Strasbourg, 23 March 1999 CDL-RA(98)001

ANNUAL REPORT OF ACTIVITIES FOR 1998

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MEMBERSHIP

At the end of 1998, the Commission totalled 37 full members, 5 associate members and 8 observers.

Members

No States acceded to the Partial Agreement during 1998.

Mr Kaarlo Tuori, Professor of Administrative law, University of Helsinki, was appointed member in respect of Finland, Mr James Hamilton, Director General; Office of the Attorney General, member in respect of Ireland, Mr Valeriu Stoica, Minister of Justice and Mr Alexandru Farcas, Counsellor, Embassy of Romania in Geneva, member and substitute member in respect of Romania, Mr Hjrtur Torfason, Judge, Supreme Court of Iceland, member in respect of Iceland and Mr Lszl Slyom, President, Constitutional Court of Hungary, member in respect of Hungary respectively replacing Mr Antti Suviranta, Mr Matthew Russell, Mr Petru Gavrilescu, Mr Magnus Hannesson and Mr Janos Zlinszky whose mandates had expired.

In addition, Mr Luan Omari, Vice President, Sciences Academy of Albania, was appointed member in respect of Albania, and Mr Hans-Heinrich Vogel, Professor of Public Law, University of Lund substitute member in respect of Sweden.

Observers

Kazakhstan obtained observer status, and appointed Mr Oljas Souleimenov, Ambassador of Kazakhstan in Rome as its observer on the Commission.

In addition, following a request from the First Vice-President of the National Assembly, Mozambique was admitted by the Committee of Ministers to co-operate with the Commission in the process of revision of the Constitution of this country.

The full list of members, associate members and observers by order of seniority is set out in Appendix I to this report.

Proposed amendments to the Statute

During 1998 the Commission considered the possibility of transformation to an Enlarged Partial Agreement. This change would allow for full membership of non-member States of the Council of Europe and, consequently, would entail a budgetary contribution from them. In the light of the fact that there was increasing interest in the work of the Commission from outside Europe,this step would allow non-European states to participate in the Commission on a more or less equal footing with European member states.

The proposed amendments to the Statute will also take into account the Report of the Wise Persons Committee.

Other proposed changes to the Statute, of a mainly formal nature, include :

- the majority required for decision-making
- co-operation with the Congress of Local and Regional Authorities of Europe
- co-operation of the Commission with other similar bodies on other continents, Latin America, Southern Africa

A decision from the Committee of Ministers is expected before summer 1999.

Sub-Commissions

No new Sub-Commissions were created during 1999.

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 1998, the Commission continued to co-operate with many countries for the consolidation of democratic institutions and the strengthening of the rule of law.

In particular, the Commission was very closely associated with the drawing up of the new Albanian Constitution, adopted by referendum on November 1998. This was achieved following a long constitutional process which was often disturbed during the last few years by the political and economic instability of the country. The Commission is convinced that the new Constitution will enable solid democratic institutions to be established and to function correctly. These institutions should be capable of managing the social and political conflict which have poisoned the countrys democratic life and facing up to the future challenges of Albania within the Council of Europe.

The Commission also continued to provide assistance to the authorities of Bosnia and Herzegovina in the effective application of the Peace agreements and with regard to the countrys constitutional regime. The Commission gave several opinions on subjects concerning, amongst others, the question of electoral law, the functioning of the judicial apparatus, the distribution of competences between the two entities of Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and the Republika Srpska), the integration of international treaties in the domestic legal order, the functioning of institutions dealing with human rights. The Commissions co-operation with Bosnia and Herzegovina should become even more intense during 1999.

The Commission as a European consultative institution in the field of constitutional engineering, gave particular attention to the Kosovo crisis and to the constitutional aspects of a possible solution. It actively followed the work of the Contact Group in autumn 1998 and, in 1999, the Peace Conferences in Rambouillet and Paris. The Commission is ready to make every possible effort to facilitate the success of the negotiations and to contribute to the establishment of a constitutional regime in Kosovo which will ensure the democratic functioning of institutions as well as the protection of human rights and the rights of minorities.

Deeply concerned by the crisis situation and the instability which exists in this region of Europe, the Commission, in co-operation with the Greek presidency of the Committee of Ministers of the Council of Europe, brought together in Strasbourg in May 1998, within the framework of a Conference on the theme Democratic Institutions and Civil Society in South-Eastern Europe a large number of principal personalities from the political, social and economic life of the region. The encouraging conclusions which the President of Albania, Mr Rexhep Meidani, gave at the end of the Conference reinforce the Commissions conviction that democratic development and an efficient protection of human and minority rights within the framework of pan-European integration are the key points for the solution of the conflicts which weaken the societies in these countries.

If crisis situations and the management of conflicts constitute a natural priority in the Commissions activities, the consolidation of democratic institutions and the rule of law in the member States of the Council of Europe and on the whole continent remains and is increasingly an operation to which the Commission attaches a great deal of importance. Bulgaria, Croatia, Estonia, Moldova, Romania, Ukraine, the former Yugoslav Republic of Macedonia as well as Armenia, Azerbaijan and Georgia all co-operated with the Commission during 1998 in this field. With the backing of other Council of Europe bodies and institutions, in particular the Parliamentary Assembly, the Commission hopes it will be able to continue the fruitful co-operation already started. Finally, the Commission continues working to spread, even beyond the continent, the principles which are at the basis of the democracies which make up the Council of Europe. In particular, its co-operation with South Africa and Mozambique fall into this category.

