in the meeting. Such a discussion, however, took place on 28 August 1996 in Sarajevo.

The Preamble

The preamble of the constitution of R.S. is missing in document CDL (96) 48 but its text is contained in Amendment XXVI adopted by the Parliament of RS on 11 November 1994. At this time R.S. aspired to be an independent State, sovereign under international law: with the wish to unite with other Serb countries, and the text reflects this situation.

According to Articles I.1 and I.3 of the Constitution of B.H., however, both the R.S. and the F.B.H. are Entities of B.H. which "shall continue its legal existence under international law as a State, with its internal structure modified as provided herein...". Thus, the Entities are part of the internal structure of B.H. and cannot be sovereign States in their own right. It is recalled in this connection that all references to sovereignty and independence have been deleted from the Constitution of the Federation; this should also be the case for the R.S.

In addition, while Article III.2.(a) of the Constitution of B.H. allows the entities to establish special parallel relationships with neighbouring States, these relationships have to be "consistent with the sovereignty and territorial integrity of B.H.". This does not allow one of the Entities to unite with a foreign State. The phrase concerning the decision to unite with other Serb countries would therefore also have to be deleted.

During the exchange of views on 28th August 1996, the experts of R.S. maintained that the Preamble had no normative character and that R.S. was therefore under no obligation to amend it. Since, however, the Preamble is important for the interpretation of the whole Constitution, the members of the Working Party could not accept the maintenance of a text which is in direct contradiction with the state structures of B.H. and the obligations of R.S. under the Dayton Agreement.

Article 1:

It should be noted that the word "sovereign" appearing in the text of this article in document CDL (96) 48 was in fact deleted by Amendment XLIV, passed by the Parliament of R.S. on 2 April 1996. This is positive.

A provision should, however, be added that R.S. is a constitutive part of B.H. (cf. the new preamble of the F.B.H. Constitution). During the exchange of views on 28 August 1996, the experts of R.S. accepted that R.S. is part of B.H. under international law but considered it as a superfluous repetition of the provisions of the Dayton Agreement to say so in the text of the Constitution of R.S. Due to the overriding importance of this principle, the Working Party nevertheless considers it necessary to make an express statement in the Constitution, all the more so since the text of the Preamble still contradicts it.

Article 2:

The present wording of para. 2 is unfortunate since it gives the impression that borders could be changed unilaterally by plebiscite without the agreement of the other Entity concerned and should therefore be amended. The experts from R.S. said that this was not the intention and that R.S. was bound by Annex 2 to the Dayton Agreement. According to the R.S. experts, a change in wording might be considered.

Article 3:

It has already been recommended that the word "sovereign" be deleted throughout the whole Constitution. The experts of R.S. accepted that the word "sovereign" could not mean sovereign according to international law but that it was to be understood in the sense of "competent". Since this use is in accordance with Yugoslav tradition, they were reluctant to abandon the wording, though this is considered imperative by the Working Party. The words "in the joint interest" are also inappropriate because the competences of B.H. result from the Constitution of B.H. and it is not up to the R.S. to unilaterally decide on whether there is a joint interest justifying the competences of B.H.

The reference in paragraph 2 of this Article whereby "the Republic can establish special parallel relations with the Federal Republic of Yugoslavia and its

constitutional units" is partly a quotation from Article III.2 (a) of the Constitution of B.H., whereby "the entities shall have the right to establish special parallel relationships with neighbouring States consistent with the sovereignty and territorial integrity of B.H.". The important qualification "consistent with ..." is however missing and should be introduced.

Article 4:

This article is already considered abrogated following the introduction of the new version of Art. 3.

Article 5:

The first dash refers to the guarantee and protection of human freedoms in accordance with international standards. While it does not contain as many specific details as the provisions on the implementation of international human rights agreements in Article II of the Constitution of B.H., this cannot be considered as an inconsistency. It would however be advantageous if such provisions were explicitly included in the text.

Article 6:

While the main inconsistencies with the Constitution of B.H. have been removed, an explicit reference to the citizenship provisions of the Constitution of B.H. is still missing. The above remarks on Article II.5 of the Constitution of F.B.H. apply *mutatis mutandis* to this Article.

Chapter II - Human Rights and Freedoms:

a) The Constitution contains an extensive Chapter on Human Rights and Freedoms (Articles 10-49). At the same time, the Constitution of B.H. provides for the application of a great number of international legal instruments in this field, with a particularly prominent place being reserved to the European Convention of Human Rights in Article II.2. The rights and freedoms set forth in the Convention are applied directly in B.H. and have priority over all other law. There is obviously a big risk that a detailed catalogue of human rights and freedoms as set out in the Constitution of R.S. may not always be fully in line with the relevant international instruments and the latest interpretation given to them by the competent bodies like the European Court of Human Rights. It is impossible in the present opinion to analyse the text of the Constitution article by article and to assess for each article whether some formulation might be incompatible with one or the other international legal instrument. Only some particularly important questions will be addressed.

As a general solution to this problem, it is suggested that the Constitution should expressly state that, in the event of any discrepancy between the rights set out in the Constitution of the R.S. and the rights applicable by virtue of the Constitution of B.H., the provision most favourable to the rights of the individual will be applicable.

b) A striking feature of this chapter is that a large number of rights are guaranteed only to citizens of the Republic, in particular:

- Article 10: non-discrimination;
- Article 21: freedom of movement and residence;
- Article 29: the right to vote;
- Article 30: the right to peaceful assembly;
- Article 32: the right to petition;
- Article 33: the right to participation in public affairs;
- Article 34: freedom to express national affiliation;
- Article 38: the right to establish private places of instruction;
- Article 43: the right to job training for partially disabled.

With respect to the right to vote (Article 29), the comments on Article II.A.2 of the Constitution of F.B.H. apply *mutatis mutandis* to the Constitution of the R.S.

The restriction of the principle of non-discrimination, of freedom of movement and of the right to peaceful assembly to citizens of the R.S. clearly contradicts Article II.2, II.3 and II.4 of the Constitution of B.H., which provide that the rights guaranteed in these Articles apply "to all persons in B.H.". The restriction of the freedom of movement to citizens in Article 21 is also in direct contradiction with Article I.4 of the Constitution of B.H.

The freedom to express one's national affiliation (Article 34) is guaranteed by the Framework Convention on National Minorities (Annex I to the Constitution of B.H.). One could also argue that freedom of expression, in conjunction with the non-discrimination principle, implies the freedom to express one's national affiliation. Hence this particular right at least must be granted to all citizens of B.H., but should better be understood as a fundamental human right.

Article 22:

The reference to the security of Yugoslavia at the end of this Article should be deleted.

The experts from R.S. accepted that this reference is obsolete.

Article 34:

The last paragraph of Article 34 that citizens of the Republic may also declare that they are Yugoslavs is a remainder of a previous Yugoslav practice. The freedom to express one's national affiliation is already guaranteed by the first paragraph, and the paragraph therefore seems superfluous. In no case it may be understood as referring to Yugoslav citizenship.

Articles 47 and 48:

These Articles should be thoroughly reviewed and are in their present form clearly incompatible with the European Convention on Human Rights.[13] Article 48 paragraph 2, which states that "abuse of freedoms and rights is unconstitutional and punishable", is by far too imprecise (cf. Arts. 8 - 11 ECHR). Clear criteria would have to be included on what constitutes such abuse.

At the meeting on 28 August 1996, the R.S. experts seemed willing to consider a revision of the human rights provisions (which are mainly based on the old Yugoslav constitution) on the basis of the international legal instruments.

Article 57:

The provision in paragraph 2 that property and other rights of a foreign investor acquired on the basis of capital invested cannot be restricted even by a law goes too far (cf. the first additional protocol to the European Convention on Human Rights).

Article 68:

Amendment XLIX has introduced a new paragraph into Article 68, stating that the "functions of the Republika Srpska ... are carried out in accordance with its Constitution, and within the framework and to the extent they have been determined as being the competence of the institutions of Bosnia and Herzegovina as well, shall also be carried out in accordance with the Constitution of B.H." There is a serious problem of language (or perhaps of translation) here, but the Amendment, if it means anything, seems to have recognised the supremacy of the Constitution of B.H., in which case all competences attributed to the R.S. by Article 68 as amended by Amendment XXXII should be read within the limits posed by the Constitution of B.H. Nevertheless, Amendment XLIX requires clarification. It should clearly state the supremacy of the Constitution of B.H., as well as stating that the S.R. is competent in all matters which are not within the competence of B.H. by virtue of its Constitution.

The provision also does not justify leaving in the catalogue of competences matters which are within the exclusive jurisdiction of B.H. since this would threaten to completely overburden the Constitutional Court of B.H. and be incompatible with legal certainty.

As regards the various provisions in the catalogue, the following comments have to be made:

No. 1:

It has already been stated above that the word "sovereignty" cannot be used for the R.S. This equally applies to the word "independence", which is in contradiction with Article I.3 of the Constitution of B.H. This was accepted by the R.S. experts at the meeting on 28 August 1996.

Nos. 2 and 3:

As is the case of the Federation of B.H., it would be desirable to introduce a provision on co-operation with the Standing Committee on military matters set up by Article V.5 of the Constitution of B.H.

At the meeting on 28 August 1996, the R.S. experts vigorously contested any B.H. competence in the field of defence. According to them the civilian command authority of members of the B.H. Presidency means that the Serb members of the B.H. Presidency commands the R.S. troops. Since defence is not mentioned in Art. III.1 of the B.H. Constitution, it is within the exclusive competence of R.S. While the Working Party agreed that the main competence lies with the Entities, it nevertheless continues to consider that the coordinating function of the Standing Committee limits the discretion of the Entities and should therefore be mentioned.

No. 6:

According to Article III.1 of the Constitution of B.H., economic relations with foreign countries are the responsibility of the institutions of B.H. These words should therefore be deleted in No. 6.

No. 7:

According to Articles III.1 (d) and VII of the Constitution of B.H., the Central Bank of B.H. shall be the sole authority for issuing currency and for directing monetary policy. The references to the monetary and foreign exchange systems in No. 7 therefore have to be deleted. At the meeting on 28 August 1996 this seemed to be accepted by the R.S. experts.

As explained with respect to Article III.1 of the Constitution of the F.B.H., the word "customs" must also be deleted.

In particular for the remaining competences under Nos. 6 and 7, and also for others, the overriding principle of the freedom of movement of goods, services, capital and persons throughout B.H. will have to be respected.

No. 15:

The R.S. has only a very limited capacity to enter into agreements with States and international organisations under Article III.2.(d) of the Constitution of B.H. The wording of No. 15, which indicates a general competence in the field of international co-operation, therefore has to be amended.

Article 70:

In No. 12 the references to confederation or similar forms of uniting with other countries have to be deleted (cf. the remarks on Article 4). This was accepted by the R.S. experts.

No. 13 has to be brought into line with the limited foreign policy competence of R.S. (see above, Article 68 No. 15). The R.S. experts indicated that this paragraph might be reworded.

The second paragraph, according to which the National Parliament decides on war and peace and declares a state of war in case of an armed attack on the Republic, is problematic, also with respect to international law. The R.S. experts indicated that this paragraph might be reworded.

Article 80:

According to No. 8, the President of the R.S. should perform, in accordance with the Constitution and the law, tasks related to the defence, security and the Republic's relations with other countries and international organisations. These tasks are not defined and, since the competences of the R.S. are limited by the respective provisions of the Constitution of B.H., a specific reference to the Constitution of B.H. should be introduced into this provision.

As set out above with respect to the Constitution of the F.B.H., Article V.3.(b) of the Constitution of B.H. vests the power to appoint ambassadors in the Presidency of B.H. There is no room for the President of the R.S. to nominate ambassadors of B.H.; at the most he may make non-binding proposals. At the meeting on 28 August 1996, it was explained that the word "nominate" in No. 9 was a wrong translation and should instead read "propose candidates". As regards the nomination of ambassadors of the R.S., the word ambassador implies a sovereign State and can therefore not be used. The existence of representation offices abroad and of other international representatives may comply with the Constitution of B.H. provided that these offices and representatives do not function as regular embassies or consular offices.

Article 90:

With respect to No. 10 the remarks on Article 80, No. 9 apply. No diplomatic or consular offices of the R.S. may be established.

Article 98:

The R.S. experts explained that the "National Bank" was not supposed to issue money but only had functions like the banks of the Republics in former Yugoslavia.

Article 101:

The words sovereignty and independence in No.1 have to be deleted.

Article 106:

The Articles on defence, in particular Article 106, do not take into account the fact that under Article V.5 of the Constitution of B.H. the members of the Presidency of B.H. have command authority over the armed forces, and that there is a Standing Committee on military matters to co-ordinate activities of armed forces in B.H.

Article 119:

The various competences of the Constitutional Court of R.S. as enumerated in Art. 115, are, with the exception of Art. 115 No. 5, unlikely to frequently lead to the possibility of an appeal to the Constitutional Court of B.H. Nevertheless, this possibility exists at least for No. 5 and therefore the word final for the decisions has to be qualified as "final for matters not falling within the jurisdiction of the B.H. courts".

Article 138

Adopted on 1 and 2 April 1996 by the National Assembly of the R.S., Amendment LI to the Constitution provides for a new text of Article 138, including a sort of ius nullificandi for the R.S. with respect to acts of B.H. considered as violating the rights and legal interests of the R.S. This provision is in clear contradiction with the Constitution of B.H., which requires such conflicts to be settled by the Constitutional Court and which provides for many procedural guarantees for the Entities and for the national groups to protect their interests. This Amendment is completely unacceptable and has to be deleted.

During the discussions on 28 August 1996, the R.S. experts interpreted this provision restrictively as referring only to exceptional situations, e.g. before

the Constitutional Court of B.H. has reached a decision. They promised to consider amending the provision so that it would permit only temporary measures to prevent irreparable damage. This would make the text somewhat less objectionable but not aceptable.
Proposals for amendments for the Constitution la R.S.

The Commission had made a certain number of propositions for amendment some of which had been taken up by the R.S.

Below is a memorandum prepared by the Secretariat on the question of the compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia and Herzegovina following the adoption of amendments LIV-LXV by the National Assembly of the Republika Srpska.

Introduction

At its 28th meeting in Venice on 13 and 14 September 1996 the Venice Commission adopted an opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS) with the Constitution of Bosnia and Herzegovina (BH). The text of this opinion appears in Document CDL(96)56 final. Appendix 2 to the opinion contains a number of concrete proposals for amendments to the Constitution of RS.

On 13 September 1996, the National Assembly of RS adopted amendments LIV to LXV to the Constitution of RS. These amendments were adopted following discussions between the working group of the Commission and experts from RS on 28 August 1996. To a considerable extent, these amendments take up recommendations made by the Venice Commission.

The Preamble

The opinion of the Commission recommends to replace the previous text of the Preamble by a new text. Amendment LIV only replaces the third and fourth paragraphs which were in clear contradiction with the Constitution of Bosnia and Herzegovina (establishment of a sovereign and democratic state, decision to reunite with other Serb countries). The new text of the Preamble is still problematic. Can one state that the Serb people independently decides on its political and national status when the Entity is part of BH, and can one speak of the decisiveness of the Serbian people of the RS to connect their state closely and in all aspects with other states of the Serbian people, when all such relations have to be consistent with the sovereignty and territorial integrity of BH? It is also problematic to call the RS a state, though there are precedents for this in other federal states (United States, Free States of Bavaria and Saxony in Germany). On the whole the Preamble still gives the impression of being a Preamble for an independent state. Although the Preamble has no direct operational consequences but is a text mainly serving to interpret the Constitution, it should reflect the character of the RS as an Entity of BH and therefore a further revision seems necessary. The Constitutional Court of BH might be called upon to decide on this matter.

Chapter I - Basic Provisions

The previous inconsistencies with the text of the Constitution of BH have been removed, as recommended in the Commission's opinion. This concerns in particular Articles 2 and 3. The Commission's proposal to state explicitly that RS is a constitutive part of BH has not been taken up. This can however not be regarded as directly required by the text of the Dayton Constitution and it may be argued that the new Article 3, as well as other Articles, implicitly acknowledge that RS is a part of BH.

Chapter II - Human Rights and Freedoms

With respect to this Chapter, the recommendations of the Commission have been implemented. In particular, the rights previously reserved to RS citizens have now been granted to everyone and the clauses on the restriction of rights which were formulated in a completely unacceptable way have been deleted.

The problem that the international legal instruments being part of the Constitution of BH may in several respects be more favourable to citizens than the Human Rights catalogue contained in the Constitution of RS has been solved, as proposed by the Commission, by introducing a provision that, in case of any discrepancy, the provision more favourable to the individual will be applied. It is therefore not essential that the wording of every single article is fully in line with the most recent interpretation of the legal international instruments.

Chapter III - Economic and Social Order

No amendments were requested by the Commission to bring this Chapter in conformity with the Constitution of BH.

Chapter IV - The Rights and Duties of the Republic

The Commission recommendations to amend Article 68 have mostly been followed, in particular:

in No. 1 the words "sovereignty" and "independence" were deleted and replaced by "integrity" and "constitutional order";

in No. 6 the words "economic relations with foreign countries" were not deleted but qualified "which have not been transferred to the institutions of BH"; direct incompatibility is thus avoided;

in No. 7 the words "monetary", "foreign exchange" and "customs" were deleted;

in No. 15 international co-operation is qualified now by "except one which has been transferred to the institution of BH";

the unfortunately worded second paragraph introduced by amendment XLIX is deleted.

The proposal to introduce into Nos. 2 and 3 a reference to the civilian command authority of the members of the Presidency of BH and to the co-ordinating function of the Standing Committee on Military Matters was not followed. It should however be noted that this reference is also missing in the Constitution of the Federation.

Chapter V - Organisation of the Republic

The catalogue of competences of the National Assembly in Article 70 has been amended, as requested by the Commission, by deleting the reference to the uniting with other countries and introducing the reference to the BH competences concerning international agreements.

The provision on the declaration of war was reworded but not deleted. This provision raises very delicate and difficult issues. Can an Entity declare war and to what extent do Entities have under international law the right to self defence? This problem will have to be settled by the Constitutional Court of BH.

With respect to the competences of the President enumerated in Article 80, first of all the proposed reference to the BH Constitution in No. 8 concerning tasks related to defence was not introduced. This would have been advisable but can not be regarded here as a direct inconsistency and is also missing in the Constitution of the Federation. In Article 80, No. 9, an inconsistency remains insofar as the word ambassador may also refer to the RS representative (while the Amendment to Article 90 makes it clear that there is no more a possibility for diplomatic offices of the RS). This inconsistency seems not very important.

In Article 90, the possibility of the establishment of diplomatic and consular offices by RS was deleted as recommended.

Chapter XII - Concluding Provisions

The Venice Commission requested the deletion of Article 138 since this Article gave the authorities of RS the possibility to take unilateral measures when they believe that their rights are violated by acts of BH or FBH. This Article has not been deleted but it has been very much qualified. Such measures are now possible only "temporarily until the decision of the Constitutional Court of BH in cases when ineliminable detrimental consequences may occur". This is still not acceptable under the Constitution of BH but the practical importance of this provision seems very much reduced.

Conclusions

In conclusion it may be stated that the amendments adopted by the National Assembly of RS take to a very large extent account of the recommendations of the Venice Commission and that nearly all direct incompatibilities have been removed, the most obvious exception being the command authority of the President over the military forces. The RS has not followed the recommendations to introduce positive references clearly stating that it is a constitutive part of BH, but these recommendations could not be regarded as directly required by the Constitution of BH.

Since the Constitution of BH foresees that its provisions supersede any incompatible provisions of the legal order of the Entities and gives to the Constitutional Court the power to decide in the case of conflict, it would seem that the Constitutional Court of BH should be able to deal with the remaining problems of incompatibility. The area of defence certainly merits the further attention of the international community with respect to both Entities. On the whole, however, it has to be acknowledged that the RS, like before the Federation, has taken a major step to fulfil its commitments under the Dayton Peace Agreement.

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GENERAL CONCLUSIONS

The Commission acknowledges with satisfaction that both the F.B.H. and the R.S. have made a serious effort to bring their Constitutions into line with the Dayton Agreements. As the above detailed analysis of their provisions has shown, however, such compatibility has not as yet been achieved.

With respect to the F.B.H., the task is obviously complicated by the fact that the federated Entity is itself a federation and that competences have to be distributed between multiple levels, making the whole legal system extraordinarily complicated. However, the obvious discrepancies with the Constitution of B.H. have been eliminated or, at least, their elimination is under discussion. In particular it has to be acknowledged that Article 1 of the Constitution of the Federation as amended explicitly provides for the integration of the Federation into B.H.

With respect to the R.S., an effort has also been made to remove incompatible provisions from the Constitution of R.S. There remain problems in particular with respect to the concept of the sovereignty of the R.S., which is maintained in a form that is inherently incompatible with its status as an entity of a Federal State, and concerning the rights of non-citizens of the R.S. within the R.S. In addition, Article 68 paragraph 2, which acknowledges the competences of B.H., is worded in a somewhat unfortunate way.