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

A. <u>Description of the Commissions activities</u>

1. CO-OPERATION WITH ALBANIA

A Working Group for Albania had been set up within the Commission in 1997. This group, under the auspices of the Sub-Commission on Constitutional Reform, continued its close co-operation with the Albanian authorities during 1998. In addition the Commission was represented by a liaison officer in Tirana during a great part of the year.

At the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly the Commission examined amendments to the major constitutional provisions of Albania which were in force at the time, concerning :

- the High Council of Justice
- additional rules on the rotation of judges of the Constitutional Court
- new rules on the public administration of unlawful economic activity

This question was discussed at the Commissions 34th Plenary Meeting in the presence of representatives of the Albanian Parliament. At a meeting of the Sub-Commission on Constitutional Reform held in Paris on 15 April 1998 the opinion on amendments to the law on major constitutional provisions of the Republic of Albania was adopted. The text of this opinion appears in Part B.

The Commission was also requested to participate in the preparation of the new Albanian Constitution. The Sub-Commission on Constitutional Reform commenced its examination of this text in the presence of representatives of the Constitutional Commission of Albania at the Commissions 35th Plenary Meeting. Several meetings were held throughout the year at which various versions of the draft Constitution were examined article by article. The Commission was invited to give advice on some major issues within the draft such as the choice between a unicameral or bicameral system. In addition, most of the articles of the Constitution were discussed in detail and a considerable number were amended to take account of the suggestions from the Commission.

The new Constitution as adopted by referendum is the result of close co-operation between the Venice Commission and the Albanian Constitutional Commission.

2. CO-OPERATION WITH ARMENIA

- Control of constitutionality

The Commission continued its work on this matter during 1998 and in particular held an exchange of views with the Constitutional court and the Armenian authorities in Yerevanin May 1998 on constitutional reform and the introduction of individual constitutional complaint. A Constitutional Commission has been set up in Armeniaand has already started work. In addition to appeals before the Constitutional Courtthe main areas of work of this Commission are, a reduction of the Presidents powers and the introduction of decentralisation in Armenia.

The Venice Commission expressed its readiness to assist the Armenian authorities on all these issues as well as any other issues

of constitutional reform in Armenia.

A new request to examine the amendments of the Constitution should be forthcoming during 1999.

- Electoral Law

Mr Owen had assisted the Armenian Central Electoral Commission in the preparation of the presidential elections and had also commented on the draft electoral laws of Armenia drawn up by Messrs Yegorian and Sahakian. As far as possible another draft by Mr Khatchatrian had also been taken into account. The Commission underlined that the main guarantees to be ensured in electoral legislation are an impartial and competent composition of the electoral commissions by including party representatives but also external participants (administration, judiciary), a sufficiently long registration period and transparency of the voting procedure. The Commission was informed that the presidential elections had taken place on 16 March 1998 according to the old electoral code.

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In addition, the Commission organised a Seminar on Electoral disputes before the Constitutional Court in co-operation with the Constitutional Court of Armenia in Yerevan on 15-16 October 1998.

3. CO-OPERATION WITH AZERBAIJAN

The Commission continued to follow constitutional developments in Azerbaijanduring 1998 and was informed that the rules of procedure of the Constitutional Court had been adopted.

It is proposed to hold a seminar on the constitutional status of self-governing local authorities during 1999.

4. CO-OPERATION WITH BOSNIAAND HERZEGOVINA

Throughout the whole of 1998 co-operation with Bosnia and Herzegovina was one of the Commissions priority activities. The effective implementation of civil aspects of the peace agreements, and in particular the establishment of a coherent constitutional regime and the rule of law, were the Commissions primary objective. The Commission is particularly satisified with its intense and fruitful co-operation with the Office of the High Representative, as well as with the Constitutional Court, the Human Rights Chamber of Bosnia and Herzegovina, the Office of the Ombudsperson for Human Rights and the OSCE.

At its 34th Plenary Meeting the Commission held an exchange of views with Mr Carlos Westendorp, High Representative of the International Community in Bosnia and Herzegovina.

Mr Westendorp highlighted the important role the Venice Commission had played in Bosnia and Herzegovina and stated that his office had already several times asked for opinions by the Commission. He stated that the situation in Bosnia and Herzegovina had improved significantly. The Bonn Conference had given the High Representative substantive new powers which were important in order to achieve a democratic State in Bosnia and Herzegovina. An obstacle in this process was the party structure which was mostly monolithic and monoethnic. Only in the Republika Srpska had parties also formed along ideological lines. Obstacles to further progress were the economic situation, the parties and the media. It had been necessary to take over the TV stations in the Republika Srpska in order to guarantee a free flow of information. Now the media in the Federation of Bosnia and Herzegovina might need to be reconstituted. Moreover, Mr Westendorp indicated that on certain points the Constitution of Bosnia and Herzegovina would need to be revised.

The following opinions were given by the Venice Commission at the request of the Office of the High Representative :

nion on the competence of the Federation of Bosnia and Herzegovina in Criminal law matters (CDL-INF (98) 5) adopted at the 34th Plenary Meeting (6-7 March 1998);

nion on the number of municipal courts to be established in Mostar (CDL (98) 37);

nion on inter-entity judicial co-operation in Bosnia and Herzegovina (CDL-INF (98) 11) adopted at the 35th Plenary meeting (12-13 June 1998);

nion on the competence of Bosnia and Herzegovina in electoral matters (CDL-INF (98) 16) adopted at the 36th Plenary Meeting (16-17 October 1998);

nion on the need for a Judicial Institution at the level of the State in Bosnia and Herzegovina (CDL-INF (98) 17) adopted at the 36th Plenary meeting (16-17 October 1998);

nion on the constitutionality of international agreements concluded by Bosnia and Herzegovina and/or the entities (CDL-INF (98) 20) adopted at the 37th Plenary Meeting (11-12 December 1998).

In addition, on a proposal from Mr Gewirtz, Observer in respect of the United States, and following the previous opinion on the constitutional situation in Bosnia and Herzegovina concerning the human rights protection mechanisms, the Commission gave an :

nion on the admissibility of appeals against decisions of the Human Rights Chamber of Bosnia and Herzegovina (CDL-INF (98) 18) adopted at the 36th Plenary Meeting (16-17 October 1998).

The text of these opinions can be found in Part B.

Moreover, during 1998 the Commission continued its work on the establishment of a coherent Ombmudsman system in Bosnia and Herzegovina.

At its 34th Plenary Meeting the Commission examined a preliminary draft law on the Ombudsman of the Republika Srpska (CDL (98) 12). Work on the draft law had continued during the first months of 1998 in spite of the institutional crisis in the Republika Srpska. Its main principles were : Firstly, wide competencies for the Ombudsman including the protection of human rights. Secondly, the Ombudsman's independence should be effectively guaranteed. To this end, the preliminary draft law provides for a series of immunities and incompatibilities of the Office of the Ombudsman. A third requirement was the possibility for the Ombudsman to entertain relations with the judiciary. Finally, a composition analogous to the one of the Ombudsmen of the

Federation would be desirable, i.e. an ombudsman from each of the three ethnic communities of Bosnia and Herzegovina.

On 23 October 1998, a delegation of the Working Group on the Ombudsman Institutions in Bosnia and Herzegovina, set up by the Commission and the Council of Europe's Directorate of Human Rights, contacted the new President of the Republika Srpska, N. Poplasen, in Banja Luka with a view to promoting the draft Law for an Ombudsman in this entity of Bosnia and Herzegovina. The meeting showed that an agreement existed in principle on the usefulness and importance of instituting an Ombudsman in a situation of social conflict and on the organisation and functioning of this institution in the constitutional system of the entity. However, there was disagreement as to its composition: the Serb authorities seemed fundamentally opposed to the working group's proposal that there should be three ombudsmen (ie a multi-ethnic composition), which had the backing of the entire international community, and even challenged the very constitutionality of this proposal. It should be noted that the Peace Implementation Council of Madrid (December 1998) expressly supported the draft drawn up by the Working Group.

On 3-4 December 1998, the Working Group had also held a meeting in Sarajevo with the Ombudsmen of the Federation of Bosnia and Herzegovina to discuss the draft organic law concerning this institution. Representatives of the Office of the High Representative and the OSCE had taken part in the meeting, at which the main points of the organic law had been approved. However, no decision had been taken on the proposal to appoint the ombudsmen during the transitional period, their immunity and their removal from office; a meeting would take place in January or early February 1999 to settle these questions.

On the same dates, the Working Group met Ms Haller, Ombudsperson of Bosnia and Herzegovina, and the staff of the Ombudsperson's office, in Sarajevo. This meeting provided the opportunity to clarify the concept of a possible Organic Law for the Ombudsperson of the Federation of Bosnia and Herzegovina (in particular the ombudsperson's powers and responsibilities and his/her relations with the other institutions responsible for mediation in the entities). Draft legislation was currently being prepared and might be presented to the Commission for approval in 1999.

Moreover, at its 35th Plenary Meeting, the Commission examined the structural and operational relations in the Ombudsman Institutions in Bosnia and Herzegovina and adopted its draft report on this question.

The text of this report can be found in Part B.

In addition the Commission organised the following events in Bosnia and Herzegovina during 1998 :

nd Table on the functioning of the system of constitutional control in co-operation with the Constitutional Court of Bosnia and Herzegovina, the Office of the High Representative, the American Bar Association and the Phare programme of the European Union 4-5 April (Sarajevo)

nd Table on Constitutional Justice in co-operation with the American Bar Association and the Phare programme of the European Union 23-24 October (Banja Luka)

Work on four further requests for opinion from the Office of the High Representative is on-going and will continue during 1999 :

nion on the modalities for election of the Presidency of Bosnia and Herzegovina and the President and Vice-President of the Federation;

- Opinion on the restructuring of Human Rights protection mechanisms in Bosnia and Herzegovina, at the end of the transitory period forseen in the Dayton Agreements;

nion on the competence of Bosnia and Herzegovina in the conclusion and implementation of international agreements, according to the Constitution of Bosnia and Herzegovina;

nion on the scope of the responsibilities of Bosnia and Herzegovina in the field of immigration and asylum with particular regard to possible involvement of the Entities;

5. CO-OPERATION WITH BULGARIA

The Commission co-operated with Bulgaria on several issues during 1998.