Therefore, work remains to be done for both Entities. It should however be stressed that this work cannot be seen to consist simply in removing inconsistencies from the Constitutions of the Entities. B.H. will have to become a viable State. In order for this to come about, the difficulties of the implementation of the Constitution of B.H. as agreed at Dayton will have to be overcome. At present the Federation has a dual character with certain competences lying with B.H. and others with the Entities. But cooperative mechanisms, which will be indispensable in many sectors to ensure the effective functioning of the institutions both of B.H. and of the Entities, are lacking. Article III.4 and III.5 of the Constitution of B.H. may provide a starting point for the development of such mechanisms. Both Entities however will have to reflect on how to integrate such co-operative mechanisms into their constitutional structure.

v. Opinion on the amendments and addenda to the Constitution of the Republic of Belarus

Adopted by the Commission at the 29th Plenary Meeting of the Commission in Venice, on 15-16 November 1996 on the basis of contributions by Mr S. Bartole (Italy), Mr K. Lapinskas (Lithuania), Mr G. Malinverni (Switzerland), Mrs A. Milenkova (Bulgaria), Mr E. Özbudun (Turkey), Mr M. Russell (Ireland)

INTRODUCTION

1. Mr Sharetsky, Speaker of the Parliament of the Republic of Belarus, asked the European Commission for Democracy through Law to examine two proposals for amendments and addenda to the Constitution of the Republic of Belarus, submitted respectively by the President of the Republic and the Agrarian and Communist Groups of parliamentarians (document CDL(96)71) to a popular referendum, which is scheduled to be held on 24 November 1996. Six members of the Commission, Ms Milenkova and Messrs Russell, Bartole, Lapinskas, Malinverni and Özbudun commented on the drafts. The present opinion adopted by the Commission at its 29th meeting on 15 and 16 November 1996 is based on their comments while taking into account that the President has in the meantime substantially modified his proposals and submitted a revised draft (document CDL(96)90).[14]

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2. According to this proposal, the 1994 Constitution will keep its formal structure, still being divided into sections. An important addition, however, has been made, as a consequence of the introduction of a supplementary section containing final and transitional provisions. In substance, the changes proposed are of enormous importance and lead to the establishment of a completely different system of State power.

a) General principles and human rights

3. As regards the first two sections (Principles of the constitutional system; The Individual, Society and the State), several changes are envisaged, following a tendency to stress the "social" character of the State.

4. One such an example is provided by article 13 of the draft (concerning public and private property) which entrusts the State with the task of guiding private economic activity to achieve social goals, and which also expresses a State commitment to guarantee the working people the right to participate in the management of enterprises, organisations and institutions with the aim of increasing the efficiency of their work and raising socio-economic living standards. Land intended for agricultural use would be principally State-owned.

5. According to article 14, social and labour relations between organs of the State power, employers' associations and trade unions shall be conducted according to the principles of social partnership and mutual co-operation.

6. The prominence given to social rights becomes very apparent when reading other provisions of the draft, such as article 32 (equal opportunities for men and women in education and vocational training, work and advancement; participation of youth in political, social, economic and cultural development), article 42 (right to receive a wage not below the level that can secure the employees and their family free and adequate existence), and, as a general statement, article 21, which proclaims the right to an adequate standard of living, inclusive of sufficient food, clothes, housing facilities.

7. These provisions are not at variance with the international principles on protection of human rights, even if their inclusion in the draft seems to have some worrying resemblances to the former communist regime, based on a massive presence of the State in social life.

8. In the draft three articles deserve a positive comment. Article 17 gives equal rank to Belarusian and Russian, considering both as official languages of the Republic. Another useful provision is the new Article 61, according to which everyone shall be entitled to apply to international organisations to defend his rights and freedoms, if all available domestic legal remedies have been exhausted, and, in another Chapter, the new Article 115, para. 2: "Court decisions shall be binding for all citizens and officials".

9. On the other hand, the draft does not guarantee an adequate standard of protection for the freedom of religion: after having stated that all religions and denominations shall be equal before the law, Article 16 of the draft adds that relations between the State and the religions shall be governed by the law with regard to their influence on the development of the spiritual, cultural and public tradition of the Belarusian people: this statement does not prevent any discrimination of religious organisations and contradicts the initial proclamation. The new provision that religious activity may not aim at preventing citizens from fulfilling their public, social or family obligations is also worrying and seems to invite abuse. The tendency to restrict freedom of worship is confirmed by article 31, which introduces a possibility to prohibit, on the basis of a law, religious services and ceremonies, without specifying the circumstances in which this prohibition can take place.

10. The limitation of the use of information contained in the new Article 34, para. 3, may easily be abused. Such restrictive legislation would have to be drafted with the utmost care to avoid violating freedom of expression.

11. With respect to human rights and fundamental freedoms, it has also to be borne in mind that their maintenance is closely connected with the establishment of a democratic form of government: an excessive concentration of State powers can make even the best provisions for the protection of human rights useless, if there is a lack of an effective system of checks and balances between the institutional organs. It is therefore also dangerous for human rights that the presidential draft does not respect the principle of separation of powers, giving the Head of State too many prerogatives, and depriving the parliamentary assemblies of the possibility of working as a real counterweight (see below).

b) The President and the Parliament

12. As regards the section concerning the three main organs of the State, the order of the chapters has been changed, the articles referring to the

Head of State being placed before the chapter dedicated to Parliament.

13. According to Article 80 of the draft, only a citizen of the Republic who has permanently lived in Belarus for at least ten years before the election is eligible as President; the requirement of "permanency" leads to the impossibility, for someone who stayed abroad for some time (or who is now abroad but is still a citizen of Belarus), to take part in a presidential election.

14. The preponderance of the Head of State must be assessed by taking into account that the project of amendment introduces a bicameral system, giving the President the right to appoint eight members of one Chamber (the Council of the Republic, as stated by Article 91). The other members of the Council of the Republic are elected from each of the regions and the city of Minsk by secret ballot at the sittings of the local councils of deputies at the basic level of each of the regions and the city of Minsk. This conception of the Council of the Republic as a house of regional representation is surprising since the Constitution contains no rules on the regions, not even a simple list of the regions. It can therefore also not be ascertained whether the regional councils possess guarantees of their independence sufficient for such an election.

15. The two assemblies do not perform the same tasks: in fact, many functions are solely exercised by the Council of the Republic and the House of Representatives cannot interfere in any way. So, for instance, the appointment of the Chairman and the members of the Supreme Court, the Chairman and the judges of the High Economic Court, the Procurator General, the Chairman and the members of the Board of the National Bank, the Chairman of the Central Board for elections and national referenda, the Chairman of the Committee for State Control is made by the President with the sole consent of the Council of the Republic (Article 84). Moreover, in the event of natural calamity, catastrophe, disorder involving violence or threat of violence on the part of a group of individuals, the President may declare a state of emergency, needing the approval, within three days, of the Council of the Republic (Article 84); to be fully aware of the consequences of such a situation, one has to consider that, in case of a declaration of a state of emergency, there is a possibility to suspend most of the fundamental rights (Article 63).

16. Anyway, even compared to all the functions performed by the Chambers together, the influence of the President appears preponderant.

17. This is the case of the legislative process: It is not even clear whether Parliament has a general legislative competence. Article 97 no. 2 contains a list of matters to be settled by law. The ambiguous wording of this provision makes it impossible to determine whether the House of Representatives has legislative competences in other fields, having regard also to the last paragraph of Article 97 limiting the House of Representatives to the tasks expressly foreseen by the Constitution.

18. In addition, all financially relevant bills may be submitted to the House of Representative only upon the consent of the President (Article 99). Since most bills will involve an increase or decrease in State spending, this deprives Parliament to a large extent of the right of legislative initiative.

19. Furthermore, on Presidential demand or, with presidential consent, that of the Government, the Chambers shall take decisions on an entire draft or on a part of it, while retaining only the amendments proposed or adopted by the President or the Government.

20. An eventual presidential veto on a draft law can be overcome with a majority of two thirds of the members in each Chamber (Article 100); but, in case of a veto concerning amendments or addenda to the Constitution, the interpretation of it, as well as basic laws, the majority required to overrule the presidential will is raised to three-quarters of the members of each Chamber: taking into consideration the right to appoint eight members of the Council, the President, with the support of only nine additional members of this Chamber, will stop the most important bills.

21. The weakness of the Parliament is aggravated even by the schedule of its sessions: according to Article 95, the Houses shall be summoned for two regular sessions a year, for a maximum of 170 days; extraordinary sessions shall be convened only in the event of special necessity, following the initiative of the President, the Speakers of the Houses, or the majority of the full membership of each of the Houses. In other words, the assemblies do have not the power to organise independently their activity, and will have, in all probability, no time to satisfy the needs of legislation.

22. The President, on the other hand, is entrusted with the power of dismissing the Parliament, on the ground of a judgment of the Constitutional Court, in the event of systematic and flagrant violation of the Constitution by the Chambers (Article 94): this provision clearly shows that the assemblies are constantly under a threatening control, because the notion of violation is not determined and must be assessed by a tribunal whose guarantee of independence is not assured.

23. The position of the individual members of Parliament is even more precarious since Article 72 provides that members of Parliament may be dismissed "on specific grounds and according to a procedure prescribed by law". The grounds for dismissal are in no way specified in the Constitution. This provision is reminiscent of similar rules characteristic of the Soviet system and threatens the independence of the members of Parliament in a way unacceptable in any democratic system.

24. The President therefore clearly has a dominant role with respect to Parliament. If for some, though by no means all, of these provisions parallels may be found in Western constitutions, in these constitutions there exist checks and balances completely absent in the proposed draft.

c) The President and the Constitutional Court

25. The Constitutional Court will continue to be composed of twelve members, but the president will be authorised to appoint the Chairman of the Court (with the consent of the Council of the Republic), as well as five other judges; the remaining six judges will be appointed by the Council of the Republic, and, in this context, the "political weight" of the members of the Council nominated by the President could be decisive (Article 116). Taking into account that, in the event of a tie, the Chairman will have the casting vote, the Court will not appear as impartial in the eyes of the public but will be suspected as generally supporting the President's choices.

26. The role of the Constitutional Court will be considerably weakened because it can no longer be seized by a minority of Deputies but only by the Chambers. The opposition therefore no longer has the possibility to have the constitutionality of norms verified by the Constitutional Court. One also

wonders which reason could justify the deletion of Article 126, para. 3 of the present Constitution: "Direct or indirect pressure on the Constitutional Court or its members in connection with the execution of constitutional supervision shall be inadmissible and shall involve responsibility in law."

d) The President and the Government

27. As regards the Government, and the relations between this organ, the Parliament and the resident, it could be argued that the system envisaged by the draftsmen can be defined as semi-presidential, with a Government which is accountable to the President and, at the same time, responsible to Parliament.

28. A deeper examination of the presidential proposal demonstrates that the situation is different. The possibility of concrete control of the Government by Parliament and, on the other hand, a margin of autonomy of the Government towards the President are characteristic of semi-presidential systems.

29. By contrast, the Presidential proposal does not respect these characteristics. It has already been explained that the Parliament is weak and, to a certain extent, influenced by the Head of the State. In addition to that, according to Article 106 of the text, the President has the right to dismiss, by his own initiative, every member of the Government (with the exclusion of the Prime Minister).

30. The presidential power is further reinforced by the provision of Article 84 (point 24), which entrusts the Head of the State with the right to repeal Government acts. And, if the House of Representatives twice rejects the presidential nominees for the post of the Prime Minister, the President shall be entitled to appoint an acting Prime Minister and to dissolve the House of Representatives, calling new general elections (Article 106).

e) The President and the referendum

31. The presidential preponderance reappears, if we look at the changes proposed with reference to the popular referendum: according to Article 74 of the draft, a referendum will be called by the President of the Republic, on his initiative or following the proposal of both Chambers.

32. In this specific case, however, the proposal must be approved by the majority of the members of each Chamber. This high quorum is probably aimed at discouraging the proposals by the Chambers, as is even more evident concerning the procedure of amendment of the Constitution (see below).

f) The President and the other bodies of the State

33. With reference to the Procurator General, which is appointed by the President (with the consent of the Council of the Republic), there is an evident contradiction in Article 126 of the draft: after stating that the Procurator General and subordinate procurators are independent in the exercise of their powers and are guided by the legislation, it is affirmed that the Procurator General is accountable to the President. This statement (together with the provision enabling the President to dismiss the Chairman of the Supreme Court) represents a serious distortion in a constitutional model which should be based on the independence of judicial power, especially because Article 125 entrusts the Procurator's Office with the task of checking the observance of laws, decrees and edicts by anybody, following the model of the Soviet Prokuratura.

34. Moreover, the President (Article 84, no. 11) may dismiss by his own initiative the Chairman and the members of the Constitutional Court (even those appointed by the Council of the Republic), the President and the members of the High Economic Court, the Chairman and the members of the Central Board for elections and referenda, the Procurator General, the Chairman of the Committee for State Control, and the Chairman and the members of the Board of the National Bank: even if the grounds for the exercise of these prerogatives shall be provided by law (regrettably they are not defined in the Constitution), it is possible to say that the interference of the President in the sphere of other state bodies could not be stronger.

35. With regard to the Committee of State Control, the President of the Republic has also the right to appoint all the members (article 130, according to the English translation, states that the Committee "shall be established by the President"): this prerogative seems to be particularly significant, for the said organ is entrusted with the power to control the national budget execution, the use of state property, the observance of acts of President, Parliament, Government and other state bodies governing state property relationships, as well as economic, fiscal and taxation relations.

36. Such a complex of powers should be attributed to an independent organ. The examined draft tends to transform the Committee into a branch of the presidential administration, thus neutralising a further possible constitutional guarantee.

37. The Head of State, according to article 119 of the draft, shall directly (or through a procedure established by himself) appoint the leaders of local executive and administrative bodies: the principle of separation of persons, conceived in a vertical sense, is violated. The appointment of mayors by the President does not seem acceptable in a country wishing to become a member of the Council of Europe.

g) Other powers of the President

38. In a context dominated by the preponderance of the Head of the State, some powers attributed to this organ seem to have a secondary importance: so, according to Article 84 of the draft, the President may postpone a strike (for a period of no more than three months) in cases envisaged by the law; he may suspend decisions of local councils of deputies and cancel decisions of local executive and administrative bodies; he may introduce martial law within the territory of Belarus; he may appoint and dismiss the High Command of the Armed Forces.

39. More importantly, the President has the right to issue edicts and orders having binding force (Article 85). An ordinary law, according to Article 137, shall have priority on the said acts only if the authority to issue the edict has been given by this very law. The possibility given by Article 116 to the Constitutional Court to check the conformity of the presidential decrees and edicts to the laws is therefore limited to the cases in which these are issued for the purpose of implementing these laws. In any case, the draft no longer gives to the ordinary courts the possibility to question the conformity of a regulatory enactment with the law as provided for in Article 112 of the present Constitution.

40. In addition, Article 101, para. 3 gives to the President the possibility to issue "temporary" decrees "on grounds of exceptional necessity and urgency", which remain indefinitely in force "unless they are repealed by the majority of votes of the full membership of each House".

41. In other words, a large part of the legislative functions is in fact vested in the President and not in Parliament. This is all the more worrying because Parliament, to a large extent, is deprived of its right of legislative initiative (see above). Large areas will therefore be regulated by presidential decrees only.

h) The amendments and addenda to the Constitution

42. The procedure of amending and supplementing the Constitution can be opened on presidential or popular initiative (150,000 citizens, according to Article 138); the amending text has to be approved by at least two-thirds of the members of each Chamber: on this occasion the vote of the Senators appointed by the President could be decisive.

43. In any case, the Head of State can call a referendum to amend the Constitution, while by- passing the Parliament (Article 140).

44. The Chambers, deprived of the right to propose addenda and amendments to be voted by themselves, could act by means of a popular referendum; in this case (as was stated before) the quorum required by the draft is rather high, and parliamentary minorities will be virtually prevented from initiating a procedure of amendment of the Constitution.

i) The procedure of impeachment

45. Article 88 of the draft takes into account the possibility of a dismissal of the President for high treason or other (not specified) serious crime, but states that the relative inquiry shall be organised by the Council of the Republic (following a motion approved by the majority of the members of the House of Representatives), and prescribes a majority of two-thirds of the members of the Council of the Republic to decide upon the dismissal (after a similar decision which the House of Representative has to adopt with a majority of two-thirds of the members).

46. Given the mentioned presidential power of appointing eight members of the Council of the Republic, and considering the complexity of the whole procedure (which, in order to be effective, must come to an end within a month from the day that the accusation was brought) the Head of the State must be considered as virtually irremovable from office.

47. Anyway, even if the Chambers voted in favour of the dismissal, the competent court of trial would be the Supreme Court, whose members are appointed by the President: so, this instrument has little chance of being really effective.

k) Final and transitional provisions

48. The final section of the presidential draft contains six articles which are considered as final and transitional provisions.

49. If the whole constitutional text can be criticised as lacking some elementary democratic guarantees which are now generally accepted in all the modern European constitutional systems, the transitional provisions are, without any doubt, still more at variance with democratic standards, providing for an institutional model in which the imbalance between the President and the other powers is striking.

50. According to Article 143, the President and the Supreme Council shall form the new 110- member House of Representatives from among the deputies of the present Supreme Council. If there are discrepancies between President and Supreme Council, as to the composition of this Chamber, the President shall dissolve the Supreme Council and call new Parliamentary elections. The Council of the Republic will be formed in the manner foreseen in Article 91 of the draft, i.e. 8 members appointed by the President and the rest by regional councils.

51. The principle of continuity shall be applied as regards the President and the Supreme Council (or better, the Supreme Councillors fortunate enough to have been selected for the new House of Representatives) whose powers, according to article 144 of the draft, will be prolonged. For them a full new term of office will start to be counted from the day of entry into force of the amended Constitution. It would be advisable, considering the great number of other changes proposed by the referendum, that the people had the possibility to decide, through a general election, on the composition of the new Parliament. The same can be said as regards the President: it is not correct to transform the referendum on the draft into a consultation implying a vote of confidence (or no-confidence) in the President. Moreover, the last article of the draft (146) states that President, Parliament and Government, within two months of entry into force of the Constitution, shall establish and form the other state bodies, such as the Constitutional Court. The checks and balances to the presidential prerogatives will be totally missing during the transitional period, and there will be no constitutional guarantees, given the massive influence of the Head of State, in the process of formation of Government and Parliament.

THE DRAFT SUBMITTED BY THE AGRARIAN AND COMMUNIST GROUPS OF PARLIAMENTARIANS

52. This proposal also aims at changing the form of government, introducing a sort of "gouvernement d'assemblée", in which Parliament (which would still be composed of one Chamber, such as the Supreme Council) has an obvious supremacy on all the other organs.

53. The differences between this draft and the one proposed by the President are evident. It has to be said, however, that this second project is a bit closer to the system envisaged in the Constitution now in force, which, though providing for a presidential system, puts the Parliament in a strong position, giving it the possibility to counterbalance (and, in some circumstances, to prevail over) the President.

54. Nevertheless, the agrarian and communist groups suggest abolishing the office of the President of the Republic and entrusting the Chairman of the Supreme Council with the tasks of the President. This is a serious breach of the principle of separation of powers, since the same person cannot

exercise executive functions while chairing the body which has the duty of checking and approving the conduct of the executive.

a) General principles and human rights

55. The first two sections of the 1994 Constitution are kept virtually unaltered; some little variations and additions are proposed, such as in article 17, where it is proclaimed that the Belarusian language and the Russian language are both considered as official languages of the Republic (whereas, according to the 1994 Constitution, only the former can be defined as an official language).

56. Article 39 has been positively reinforced, thanks to the inclusion of a principle of non-discrimination (based on race, sex, ethnic origins, religious beliefs) of the citizens as regards access to public offices.

57. An important provision has been added: according to article 42 of the draft, citizens shall have the right to protection of their economic and social interests, including the right to form professional unions, to conclude collective agreements and the right to strike.

58. Article 49 (corresponding to article 48) contains a more detailed provision, in which it is stated that a privation of a dwelling is possible (whereas, in the present Constitution, there is an absolute prohibition of a privation) only "by a court decision or in accordance with the law prescribing a different procedure which is not in conflict with the principles of social justice". This text, in the English translation, is not very clear and seems somewhat vague.

b) Referendum

59. The articles dedicated to the electoral system and the referendum have been gathered in one chapter with only one article now referring to questions of referenda. The procedure of holding popular consultations, according to article 74 of the draft, will be determined by a law. Since nearly all powers are concentrated in the Supreme Council, it seems questionable to give no details on the conditions for the holding of a referendum in the Constitution itself. The Supreme Council may well be tempted to set the hurdles to the introduction of a referendum so high that it becomes practically impossible to introduce a referendum. The referendum would therefore be no effective check on the powers of the Supreme Council.

c) The new powers of the Chairperson of the Supreme Council

60. More relevant are the changes envisaged in the Sections concerning the prerogatives of the main state bodies.

61. All the provisions which, according to the text now in force, relate to the office of the President of the Republic, do not appear in the draft prepared by the communist and agrarian groups. On the other hand, article 82 of the said proposal states that the Chairperson of the Supreme Council shall be the highest official of the Republic, representing it while dealing with other countries.