At the 36th Plenary Meeting the Commission was informed of the request from the Parliamentary Assembly to give an opinion on the draft Bulgarian Law amending and supplementing the Law on the Judiciary and on the draft Bulgarian Civil Service Act. Rapporteurs were appointed on these two laws.

- Bulgarian law amending and supplementing the Judicial System Act

During its 37th Plenary Meeting the Commission held an exchange of views with Mr Gotsev, Minister of Justice of Bulgaria, and Mr Toshev, chairman of the Bulgarian delegation to the Parliamentary Assembly, on the Bulgarian law amending and supplementing the Judicial System Act.

Mr Gotzev underlined the difficulties in the transition from totalitarian regime to democracy. The most important reforms which had already taken place included the introduction of a further tier of jurisdiction (by the setting up of courts of appeal) and some increase in the powers assigned to the Minister of Justice. The Minister could, for example, ask for disciplinary proceedings to be instituted. The powers of the Prokuratura had been amended, in that public prosecutors could only prosecute cases which had been referred to the court where they worked. On the other hand, only the Principal State Prosecutor still had authority to withdraw immunity from judges and other members of the judiciary, and only for crimes liable to more than five years imprisonment. The disciplinary sanctions applicable to judges had been changed. Following the creation of the appeal courts, the judges at these courts had elected their representatives on the Supreme Judicial Council. Parliament had also elected its eleven representatives to the Supreme Judicial Council by simple majority. Eleven of the members of the Supreme Judicial Council - who were elected for a five-year term - were elected by Parliament from among its own ranks, six by the judges, three by the Principal State Prosecutors Department and two by the special investigation services. The Prokuratura still had to be reformed and the criminal code was being revised.

The Commission was informed that these amendments had been submitted to the Bulgarian Constitutional Court and that the Court will hand down its decision in January 1999. The Commission decided to continue the examination of the above amendments after having taken note of the decision of the Constitutional Court. The opinion on the Bulgarian legislation amending and supplementing the Judicial System Act would be presented to the Parliamentary Assembly in March 1999.

- Draft Civil Service Act

During this same meeting the Commission examined the draft Civil Service Act. The Commission was informed that a new draft Civil Service Act, introducing the office of ombudsman, would be forwarded to the Commission for consideration.

Work on this issue is continuing in 1999.

6. CO-OPERATION WITH CROATIA

At its 34th Plenary Meeting the Commission adopted its second progress report on co-operation with Croatia. There had been positive developments in this co-operation: the Council of National Minorities had been set up and several Conventions of the Council of Europe in the field of Human rights and the protection of minorities had been ratified by Croatia. Other elements were however less satisfactory: the Council of National Minorities had not been established by law, the process of amending the partially suspended Constitutional Law on the Protection of Minorities of 1991 had been halted since May 1997 and the system of international advisers for the Constitutional Court had never been used by the Court. Since then, however, co-operation with the Constitutional Court has developed positively.

- Co-operation with the Constitutional Court

The Constitutional Court had invited the advisers to participate in its work in five cases. These concern legislation on property, access to public functions of members of minority groups and curricula in Italian language schools. Preparatory meetings have been held between the advisers and the Court in all these cases (on 15-16 June, 10 July and on 15-16 December) and the advisers preliminary opinions have been sent to the Court. It is expected that the hearings with participation of the Council of Europe advisers and the final deliberations in these cases will be held in 1999.

During its 35th, 36th and 37th Plenary Meetings the Commission expressed its satisfaction regarding co-operation with the Constitutional Court which is an important contribution towards the honouring of Croatias commitments as a member State of the Council of Europe.

- Revision of the Constitutional law on rights of national minorities

Co-operation on the revision of the Constitutional law on the rights of national minorities was on the agenda of all the Commissions meetings during 1998.

At its 37th Plenary Meeting, at the request of the Rapporteurs of the Parliamentary Assemblys Committee on the honouring of obligations and commitments by member States, the Commission considered progress in its co-operation with Croatia in this field. Ms Busic, Member of the Croatian Sabor and Deputy Head of the Croatian Delegation to the Parliamentary Assembly, Mr Jansson, Representative of the Parliamentary Assembly, Ambassador Guldimann, Head of the OSCE Mission in Croatia, Mr Packer, Representative of the OSCE High Commissioner on Minorities and Ms Zoricic Tabakovic and Mr Vojta, respectively President and Vice President of the Croatian Council of National Minorities, took part in the discussions.

It was recalled on this occasion that, within the framework of the procedure for Croatias accession to the Council of Europe, the Venice Commission recommended, inter alia, that the suspended provisions of the 1991 Constitutional Law on Human Rights and Rights of Minorities 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). On its accession to the Council of Europe, Croatia undertook to implement these recommendations (cf. Parliamentary Assemblys Opinion No. 195 (1996) para. 9.vii on Croatia's request for membership of the Council of Europe). Furthermore, under Committee of Ministers Resolution (96) 31, such membership is subject to the requirement to co-operate with the Council of Europe, inter alia, in applying the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities. In October 1996, the Government of the Republic of Croatia established a commission entrusted with the task of examining the Constitutional Law and making proposals for its revision. The Venice Commission appointed Rapporteurs (Messrs Batliner, Helgesen, Maas Geesteranus, Matscher, zbudun and Ms Suchocka) to participate in the work of this commission. The members of the Venice Commission met the Croatian Commission for the Revision of the Constitutional Law in Zagreb in March and May 1997. Following these meetings, in June 1997 the Venice Commission forwarded a memorandum to the Croatian authorities containing the orientations and conclusions concerning the revision of the Constitutional Law. In accordance with the Venice Commissions proposal, a consultative body, the Council of National Minorities, was set up in which representatives of minorities sit and discuss questions concerning minority protection policy with Government representatives and officials.