62. Forced by the need to entitle someone to carry out some indispensable functions, and being afraid of the possible political consequences of the institution of a presidential or semi-presidential system, the drafters chose a solution which is not consistent with the principle of separation of powers.

63. This conclusion can be easily drawn as soon as we read article 83 of the project: the Chairperson of the Supreme Council, in addition to the normal tasks usually performed by every chairman of an assembly, shall sign the laws of the Republic and other acts adopted by the Supreme Council and its Presidium; shall report at least once a year to the Supreme Council on the situation in the Republic and on the most important issues of domestic and foreign affairs; shall represent the country in the relations with organisations and bodies inside the country and abroad; shall conduct negotiations and sign international treaties; shall appoint judges of the regional city and district courts as well as judges of the regional and city economic courts.

64. All these functions are executive by nature, and, as a consequence, should belong to an organ not linked to a parliamentary assembly; this exigency can be fully appreciated if we consider that the Chairperson will not be allowed to ask the Council for a new discussion about a bill, and so the system will lack an important constitutional guarantee (which can be found not only in presidential regimes, but also in some parliamentary ones).

65. These executive functions are also incompatible with the main functions of a Speaker of an elected assembly, who should be an impartial person entrusted with the task of ensuring the correct functioning of the assembly itself and thereby guaranteeing the equal protection of all parliamentarians. This task cannot be assumed by a person who, according to article 83.3, "reports at least once a year to the Supreme Council on the situation in the Republic and on the most important issues of home and foreign affairs"; this latter function can only be fulfilled by a politically active person in charge of executive functions.

66. The power to appoint local judges, which is attributed to the Chairperson, represents another serious breach of the principle of separation of powers: it is inconceivable that a chairman of a legislative assembly can freely appoint some judges, especially when (and this is the case) the procedure of appointment is not clearly defined by the Constitution.

d) The Supreme Council and the other State bodies

67. It is essential to point out that, even if we limit our examination to the role and to the powers of the Supreme Council, the opinion on the draft must be negative.

68. In fact, according to article 79, the Council shall adopt the Constitution and its amendments; shall call national referenda; shall decide on holding elections of deputies of local councils; shall appoint the Prime Minister and approve the programme of the Government; shall set up and dissolve ministries of the Republic; shall elect all the members of the Constitutional Court, the members of the Economic Court, the Procurator General of the Republic, as well as the members of the Board of the National Bank and of the Supervisory Authority; shall determine the priorities in foreign and domestic policy; shall approve the plan of economic and social development, as well as the state budget; shall decide upon military policy, shall take

decisions of amnesty; shall veto instructions by the Chairman of the Supreme Council or the Presidium, as well as resolutions passed by Council of local deputies.

69. Such a range of powers (to mention only the more important ones) gives the Supreme Council a sort of omnipotence, the independence of other state bodies being irreparably endangered.

70. The Cabinet of Ministers (Chapter 5 of the draft), which is defined as the supreme executive and administrative body of state power in the Republic, is deprived of the possibility of auto-organisation, given the parliamentary power to set up and dissolve ministries, and considering that, according to article 98, the jurisdiction of the Cabinet, its rules of procedure and its relationships with other state bodies shall be defined by a law.

71. It is true that, even according to the Constitution now in force, the Parliament is entrusted with some administrative functions, but the proposal of amendment aims at eliminating all possible counterbalances to the parliamentary supremacy (beginning with the office of the President of the Republic). The right to appoint the Constitutional Court, as well as the Supreme Court and the Procurator General gives the Supreme Council the opportunity to interfere or, more precisely, to control the judiciary, providing the most striking example of a breach of the principle of separation of powers.

72. Last, but not least, article 138 restricts the possibility of the people, as well as of the parliamentary minority, initiating the procedure of amending and supplementing the Constitution: the provision requires a proposal of at least 250,000 citizens or 70 deputies, and the vote of two-thirds of the deputies (in two separate approvals); moreover, the amendment proposed by popular referendum can be approved only with the consent of two-thirds of the citizens included in the register of electors.

CONCLUSIONS

73. To summarise, both the examined proposals fall short of the democratic minimum standards of the European constitutional heritage.

74. Even if the text now in force contains some shortcomings, setting up a system in which the Parliament has a slight preponderance over the President (a preponderance which, to a certain extent, can be justified on the basis of the principle of popular sovereignty and which seems more theoretical than practical), both the proposals of amendment lead to an escalation of the institutional problems, in two opposite senses, towards an authoritarian evolution of the Belarusian constitutional system.

75. In other words, neither the establishment of a false semi-presidential regime, with a strong influence of the President (implying, sometimes a total control) on all other bodies of the State (Parliament included), nor the proposal of abolishing the presidential office, with the introduction of an "assembly regime" deprived of the checks and balances which avoid the omnipotence of the Parliament, can be considered as acceptable alternatives to the 1994 Constitution.

76. In these circumstances, the Venice Commission notes that the Constitutional Court of Belarus has decided that the referendum could not have a binding but only a consultative character. In accordance with this decision, the Supreme Council declared that the referendum would not be legally binding. For the Commission it is self-evident that in any country wishing to become a member of the Council of Europe, the decisions of the Constitutional Court have to be accepted and implemented by all other organs of State power.

77. The Commission therefore calls on the authorities of Belarus to abide by the decision of the Constitutional Court and to try to find a solution to the constitutional crisis which is in harmony with European standards, a solution which can only be substantially different from both drafts treated here. The Commission is at the disposal of the authorities of Belarus if they wish to have its assistance in this respect.

vi. Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan

Adopted by the Commission at its 29th Plenary Meeting (Venice, 15-16 November 1996) on the basis of comments by : Mr Özbudun (Turkey), Mr Russell (Ireland), Mr Lesage (France)

1. Introduction

The present opinion was requested by the authorities of the Republic of Azerbaijan. It relates to the text of the draft law on the Constitutional Court in its English version sent to the Commission on 3 September 1996 (document CDL(96)64).

A first discussion on this draft took place at the Commission's 28th Plenary Meeting (13-14 September 1996), following which a Commission delegation composed in particular of the rapporteurs Messrs Özbudun, Russell and Lesage went to Baku from 16 to 19 September 1996 to meet the persons and the authorities involved in the drafting of the law in question and the authorities which would have the task of implementing the law on the Constitutional Court of Azerbaijan following its adoption.

The present opinion drafted on the basis of the comments presented by the rapporteurs was adopted by the Commission at its 29th Plenary Meeting (15-16 November 1996).

2. General observations

The Commission finds that the draft shows the will of Azerbaijan to guarantee the principle of the supremacy of the Constitution by creating a Constitutional Court composed of independent members, in accordance with the standards of the modern democratic state and entrusting it with the tasks of protecting human rights and respecting the principle of the rule of law. Of course, the text of the draft contains several details which could as such be included in the text of the Rules of Procedure to be adopted by the Constitutional Court itself, in accordance with the procedure provided for in Article 88 of the draft law. However, regulating questions relating to the procedure before the Constitutional Court in an Act does not raise any problem

vis-à-vis the pertinent European standards.

3. Constitutional judges

As regards **the term of office** of Constitutional Court judges, the draft law has two variants. In accordance with the first variant, judges of the Constitutional Court shall be appointed for a period of 15 years and may not be re-appointed for a second term. The second variant provides that constitutional judges shall be irremovable and will cease to exercise their functions on attaining retirement age (75 years). Either variant is acceptable since the independence of judges is sufficiently guaranteed. However, the first alternative has the advantage of allowing a renewal of the composition of the Court from time to time.

Article 11 of the Constitution provides in its second paragraph that a judge accused of a criminal offence may be removed from office, in accordance with the procedure provided for in Article 128, paras. 4 and 5 of the Constitution. This provision could be interpreted as allowing the definitive removal of the Constitutional Court judge when he is merely accused of having committed an offence before he has been found guilty. Such an interpretation affects both the independence of the Court and the principle of presumption of innocence and must, therefore, be excluded. The provision should be formulated in such a way as to provide that a constitutional judge charged with a **serious** offence be **provisionally suspended** from duties without being removed from his office in the Court before he has been found guilty by a final court decision.

The same goes as far as the arrest of judges of the Court is concerned. This should only occur in cases of serious *in flagrante delicto*. Moreover, in case of the arrest of a member of the Constitutional Court, it is necessary to promptly inform not only the Prosecutor General of the Republic of Azerbaijan, but also the President of the Constitutional Court and, if necessary, the President of the Supreme Court.

4. The President of the Constitutional Court

As regards the appointment of the President of the Court (Article 12 of the draft), the Commission finds that in order to ensure maximum independence to the Constitutional Court it is preferable to leave the choice of the President and the Vice-President to the judges themselves who should elect the President and the Vice-President for a limited but renewable term of office (variant *D* of the draft).

Variant *A*, in accordance with which the President should change every year, seems to be the less advisable. Institutions are symbolised by their President and a symbol which changes every year is not a symbol.

Moreover, variants *B* and *C* present a serious political inconvenience: the risk of public disapproval of the choice of the President of the Republic either by the Parliament (variant *B*) or by the judges of the Court (variant *C*).

5. As regards the competences and the procedure for bringing a case before the Court

Particular attention should be paid in order to avoid that the Court being overburdened with work it would have difficulty in assuming. Such a risk exists when, as in the present case, the Constitutional Court not only deals with issues of constitutionality but is also required to ensure respect for the entire hierarchy of norms in Azerbaijan's legal system, a task which, in the European continental legal system, is more often attributed to administrative tribunals.

As far as referral to the Court is concerned, the Commission focused its attention on the following two points:

1) It is not provided in the Constitution that **a minority in the Parliament can refer a case** to the Constitutional Court. Article 130.III of the Constitution provides that a case can be referred to the Court by the Parliament as a whole, i.e. by a decision taken by the majority of its members. However, the Constitutional Court can play an important role in the establishment of the rule of law and the reinforcement of law through the protection of the rights of a minoritarian group in the Parliament. When the case is brought before the Constitutional Court by a group of members of Parliament, the Court's decision may result in avoiding political conflict on the passing of a bill (see, for example, the Constitutional revision of 1974 in France which granted to groups of 60 members of the Parliament or 60 members of the *Sénat* the right to refer a case to the *Conseil constitutionnel*; see also the Constitution of the Russian Federation of 12 December 1993 which gives to groups representing one fifth of the members of the Federation Council or one fifth of the members of the State *Duma* the right to refer a case to the Constitutional Court).

   The Commission is nevertheless aware that since the persons and institutions which can refer a case to the Constitutional Court are defined in Article 130.III of the Constitution, adding a new category of persons entitled to bring a case before the Constitutional Court can only be done by means of a constitutional law supplementing this provision of the Constitution (see below).

2) The question was also raised whether the draft law allows citizens who feel that their constitutional rights are violated by legal acts to bring their case, be it indirectly, before the Constitutional Court (**individual applications, *in concreto* control of the constitutionality of norms**).

   In order to decide whether it is advisable to introduce at this stage this way of referral of cases to the Constitutional Court, it would first be desirable to evaluate the risk of a very large number of applications being brought before the Court. A solution which seems to be permitted under the Constitution and under the draft text consists in authorising the Supreme Court (and also any other jurisdiction through the Supreme Court) to submit to the Constitutional Court any objection of unconstitutionality raised before it. This will allow the Constitutional Court to control not only *in abstracto* the constitutionality of norms (a control which is already foreseen in the Constitution), but also *in concreto* within the framework of incidental control procedures. In other words, in a given case, every tribunal of the Republic of Azerbaijan before which the constitutionality of a legal act is challenged would stay the proceedings until the Constitutional Court has given its decision on this issue.

Another point which created some concern within the Commission, relates to the **initiative of constitutional judges in the procedure for the removal of the President from office**. Article 74 of the draft gives the Constitutional Court "power of initiative" to remove the President of the

Republic of Azerbaijan from office; this power directly brings the Court into the centre of political struggle. In fact, if the Court can take initiative on this question, the part of the public opinion which contests the President's policy will directly put into question the Court's responsibility and will blame it for remaining inactive. However, the Constitutional Court is not a kind of Constitutional super Prokuratura and the role of judges is not to initiate proceedings but to judge.

6. Relations of the Constitutional Court with the Press

In accordance with Article 20 of the draft law, the mass media shall not have the right to interfere in the Constitutional Court's activities nor directly or indirectly exert influence on the judges of the Court. Persons committing such acts bear legal responsibility in the established legal order. The Commission does not overlook the fact that sometimes a virulent press campaign may exercise some influence on the judiciary. It also recognises that the provision of Article 20 aims at safeguarding the judiciary from such interferences. However, a very cautious approach is required in order to obtain a fair balance between the interests some administration of justice and those of freedom of expression guaranteed under Articles 47 and 50 of the Constitution of Azerbaijan. The case-law of the European Court of Human Rights in this field could provide guidelines on this issue.

7. Some observations concerning Article 130 of the Constitution

The Commission would like to make some observations concerning a possible amendment of Article 130 of the Constitution.

Enabling a minoritarian group in the Parliament to refer a case to the Constitutional Court requires, as we have seen (point 4 above), supplementing Article 130.III by means of a constitutional law as provided in Article 156 of the Constitution. This requires that the constitutional law will be adopted by the Parliament by a majority of 95 votes over two ballots, the second ballot being held six months after the first; it also requires the President's agreement. Such a procedure for the amendment of Article 130.III does not fall under the scope of Article 11 of the transitory provision of the Constitution which sets a one-year time limit for the adoption of the law on the Constitutional Court. The two operations, adoption of the law and amending Article 130.III, can take place at separate times.

If a procedure for the amendment of Article 130.III of the Constitution is opened with a view to enabling a minority in the Parliament to bring a case before the Court, one could also envisage inserting into the Constitution the fundamental provisions concerning the term of office of the constitutional judges and the method of electing the President and Vice-President of the Court.

II. Co-operation between the Commission and the statutory organs and certain committees of the Council of Europe, and international organisations

During 1996 the Commission continued its fruitful co-operation with the statutory organs and certain committees of the Council of Europe, and international organisations.

- Co-operation with the Committee of Ministers

The Commission had regular contacts with the Committee of Ministers throughout 1996.

At the 26th plenary meeting, Ambassador Overvad, Chairperson of the Ministers' Deputies of the Council of Europe, held an exchange of views with the Commission concerning Russia's accession to the Council of Europe, the system of commitments entered into by new member States and the prospects for co-operation between the Committee of Ministers and the Venice Commission. Ambassador Malenovský, Chair of the Rapporteur Group on Legal Co-operation of the Ministers' Deputies of the Council of Europe, placed emphasis on the Commission's role as an independent legal body capable of submitting legal opinions to both the Parliamentary Assembly and the Committee of Ministers.

At its 27th meeting, the Commission held an exchange of views with Ambassador Winkler, Chair of the Rapporteur Group of the Ministers' Deputies on Administrative Questions, Ambassador Lansloot, Chair of the ad hoc Working Party of the Ministers' Deputies on Partial Agreements and Ambassador Gualtherie van Weezel, former Chair of the ad hoc Working Party on Compliance with Commitments Accepted by Member States. Mr Lansloot gave an account of the current work of the ad hoc Working Party on Partial Agreements, which involved a particularly flexible form of intergovernmental co-operation allowing a limited number of member States interested in a particular activity to pursue that activity and share the financial burden among themselves. Mr Winkler considered that the Commission's expertise in core issues such as democracy, the rule of law and human rights was of paramount importance for the Organisation. He suggested that there would be an increased need for the Commission's legal advice in the field of Constitutional Law and the functioning of democratic institutions. Mr Gualtherie van Weezel informed the Commission about the activities of the Committee of Ministers with regard to the monitoring of commitments by member States. He pointed out that the fundamental objective of the Committee of Ministers was not to criticise countries in public, but to help them overcome their problems.

At the 28th plenary meeting, Ambassador Lundbo, Chair of the Committee of Ministers' ad hoc Working Party on Co-operation with the European Union, informed the Commission about recent developments relating to the introduction of a system for monitoring compliance with commitments entered into by Council of Europe member States. He pointed out that several of the issues to be addressed under the system for monitoring compliance with commitments were of particular interest to the Commission.

At its 29th Plenary Meeting the Commission held an exchange of views with Mr Horst Schirmer, Chairman of the Enlarged Rapporteur Group on co-operation with countries of Central and Eastern Europe (GREL). Ambassador Schirmer informed the Commission of the decision of the Committee of Ministers to hold a second summit of Heads of State and Government of the member States of the Council of Europe in Autumn 1997, in Strasbourg. He also stressed the importance which the GREL attributes to legal co-operation in the field of constitutional law with non-member Sates of the Council of Europe. He particularly valued the Commission's work concerning constitutional reform in Belarus. The Ambassador underlined the excellent co-operation in the form of mutual information between the Commission and the Committee of Ministers. The Commission would be kept informed about progress being made in monitoring of commitments undertaken by new member States of the Council of Europe in order to explore possibilities of co-operation in this field.

The Commission declared its readiness, within its field of competence, to assist the Committee of Ministers in any way the latter might deem useful.

- **Co-operation with the Parliamentary Assembly of the Council of Europe**

The Commission can only welcome the fact that its co-operation with the Parliamentary Assembly was further reinforced in the course of 1996. This co-operation extends from the consistent and helpful attendance of Assembly members at plenary meetings of the Commission to the growing demand for Commission opinions on an increasingly varied range of issues. The Commission is aware of the importance of the Assembly's action to promote the consolidation of democratic security in Europe, and has spared no effort for the sake of discharging the responsibilities entrusted to it by the Assembly.

Firstly, it should be pointed out that the Commission's opinions on implementation of the Croatian Constitutional Law on the protection of human rights and minorities, the opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, and the study on the rules of parliamentary immunity were drawn up at the request of the Parliamentary Assembly.

In addition, the Assembly again requested a Commission opinion on the Constitution of Ukraine and the Ukrainian law on the Constitutional Court, as well as a report on the progress of co-operation between the Commission and the Republic of Croatia. The opinion and report in question are under preparation.

The Commission has furthermore co-operated with the Parliamentary Assembly on the following questions :

Opinion on the "hard core" of the European Charter for Regional or Minority Languages

The Commission was requested by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to study the question "whether it is possible to arrive at a hard core of rights in the European Charter for Regional or Minority Languages, to be accepted by all Contracting States to that convention". The Commission decided to instruct its Sub-Commission on the Protection of Minorities to study this question on the basis of a preliminary report prepared by Mr Maas Geesteranus. The Sub-Commission on the Protection of Minorities held two meetings on this topic, on 23 November 1995 and 29 February 1996. The Commission's opinion, drawn up on the basis of the report by Mr Maas Geesteranus and the contributions of Mr Malinverni and Mr Matscher, was adopted by the Commission at its 26th plenary meeting (Venice, 1-2 March 1996).

The Commission took the view that the idea of a hard core, as envisaged by the Parliamentary Assembly, is alien to the spirit and the operational mechanisms of the European Charter for Regional or Minority Languages. The Charter already has something of a "hard core" of principles (Part II), which guarantees the effectiveness of the protection afforded by its provisions. Moreover, a hard core of linguistic rights may be inferred from the obligations provided for in the framework convention, particularly in Articles 5.1, 6, 9.1, 10-14 and 17.

Control mechanism of the Framework Convention for the Protection of National Minorities

Mr Malinverni was nominated by the Commission to take part in a meeting of the Parliamentary Assembly's Sub-Committee on Human Rights, at which the question of the control mechanism of the Framework Convention for the Protection of National Minorities was discussed (Paris, 2 April 1996).

Opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights contained in Recommendation 1201 (1993) of the Parliamentary Assembly

In a letter dated 24 November 1995, the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly requested the assistance of the European Commission for Democracy through Law in preparing an opinion on the interpretation of the draft protocol to the European Convention on Human Rights contained in Recommendation 1201 (1993), particularly Article 11 thereof.

The Sub-Commission on the Protection of Minorities considered this matter at its meeting in Venice on 29 February 1996, on the basis of a report prepared by Mr Malinverni and Mr Matscher. The Commission's opinion was adopted at the 26th plenary meeting. In its Recommendation 1300 (1996), adopted on 25 June 1996, the Assembly expressed the view that the opinion in question was a most important reference document for the interpretation of the draft protocol.

The Middle East Peace Process

Mr Robert, Chair of the Sub-Commission on the Mediterranean Basin, took part in the meeting of the Assembly's ad hoc Sub-Committee on the Peace Process in the Middle East, held in Paris on 4 March 1996. The meeting, which was attended by high-level representatives of Israel and the Palestinian Authority, was devoted mainly to the judicial machinery of the peace process.