The Venice Commission Rapporteurs noted however that, regrettably, no significant progress has been made with regard to the revision of the law. They also noted that the Croatian authorities had not yet indicated any time-table for the revision.

Participants in the meeting agreed that provisions concerning electoral rights of members of minorities and representation of minorities in the Croatian Parliament should be dealt with as a matter of urgency, having regard to the forthcoming legislative elections. The present electoral practice could raise doubts as to its compatibility with the Framework Convention for the protection of national minorities and it might be appropriate to revise the relevant provisions in order to safeguard the interests of minorities and voter anonymity. Proposals made by the Council of national minorities should be carefully considered, together with comments by other governmental and non-governmental institutions.

It was further felt that action should be taken without any further delay to enshrine specific minority rights at a constitutional level. This can be done either by the revision of the suspended provisions or by drafting an entirely new constitutional law. The proposals included in the Venice Commission Memorandum are still very relevant and should be taken into consideration. Participants invited the Croatian legislative authorities to take action in this respect and to communicate to the Parliamentary Assembly of the Council of Europe and the Venice Commission the time-table for the revision. It was also stressed that the forthcoming elections should not be regarded as a reason for further delaying the drafting of the revised (or the new) Constitutional Law.

The Commission considered that the adoption of legal measures regarding the status of minorities in Croatiawas now urgent, in particular as regards electoral rights and procedures for the election and effective participation of members of minorities in public life. It invited the Croatian authorities to start, without any further delay, the drafting of a revised Constitutional Law on the Rights of National Minorities and to inform the Parliamentary Assembly and the VeniceCommission of the time-table scheduled for the revision.

Active co-operation with Croatia in this field is expected in 1999.

7. CO-OPERATION WITH ESTONIA

During 1998 the Commission continued its examination of Estonian constitutional reform concerning the constitutional issues involved in Estonias possible accession to the European Union and the question of the reform of the system of constitutional control in Estonia. Both these opinions had been requested by the Minister of Justice during 1997.

- Accession to the European Union

At the 34th Plenary Meeting, the Venice Commission Rapporteurs underlined the profound changes due to accession to the European Union which are accompanied by a massive transfer of sovereignty to the EU. They highlighted the principles of direct effect and primacy of Community law over national law, including the Constitution. By comparing the Estonian Constitution to those of members of the European Union they came to the conclusion that a general empowerment clause was advisable. This would both allow for the participation of Parliament in EU affairs, which, being foreign affairs otherwise would fall exclusively within the competence of the executive, and for guaranteeing the primacy of European law in the Estonian system of quasi diffuse constitutional control.

In subsequent meetings, the Commission noted with satisfaction that its suggestions on this issue had been taken into account by the Estonian Governmental Commission and there had been a proposal in the intermediary report of the Estonian Governmental Commission to reform the Estonian Constitution by creating an empowerment clause making possible the transfer of competences to the European Union. Some other issues, however, remained unresolved

- System of Constitutional Reform

At its 34th Plenary Meeting the Commission was informed that the governmental commission on the revision of the Constitution had elaborated proposals for the creation of a Constitutional Court and a reform of the Supreme Court respectively. The Commission favoured this development.

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The consolidated opinions on these two questions drawn up on the basis of the rapporteurs comments were adopted by the Commission at its 35th Plenary Meeting. The text of these opinions appears in Part B.

8. CO-OPERATION WITH GEORGIA

The Commission followed closely constitutional developments in Georgia throughout 1998.

Mr zbudun reported to the Commission on the meeting held in Tbilissi on 7-8 July which dealt with the possible revision of the Constitution of Georgia which would introduce a rather parliamentarian style of government as opposed to the current presidential system. However, developments in this direction were not regarded as imminent.

Moreover, the Commission was informed of the activities of the Constitutional Court. There had been considerable opposition to a decision taken by the Constitutional Court of Georgia on Item 1, Article 86 of the Georgian Organic Law on courts of ordinary jurisdiction which precluded the mass removal from office of ordinary judges. The Commission declared its readiness to assist the Georgian authorities and the Constitutional Court in establishing a well functioning system of constitutional control.

9. CO-OPERATION WITH THE REPUBLIC OF KOREA

Mr Kim, Senior Prosecutor, Ministry of Justice of Korea, participated in the Commissions 35th Plenary Meeting and presented a report on "The Legal Analysis of the Special Relationship between South and North Korea and the accomplishment of the rule of law in the Korean peninsula".

The Commission noted that the situation in Korea raised a number of questions in which the Commission is keenly interested, such as the legal engineering by which states co-operate with each other and form special relationships and the solutions which can be found to bring states gradually closer together while at the same time guaranteeing rights for individual citizens.

The Commission declared its willingness to remain in contact with the Korean authorities.

10. CO-OPERATION WITH KYRGYZSTAN

During 1998 the Commission continued its co-operation with Kyrgyzstan and followed the process of constitutional reform in this country.