Moreover, at the Assembly's request, Mr Robert, Mr Economides and Mr Helgesen, in their capacity as members of the Sub-Commission on the Mediterranean Basin, examined a draft provisional Constitutional Law for the Palestinian National Authority.

At its 28th plenary meeting, the Commission approved the preliminary comments of the above-mentioned rapporteurs and decided to forward them to the Assembly for the latter's discussion on the Middle East.

- **Co-operation with the Congress of Local and Regional Authorities of Europe**

As from the first plenary meeting in 1996, the Congress of Local and Regional Authorities of Europe, has been involved in the Commission's work. Mr Locatelli, Head of the Congress Secretariat, emphasised that much of the Commission's work is in fact of interest to the Congress. CLRAE representatives have taken part in Commission activities concerning inter alia the draft constitution of Ukraine and the UniDem Seminar on "Local self-government, territorial integrity and protection of minorities" (Lausanne, 25-27 April 1996).

Furthermore, Mr Nick represented the Commission at the Seminar "Federalism, Regionalism, Local Self-Government and Minorities" organised by the Congress at Cividale del Friuli from 24-26 October 1996.

- **Co-operation with certain Council of Europe committees**

In the course of 1996, the Commission monitored the work of the ad hoc Committee on the Implementation Mechanism of the Framework Convention for the Protection of National Minorities (CAHMEC).

Furthermore, Mr Kojanec and Mr Schaerer, members of the Committee of Experts on Nationality (CJ-NA), took part in the work of the Commission concerning the consequences of State succession for nationality.

- **Co-operation with the European Union**

- **The European Commission** took an active part in the work of the Venice Commission and lent support to its activities. In particular, the European Commission made a financial contribution to the organisation of several Commission events concerning the development and consolidation of democracy and human rights in central and eastern Europe and in South Africa. A request for funding for similar activities in 1997 has been submitted to the competent department of the European Commission.

- **1996 Intergovernmental Conference of the European Union**

In view of its growing impact on the lives of all Europeans, the process of European construction cannot fail to be of significant interest to the European Commission for Democracy through Law. With the encouragement of the President of the European Commission, Mr Jacques Santer, the Commission therefore decided to submit a set of proposals on European citizenship to the 1996 Intergovernmental Conference.

Accordingly, in May 1995, the Commission instructed a working group chaired by President La Pergola, and composed of Mrs Suchocka, Mr Economides, Mr Reuter, Mr Russell, Mr Scholsem, Mr Svoboda and Mr Toledano Laredo, to draft a memorandum as a contribution by the Commission to the 1996 Intergovernmental Conference of the European Union. The Working Group met in Luxembourg on 8 November 1995 and decided to prepare the text of an **Act on European Citizenship**. Professor Denys Simon, of the Robert Schuman University in Strasbourg, was involved in the work of the Working Group which met on 7 February 1996 in Luxembourg to examine the draft to be submitted to the plenary Commission at its 26th meeting (1-2 March 1996).

At its 26th meeting, the European Commission for Democracy through Law adopted the draft Act on European Citizenship as a contribution to the work of the 1996 Intergovernmental Conference. The Act fits into the context of the Intergovernmental Conference; it is aimed at giving new impetus to the process of building on Community experience and achievements, while at the same time introducing more innovative elements in a constructive and imaginative spirit.

3. Co-operation with other international bodies

The **United Nations High Commissioner for Human Rights** and the **High Commissioner for National Minorities of the OSCE** were represented at several meetings of the Commission in 1996.

Moreover, Mr Russell, Chairman of the Sub-Commission on Constitutional Justice, represented the Commission at the **Conference of the Presidents of European Constitutional Courts**, where he presented the activities of the Commission.

Mr Amneus, Chairman of the Joint Committee of **UNTAES (United Nations Transitional Administration for Eastern Slavonia)** on the implementation of human rights, took part in the 28th plenary meeting of the Commission, at which he spoke about UNTAES activities. The Commission declared its readiness to assist UNTAES in the fields for which it was competent.

At its 28th plenary meeting, the Commission took note of the request for an opinion on the Economic Court concept of the **Commonwealth of Independent States**, submitted by Mr L A Dashuk, President of the Court. Following an exchange of views, the Commission concluded that it was unable to reach a consensus on this question. It therefore decided not to adopt a position on the request for the time being.

Opinions and Reports adopted

i. Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the Contracting States

Introduction

The European Commission for Democracy through Law (Venice Commission) has been requested by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to study the question whether "it is possible to arrive at a hard core of rights in the European Charter for Regional and Minority Languages, to be accepted by all Contracting States to that convention" (cf. Assembly Order No. 513 (1996)).

At its 24th plenary session (Venice, 8-9 September 1995) the Commission decided to instruct its Sub-Commission on the Protection of Minorities to study this question on the basis of a preliminary report prepared by Mr Maas Geesteranus. The sub-commission held two meetings on this question, on 23 November 1995 and 29 February 1996.
This opinion was prepared by the sub-commission on the basis of a report by Mr Maas Geesteranus and contributions from Mr Malinverni and Mr Matscher. It was adopted by the Commission at its 26th plenary session (Venice, 1l2 March 1996).

1. The concern to guarantee the hard core of minority language rights in Europe

The Venice Commission shares the concern expressed in the Bindig report (Doc. 7442 of 20 December 1995) on the rights of national minorities, a concern which has given rise to the Parliamentary Assembly's proposal to study the possibility of identifying a hard core of obligations to which all States Party to the European Charter for Regional or Minority Languages should subscribe. Consequently, this stresses that the knowledge and possibility of employing the mother tongue constitutes the essence of cultural identity of a minority, ie with the loss of its language, a minority may well lose its identity and eventually disappear.

The Commission agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area (cf. judgment of the European Court of Human Rights in the Belgian language case, judgment on the merits on 27 June 1968, Series A No. 6), the Convention does not explicitly guarantee any linguistic freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression (Article 10; see however the "Sadik Ahmet v. Greece" case, currently pending before the Court), freedom of thought and conscience (Article 9) or Article 3 of Protocol No. 1 (cf. the "Mathieu-Mohin and Clerfayt v. Belgium" case of 2 March 1987, Series A No. 113).

The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7, 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group.

Several provisions of the framework Convention for the Protection of National Minorities (Articles 9.1, 10-14 and 17) and of the draft of the Additional Protocol to the European Convention on Human Rights contained in Parliamentary Assembly Recommendation 1255 (Article 8.1)[15] are along the same lines.

In the view of the Venice Commission, the question raised is not whether linguistic rights must benefit from a collective guarantee at European level (it has no doubt about this) but whether the creation of a hard core on the basis of the provisions of the European Charter for Regional or Minority Languages is an appropriate way to ensure those rights.

2. The purpose of the Charter

The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14).

The Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard "the value of interculturalism and multilingualism" as an "important contribution to the building of a Europe based on the principles of democracy and cultural diversity", but always "within the framework of national sovereignty and territorial integrity" (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report). Moreover, the definition of regional or minority languages as set forth in the Charter in Article 1.a.i only covers languages which are traditionally used within the territory of a State by its nationals and are different from the official language(s) of the State, and does not include either the languages of migrants or dialects (Article 1.a.ii).

Notwithstanding the stated objective of the authors in the explanatory report (para. 10.f), the Charter is quite often considered both within the Council of Europe and elsewhere as a basic instrument for the protection of minorities[16].

This should come as no surprise. Not only does the scope of the various instruments for the protection of minorities already adopted, proposed or in the course of drafting cover very similar areas, but the provisions of these instruments also include the problem of minority languages.

Thus, for example, part of the principles set out in Part II, Article 7, of the Charter, notably Article 7.1.d ("the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life") is found in the following documents:

- Article 10.1 of the framework Convention for the Protection of National Minorities ("The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing");

- Article 7.1 of Parliamentary Assembly Recommendation 1201 ["Every person belonging to a national minority shall have the right freely to use his/her mother tongue in private and in public, both orally and in writing", see also Recommendation 1255 (1995)];

- Article 7 of the Venice Commission's proposal for a European Convention for the Protection of Minorities ("any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private");

- Article 2.1 of the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities ("persons belonging to minorities have the right ... to use their own language, in private and in public, freely and without interference or any form of discrimination");

- Article 27 of the International Covenant on Civil and Political Rights ("in those States in which... linguistic minorities exist, persons belonging to such minorities shall not be denied the right ... to use their own language").

Focusing first on languages and only then on traditional linguistic minorities in the European States, the Charter advocates a number of positive measures in favour of minority languages on the part of the Contracting States.

However, given the need to bear in mind the complexity and diversity of the situation of regional and minority languages in Europe, the Charter has provided itself with a special structure enabling it to cope with the problem of the specific aspects of each situation by modifying its requirements accordingly.

3. Structure of the Charter: the "à la carte" system

3.1 The European Charter for Regional or Minority Languages offers States two levels of commitment.

Part II, Article 7, of the Charter defines the objectives and principles pursued, which constitute a "common core", ie obligations which must be accepted by all States Parties. No reservations may be made to Article 7.1, in conformity with Article 21.

Part III contains a choice of specific commitments for implementing the principles set forth in Part II. In accordance with Article 2, paragraph 2, of the Charter, States may freely specify the languages to which they agree to have Part III apply, and for each language chosen they may indicate which provisions of Part III shall apply. The same provision states that "each Party undertakes to apply a minimum of 35 paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter".

3.2 This selective system has obvious advantages. For regional or minority languages, as defined in Article 1, paragraph a, of the Charter, the State agrees to a dual commitment whose mechanism is set out in Articles 2 and 3 of the Charter.

The State Party to the convention "undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1" (Article 2.1); the State then specifies at the time of ratification to which language(s) it undertakes to apply 35 paragraphs or sub-paragraphs (at a minimum) chosen from among the provisions of Part III of the Charter (Article 3.1).

The State's freedom of choice is only relative, because apart from the numerical provisions of Article 2, paragraph 2, in making its choice the State must also take into consideration the "needs and wishes expressed by the groups which use such languages" (Article 7.4). Thus, its choice cannot be arbitrary, but will be dictated by the desire to adopt for each regional or minority language the wording which best fits the characteristics and state of development of that language (cf. paragraph 46 of the explanatory report).

3.3 This particular structure of the Charter and its logic of being adaptable to the extreme variety of situations of regional and minority languages is in marked contrast to the concept of a list of uniform obligations which must be accepted by all the Contracting States of the Charter.

But it is important to emphasise that the idea of a certain hard core is by no means alien to the Charter. A hard core already exists in the Charter, in Part II, Article 7, and states "that each Party shall undertake to apply (certain principles) to all regional or minority languages used in its territory", as defined by the Charter.

4. Article 7 as the "hard core" of the Charter

4.1 Article 7 enumerates a number of principles and objectives which constitute the necessary framework for the preservation and promotion of

regional and minority languages.

The Article does not contain specific rules, but seeks to define the foundations upon which "the Parties shall base their policies, legislation and practice" (Article 7.1) for "all the regional or minority languages spoken within (a) territory" (Article 2.1).

These objectives and principles are enumerated in the explanatory report under six main headings (para. 58 f. of the report):

- recognition of the existence and of the legitimacy of the use of regional or minority languages (Article 7, para. 1.a);
- respect for the geographical area of each regional or minority languages (Article 7, para. 1.b);
- need for positive action for the benefit of regional or minority languages (Article 7, paragraphs 1.c and d[17]);
- guarantee of the teaching and study of regional or minority languages (Article 7, paragraph 1.f and h);
- facilities afforded to non-speakers of regional or minority languages to acquire a knowledge of them (Article 7, paragraph 1.g);
- relations between groups speaking a regional or minority language.

4.2 Furthermore, Article 7, paragraph 2, the scope of which extends to the entire national territory, contains a non-discrimination clause which amounts to recognition of the admissibility of positive discrimination:

> "Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it".

However, "the adoption of special measures in favour of regional or minority languages (...) is not considered to be an act of discrimination against the users of more widely used languages". This positive discrimination follows logically from the very objective of the Charter, which is to stop the decline of regional and minority languages and, where possible, promote their use in order to contribute to "the maintenance and development of Europe's cultural wealth and traditions" (cf. Preamble to the Charter).

5. The function of Part III of the Charter

5.1 The question has been raised whether a "hard core" composed of certain provisions of Part III of the Charter is conceivable with a view to strengthening the protection of minority languages.

Pursuant to the provisions of Article 2, paragraph 2, of the Charter, in respect of "each language specified at the time of ratification, acceptance or approval ... each Party undertakes to apply a minimum of 35 paragraphs or sub-paragraphs chosen from among the provisions of Part III". It is also stated that "any Party may, at any subsequent time, notify the Secretary General that it accepts the obligations arising out of the provisions of any other paragraph of the Charter not already specified in its instrument of ratification ..." or that it will apply Part III of the Charter to other regional or minority languages used on its territory (Article 3.2). On the other hand, a State may not deny a regional or minority language the benefit of the provisions to which it has subscribed (unless it denounces the entire Charter, within the meaning of Article 22).

5.2 Given the extreme diversity of situations of minority languages in Europe, the Commission considers that the too rigid wording of the provisions of Part III makes none of them very amenable to being accepted by all Contracting States for all regional or minority languages without exception.

5.3 Moreover, the Commission is duty-bound to stress the importance of Part III of the Charter:

It transforms into specific commitments the general principles defined in Part II. Once a Contracting State accepts the provisions of Part III, it assumes international responsibility for any failure to comply with the obligations into which it has itself entered, even though those obligations vary from one Contracting Party to another and even from one regional or minority language to another. Furthermore, it undertakes to accept monitoring as set out under Part IV of the Charter.

5.4 The Venice Commission notes that, pursuant to the explanatory report (paragraphs 42, 43 and 49), States are not compelled to accept both Parts II and III of the Charter, and that it remains possible in principle for a State to ratify the convention without specifying a language for the purposes of the application of Part III (paragraph 49 of the explanatory report). In that regard, the Commission emphasises that the decision of a State not to extend to a language the benefit of the provisions of Part III must be based on reasons which lie within its own discretion but that such reasons must be compatible with the spirit, objectives and principles of the Charter.

5.5 In the view of the Commission, the "hard core" constituted by Part II of the Charter and the protection afforded to a language or languages by virtue of the provisions of Part III give the European Charter for Regional or Minority Languages a special character, making it suited, in principle, to the situation of historical regional and minority languages in Europe.

6. Conclusion

In the opinion of the Commission,

6.1 The concept of a hard core as envisaged by the Parliamentary Assembly is alien to the spirit and working system of the European Charter for

Regional or Minority Languages;

6.2 The Charter already has a "hard core" of principles (Part II) which guarantees the effectiveness of the protection that it affords;

6.3 In any event, the provisions of Part III, given their wording and the detailed fashion in which they regulate the subject-matter, are hardly suitable for the creation of a hard core likely to be accepted by all Contracting States;

6.4 Moreover, a hard core of linguistic rights may be derived from the obligations provided for in the framework convention, notably in Articles 5.1, 6, 9.1, 10-14 and 17. The effectiveness of the protection that the latter offers will depend largely upon the implementation of the mechanism to ensure compliance with its provisions.

ii. Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly

Introduction

By letter dated 24 November 1995 the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly requested the assistance of the European Commission for Democracy through Law in the preparation of an opinion on the interpretation of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 (1993), with particular reference to Article 11 of the draft.

The Sub-Commission on the Protection of Minorities examined this question at its meeting in Venice 29 February 1996 on the basis of a report prepared by Mr Malinverni and Mr Matscher.

The present opinion, which is limited at this stage to the question of Article 11, was adopted by the Plenary Commission at its 26th meeting (1 and 2 March 1996).

* * *

1. The object of the request

By its Recommendation 1201 (1993), the Parliamentary Assembly requested the Committee of Ministers of the Council of Europe to adopt an additional protocol to the European Convention on Human Rights, drawing on a proposed text appended to the Recommendation and forming an integral part thereof. The proposed text was one of the reference documents used in the work of the Committee of Experts for the Protection of National Minorities (CAHMIN), which was entrusted with the task of drafting an additional protocol to the European Convention on Human Rights, aimed at guaranteeing individual rights in the cultural field, particularly for national minorities. Moreover, it was and is still used as a reference document by the Assembly whenever it examines applications by States for membership of the Council of Europe (see Recommendation 1285(1996) of the Assembly). Above all, allusions to the proposed text have been included in several bilateral treaties regulating neighbourhood relations between member States of the Council of Europe.

The letter in which the Commission's assistance was sought by the Committee on Legal Affairs and Human Rights refers to this particular fact as well as to the difficulties in interpreting, in this context, the draft protocol both as a whole and as regards Article 11 thereof, which reads as follows:

> *"In the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the State."*

The fact that this provision is not an operative rule of international law but a mere proposal to which reference is nevertheless made in other international treaties creates a special situation that makes the task of interpreting this text a difficult one. The Commission feels that in this instance account should be taken not only of the ordinary meaning of the terms used but also of the relevant *travaux préparatoires*, the other work carried out within the Council of Europe with regard to the protection of national minorities, the practices of member States as regards the right of the minorities to have at their disposal local or autonomous authorities, and the attitudes adopted by Council of Europe member States towards this provision (see, *mutatis mutandis* Articles 30 and 31 of the Vienna Convention on the Law of Treaties of 1969).

All these elements capable of revealing the substance of the right of minorities to have at their disposal local or autonomous authorities as it may be understood and applied by European States.

2. Elements to be taken into consideration for the purpose of interpretating Article 11 in general

a. The *travaux préparatoires*: the report proposing the adoption of Recommendation 1201 (1993) (Worms report)

The introductory report by Mr Worms is not very helpful for the purpose of interpretating Article 11. It simply indicates that "Articles 10 and 11 deal with rights which may have political consequences. They have been drafted having in mind the need to preserve in any case the integrity of the State. Contacts with citizens of another country shall take place while duly "respecting the territorial integrity of the State". As regards the status of appropriate local authorities to allow a certain degree of administrative autonomy of the regions where minorities are in a majority, these authorities can only be established in accordance with the domestic legislation of the State ".

b. Work carried out in the Council of Europe with regard to the protection of the rights of minorities

The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities. Article 14 paragraph 1 of the Commission's proposal provides that "States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them".

In the Vienna Declaration of Heads of State and Government of the member States of the Council of Europe, of 9 October 1993, it is recognised that the creation of a climate of tolerance and dialogue is necessary for participation by everyone in public life. An important contribution to this can be made by local and regional authorities.

The Framework Convention for the Protection of National Minorities did not borrow from Article 11 of the Parliamentary Assembly's proposal the idea of granting to persons belonging to national minorities in the regions where they are a majority "the right to have at their disposal appropriate local or autonomous authorities or to have a special status". In this Convention the right to have a special status is in fact replaced by a provision based partly on the Venice Commission's proposal: Article 15 of the Framework Convention guarantees *the right to effective participation of persons belonging to national minorities in public affairs* affecting them. However, no reference is made to local authorities. From the stand point of the Framework Convention, participation in public affairs is above all a question of personal autonomy, not of local autonomy.

Nor has the case-law of the European Convention on Human Rights implied that some provisions of this Convention could be used for the purpose of claiming a right to a special status. The European Commission of Human Rights has twice declared that the Convention does not include any right for national minorities to self-determination (No. 6742/75, DR/3 p. 98, concerning Germans who formerly lived in Czechoslovakia; No. 7230/75, DR/7 p. 109, concerning the population of Surinam). Article 3 of Protocol No. 1 (guaranteeing electoral rights) does not apply to elections to non-legislative bodies such as municipal councils (No. 10650/83, DR/42, p. 212), nor does it guarantee any right of national minorities to separate political representation (Nos. 9278/81 and 9415/81, decision of 3 October 1983, DR/35 p. 30)[18].

It follows from the foregoing that international law cannot in principle impose on States any territorial solutions to the problem of minorities and that States are not in principle required to introduce any forms of decentralisation for minorities (see also Article 35 paragraph 2 of the Copenhagen Declaration).

c. The attitude of States towards Article 11

The treaty of 5 April 1995 between Hungary and Croatia refers to Recommendation 1201, and contracting parties did not make any declaration when ratifying it.

The treaty of 19 March 1995 between Slovakia and Hungary on good neighbourly relations and friendly cooperation [Article 15 paragraph 4(b)] refers to Recommendation 1201, but the Government of Slovakia made the following declaration when ratifying it: "The Government of the Republic of Slovakia declares that at no time did it accept or enshrine in the treaty any formulation founded on recognition of the principle of collective rights for minorities or allowing of the creation of autonomous structures on an ethnic basis."

It seems, lastly, that the inclusion of a reference to Recommendation 1201, in particular to Article 11, is at the centre of the negotiations concerning a bilateral treaty between Hungary and Romania.