At its 36th Plenary Meeting the Commission was informed that a referendum on a modification of the Constitution had been held in Kyrgyzstan. Major points of the constitutional reform, which had been instigated by the President, were:

- the introduction of private ownership of land (this point had encountered resistance from Parliament);

odification of the structure of the two chambers of Parliament and new electoral districts;

obligation for candidates in elections to have lived at least five years in the Republic;

introduction of a functional immunity for parliamentarians as opposed to the existing system of full immunity;

need for an agreement by the government, before Parliament can introduce new taxes;

- the prohibition of any laws which will restrict the freedom of the press.

Moreover, the following workshops and seminars were held in Kyrgyzstan during 1998:

kshop on Judicial independence and incompatibilities of the function of judge with other activities (Bishkek, 20-21 April 1998);

- UNESCO seminar on Democratic Governance in a multi-cultural and multi-ethnic society (Bishkek, 7-11 September 1998)

11. CO-OPERATION WITH LATVIA

At its 37th Plenary Meeting the Commission was informed that the chapter on human rights and freedoms of the Latvian Constitution had been adopted. This text was intended to supplement the 1922 Constitution, which did not contain any human rights provisions, even though a Constitutional law on human and citizens rights and obligations had been passed in 1991. Almost all the rights safeguarded by this text were secured to foreign nationals as well as Latvian citizens, with the exception of political rights, the right of access to the civil service and the right not to be extradited.

There were plans to introduce a right of individual petition before the Latvian Constitutional Court. It was envisaged that the Commission and the Sub-Commission on Constitutional Justice would be asked for their opinion on this matter.

12. CO-OPERATION WITH MOLDOVA

By a letter dated 29 January 1998 and following discussions between representatives of the central authorities of Moldovaand the Council of Europe, the President of the Parliament of Gagauzia, Mr Pashali, submitted the draft Legal Code of Gagauzia to the Council of Europe for opinion. Mr Malinverni was appointed Rapporteur together with Mr De Bruycker (Congress of Local and

Regional Authorities of Europe (CLRAE)).

The rapporteurs visited Chisinau on 16 March 1998 to meet representatives of the Moldovan authorities and the Gagauz community as well as the group of experts involved in drafting the Legal Code. The discussions focused on the content of the Code and the holding of a referendum on the basic principles of the Code, on the same day as the general elections.

A further meeting was held in Strasbourg on 9 April 1998 at which the rapporteurs adopted an opinion which was forwarded to the Moldovan authorities as requested.

At the Commissions 35th Plenary Meeting, in the presence of Ms Gorea Costin, Permanent Representative of Moldova to the Council of Europe and Mr Pashali, Chairman of the Peoples Assembly of Gagaouzia, the rapporteurs summarised the main comments made in the opinion. These included:

- hierarchy of norms to be applied in Gagaouzia: the Statute did not make clear the position of the Moldovan legislation with respect to the Statute;

- distribution of powers was not clear from the text and some articles attributed powers to the bodies of Gagaouzia which belonged to the central government of Moldova, notably giving them the power to organise local referenda on constitutional issues;

c) legislative problems relating to the fact that other texts had been copied by the Statute;

- chapter on human rights had been copied from the Constitution of Moldova and therefore did not introduce anything new in the legal order of the region;

ne provisions of the European Charter of Local Self-Government had not been respected;

f) the electoral system was not sufficiently defined;

- text did not clearly state that Gagaouze courts could not be responsible for the control of constitutionality.

The rapporteurs added a certain number of issues arising from the text approved by the Popular Assembly. They noted that provisions which state that the Gagaouzian court rather than Moldovan authorities should decide on whether local entities join Gagaouzia are contrary to the Moldovan Constitution. There is also a question relating to whether the rights in the Gagaouzian Statute apply to everyone or only to citizens.

Ms Gorea Costin expressed the gratitude of the Moldovan authorities to the rapporteurs for their work and pointed out that the concern over certain provisions of the Statute outlined by the opinion was shared by the governmental experts dealing with the issue. She suggested that the co-operation over this issue between Moldovan authorities, representatives of Gagaouzia, the Venice Commission and the Congress of Local and Regional Authorities should be pursued.

Mr Pashali thanked the Commission for its assistance. He recalled that the decision to create Gagaouzian autonomy was taken by the Moldovan Parliament in 1994 and outlined the progress which had been made since then. He informed the Commission that the text had been approved by the People's Assembly of Gagaouzia on 14 May 1998. There was however still a need for further co-operation.

At the 36th Plenary Meeting, the Commission examined the Statute of Gagauzia as adopted. The Statute did not correspond to the comments made by the Commission on the following points and seemed to be in conflict with the Constitution of Moldova :

Gagauz autonomy

Article 2 of the Code, on the hierarchy of legislation, still appears to omit Moldovan laws and talks only of the direct and exclusive action of the Legal Code on Gagauz territory. According to Article 2, paragraph 3 the hierarchy is as follows: (i) the Moldovan Constitution; (ii) the Legal Code of Gagauzia; (iii) Gagauz laws.

However, certain other articles include the law on the special legal status of Gagauzia (Articles 70, 98 and 100) and Moldovan laws (Articles 6, 8, 83 and 89) in this hierarchy just below the Moldovan Constitution, which may give rise to confusion.

There has been no change to the wording of Article 8 (numbered Article 7 in the version examined by the experts) on the incorporation of areas with a majority Gagauz population into Gagauzia, in spite of the fact that the Working Group considered that it failed to comply with the provisions of the Organic Law on the status of Gagauzia (particularly Article 5 thereof). According to the Organic Law on the status of Gagauzia the organisation of a referendum is the responsibility of the Moldovan authorities. Therefore, the Court of Gagauzia is not entitled to confirm the results as stated in Article 8, paragraph 7 of the Legal Code.

Human rights

The text of the Legal Code adopted by the Peoples Assembly of Gagauzia has retained the chapter on human rights, thereby reiterating the guarantees provided for in the Constitution of the Republic of Moldova.

The original wording of Article 19, stipulating that no-one shall be arbitrarily deprived of life, has been retained, although the death penalty has been abolished in Moldova; this statement may be regarded as contrary to Moldovan legislation because it could be construed that it is possible to inflict the death penalty in a non-arbitrary manner.

It is not stipulated in Articles 25 paragraph 2, 26, 27, 37 paragraph 1 and 40 whether the fundamental rights guaranteed therein apply to everyone on Gagauz territory (including foreigners) or just to Gagauz citizens.

Separation of powers

Though some of the rapporteurs recommendations on the powers of the Peoples Assembly have been taken into account in the new version of the Legal Code, Article 51 paragraph 7 still states that the Assembly is entitled to decide on the procedure for the composition and functioning of the local authorities. This provision may be regarded as contrary to the European Charter of Local Self-Government which grants local authorities a considerable degree of independence in the area of management. This is not taken into account in the latest version of the Legal Code.

Electoral system

There are no articles on the electoral system in the Legal Code.

Conclusions

The Commission concluded that quite a number of positive changes have been made in the Legal Code adopted by the Peoples Assembly of Gagauzia compared to the text originally submitted to the Council of Europe experts. However, it is to be regretted that some of the recommendations contained in the opinion on the Legal Code of Gagauzia have not been taken into account.

However, the Commission understood that a political compromise had been reached between the Gagauz and Moldavian authorities not to touch on the subject for the time being. Work is continuing in 1999.

13. CO-OPERATION WITH MOZAMBIQUE

By letter dated 29 June 1998 from Mr Iss, First Vice-President of the National Assembly of Mozambique, the Commission received a request for assistance in the process of the revision of the Constitution of Mozambique. The Committee of Ministers of the Council had authorised co-operation between the Commission and Mozambique. This work would be financed by an Italian contribution managed by the United Nations Office for Project Services (UNOPS) in Maputo.

At its 36th Plenary Meeting the Commission held an exchange of views with Mr Iss. He informed the Commission that since 1975 Mozambiquehad had a Marxist constitution. In 1990, a new pluralistic Constitution based on a market economy had been drawn up with the help of, inter alia, the Portuguese member of the Commission. Now, a new draft constitution had been drawn up. The main points of the reform were citizenship law, better developed fundamental rights, a prime minister who would head government as opposed to the President in the current system, a State Council which would advise the President following the Portuguese model, the creation of the institutions of an ombudsman and a constitutional court. Most points were already agreed upon. Transitional provisions had yet to be drafted. Public hearings were about to start and would last until the end of December 1998.

The Commission declared its readiness to assist Mozambique in its process of constitutional reform.

14. CO-OPERATION WITH ROMANIA

The Commissions fruitful co-operation with Romania continued during 1998 in particular concerning the draft laws on the organisation of Government and on the functioning of Ministries.

At the 34th Plenary Meeting the rapporteurs presented their opinions on the above draft laws in the presence of Mr Nastase, Deputy Speaker of the Romanian Parliament, representing the Parliamentary Assembly. The latter informed the Commission on the recent normative activity of the Parliament.

The Rapporteurs comments on these laws were forwarded to the Romanian authorities.

During its 35th Plenary Meeting the Commission held an exchange of views with Mr Stoica, Minister of Justice of Romania. Mr Stoica thanked the Commission for its role in developing democracy in central and eastern Europe and in particular in Romania. He referred, in particular, to the above-mentioned examination by the Commission of the draft laws on the organisation of government and the functioning of ministries.

Mr Stoica indicated that the crucial issue for the current government in Romania was the deepening of institutional reform, including central government. Its goals are the modernisation of the state and decentralisation by developing local government. Reform of key institutions - including the parliament, the judiciary, the electoral system and local government - is underway. He mentioned that the parliament had now regained much of its importance vis--vis the government and that draft laws had been prepared to change the electoral system from political parties list to individual candidates competing for places. He also referred to reform of public administration, which will be forced to devolve some of its tasks to a local level, and the statute of public servants which is being rewritten.

With regard to the judiciary, he noted that efforts had been made to help the judiciary handle the high number of cases. In the past, the major threats to the judiciary included low salaries, complicated judicial procedures, lack of trust from ordinary citizens, poor working conditions and lack of human resources. Although problems remained, he noted that substantial progress had been made. Major changes to the law on judicial organisation, although not welcomed by all prosecutors, had highlighted the distinction between them and judges. He mentioned that the new National Institute for Magistrates had been reformed in order to respond to the need for new entrants to have both practical skills as well as theoretical knowledge. Salaries for judges had doubled. He also noted that reflection groups had been set up to consider improvements to the civil and criminal procedure and the criminal law. The aim of all these measures was to strengthen judicial independence and bring justice closer to the citizens of Romania.