States seem in fact to be afraid that the right to have appropriate local or autonomous administrations, combined with the right to transfrontier contacts (Article 10 of the draft protocol), may promote secessionist tendencies. Even those States which, while adhering to the principle of unitarity have granted a large degree of regional autonomy hesitate to accept binding international instruments on the right of minorities to a certain autonomy. As pointed out by H. Klebes[19], sensitivity towards any autonomy of national minorities is still too great in many States: there is a fear of cultural autonomy leading to administrative autonomy, followed by secession.

d. The practices of European States in respect of the rights of minorities to have at their disposal local or autonomous authorities

In the course of its work, the Commission has already observed the diversity of legal models of protection of minorities in Europe, a diversity which reflects the complexity of situations and, hence, the variety of solutions adopted by the different States to deal with the problem concerned[20]. The Commission's work and a study of national systems for protecting minorities do not reveal the existence of any common practice in the matter of territorial autonomy, even in general terms.

In the Commission's view, the above-mentioned elements indicate:

that any attempt to interpret Article 11 of Recommendation 1201 (1993) should be very cautious; and

that, having regard to the present state of international law, a broad approach to the right of minorities to have local or autonomous authorities at their disposal is possible only in the presence of a binding instrument of international law, which is not the case in this instance.

3. Interpretation of Article 11 of Recommendation 1201 (1993)

a. "... the persons belonging to a national minority ..."

Holders of the right provided for in Article 11 are "the persons belonging to a national minority", not the minorities as such, although, in the Commission's view, despite this formulation, the right to autonomy is conceivable only as a right exercised in association with others. Therefore, the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a

component of the people or the nation, a concept which might affect any unitarity of the State. The presentation of the minority phenomenon in Article 11 is no different from that in the other provisions of the text proposed in Recommendation 1201: it is indirect and based on recognition of individual rights, albeit exercised in association with others (ie. collectively), a point merely mentioned in the Slovak declaration accompanying the ratification of the neighbourhood treaty with Hungary. This element should nevertheless be taken into consideration for the purpose of interpretating the substance of the right provided for in Article 11.

Article 1 gives a definition of the term "national minority". This denotes a group of persons in a State who: reside in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity.

It follows from this definition that the persons to whom the rights included in Recommendation 1201 are guaranteed are nationals (citizens), of the State, not foreign migrants. This is further underlined by the fact that only persons belonging to "historical" minorities (having "long-standing, firm and lasting ties" with the State) can enjoy them.

The expression "long-standing, firm and lasting ties with that State" should be so interpreted as to include ties with the territory of a State as a component of the latter. In this way persons belonging to a minority will not lose minority status as a result of the transfer of the territory to another State or to a new State, and Recommendation 1201 will retain its relevance in the event of such territorial transfer or of State succession - assuming, of course, that the persons concerned continue to be in a minority.

b. "... in the regions where they are a majority ..."

A minority must constitute a majority in a "region" for Article 11 to be applicable. However, it is very difficult to define the term "region" in the context of this provision.

In principle, the term should be construed in its geographical, not administrative or political, sense. But it also has an historical dimension which is not unconnected with the settlement of various groups in a particular territory.

In fact, States have a large margin of appreciation in defining what they regard as a "region". However, the designation of a particular territory as a "region" for the purposes of the application of Article 11 must be done in good faith. In particular, it should not be aimed at rendering Article 11 inapplicable, nor be arbitrary (see, in this context, Article 16 of the Framework Convention). On the contrary, if should be based on objective criteria and have regard to the minority phenomenon. In the course of its own work, the Commission explicitly stated that it was necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies (explanatory report to the Venice Commission's proposal for a European Convention for the Protection of Minorities, paragraph 42).

The phrase "in a majority" should also be interpreted in the light of the aim pursued by Article 11. Being allowed to have local or autonomous authorities represents the most consummate fulfilment of the demands of concentrated minorities within unitary States; a federal state may in fact go further in this field (see on this point the Venice Commission Report on the Protection of Minorities in Federal and Regional States)[21].

Moreover, the phrase should be understood not as denoting a mere numerical relationship but as implying that the minority has settled and is concentrated in the region concerned.

c. "... have the right to have at their disposal appropriate local or autonomous authorities or to have a special status ..."

Article 11 foresees the right to enjoy a certain autonomy by three means (local authorities, autonomous authorities and special status), which it does not define.

It can be stated in general terms that the right guaranteed in Article 11 cannot be interpreted as requiring measures that would fundamentally affect the structure of the State, eventhough a federal or regional structure allows minorities residing in the territory of the State to be accorded a degree of autonomy through the grant of a territorial basis of their own where they can pursue a policy via autonomous institutions. Nor does Article 11 impose a specific model of local autonomy institutions: the variety of models in Europe is such that none can be advocated as the one to be adopted by all States.

The State will therefore have a wide choice of options for discharging its obligations under Article 11.

Appropriate local or autonomous administrations

Some important indications of the substance of the right to enjoy a certain autonomy can be obtained from the European Charter of Local Self-Government. Under this instrument, local authorities must be capable "of regulating and managing a substantial share of public affairs under their own responsibility and in the interest of the local population" (Article 3.1 of the Charter). Moreover, the Charter provides a set of elements concerning the implications of this "right to regulate and manage a substantial share of public affairs". Thus:

this right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct equal universal suffrage, and which may possess executive organs responsible to them (Article 3.2 of the Charter);

local authorities must be able to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority, since public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen

(Articles 4.2 and 4.3 of the Charter);

local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management (Article 6 of the Charter);

any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute; this supervision shall aim only at ensuring compliance with the law and with constitutional principles; it may be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities (Article 8 of the Charter);

local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government, as are enshrined in the constitution or domestic legislation (Article 11 of the Charter).

These are simply guidelines which should inspire the practice of States when discharging their obligations under Article 11; they are not actual requirements deriving from Article 11.

Special status

The meaning of the term "special status" is, admittedly, somewhat vague; but it does reflect the desire of the authors of Article 11 to allow States to depart from the traditional patterns of local government. In this respect the State remains free to determine what will be the scope of this special status. In the absence of any common practice capable of specifying the minimum requirements of such status, the scope of the right to have a special status should be determined by reference to the aims of Article 11 in general and the presumed will of the Council of Europe member States. Some examples can be found in the special statuses existing in Italy or Spain, without this precluding the solution of personal autonomy.

In the Commission's opinion, any "special status" should be founded on the will to enable persons belonging to a minority to participate effectively in decision-making concerning the regions in which they live or in matters affecting them. The institutions which make up this special status should be capable of representing the minorities and ensuring that persons belonging to the minorities:

will be consulted whenever the Parties are contemplating legislative or administrative measures liable to affect them directly;

will be involved in the preparation, evaluation and implementation of national and regional development plans and programmes liable to affect them directly;

will effectively participate in the decision-making process and elected bodies at both national and local level, particularly in the fields of culture, education, religion, information and social affairs.

These are only minimum requirements. A special status can, of course, go much further by endowing a region where a minority is in the majority with legislative and executive power of its own in respect of regional affairs, thus introducing a system akin to partial federalisation of the State.

d. "... matching the specific historical and territorial situation ..."

The phrase "matching the specific historical and territorial situation" serves a twofold function:

First, it demands from States to take into account the traditions of the minorities concerned and their specific needs. In this respect it supplements the adjective "appropriate" in the same provision.

Secondly, it introduces the possibility of modulating the application of this right between one State and another and even between one minority and another within the same State. The application of Article 11 will not, therefore, be uniform but will be adapted to allow for the great diversity of situations of national minorities. The case-law of the institutions of the European Convention on Human Rights has succeeded in striking a balance between the State's discretionary power to evaluate the individual circumstances of each specific case and the European monitoring required by the Convention, and it is reasonable to suppose that a similar balance will also be maintained within the framework of Article 11.

e. "... in accordance with the domestic legislation of the State ..."

First of all, the fact that the local or autonomous authorities and the special status which minorities should have must be in accordance with the national legislation of the State sets the limits of this right. It is the State that prescribes the legal framework within which the right may be exercised, and international protection will be accorded only as long as the right is exercised legally.

At the same time, however, the above phrase contains a guarantee that a legal framework will exist for the exercise of the right.

Moreover, according to the established case-law of the institutions of the European Convention on Human Rights, the discretionary power which the State has in laying down the legal system concerned is limited by the fact that the system must itself be compatible with the Convention and its Protocols. In particular, it must not have the effect of robbing Article 11 of its substance.

4. Article 11 of Recommendation 1201 (1993) in conjunction with Articles 13 and 14 of the same Recommendation

Articles 13 and 14 read as follows:

Article 13

"The exercise of the rights of freedoms listed in this protocol fully applies to the persons belonging to the majority in the whole of the State but who constitute a minority in one or several of its regions."

Article 14

"The exercise of the rights and freedoms listed in this protocol are not meant to restrict the duties and responsibilities of the citizens of the State. However, this exercise may only be made subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The possibility of Article 13 being applied in combination with Article 11 of Recommendation 1201 cannot be precluded.

As for Article 14, it allows the exercise of the rights guaranteed, including the one referred to in Article 11, to be restricted by measures prescribed by law which are necessary in a democratic society for aims recognised as legitimate by the Convention, among which appear national security and territorial integrity. The case-law of the European Convention on Human Rights concerning the interpretation of paragraphs 2 of Articles 8-11, in particular the principle of proportionality, comes into the reckoning here.

iii. Venice Commission contribution to the 1996 Intergovernmental Conference

Introduction

Having regard to its growing impact on the life of all Europeans, the process of European integration is naturally of central interest to the European Commission for Democracy through Law. The latter therefore decided, with encouragement from Mr Jacques Santer, President of the European Commission, to submit to the 1996 Intergovernmental Conference a series of propositions concerning European citizenship.

A. 1. Thus, during its 23rd meeting (19-20 May 1995), the Commission entrusted a Working Group headed by the President, Mr La Pergola, and including Mrs Suchocka and Messrs Economides, Reuter, Russell, Scholsem, Svoboda and Toledano Laredo with the task of drafting a memorandum as the Commission's contribution to the 1996 Intergovernmental Conference of the European Union.

2. The Working Group met in Luxembourg on 8 November 1995. Members then held an exchange of views on the issues at stake in the Conference and considered the fields in which the Commission might make a fruitful contribution. Emphasis was specifically placed on the rights of European citizens, and the Working Group accordingly decided to prepare, with the assistance of an expert, the text of an **Act on European Citizenship**.

3. At its 25th meeting (24-25 November 1995), the Commission confirmed the Working Group's proposal.

4. The Working Group, in association with Professor Denys Simon, of the University Robert Schuman in Strasbourg, who acted as an expert, met in Luxembourg on 7 February 1996 in order to examine a draft text for submission to the Commission at its 26th plenary meeting (1-2 March 1996).

5. At its 26th meeting, the European Commission for Democracy through Law adopted the draft Act on European Citizenship, as a contribution to the work of the 1996 Intergovernmental Conference.

dynamic manner. At the same time, in a constructive and imaginative spirit, it includes certain innovative elements.

B. 1. The contribution of the European Commission for Democracy through Law finds its place within the framework of the close collaboration which exists between the Council of Europe and the European Union, based particularly on Article 230 of the EC Treaty. The European Commission has always emphasised that the European Communities and the Council of Europe are founded upon the same values.

2. This collaboration has been fostered by both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

As stressed in the document entitled "Place and role of the Council of Europe in European construction, with the prospect of the European Union's 1996 Intergovernmental Conference (IGC) - Considerations which the Ministers' Deputies wish to bring to the attention of the Reflection Group", the activities of the European Community and of the Council of Europe have a complementary character in the field of strengthening democratic security, as well as in other fields which include those of culture and education, health, and transfrontier cooperation. Attention should be particularly drawn in this context to the essentially intergovernmental character of cooperation in the Committee of Ministers, as well as to the importance of both existing and future working relations between the Council of Europe and the European Union.

The Parliamentary Assembly of the Council of Europe has always been concerned with the interests of the European citizen. To this end, it has particularly taken initiatives for the creation of European symbols (European flag, Europe day, European anthem). It has also worked in the field of abolition of visas and border controls. Finally, in the course of 1995 the Parliamentary Assembly adopted

Recommendation 1279 (1995) relating to the 1996 Intergovernmental Conference of the European Union, Resolution 1067 (1995) on the 1996 Intergovernmental Conference of the European Union, and Resolution 1068 (1995) relating to the Accession of the European Community to the European Convention on Human Rights.

C. 1. Accession to the Council of Europe and, particularly, the fact of being party to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), have become an implicit condition for the accession of a State to the European Union.

2. The present Act is concerned essentially with the rights of citizens, and not with human rights in general. Nevertheless, European citizenship cannot but be founded upon human rights, as protected by the ECHR mechanism. The European Commission for Democracy through Law believes that the effective protection of human rights can only be fully realised by the accession of the European Community to the ECHR, thereby also formalising the central position of fundamental rights in the European Union, as presently set out in Article F paragraph 2 TEU.

3. The accession of the European Community to the ECHR is in effect indispensable if human rights are to be fully protected at the international level in relation to the ever growing number of acts connected to European integration, to the same extent as they are protected in matters falling within the competence of States.

4. Since 1979, the European Commission has also declared itself in favour of the accession of the European Community to the ECHR. This position was reiterated at the 1990 Rome Conference: the Commission formally requested the Council to approve the opening of negotiations with a view to such accession. At its session of 18 January 1994, the European Parliament adopted a Resolution in favour of the accession of the Community to the ECHR.

D. Apart from the field of the fundamental rights of European citizens, which is the subject of the attached Act on European citizenship, the European Commission for Democracy through Law suggests that a European District be established. The creation of such a District, encompassing the institutions and organs of the Union already established in Luxembourg as well as those bodies which may be said to constitute the symbols of the European Union, should in effect allow for the specific character of the Union, when compared to classic international organisations, to be highlighted.

A provision governing the European District could be worded as follows:

"1. A European District is hereby established in Luxembourg. It shall constitute the symbol of the common cultural heritage of the peoples and Member States of the Union.

2. The European District shall harbour the headquarters of the institutions and organs of the Union established in Luxembourg, as well as the following bodies:

a) the Museum of the Union;
b) the Historical Archives of the Union;
c) the European Academy;
d) the Library of the Union.

3. The Council, acting unanimously on a proposal from the Commission and after consultation with the European Parliament, shall adopt the rules governing the European District as well as those governing the bodies referred to in the previous paragraph.

4. The provisions of the Protocol on the Privileges and Immunities of the European Communities shall apply to the bodies of the European District."

ACT ON EUROPEAN CITIZENSHIP

Article 1

1. A citizenship of the Union is hereby established.

2. Every person having the nationality of a member State is a citizen of the Union.

3. Citizenship of the Union is additional to citizenship of Member States.

Article 2

1. Citizens of the Union shall enjoy the rights and be subject to the duties conferred by this Act, by the Treaty on European Union, by the Treaty establishing the European Community, by the Treaty establishing the European Coal and Steel Community, and by the Treaty establishing the European Atomic Energy Community.

2. The Union, the European Communities and their Member States shall be bound to respect the rights conferred by this Act in matters covered by the Treaty on European Union, the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community.

3. Legal persons created in accordance with the law of Member States of the Union shall benefit from the fundamental rights conferred by paragraph 1 to the extent that such rights are applicable.

4. The present Act shall not prevent all or any of the rights attributed to citizens by the present Act, the Treaty on European Union, the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community or the Treaty establishing the European Atomic Energy Community, and especially those rights recognised in Articles 13 and 17 of the present Act, from being vested in citizens of third States as well as in refugees and stateless persons regularly residing on the territory of Member States, in accordance with principles determined by the European Council and rules established by the Council acting unanimously on the proposal of the Commission and after obtaining the assent of the European Parliament, save as otherwise provided by the Treaties.

Article 3

1. The Union and the Member States' systems of government are based on the principles of liberty, democracy, respect for human rights and fundamental freedoms and of the rule of law. Membership of the Union is dependent on respect for these rights.

2. The Union shall respect the national identities of its Member States.

Article 4

The Union shall respect fundamental rights, as guaranteed by international instruments binding on Member States and in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature in Rome on 4 November 1950, as well as those deriving from constitutional traditions common to Member States, as an integral part of community law.

Article 5

1. Within the scope of application of the Treaty on European Union, and without prejudice to any special conditions contained therein, any discrimination on grounds particularly of race, colour, nationality, sex, language, religion, political or other opinion, association with a national minority, social origin, property, disability, sexual preference or any other specific status shall be prohibited.

2. The Council, acting in accordance with the procedure provided for in Article 189c, may adopt rules designed to facilitate the elimination of such discrimination.

3. In order to combat racism, anti-Semitism, xenophobia, intolerance, sexism and exclusion, the Member States shall co-ordinate action taken in accordance with Article K.3 paragraph 1 of the Treaty on European Union, without prejudice to any joint positions and joint actions adopted by the Council in accordance with Article K.3 paragraph 2.

Article 6

1. Every citizen of the Union shall have the right to enter, move and reside freely within the territory of all Member States, including the one of which he is a national, as well as to leave such territory, and shall enjoy the same rights as nationals of the Member State in which he or she resides, subject to the exceptions, limitations and conditions laid down in the Treaty establishing the European Union and by the measures adopted to give it effect, in accordance with the procedure set out in Article 189B.

2. Every citizen of the Union shall have the right to supply or receive transfrontier services that do not require the movement of persons.

3. The Council, taking due account of the requirement for balanced and sustainable economic and social progress, in particular the need to strengthen economic and social cohesion, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraphs 1 and 2. Save as otherwise provided in the Treaties, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.

Article 7

1. Every citizen of the Union shall be entitled to equal access to public services under optimum conditions of universality, quality, continuity, efficiency and transparency.

2. Every citizen of the Union shall have the right to participate in public service and solidarity-based activities and, if established, a voluntary European civilian service scheme.

Article 8

Every citizen of the Union shall have the right of access to information and documents relating to the functioning of the Union and to acts of the institutions affecting him, under conditions that ensure a balance between the requirements of confidentiality and the need for transparency in the Union's activities.

Article 9

Every citizen of the Union shall have a right to join the civil service of the institutions and organs of the European Community in accordance with his or her aptitudes, abilities and professional qualifications.

Article 10

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections, as well as the right to participate in municipal referendums, in the member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised in accordance with the arrangements determined by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament.

2. Without prejudice to Article 138 para 3 and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.

Article 11

Every citizen of the Union called upon to exercise duties of elected office within the meaning of the Act on European Citizenship shall have the right to the time necessary to exercise such duties and to keep his job.

Article 12

1. Citizens of the Union can, by means of a proposal signed by at least two million electors, promote the adoption of normative European instruments.

2. The proposal shall be submitted to the European Parliament, which shall present a draft to the Council within one year of its receipt of the initiative. The Council, after consulting the Commission and after obtaining the assent of the European Parliament, decides upon the initiative by a qualified majority, in accordance with Article 189B paragraphs 3-7.

Article 13

1. Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 138D of the Treaty establishing the European Community.

2. Every citizen of the Union may apply to the Ombudsman established in accordance with Article 138E of the Treaty establishing the European Community.

Article 14

1. Citizens of the Union shall have the right to freely associate in the form of political parties operating at European level. Such parties shall contribute by democratic means to forming a European awareness and to expressing the political will of the citizens of the Union. They must respect the rights and principles laid down in this Act.

2. Citizens of the Union shall have the right to participate in trade unions and other associations and groups operating at the European level and respecting the rights and principles laid down in this Act.

3. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may grant a specific status to these political parties, trade unions and other associations and groups.

Article 15

1. Every citizen of the Union shall, on the territory of a third State in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. The Member States shall draw up between themselves the necessary rules and commence the international negotiations required to ensure such protection.

2. Every citizen of the Union shall benefit, on the territory of a third State in which no Member State is represented, from protection on the part of the European Commission delegation accredited to such territory.

3. Legal persons within the meaning of Article 58 of the Treaty establishing the European Community shall benefit, on the territory of third States, from protection on the part of the European Commission delegation accredited to such territory. The Council, acting in accordance with the procedure provided for in Article 189C, shall decide upon the measures for implementing this right.

Article 16

1. Every citizen of the Union shall have the right to an education which takes account of the common heritage of European civilisation, and to learn during the entire duration of one's studies a language of the Union other than one's mother tongue.

2. The Council, acting in accordance with the procedure provided for in Article 189C, shall decide upon the required measures for implementing these rights and for facilitating the learning of other languages of the Union by citizens of the Union.

Article 17

Every citizen of the Union shall have access to an effective judicial remedy before a national authority in the event of a violation of the rights conferred by this Act and by the Treaties referred to in Article 2 paragraph 2.

Article 18

Nothing in this Act may be interpreted as implying for any institution, Member State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights set forth herein or at their limitation to a greater extent than is provided for in this Act.

Article 19

The Court of Justice of the European Community shall ensure that in the interpretation and application of this Act the law is observed.

Article 20

Without prejudice to the other provisions of this Act, the Council, acting unanimously on a proposal of the Commission and after consulting the European Parliament, can adopt provisions designed to complete the rights provided for in this Act. Such provisions shall enter into force after having been adopted by all Member States in accordance with their respective constitutional rules.

EXPLANATORY MEMORANDUM

Article 1
(*Definition of citizenship*)

The definition of citizenship is based on Article 8 para 1 EC. The clarification in paragraph 3 is designed to indicate clearly in the Act itself that citizenship of the Union is not a substitute for national citizenship (see Reflection Group report, para 41).

Article 2
(*General provisions*)

2.1 Article 2 para 1 reproduces Article 8 para 2 EC.

2.2 Article 2 para 2 makes the provisions relating to citizens' rights mandatory within the areas of responsibility of both the Union (including the common foreign and security policy and co-operation in the fields of justice and home affairs) and the Communities. The reference to Member States' duty to respect the rights conferred by the Act "with regard to matters covered by the treaties" is designed to incorporate into the Act a legal situation already established in the case-law of the Court of Justice (CJEC 13 July 1989 Wachauf, 5/88, Rep 2609; 18 June 1991 ERT, C-260/89, Rep I-2925; 4 October 1991 Grogan, C-159/90, Rep I4685; 8 April 1992 Commission v Germany, C-62/90, Rep I2575; 24 March 1994 Bostock, C-2/92, Rep I-955).

2.3 Article 2 paragraph 3 aims to guarantee the application of fundamental rights to legal persons having the nationality of a member State whenever that is possible by analogy. Each case will need to be examined in detail to discover whether such application is warranted, but it can in any case be envisaged that Articles 6 paragraph 2, 7 paragraph 1, 8, 13, and 17 will apply to legal persons.

2.4 The possibility of extending some or all of the guaranteed rights to citizens of other States normally resident in the territory of the Union reflects a concern expressed several times in the European Parliament (see, in particular, the opinion of the Legal Affairs and Citizens' Rights Committee on the Bourlanges-Martin report, EP Doc A4I0102/95/Part II, 212-450/ def/Part II, p 59) and by trade unions and NGOs. Automatic extension would challenge the very concept of citizenship. "Variable geometry" extension is both more logical and more realistic. An explicit reference to this option seems necessary in connection with the right of petition, access to the Ombudsman (Article 13) and effective judicial remedies (Article 17). In effect, it must be acknowledged that the recognition of such rights in the nationals of third States results either from the logic of the internal market or from the very nature of a Community governed by the rule of law. The same logic governs the extension of such rights to refugees and stateless persons (within the meaning of the United Nations' Conventions) residing regularly on the territory of Member States. It should be pointed out that any extension of these rights must be confined to nationals of other States who are in a regular position on the territory of a Member State and that such an extension does not, of course, preclude the Council from introducing, in accordance with the appropriate procedures, restrictions concerning the length and continuity of residence.

Article 3
(*Principles*)

Article 3 is based on a combination of the third paragraph of the preamble to the Maastricht Treaty and Article F para 1 of the Treaty on European Union (TEU). The modifications are intended to ensure that the democratic principle applies not only to Member States' systems of government but also to the Union, in accordance also with the case-law of the Court of Justice. The reference to the link between respect for the rights set out in this article and membership of the Union implies that compliance with these principles is a precondition of accession to the Union and that serious and repeated violations of the principles would be likely to lead to the loss of membership. The majority of the Reflection Group's members support this view (final report, paras 31 to 33).

The reference to respect for Member States' national identities is taken from Article F TEU.

Article 4

(*Fundamental rights*)

The principle of respect for fundamental rights features in Article F para 2 TEU, but in a significantly different form to the wording adopted here. The Treaty is only concerned with the European Convention on Human Rights, thereby ignoring the other international instruments concerned with civil and political, economic, social and cultural rights, whether these be universal instruments drawn up by the United Nations, such as the Universal Declaration, the covenants and specialised conventions, or European instruments, such as the Social Charter and various Council of Europe and other conventions, even though the Court does not exclude them as possible material sources for the fundamental rights which it is called upon to guarantee. Moreover, Article F only treats these fundamental rights as "general principles of Community law". The wording used here is designed to establish beyond doubt their constitutional force within the Community's and the Union's legal system. As a consequence, the beneficiaries are not only citizens of the Union but also nationals of other States resident in the territory of a Member State.

Article 5

(*Non-discrimination*)

The Community treaties provide for an express prohibition on discrimination, in Article 6 EC (former Article 7 EEC), only on grounds of nationality. Most of the proposals made during the preparations for the IGC emphasise the need for the underlying treaties to include a general non-discrimination clause. The retention of the words "within the scope of application of this Treaty" is justified by the fact that any eventual discrimination practised by Member States outside the treaties' scope comes within the ambit of their respective constitutional provisions and international obligations. The list of types of discrimination is largely taken from Article 14 of the ECHR, to which have been added distinctions based on disability or sexual preferences, in view of the growing sensitivity to these types of discrimination. The term *discrimination,* which implies an unjustified form of differentiation, has been used in the French version in preference to *distinction*, which occurs in the French version of the European Convention on Human Rights (the English version has always used the term "discrimination").

It has been considered necessary to lay down the procedure for "facilitating" the elimination of discrimination, in order to provide for the adoption of subordinate legislation, which may be required if this Article's objective of equality of treatment is to be fully achieved. The procedure chosen is that provided for in Article 6 para 2 CE, within the more restricted scope of Article 6 CE.

The reference to measures necessary to combat racism, anti-Semitism and xenophobia is intended to give treaty force to the objectives set out in the 1986 joint declaration of the Council, European Parliament and Commission and the conclusions of the presidency following the Corfu European Council. They are supplemented by the measures to combat sexism and exclusion, which seem essential in the light of changes in European societies. The reference to the procedures in Title VI of the Treaty on European Union is necessitated by the lack of any Community authority under the Treaty establishing the European Community and the need to provide for the co-ordination of national policies and possible joint action in this area, under the terms of Article K.3.

Article 6

(*Freedom of movement*)

The provisions relating to the freedom of movement of persons within the European Union are largely based on Article 8a of the Treaty on European Union. The wording used explicitly establishes the principle that Member States may not refuse their own nationals entry or the right of residence and may not deport them (CJEC 4 December 1974, Van Duyn, Case 41/74, Rep p 1337) and serves to justify the link between paragraphs 1 and 3 of Article 6. In addition, the right to leave any country, including one's own, provided for until now under secondary law (see for example Article 2 of Directive 68/360, OJEC L 257 of 19 October 1968, p.13), warrants inclusion in a general manner as a principle of primary law (cf. Article 2 paragraph 2 of Protocol N° 4 to the ECHR).

The prohibition on discrimination on the grounds of nationality, already established notably in Article 6 EC, is not only indispensable for the free movement of persons, but is also a fundamental principle of the European Union. It is therefore desirable that it be extended beyond the application of the Treaty of Rome, and that exceptions, limitations and restrictions should henceforth be authorised solely under the Treaty and its implementing provisions.

Paragraph 2 deals with the possibility of free movement of services in the absence of the movement of persons, which is not explicitly recognised in existing provisions of the treaties, at least in general terms.

Paragraph 3 is the logical extension of individuals' right to remain in the territory of the State of which they are nationals in satisfactory living and working conditions, as laid down in the preamble to the EC treaty. These rights are given substance by linking them to balanced economic and social progress, and in particular to the restated objective of strengthening economic and social cohesion, which the Single European Act imposes on the Community and the Treaty on European Union on the Union. The prospect of subsequent enlargements of the Union makes this wording even more necessary.

Article 7

(*Public services, public service activities and transparency*)

Article 7 sets out citizens' rights in their dealings with public authorities.

The first paragraph establishes the principle of equal access to public services, with its corollaries of universality, quality, continuity, effectiveness and transparency. Universality encompasses the notion of a minimum level of accessibility of public services for all citizens, irrespective of their geographical location and at a uniform and reasonable cost. Quality signifies a duty to provide appropriate services of a high standard, having regard to technical progress. Continuity presupposes the uninterrupted and efficient provision of services adapted to users' needs. Efficiency implies a service which responds promptly to the needs of users. The principle of transparency has been solemnly adopted in a number of recent instruments, and is elaborated upon further in the commentary to Article 8, which develops the principle.

The second paragraph refers to the possibility of developing citizens', and in particular young persons', participation in public service and solidarity-based activities on a European scale, which could take the form of a European civilian service scheme. It is important to recognise the value of such activities as an element of citizenship, even though it is probably not desirable to anticipate further the forms they might take, given the current state of integration in the Union. The majority of the Reflection Group support this view (final report, para 43).

Article 8

(*Transparency of acts of the Union*)

Article 8 considers the issue of transparency of documents relating to the functioning of the Union and of acts of the institutions, as defined in the 17th declaration appended to the Final Act of the Treaty of Maastricht and in the conclusions of the Birmingham and Edinburgh European Councils, the first of which issued the declaration: "a Community closer to the people". The issue has also been the subject of two Commission communications (5 May 1993, OJEC no C 156, 8 June 1993; 2 June 1993, OJEC no L 166, 17 June 1993), a Council and Commission Code of Conduct dated 6 December 1993 (OJEC no L 340 31 December 1993) and a Council decision (OJEC no L 340 31 December 1993). Recent case-law has highlighted the scope of this principle (CFI 19 October 1995 Carvel and the Guardian, T-194/94, Europe December 1995 comm YG no 423). The Reflection Group's report also wants the right to information to become a recognised right of European citizens. It is therefore essential to provide a firmer legal basis to Community citizens' right to information and access to documents by incorporating it in this Act. The careful wording used to define the limits to Community institutions' duty to communicate information reflects the approach adopted by the European Court.

Article 9

(*Right of access to the Community civil service*)

The increasing importance of the Community civil service favours the inclusion of a right of equal access to it in a primary legal source.

Article 10

(*Voting rights*)

This provision reproduces Article 8b EC. While extending it to municipal referenda, it excludes any specific provision applicable to citizens of the Union not originating in the State of residence in the matter of elections to the European Parliament.

Article 11

(*Necessary time for the exercise of elected mandate*)

This provision aims to prevent a person elected to the European Parliament or to a municipal body (Article 10) being disadvantaged in his employment. It corresponds to analogous provisions in Member States applying to members of national Parliaments.

Article 12

(*Popular initiative*)

In order to increase the participation of citizens in the European decision-making process, the Act sets out a form of popular initiative allowing for draft normative instruments to be submitted to the Council and to the European Parliament on the petition of two million electors, a number which, although reasonably attainable, is sufficiently high to avoid an undue influx of petitions.

Article 13

(*Petitions and Ombudsman*)

This provision is taken word for word from the Treaty of Maastricht (Article 8d EC).

Article 14

(*Political parties, trade unions and associations*)

Any declaration concerned with the rights of European citizens must include a reference to political parties. However, this must be confined to the recognition of political parties operating at the European level, since the status of national political parties comes within the ambit of national sovereignty and Member States' constitutions. The purely declaratory and non-binding wording of Article 138a EC, as introduced by the Treaty on European Union, is important for symbolic reasons. The proposed provision, however, aims to confer a veritable right to form European political parties. The role attributed to European parties, as set out for the most part in the second sentence of Article 138a EC, also serves to define their functions. While it does not establish a ground of unconstitutionality comparable to that in Article 21 para 3 of the German Basic Law, the duty to respect the rights and principles laid down in this Act effectively provides constitutional justification for any conditions that might be attached to a future statute of European political parties.

It seems appropriate to introduce similar provisions relating to the right to participate in trade unions and other associations and groups operating at the European level.

The reference to the procedures for implementing the two preceding paragraphs, and in particular the prospect of granting parties, trade unions and other associations and groups a special European status, is necessary if these provisions are to have more than just a declaratory effect. In the absence of specific Community powers, the procedure adopted is the one laid down in Article 235 CE.

Article 15

(*Diplomatic and consular protection*)

The first paragraph reproduces the substance of the wording of Article 8c EC. The diplomatic protection extends, in accordance with Article 2 paragraph 3 of the Act on European citizenship, to legal persons, and particularly to companies within the meaning of Article 58 of the EC Treaty.

The second paragraph introduces, as a subsidiary measure, a new, truly Community right of "diplomatic" protection exercisable by accredited Commission delegations in third States (even if not physically present there).

In addition, the third paragraph introduces the right to Community protection in favour of legal persons, applicable within the framework of Community competence in the field of common commercial policy (Article 113 CE). Such protection shall also be exercisable by the accredited Commission delegations referred to in paragraph 2.

Article 16

(*Right to education*)

The right to education appears here in a European cultural context, the knowledge of languages being an essential element of access to cultures other than one's culture of origin. It is for this reason that the Act recognises the right to a positive service, namely to be taught at least one language of the Union other than one's maternal language. The Community also has competence to facilitate the teaching of other languages.

Article 17

(*Judicial remedies*)

There are strong grounds for including in the Act a formal acknowledgement of the right of appeal to a court, which is inherent in the notion of a Community governed by the rule of law. The right to an effective judicial remedy has been recognised in the case-law of the Court of Justice (in particular, CJEC 15 May 1986 Johnston, 222/84, Rep 1663; 13 December 1991 RTT, C-18/88, Rep I-5941; 3 December 1992 Oleificio Borelli, C-97/91, Rep I-6313). It is equally inherent in Article 13 ECHR. It is also important to establish this principle with regard to violations of citizens' rights provided for in this Act, to ensure that such rights are enforceable and thus properly applied.

The right to an effective judicial remedy is evidently not limited to complaints founded on the Act of the Rights of European Citizens, but applies also to the founding Treaties and, in consequence, to secondary law deriving therefrom.

Article 18

(*Interpretation)*

This provision is taken from Article 17 ECHR.

Article 19

(*Powers of the Court of Justice*)

This final provision is essential if the Act is to be enforceable and effectively applied. It is made even more necessary by the fact that, under Article L TEU, Article F TEU is not, in principle, subject to the legal supervision of the Court of Justice.

Article 20

(*Progressive clause*)

The extension of the rights of the citizen, and even of human rights, should be foreseen within the framework of the European Union. Such an extension will however only be possible by virtue of a new international treaty ratified by all Member States.

III. Studies of the Venice Commission

1. Consequences of State Succession for nationality

During 1996, the Sub-Commission on International Law completed its work on the consequences of State Succession for nationality.

The Sub-Commission held two meetings, on 29 February and on 16 May 1996, during which a draft report and a draft declaration prepared by the Rapporteurs, Messrs. Economides, Klucka and Malinverni, with the assistance of the Secretariat, were examined. Representatives from the Committee of Experts on Nationality (CJ-NA), Messrs Schaerer (Switzerland) and Kojanec (Italy) participated in the Sub-Commission's work.

Final versions of both the draft report and declaration were drawn up during a meeting of the Rapporteurs held in Geneva on 30 August 1996, and during the Sub-Commission meeting on 12 September 1996.

The Commission adopted the report on the consequences of State succession for nationality and the declaration on the consequences of State succession for the nationality of natural persons during its 28th Plenary meeting.

This report, essentially based upon replies to a questionnaire from more than 30 European States as well as other non-European States participating in the Venice Commission's work, and on other relevant comments, has as its object and purpose to show the diversity of legal models of regulation which have been adopted to deal with the effects of territorial transfers on nationality. The question of nationality in cases of State succession raises questions with which several member States of the Council of Europe have been confronted. The Commission, convinced that the sharing of experience in the

matter could lead to the most efficient solutions being adopted, established, more than a mere repertoire of legislative practice in several European and non-European States, a general recommendation of the guidelines to be followed in future cases of State succession. The text of the declaration and its explanatory report appear at the end of this chapter.

2. Parliamentary Immunity

During its 27th Plenary Meeting, the Commission adopted the report on the regime of Parliamentary Immunity. This report was drawn up by the Sub-Commission on Democratic Institutions based on a draft report drawn up by Mr G. W. Maas Geesteranus with the assistance of the Secretariat.

The proposal to devote a study to parliamentary immunity originates from the representative of the Parliamentary Assembly. In the opinion of the Commission, the request of the Assembly was indeed very much to the point. In fact, on the one hand, the topic of parliamentary immunity lies in the heart of the debate over the guarantees of parliamentary democracy in Europe given that the independence and satisfactory operation of parliament are essential to the separation of powers. On the other hand, the topic is of current interest in view of the tendencies in certain states to encourage elements of a "continuous democracy", ie increased citizen control or participation in the democratic process.

As a first step in the course of preparing this report, a questionnaire was drawn up for submission to the members, associate members and observers of the Commission. Working from the tabulated information, it was possible to produce this report in a comparative overall perspective. It does not constitute an exhaustive analysis of the topic, nor does it purport to infer uniform and generally applicable principles, given the diversity and complexity of the national situations. However, it provides an analytical and speculative instrument containing, in a systematic way, information which is not always accessible, particularly for linguistic reasons. The report accordingly gives an overview of the varying legal rules adopted and provides an initial basis for comparison as regards the subject-matter at Europe-wide.

In its report the Commission concluded the following :

- On balance, the system established to protect parliamentarians' freedom of expression is fairly uniform in the various countries considered. Except in cases of racist utterances by members, this particular aspect of immunity is not substantially debated or challenged.

- Immunity in the form of inviolability, however, appears more complex and generates a wider variety of legal provisions.

- The institution of immunity as such is not in fact a subject of passionate debate in most countries surveyed. It reappears as a topical issue on the occasion of proceedings against members, particularly for corruption.

- Parliamentary immunity continues to be an institution which assures members of their independence from other powers and their freedom of action and expression, although the relationship between the characteristics of the various powers has evolved considerably in the parliamentary democracies. It also protects parliamentarians from possible abuses by the majority.

- But while the necessary compliance with the principle of separation of powers and the expression of the common will render it expedient to lay down specific rules for the protection of parliamentarians, it would be inconsistent with the principles of parliamentary democracy to make members immune from punishment for offences committed. The immunity thus instituted must, of course, not be such as to obstruct the course of justice.

- In actual fact, the extent of the protection provided largely depends on parliamentary practice but also on the role of public opinion and the development of attitudes. The role of the press, together with a certain ethical sense, accordingly have a decisive effect on the application of the parliamentary immunity system.

- Finally, in certain countries a tendency to regulate in law the conditions for lifting parliamentary immunity can be observed, or else an effort to define fixed, objective criteria as far as possible. This trend is prompted by concern for stricter application of the principles of rule of law and by the demands of safeguarding fundamental freedoms.

3. Constitutional foundations of foreign policy

During 1995 the Commission had decided to study the constitutional foundations of foreign policy. This study forms part of the work of the Sub-Commission on International Law. A questionnaire has been sent to members, associate members and observers of the Commission. During its meetings on 12 September and 14 November, the Sub-Commission on International Law examined this question on the basis of a draft report drawn up by Mr Nick, with the assistance of the Secretariat.

It is envisaged that the Commission will complete its work on this question at the beginning of 1997.

4. Participation of persons belonging to minorities in public life

Since its creation, the protection of minorities has played an important role in the Commission's activities. During 1995, the Commission decided to undertake a study on the participation of persons belonging to minorities in public life. The Sub-Commission on the Protection of Minorities, together

with the Sub-Commission on Democratic Institutions, were instructed to examine this subject. A questionnaire has been sent to members, associate members and observers of the Commission. Work on this subject will continue throughout 1997.

5. Composition and establishment of Constitutional Courts

The study on the composition of Constitutional Courts, undertaken by the Sub-Commission on Constitutional Justice, aims to show, beyond a simple description of rules governing composition, the techniques employed by constitutional laws to ensure and maintain the representation and balance of different political and legal tendencies in constitutional courts. It is envisaged that the Commission will adopt a report on this question during 1997.

6. Study on Federal and Regional State

At the request of the Veneto Region, the Sub-Commission on Federal and Regional State held a special meeting in Vicenza on 11 September 1996, in the presence of a certain number of Italian representatives. This meeting had been an opportunity to prepare the ground for a study to identify, on the one hand, the basic aspects of modern federalism and, on the other hand, the particular problems which needed to be addressed in the case of Italy. As a result, a number of key points had emerged which are included in the questionnaire on the federal and regional State, adopted by the Commission during its 28th Plenary Meeting and sent to members, associate members and observers of the Commission.

Declaration on the consequences of State Succession for the Nationality of Natural Persons and its Explanatory Report

Adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting (Venice, 13-14 September 1996).

DECLARATION

on the consequences of State succession for the nationality of natural persons

The European Commission for Democracy through Law (Venice Commission),

recognising that in cases of State succession, the interests not only of States but also of individuals must be taken into account;

being committed to the principles of democracy, the rule of law and the protection of human rights;

having particular regard to State practice in the matter;

has adopted the following declaration:

I.

1. The expression "State succession" refers to the replacement of one State by another in its responsibility for the international relations of territory. It comprises, in particular, annexation, union, dissolution and separation.

2. Questions relating to nationality fall to the jurisdiction of States within the limits laid down by international law.

3. In the event of State succession, the conditions for the acquisition and loss of nationality shall be provided for by law. Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy.

4. In the event of State succession, the States involved may, by agreement, settle the question of nationality. They shall respect the human rights of the persons concerned, as guaranteed by international instruments.

II.

5. The States concerned shall respect the principle that everyone has the right to a nationality.

6. They shall avoid creating cases of statelessness.

7. In matters of nationality, they shall respect, as far as possible, the will of the person concerned.

III.

8.a In all cases of State succession, the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on the transferred territory.

b. Such nationality shall be granted without any discrimination in particular on the basis of ethnic origin, colour, religion, language or political opinions.

c. Those persons to whom this nationality has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State.

9. It is desirable that successor States grant their nationality, on an individual basis, to applicants belonging to the following two categories:

a. persons originating from the transferred territory, who are nationals of the predecessor State but resident outside the territory at the time of succession;

b. permanent residents of the transferred territory who, at the time of succession, hold the nationality of a third State.

IV.

10. The successor State shall grant its nationality:

a. to permanent residents of the transferred territory who become stateless as a result of the succession;

b. to persons originating from the transferred territory, resident outside that territory, who become stateless as a result of the succession.

11. It is desirable that the successor State grant its nationality:

a. to permanent residents of the transferred territory who are stateless at the time of the succession;

b. to persons originating from the transferred territory but resident outside that territory who are stateless at the time of the succession.

12. The predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State.

V.

13.a In all cases of State succession, when the predecessor State continues to exist, the successor State(s) shall grant the right of option in favour of the nationality of the predecessor State.

b. When two or more States succede to a predecessor State which ceases to exist, each of the successor States shall grant the right of option in favour of the nationality of the other successor States.

14. The successor States may make the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious, with the predecessor State and, in the case envisaged under number 13.*b*, also on the condition that the persons previously had the citizenship of a subdivision of the predecessor State.

15. The right of option should be exercised by all adults within a reasonable time from the date of succession.

16. The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their moveable or immoveable property located therein.

EXPLANATORY REPORT ON THE DECLARATION ON THE CONSEQUENCES OF STATE SUCCESSION FOR THE NATIONALITY OF NATURAL PERSONS

Adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting (Venice, 13-14 September 1996).

I. INTRODUCTION

1. At its 20th meeting in Venice on 9 and 10 September 1994, acting on a proposal by Ms *Buure-Hägglund*, the Chair of the European Committee on Legal Affairs (CDCJ), the Commission asked Mr *Economides* and Mr *Malinverni* to draw up a draft questionnaire on the consequences of state succession for nationality. In 1995 the questionnaire (CDL-NAT(95)1) was sent to all the members and associate members of the Committee as well as its observers.

2. The Commission received replies from the following European countries which have a practice in the field of State succession: *Albania, Austria, Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine*, as well as the two non-European States represented in the Commission, *Japan and Kyrgyzstan*. The *United States of America* have provided some information on their domestic legislation in this field[22].

3. At its 24th meeting in Venice on 8 and 9 September 1995, the Commission asked the rapporteurs, Mr *Economides*, Mr *Klu_ka* and Mr *Malinverni* to finalise the draft report on the consequences of state succession for nationality and draw up principles for national legislation.

4. Based on the replies to the questionnaire, a consolidated report was prepared (CDL-NAT (96) 5 rev.2). This report demonstrates the legal models of regulation which have been adopted, either independently or pursuant to obligations under international law, to deal with the effects of

territorial transfers on the nationality of natural persons.

5. In the course of its work, the Commission took note of the draft European Convention on Nationality [23] which had been prepared by the Committee of experts on nationality of the Council of Europe (CJ-NA). Two members of this Committee, Mr *Kojanec* (Italy) and Mr *Schärer* (Switzerland), have participated in the work of the Commission.

6. The Commission also took note of the work of the International Law Commission of the United Nations on the topic of "State succession and its impact on the nationality of natural and legal persons" [24].

7. At its 9th meeting held in Venice on 15 May, the Sub-Commission on International Law examined some draft guidelines for State practice (CDL-NAT (96) 1 rev.) and a draft declaration drawn up by Mr *Economides* (CDL-NAT (96) 3). After an extensive exchange of views, it was decided to retain the draft declaration proposed by Mr *Economides* as a basis for the Commission's future work. Following this, Mr *Steinberger* submitted an extremely useful working document to the rapporteurs.

8. It should be noted that for the nationality of *legal persons* the following provision was proposed in the draft declaration submitted by Mr Economides (CDL-NAT (96) 3): "Legal persons whose headquarters are located in the transferred territory shall acquire upon succession the nationality of the successor State". However, considering that the practice of States is very limited in this area, the Commission decided not to include it in the text of the present declaration, which therefore concentrates exclusively on the nationality of natural persons.

9. The final version of the declaration was drawn up by the Sub-Commission on International Law at its 10th meeting in Venice on 12 September 1996 and adopted by the plenary Commission at its 28th meeting in Venice on 13-14 September 1996.

II. COMMENTS ON THE PROVISIONS OF THE DECLARATION

I.

1. The definition of the expression "State succession" is taken from Article 2.1. *b* of the Vienna Convention of 1978 on Succession of States in respect of Treaties and Article 2.1.*a* of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Temporary occupations or annexations of territory which occur during a state of war do not entitle the occupant to change the nationality of the inhabitants. The same applies *a fortiori* to occupations or annexations which result from resort to the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. The two Vienna Conventions on State succession provide that they apply only to the effects of a State succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

2. Questions of nationality fall within the national jurisdiction of each State [25]. The *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* of 12 April 1930 [26] stipulates that it is "for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality" (Article 1).

3. In a State governed by the rule of law it is essential for there to be a legal basis for the conditions of acquisition and loss of nationality as well as an effective right of appeal against decisions involving the deprivation, revocation or refusal of nationality. In periods of State succession it is even more important to tackle the uncertainty experienced by those involved in the succession, by guaranteeing that the legislation meets certain substantial standards: laws must be clear, coherent and non-retroactive; they must be published, exclude any unforeseeable surprises and comply with fundamental rights and freedoms.

4. Although questions of nationality can be settled between the States involved in the succession, the latter are required to comply with the limits imposed by international standards for the protection of human rights. In an Advisory Opinion of 1984, the Inter-American Court of Human Rights stated that the powers of States in respect of nationality were limited by their obligation to guarantee full protection of human rights [27]. States must also ensure that any agreements they reach comply with the provisions contained in Chapter II of the Declaration.

II.

5. The principle that everyone has the right to a nationality is already found in the Universal Declaration of Human Rights (Article 15, paragraph 1). It was reiterated in the American Convention on Human Rights (Article 20, paragraph 1), confirmed by the Inter-American Court of Human Rights [28] and included in the draft European Convention on Nationality. The 1966 International Covenant on Civil and Political Rights (Article 24, paragraph 3) and the 1989 UN Convention on the Rights of the Child (Article 7, paragraph 1) stipulate that children have a right to acquire citizenship. Provision No.5 is linked to provision No.8 (on granting the nationality of the successor State).

6. The principle that statelessness must be avoided now forms part of international law. The *Convention on the Reduction of Statelessness* of 30 August 1961 lays down rules for giving effect to this principle. As regards the definition of statelessness, reference should be made to the first article of the *Convention on the Status of Stateless Persons* of 28 September 1954 which stipulates that "the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.". Provision No. 6 is linked to provisions No. 10 to 12 which are aimed at reducing the number of cases of statelessness.

7. The need to take account of the individual's wishes implies in particular that the persons concerned are given rights of option and that they are

not forced to adopt a nationality against their will. This provision is directly linked to provisions No. 13-16 on the right of option. In a sense it represents an exception to the rule set out in provision No. 8.

III.

8. This provision is in keeping with the practice of States in this area. It is also in harmony with the principles of general international law. All cases of State succession involve a transfer of territory which inevitably affects the nationality of those persons who, with the territory, pass from one sovereignty to another.

As a rule, successor States have adopted specific legislation conferring their nationality on former nationals of the predecessor State who continued to have their habitual residence in the transferred territory. Under this legislation, the conferment of nationality operates automatically and only exceptionally upon application.

In this way, all the nationals of the predecessor State, who are genuinely resident in the transferred territory - the condition of attachment to this territory is of paramount importance - lose the nationality of the predecessor State and acquire that of the successor State. It follows that the successor State may choose not to confer its nationality on nationals of the predecessor State who do not have effective links with the transferred territory, or on those who are resident in this territory for reasons of public service: such as civil servants of the predecessor State, members of the armed forces etc.

Finally the principle of non-discrimination on grounds such as ethnic origin, colour, religion, language or political opinion applies both to the granting of nationality by the successor State and to the enjoyment by those who acquire this nationality of all the rights and interests attaching to this nationality. This provision, which is aimed at ensuring equality before the law, lists the main forms of discrimination which are prohibited in the area of nationality. The words "in particular" clearly indicate that the list of prohibited grounds of discrimination is not exhaustive.

9. This provision constitutes a recommendation made in the interest of the persons mentioned and on the condition, of course, that they wish to acquire the nationality of the successor State on an individual and voluntary basis. In State practice it is comparatively rare for nationals of a third country, who are often known as foreign residents, to acquire the nationality of the successor State. However it may be worthwhile to make provision for the acquisition of this nationality upon application, particularly for a newly created State.

IV.

10. This provision gives effect to the obligation to avoid cases of statelessness. Article 10 of the *1961 Convention on the Reduction of Statelessness* provides that:

> "Every treaty between Contracting States providing for the transfer of territory shall include provisions to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition".

11. Provision No. 11 is aimed at reducing the number of cases of statelessness already existing prior to a State succession. It is simply a recommendation. It would be desirable for new legislation adopted following the transfer of sovereignty of a territory to enable stateless persons who permanently reside in or originate from this territory to apply for the nationality of the successor State.

12. This provision also aims at avoiding cases of statelessness. Inhabitants of a territory which has undergone a change of sovereignty generally lose the nationality of the predecessor State and gain that of the successor State. However, as explained in point 8, successor States may opt not to regard certain persons as permanent residents (particularly civil servants, members of the armed forces and other persons with the nationality of the predecessor State who reside in the transferred territory for professional reasons). In this case, predecessor States is required not to revoke the nationality of these persons, who would otherwise become stateless.

V.

13. The right of option is understood as the right of persons affected by territorial changes to choose, by making a declaration, between either the nationality of the successor State and that of the predecessor State or between the nationalities of several successor States (*option of nationality*). It is used in a broad sense, covering both the positive choice of a certain nationality and the refusal of a nationality acquired *ex lege*.

Regarding the right of option, it proved necessary to draw a distinction between cases where the predecessor State continues to exist (e.g. cession of part of the territory of a State, separation), and cases where one or several States succeed to a predecessor State which disappears (e.g. dissolution or uniting of States). In the first hypothesis arises not only the question of acquisition of the new nationality, but also that of the loss of the old one. In the second hypothesis, the nationality of the predecessor State ceases to exist, but the attachment of the persons concerned with one or the other of the successor States may give rise to problems.

14. The right of option must be granted not to all persons who pass from one sovereignty to another but only to those who have effective, and in particular ethnic, linguistic or religious, links with a predecessor or successor State. This solution is based largely on the practice of States in this area as well as on the principle that persons may not be deprived of their nationality against their will.

The notion of an "effective link" was used by the International Court of Justice in the *Nottebohm* case. The Court defined nationality as "a legal bond having as its basis a social fact of attachment, a effective connection of existence, interests and sentiments, together with the existence of reciprocal rights

and duties"[29]. As far as the right of option is concerned, the term "genuine links" implies "substantial links" between the person concerned and the State, which may be based in particular on ethnic, linguistic or religious links. Generally these links are with the predecessor State but sometimes they are with other States.

In the circumstances envisaged in point 13.b (two or more States succeeding to a predecessor State which ceases to exist), links based on the citizenship of a subdivision of the predecessor State should also be taken into account. This criterion has been applied in particular in recent cases of State succession in central and eastern Europe in order to grant the right of option (during the dissolution of Czechoslovakia, the Soviet Union, and Yugoslavia).

15. This provision is aimed at avoiding potentially damaging uncertainty as to the nationality of persons affected by State succession (for example in respect of enjoyment of diplomatic protection). The Commission did not consider it appropriate to establish a precise time limit. However the time limit should be reasonable in the light of the circumstances of each individual case.

The choice made by persons exercising parental authority will usually prevail over that made by unmarried minors provided that the choice so made is in the best interests of the minor and that, where appropriate, the minor has been granted the right to be heard.

16. In the past, exercising the right of option has often had adverse consequences for those who have availed themselves of it. In certain cases it entailed an obligation to leave the transferred territory. Today, such an obligation would be incompatible with international human rights standards. All persons who have the right of option must be allowed to choose their nationality freely.

IV. Documentation Centre on Constitutional Case-Law

With the publication of the Bulletin on Constitutional Case-Law and, more particularly, the establishment of the CODICES database in 1997, the Documentation Centre on Constitutional Case-Law has been given a major boost in its task of providing access to the European constitutional heritage.

The **Bulletin on Constitutional Case-Law** has undergone further improvements in the layout of the summaries of decisions presented. The essential purpose of the Bulletin is to provide up-to-date information on the most recent constitutional case-law. At present, the Bulletin reports three times a year on the most important judgments of the European Court of Human Rights, the Court of Justice of the European Communities and the constitutional and equivalent courts in about 50 countries.

With the aim of making the information offered by the Bulletin more complete, several countries participating in the work of the Sub-Commission on Constitutional Justice have generously made reports of cases available to the Documentation Centre.

Work has started on a series of special Bulletins which will contain a collection of constitutional and legislative provisions governing the work of constitutional and other such equivalent jurisdictions which participate in the Bulletin. Two of these special Bulletins on "basic texts", out of a series of four, have been published. This project, which started in 1995, will further continue in 1997.

1996 saw the establishment of the **computerised database on constitutional case-law**, which is one of the ongoing priorities of the Sub-Commission on Constitutional Justice. An improved version of the **CODICES** database (= **DI**gest of **CO**nstitutional **C**as**ES**) was set up by the Secretariat and distributed to the liaison officers for approval. On the basis of comments received by the liaison officers, a first version of CODICES, intended for public distribution, has been finalised and recorded on CD-ROM. This CD-ROM will be distributed at the beginning of 1997. Work has started on a project to connect the CODICES database to the Internet via the Council of Europe server.

CODICES contains all the summaries of decisions (précis) that have been published in the Bulletins, from Volume 1993/1 to 1996/1 inclusive, together with the full text of nearly 1,000 decisions in their original language or in translation, provided by the liaison officers, the systematic thesaurus, the three special Bulletins published to date, and the text of the Human Rights Convention and the protocols thereto. Links between the summaries of decisions and the Convention make it possible to bring up the text of an article once it is referred to. The text contained in the database represents about 9,500 printed pages.

In order to facilitate the liaison officers' task of processing summaries of decisions, a preliminary version of a computerised input mask developed by the Secretariat has been distributed to them.

Information exchanges on constitutional case-law between the old and the new democracies are an essential means of furthering a common European standard of adherence to the rule of law and the protection of human rights. The Commission's Documentation Centre on Constitutional Case-Law is dedicated to promoting such exchanges for the sake of the common constitutional development of the European continent.

V. The UniDem (Universities for Democracy) Programme

The Commission organised three seminars within the framework of this programme :

1. Seminar on "Local Self-Government, Territorial Integrity and Protection of Minorities" Lausanne, 25-27 April 1996

The seminar entitled "Local Self-Government, Territorial Integrity and Protection of Minorities", organised jointly by the European Commission for Democracy Through Law and the Swiss Institute of Comparative Law, was held in Lausanne on 25-27 April 1996.

The seminar united about one hundred participants originating from five continents, in particular key political figures, university members and members of Constitutional Courts.

The seminar demonstrated, on the basis of concrete examples, that autonomy and territorial integrity of States are far from being antagonistic and on the contrary, reducing tensions of the former allows the strengthening of the latter.

The first part of the seminar was devoted to the situations in certain Western Countries; a synthesis was presented by Mr Malinverni. The following points can be deduced from the conclusions reached at the seminar.

- If local autonomy concerns solely concentrated minorities as opposed to dispersed minorities, the situation becomes one of extreme diversity not only amongst different States but even internally within one State. The variety of solutions arising from diverse national laws has consequently not been significant.

- In other respects, it is necessary to establish that at the international level, only bilateral texts refer to local autonomy in relation to the protection of minorities. Emphasis was put on the necessity to adopt multi-lateral instruments to provide a general framework of local autonomy in the right of peoples to self-determination and following the principle of territorial integrity of States.

The proceedings of this seminar have been published in the collection entitled "Science and Technique of Democracy".

2. Seminar on "Human Rights and the Functioning of the Democratic Institutions in Emergency Situations" (Wroclaw, 3-5 October 1996)

The Commission organised, in co-operation with the Institute of Public Law of the University of Wroclaw, a UniDem seminar on the topic "Human Rights and the Functioning of the Democratic Institutions in Emergency Situations". The seminar, which took place in Wroclaw on 3-5 october 1996, was a follow-up to the Commission's study and report on the emergency powers of the government (cf. the Annual Report for 1994).

The first two sessions of the seminar were devoted to a comparative analysis of the European constitutional law rules on emergency situations, on the basis of reports by Professor Ozbudun (Ankara) on Western Europe and by Professor Wojtowicz (Wroclaw) on Central and Eastern Europe. Short national presentations on the situation in Germany, Spain, Japan, Hungary, Greece, Romania, Russia and Belarus provided additional material. A fairly large convergence of the national rules was noted.

The third and fourth sessions were devoted to the applicable international law rules. Professor Kolasa (Wroclaw) introduced the international legal instruments in this area and Professor Jacobs (Luxembourg) the practice of the organs of the European Convention on Human Rights. Professor Oraa (Bilbao) examined the question whether some of the rules for the protection of human rights in emergency situations were already part of customary international law. He came to the conclusion that customary law rules on this subject were emerging. This conclusion gave rise to a controversial discussion.

The proceedings of the seminar will be published in the series "Science and Technique of Democracy".

3. Seminar on "the Constitutional heritage of Europe" (Montpelier, 22-23 November 1996)

The Commission organised, in co-operation with the University of Montpelier, a UniDem seminar on the European Constitutional Heritage. The participants in the seminar tried to determine whether there are common features in the constitutional law of European States which may be described as being part of a specific European constitutional heritage.

Following an introductory statement by President La Pergola, Professor Rousseau from Montpelier University tried to define the concept of the European constitutional heritage, Professor Soulier (Amiens) examined it in a historical perspective and Professor Suchocka (Warsaw) with respect to the situation in Central and Eastern Europe. Professor Kortmann (Nijmegen) dealt with the parliamentary dimension, Professor Gautron (Bordeaux) with fundamental rights in the case law of the European Court of Justice, Professor Hofmann (Cologne) with the question of the holder of fundamental rights (individuals or groups) and Professor Peces-Barba (Madrid) with the functions of fundamental rights. The concluding report was presented by M. Scholsem.

A number of concepts like democracy, the rule of law and the protection of human rights were generally accepted as being part of the European constitutional heritage. More controversial was the question whether it includes also the control of constitutionality by an independent court.

4. Preparation of forthcoming UniDem seminars

It is envisaged to hold two UniDem seminars during 1997 :

- Seminar on citizenship and the succession of States (Vilnius, 15-17 May 1997)

- Seminar on "the transformation of the nation State in Europe at the dawn of the 21st Century" (Nancy, 6-8 November 1997)

APPENDIX I - LIST OF MEMBERS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Mr Antonio LA PERGOLA (Italy), President, Advocate General at the Court of Justice of the European Communities
(Substitute : Mr Sergio BARTOLE, Professor, University of Trieste)

Mr Constantin ECONOMIDES (Greece), Vice-President, Professor, Pantios University, Director of the Legal Department, Ministry of Foreign Affairs
(Substitute : Ms Fani DASKALOPOULOU-LIVADA, Assistant Legal Adviser, Legal Department, Ministry of Foreign Affairs)

Mr Giorgio MALINVERNI (Switzerland), Vice-President, Professor, University of Geneva

Mrs Hanna SUCHOCKA (Poland), Vice-President, Member of Parliament

Mr Giovanni GUALANDI (San Marino), Vice-President of the Council of Presidency of the Legal Institute of San Marino

Mr Franz MATSCHER (Austria), Professor, University of Salzburg, Judge at the European Court of Human Rights
(Substitute : Mr Klaus BERCHTOLD, Bundeskanzleramt, Vienna)

Mr Ergun ÖZBUDUN (Turkey), Professor, University of Ankara, Vice President of the Turkish Foundation for Democracy

Mr Gérard REUTER (Luxembourg), President of the Board of Auditors

Mr Matthew RUSSELL (Ireland), Former Senior Legal Assistant to the Attorney General

Mr Jean-Claude SCHOLSEM (Belgium), Professor, Law Faculty, University of Liège

Mr Antti SUVIRANTA (Finland), Former President of the Supreme Administrative Court
(Substitute : Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice)

Mr Michael TRIANTAFYLLIDES (Cyprus), Chairman of the Council of the University of Cyprus, Former President of the Supreme Court and former Attorney-General of the Republic

Mr Helmut STEINBERGER (Germany), Director of the Max-Planck Institute, Professor, University of Heidelberg

Mr Jacques ROBERT (France), Member of the Constitutional Council, Honorary President of the Paris University of Law, Economics and Social Science

Mr Jan HELGESEN (Norway), Professor, University of Oslo

Mr Gerard BATLINER (Liechtenstein), President, Academic Council of the Liechtenstein Institute

Mr Godert W. MAAS GEESTERANUS (Netherlands), Former Legal Adviser to the Minister of Foreign Affairs

Mr János ZLINSZKY (Hungary), Judge, Constitutional Court

Mr Joseph SAID PULLICINO (Malta), Chief Justice

Mr Ján KLU_KA (Slovakia), Judge, Constitutional Court

Mr Magnus Kjartan HANNESSON (Iceland), Professor, University of Iceland

Mr Peter JAMBREK (Slovenia), Judge at the European Court of Human Rights, Former President of the Constitutional Court
(Substitute : Mr Anton PERENIC, Professor of Law, Member of the European Commission of Human Rights)

Mr Kestutis LAPINSKAS (Lithuania), Judge, Constitutional Court

Mr Petru GAVRILESCU (Romania), Counsellor, Romanian Embassy in Brussels

Mr Asbjørn JENSEN (Denmark), Judge, Supreme Court
(Substitute : Mr John LUNDUM, High Court Judge)

Mr Cyril SVOBODA (Czech Republic), Deputy Minister of Foreign Affairs

Mr Armando MARQUES GUEDES (Portugal), Former President of the Constitutional Tribunal
Mrs Maria de Jésus SERRA LOPES (Portugal), State Counsellor, Former Chairman of the Bar Association

Mr Peep PRUKS, (Estonia), Dean, Faculty of Law, University of Tartu

Mr Aivars ENDZINS (Latvia), Judge, Constitutional Court

Mr Ilo TRAJKOVSKI ("The former Yugoslav Republic of Macedonia"), Professor of Sociology, Faculty of Philosophy, University of Skopje

Mrs Ana MILENKOVA (Bulgaria), Member of the National Assembly
(Substitute : Mr Alexandre DJEROV, Advocate, Member of the National Assembly)

Mr Mihai PETRACHI (Moldova), Head of the Legal Department, Parliament of Moldova

Ms Carmen IGLESIAS CANO (Spain), Director of the Centre for Constitutional Studies

Mr Aleks LUARASI (Albania), Professor, University of Tirana

Mr Rune LAVIN (Sweden), Parliamentary Ombudsman

ASSOCIATE MEMBERS

Mr Stanko NICK (Croatia[30]), Chief Legal Adviser, Ministry of Foreign Affairs

Mr Avtandil DEMETRASHVILI (Georgia), President of the Constitutional Court

Mr Anton MATOUCEWITCH (Belarus), Director, Institute of Public Administration and Legislation

Mr Serhyi HOLOVATY, (Ukraine[31]), Minister of Justice, President of the Ukrainian Legal Foundation
(Substitute : Mr Petro MARTINENKO, Professor of Comparative Law)

Mr Vladimir TOUMANOV (Russia[32]), President of the Constitutional Court

Mr Khatchig SOUKIASSIAN (Armenia), Counsellor responsible for expernal relations, Constitutional Court

Mr Khanlar I. HAJIYEV (Azerbaijan), Chairman, Supreme Court

Mr Cazim SADIKOVIC (Bosnia and Herzegovina), Dean, Faculty of Law, University of Sarejevo

OBSERVERS

Mr Gérald BEAUDOIN (Canada), Professor, University of Ottawa, Senator

Mr Vincenzo BUONOMO (Holy See), Professor of International Law at the Latran University

Mr Serikul KOSAKOV (Kyrgyzstan), Director General, Committee on Science and New Technologies

Mr Tasheki GOTO (Japan) Consul, Consulate General of Japan, Strasbourg

Mr Hector MASNATTA (Argentinia), Ambassador, Director of the Centre for constitutional and political studies

Mr Héctor GROS ESPIELL (Uruguay), Ambassador of Uruguay in Paris

Mr Paul GEWIRTZ (United States of America), Potter Stewart Professor of Constitutional Law, Yale Law School

SECRETARIAT

Mr Gianni BUQUICCHIO, Secretary of the European Commission for Democracy through Law
Mr Christos GIAKOUMOPOULOS, Deputy Secretary of the European Commission for Democracy through Law
Mr Pierre GARRONE
Mr Rudolf DÜRR
Ms Michelle REMORDS
Ms Helen MONKS
Ms Brigitte AUBRY
Ms Agnès READING
Ms Monica TUBAU

APPENDIX II - OFFICES AND COMPOSITION OF THE SUB-COMMISSIONS

- President : Mr La Pergola

- Vice-Presidents : Mr Economides, Mr Malinverni, Ms Suchocka

- Bureau : Mr Helgesen, Mr Maas Geesteranus, Mr Zlinszky, Mr Jambrek

- Chairmen of Sub-Commissions : Mr Aguiar de Luque, Mr Matscher, Mr Özbudun, Mr Robert, Mr Russell, Mr Scholsem, Mr Steinberger, Mr Suviranta, Mr Triantafyllides

- Constitutional Justice : Chairman Mr Russell - members: Mr Batliner, Mr Djerov, Mr Endzins, Mr Gavrilescu, Mr Jambrek, Mr Jensen, Mr La Pergola, Mr Lapinskas, Mr Lavin, Mr Marques Guedes, Ms Milenkova, Mr Özbudun, Mr Reuter, Mr Robert, Mr Said Pullicino, Ms Serra Lopes, Mr Steinberger, Ms Suchocka, Mr Suviranta, Mr Triantafyllides, Mr Zlinszky

- Federal State and Regional State : Chairman Mr Scholsem - members: Mr Economides, Ms Iglesias, Mr La Pergola, Mr Malinverni, Mr Matscher, Mr Nick, Mr Steinberger, Ms Suchocka, Mr Triantafyllides; Obs. : Canada, USA

- International Law : Chairman Mr Triantafyllides - members: Mr Djerov, Mr Economides, Mr Helgesen, Mr Jambrek, Mr Klu_ka, Mr La Pergola, Mr Malinverni, Ms Milenkova, Mr Steinberger, Mr Suviranta

- Protection of Minorities : Chairman Mr Matscher - members: Mr Economides, Mr Gavrilescu, Mr Gualandi, Mr Helgesen, Mr Maas Geesteranus, Mr Malinverni, Mr Nick, Mr Özbudun, Mr Scholsem, Mr Zlinszky

- Constitutional Reform : Chairman Mr Suviranta, Vice-Chairman Mr Batliner - members: Mr Djerov, Mr Economides, Mr Helgesen, Ms Iglesias, Mr La Pergola, Mr Maas Geesteranus, Mr Malinverni, Mr Marques Guedes, Ms Milenkova, Mr Özbudun, Mr Reuter, Mr Robert, Mr Scholsem, Ms Serra Lopes, Ms Suchocka, Mr Triantafyllides

- Democratic Insitutions : Chairman Mr Steinberger - members : Mr Economides, Mr Helgesen, Ms Iglesias, Mr Klu_ka, Mr Lapinskas, Mr Lavin, Mr Robert, Mr Suviranta, Mr Svoboda, Mr Triantafyllides
- UniDem Governing Board : Chairman Mr La Pergola, Vice-Chairman Mr Özbudun -members : Mr Helgesen, Ms Iglesias, Mr Lavin, Mr Maas Geesteranus, Mr Marques Guedes, Mr Robert, Mr Scholsem, Ms Serra Lopes, Mr Steinberger, Ms Suchocka; Obs. : Holy See

  Co-opted members : Prof. Evans (Johns Hopkins University, Bologna), Prof. von der Goblentz (College of Europe, Bruges), Prof. Masterson (European University Institute, Florence), Mr Koller (Federal Office of Justice, Berne), Mr Quinn (Federal Judicial Center, USA)

- South Africa : Chairman Mr La Pergola, Vice-Chairman Mr Helgesen - members: Mr Lavin, Mr Maas Geesteranus, Mr Malinverni, Mr Scholsem, Ms Suchocka, Mr Triantafyllides Obs. : Canada, USA

- Mediterranean Basin : Chairman Mr Robert - members : Mr Batliner, Mr Economides, Ms Iglesias, Mr La Pergola, Mr Malinverni, Mr Said Pullicino, Mr Triantafyllides

- Emergency powers of the Government : Chairman Mr Özbudun - members: Mr Batliner, Mr Russell, Mr Suviranta

- Latin America : Chairman Mr Aguiar de Luque - members: Mr Helgesen, Mr La Pergola, Mr Marques Guedes, Mr Matscher, Ms Serra Lopes, Mr Steinberger

APPENDIX III - MEETINGS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW IN 1996 [33]

Plenary Meetings

26th meeting 1-2 March
27th meeting 17-18 May
28th meeting 13-14 September
29th meeting 15-16 November

Bureau

10th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions and exchange of views with representatives from Bosnia and Herzegovina and Croatia
- 16 May

11th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions
- 14 November

SUB-COMMISSIONS

Minorities

15th Meeting - 29 February

Constitutional Justice

9th meeting Meeting with Liaison officers from Constitutional Courts
- 28 June (Madrid)

Meeting on the draft law on the Constitutional Court of Azerbaijan
- 17-19 September (Baku)

Meeting on "Monitoring constitutionality and democratic processes in the newly independent States"
- 16-18 October (Yerevan)

Seminar on "Contemporary problems of constitutional supervision"
- 2-3 December (Tbilissi)

Democratic Institutions

3rd Meeting - 29 February
4th Meeting - 16 May

International Law

8th Meeting - 29 February
9th Meeting - 16 May
10th Meeting - 12 September
11th Meeting - 14 November
Meeting of the Rapporteurs
30 August (Geneva)

UniDem Governing Board

14th meeting - 29 February
15th meeting - 14 November

Federal and Regional State

5th Meeting - 11 September (Vicenza)

Working Group on the 1996 Intergovernmental Conference

2nd meeting 7 February (Luxembourg)

Working Group on the conditions for implementation of the Croatian constitutional law on human rights and minority rights

15 March (Zagreb)

Working Group on the enlargement of the Croatian Constitutional Court

20-21 June (Paris)

Working Group on the Human Rights mechanisms in Bosnia and Herzegovina

21 May (Strasbourg)
28-31 May (Secretariat visit to Sarajevo)
21-22 June (Paris)

Working Group on comparison of the constitutions of the entities in Bosnia and Herzegovina

27 June (Paris)
27-28 August (Sarajevo)

UNIDEM SEMINARS

UniDem Seminar on Local Self-Government, Territorial Integrity and Protection of Minorities
- 25-27 April (Lausanne)

UniDem Seminar on Human Rights and functioning of Democratic Institutions in Emergency Situations
- 3-5 October (Wroclaw)

UniDem Seminar on the Constitutional Heritage of Europe

- 22-23 November (Montpellier)

PARTICIPATION IN OTHER COUNCIL OF EUROPE COMMITTEES

Participation in the meetings of the Ad Hoc Committee on the Implementation Mechanism of the Framework Convention for the Protection of National Minorities (CAHMEC)

Participation in the meetings of the Committee of Experts on Nationality (CJ-NA)
Participation in the Sub-Commission on the Peace Process in the Middle East of the Parliamentary Assembly
- 4 March (Paris)

Participation in the Informal Round Table on the development and functioning of federal structures in Russia
- 17-18 April (Moscow)

PARTICIPATION IN OTHER SEMINARS AND CONFERENCES

Participation in the International Legal Forum "The new Constitution of Ukraine : the way to Statehood building in Ukraine"
- 11-13 January (Ivano-Frankivsk)

Participation in the Belarusian-American Conference on "Actual problems of Building a Democratic, Law-Abiding State in the Republic of Belarus" organised by the Constitutional Court and the Amercian Bar Association
- 7-8 February (Minsk)

Participation in the International Conference on "Constitutional and Legal Regulation of Ethnic Relations" organised by the Slovenian Institute for Ethnic Studies
- 28-30 March (Ljubljana)

Participation in the 10th Conference of European Constitutional Courts
- 6-10 May (Budapest)

Participation in the Seminar "Federalism, Regionalism, Local Self-Government and Minorities"
- 24-26 October (Cividale del Friuli)

Workshop on Intergovermental Relations
- 28-29 October (Dikhololo, South Africa)

Participation in the Conference "Greece-Europe Minorities" organised by the Minority Groups Research Centre
- 1-2 November (Delphes)

Local Government Summit
- 21-23 November (Durban, South Africa)

Participation in the International Convention "Quale Fedrealismo?"
- 22-23 November (San Casciano dei Bani)

Seminar on the constitutional court of the Republic of Sacha
- 28-29 November (Jakutsk, Russian Federation)

Participation in the Judges' Forum of Bosnia and Herzegovina
- 11-12 December (Tuzla, Bosnia and Herzegovina)

A P P E N D I X IV - LIST OF PUBLICATIONS

Collection [1]
Science and technique of democracy

No. 1 : Meeting with the presidents of constitutional courts and other equivalent bodies
Piazzola sul Brenta, 8 October 1990 [2]

No. 2 : Models of constitutional jurisdiction
by Helmut Steinberger [3]

No. 3 : Constitution making as an instrument of democratic transition
Istanbul, 8-10 October 1992

No. 4 : Transition to a new model of economy and its constitutional reflections
Moscow, 18-19 February 1993

No. 5 : The relationship between international and domestic law
Warsaw, 19-21 May 1993

No. 6 : The relationship between international and domestic law
by Constantin Economides [3]

No. 7 : Rule of law and transition to a market economy
Sofia, 14-16 October 1993

No. 8 : Constitutional aspects of the transition to a market economy
Collected texts of the European Commission for Democracy through Law

No. 9 : The Protection of Minorities
Collected texts of the European Commission for Democracy through Law

No. 10 : The role of the constitutional court in the consolidation of the rule of law
Bucharest, 8-10 June 1994

No. 11 : The modern concept of confederation
Santorini, 22-25 September 1994

No. 12 : Emergency powers [3]
by Ergun Özbudun and Mehmet Turhan

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1. Also available in French
2. Speeches in the original language
3. Also available in Russian

No. 13 : Implementation of constitutional provisions regarding mass media in a pluralist democracy
Nicosia, 16-18 December 1994

No. 14: Constitutional justice and democracy by referendum
Strasbourg, 23-24 June 1995

No. 15 : The protection of fundamental rights by the Constitutional Court [4]
Brioni, Croatia, 23-25 September 1995

No. 16: Local self-government, territorial integrity and protection of minorities
Lausanne, 25-27 April 1996

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Bulletin on Constitutional Case-Law - 93-1,2,3
94-1,2,3
95-1,2,3
96-1,2

Special Bulletins - Volume 1[3] (1994 - Descriptions of the Courts)
Volumes 2 and 3 (Basic texts - extracts from constitutions and laws on Constitutional Courts)

3. Also available in Russian
4. An abridged version is available in Russian

[4] *This is a transitional arrangement. After five years all members of the Constitutional Court should be nationals of FBH.*

[5] *This is a transitional arrangement (see Chapter IX, Article 9 of the Constitution).*

[6] *See e.g. the Proceedings of the Seminar "The protection of fundamental rights by the Constitutional Court", Brioni, Croatia, 23-25 September 1995, Council of Europe, Science and Technique of Democracy No 15.*

[7] *See the opinion of the Venice Commission on certain aspects of the constitutional situation in Bosnia-Herzegovina, Annual Report of Activities for 1994, pp. 17-20.*

[8] *See the Ombudsmen Annual Report for 1995.*

[9] *The idea of a transitional international human rights protection mechanism is not new. It was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe. Article 5 of this Resolution provides that the arangements as to a transitional human rights control mechanism inegrated in the internal legal order of European States not yet members of the Council of Europe "shall cease once the requesting state has become a member of the Council of Europe except as otherwise agreed between the Council of Europe and the State concerned". This Resolution is expressly referred to in the Dayton Agreement, as the legal basis for the Human Rights Chamber. It may be regarded as being also at the origin of the Provisional Human Rights Court provided for in the Croatian Constitutional Law on the protection of human rights and rights of national minorities.*

[10] *This need is acknowledged in Annex 7. The Annex 7 Commission deals with real property claims in first and last instance; its decisions are final and binding.*

[11] *The experts from RS did not accept the character of B.H. as a federation but consider it a "union".*

[12] *In document CDL(96)50 the wording "exclusive competence" is used. This seems to be an erroneous translation.*

[13] *The translation of Art. 47 is not quite correct and this Article should read "are restricted" and not "shall be restricted".*

[14] *The Commission has been informed that a new text has been introduced into Parliament which should replace the text proposed by the agrarian and communist groups of Deputies. This text, which reestablishes the office of the President of the Republic, is available only in Russian and could not be taken into account in this opinion. The Commission notes that the submission of new texts shortly before the date of the referendum makes it difficult not only for the Commission but also for the people of Belarus to form an opinion on these texts.*

[15] *Cf. also Article 27 of the International Covenant on Civil and Political Rights, Articles 4.2 and 4.3 of the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities adopted by the United Nations General Assembly on 18 December 1992 and Article 5.c of the Convention against Discrimination in Education of 14 December 1960.*

[16] *Cf. Parliamentary Assembly, Bindig report on the rights of national minorities, Doc. 7442; Recommendation 1285 (1996); Order No. 513 (1996); A Verdoodt, the right to use a language of one's choice, written communication presented at the 8th Colloquy on the ECHR (September 1995); P Thornberry and M A Martin Estebanez, The Council of Europe and Minorities, publ. Council of Europe, September 1994; P Kovacs "La protection des langues des minorités ou la nouvelle approche de la protection des minorités?" in: Revue générale de droit international public, Volume 97/1993/2; P. Blair "The Protection of Regional or Minority Languages in Europe", in: Publications de l'Institut du Fédéralisme Fribourg Switzerland; EUROREGIONS, volume 5, Journal 1.*

[17] *Sub-paragraph (d) endorses an activity in favour of the free use of the minority language, both orally and in writing, both in private and in public. This sub-paragraph adopts the principle laid down in the framework Convention for the Protection of National Minorities (Articles 9, 10.1 and 10.2), which is likewise set forth in Article 7 of the proposal for a European Convention for the Protection of Minorities, drafted by the Venice Commission, and Article 2.1 of the United Nations Declaration on the Rights of Persons belonging to Minorities.*

[18] *In the same context the U.N. Human Rights Committee found that no complaint concerning self-determination can be brought under the Optional Protocol to the United Nations Covenant on Human Rights (AB and others against Italy, Decision of 2 November 1990, concerning the South Tyrol). General comment No. (23) 50, adopted by the Human Rights Committee on 26 April 1994 concerning Article 27 of the Covenant, is silent on this subject.*

[19] *Introduction to the Draft Additional Protocol to the ECHR on the Rights of Minorities, Revue universelle des droits de l'homme, 1993, pages 184 et seq.*

[20] *See Venice Commission, Conspectus of replies to the questionnaire on the rights of minorities, "The Protection of Minorities", Collected Texts of the European Commission for Democracy through Law, Council of Europe, "Science and Technique of Democracy" Series No. 9, 1994, pp. 49 et seq.*

[21] *"The Protection of Minorities, Collected Texts of the European Commission of Democracy through Law, Council of Europe, "Science and Technique of Democracy" series, No. 9, 1994, pp. 326 et seq.)*

[22] *Sections 301 et seq. of the US Immigration and Nationality Act.*

[23] *A draft Convention has been declassified by the Committee of Ministers of the Council of Europe (Doc. DIR/JUR (96) 8 of 12 July 1996). When the European Committee on Legal Co-operation has finalised the text, it will be submitted to the Committee of Ministers for adoption.*

[24] *V. Mikulka, First report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/467, 17 April 1995; Second report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/474, 16 April 1996; Report of the Working Group of State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/L.507, 23 June 1994.*

[25] *International Court of Justice, Nationality Decrees issued in Tunis and Morocco, Advisory Opinion of 7 February 1923, Series B, No.4, p.24.*

[26] *LNTS, Vol. 179, p. 89.*

[27] *Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No.4, p.94.*

[28] *Ibid.*

[29] *Nottebohm case (Second Phase), Judgment of 6 April 1955, I.C.J. Reports 1955, p.23.*

[30] *Associate member until its accession to the Council of Europe on 6 November 1996.*

[31] *Associate member until its accession to the Council of Europe on 9 November 1995.*

[32] *Associate members until its accession to the Council of Europe on 28 February 1996.*

[33] *All meetings took place in Venice unless otherwise indicated.*