Mr Stoica agreed that the role and place of prosecutors was a crucial issue for democracies in transition and had caused much debate in Romania. He noted that it was particularly pertinent in post-Communist countries, where prosecutors had previously had a continually increasing power which they tried to keep after the changes. When the constitution in Romania had been drafted, the prosecutors had formed a very efficient lobby and it was not possible to have a clear constitutional rule on the relationship between judges and prosecutors. It had been possible to establish that all prosecutors were under the authority of the Minister of Justice but the meaning of this concept was not easy to determine. In Romania, a specific law had been adopted in which the principle of the separation of powers had been clearly expressed. It stated that the judicial power was independent and equal to the other powers and that the judicial power included prosecutors. After the elections in 1996, Mr Stoica had proposed that the law be changed to have a clear distinction between judges and prosecutors. After much debate, the law was changed and it was made clear that the judicial power included judges but not prosecutors. The meaning of "under the authority of the Minister of Justice" was also clarified. In Mr Stoica's opinion, it was not so important to say whether prosecutors belong to the executive power or not but rather to distinguish between judges and prosecutors. It was also not appropriate to speak of the executive subordination of prosecutors: while the executive power could communicate general criminal policy to prosecutors it should not interfere in prosecutors' work.

The Commission took note of the information and developments which are of particular importance for the reforms which are taking place in several countries in transition.

15. CO-OPERATION WITH SOUTH AFRICA

Chairs in Intergovernmental Relations and Co-operative Governance

1998 was the year in which a second programme between the Commission and South Africa came into force, once again funded by the Swiss Federal Department of Foreign Affairs. Two chairs in intergovernmental relations and co-operative government were established in early 1998 at the University of Natal and the University of Fort Hare. Co-operative government which signifies co-operation between local, provincial and central levels of government, is a new concept in the South African Constitution of 1996 (see Chapter 3). According to the Presidential Review Commission, which undertook a major review of government in South Africa in 1998, the structures of intergovernmental relations are identified as being particularly weak. The two chairs aim to establish a

permanent research capacity on co-operative government, to promote the understanding of co-operative government and the functioning of the South African system of government among prospective public officials, to support the Department of Constitutional Development in developing the concepts of co-operative government and to develop a theoretical basis for developing intergovernmental relations in South Africa. Both chairs became fully operational in 1998. Details on the functioning of the two chairs can be found in the Annual Reports for 1998 (CDL-INF (99) 2 - University of Natal, and CDL-INF(99)3 - University of Fort Hare).

Democracy, from the law book to real life

The Commission continued to implement activities within the framework of the programme Democracy, from the law book to real life .

One of the highlights in 1998 was the organisation of two major conferences with the South African Constitutional Court. The first dealt with *Equality Jurisprudence* . A large delegation from the Commission attended the conference, led by Mr La Pergola and composed of constitutional court presidents and judges and constitutional experts from Austria, Belgium, Canada, Estonia, Hungary, Italy, Latvia, Malta, Spain and Switzerland. The second conference focused on *National and international human rights law, with particular reference to customary law and freedom of expression* . This conference was enlarged to include judges from a total of nine countries in the Southern African region. One of the aims of the conference was to examine the possibility of developing closer links between courts in Southern Africa, using the Commission as a model. The conference provided an opportunity for the Commission to develop its vision of regional co-operation, an initiative which is strongly supported by Mr Valli Moosa, Minister for Constitutional Development, and which the Commission hopes to pursue with the Department for Constitutional Development during 1999 with a conference for the Southern African region on African renaissance .

Other activities which were carried out included :

e workshops in South Africa on local government training, local government elections and the rationalisation of laws;

ision of a European expert to spend four weeks in South Africa delivering training on local government finance around the country;

visits for South African experts to Europe on the process of establishing a Commission for the Promotion and Protection of Cultural, Linguistic and Religious Communities in South Africa and on civic education;

visits by European experts to the National School of Government, Administration and Development at UNISA to deliver lectures on intergovernmental relations;

scholarships for young lecturers from the National School of Government, Administration and Development at UNISA to carry out research in Europe;

- participation of South African experts in two seminars organised by the Commission : New trends in electoral law in a pan-European context in Sarajevo and The principle of respect for human dignity in European case-law in Montpellier.

A more complete description of activities can be found in the Interim Report of the programme Democracy, from the law book to real life for 1998 (CDL-INF (99) 1).

Although the programme was originally to finish at the end of 1998, it was decided to extend it until the end of 1999.

16. CO-OPERATION WITH THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Co-operation with the former Yugoslav Republic of Macedonia continued during 1998 in particular concerning the following questions :

nion on the laws on referendum and citizen initiative

During 1997 the Commission had been requested by the authorities of the former Yugoslav Republic of Macedonia to examine the draft law on referendum and citizen initiative of "the former Yugoslav Republic of Macedonia". Rapporteurs were appointed.

At its 35th Plenary Meeting the Commission examined the rapporteurs comments on the law and held an exchange of views.

The representative of the former Yugoslav Republic of Macedonia informed the Commission that the Parliament had already made several amendments to the draft examined by the Commission. The law had been adopted on 9 May 1998. Some of the proposals made by the Rapporteurs had been followed, in particular the proposal to allow the constitutional court to decide on the legality of the decision to hold a referendum.

A consolidated opinion was drawn up based on the Rapporteurs comments. The text of this opinion appears in Part B.

:ussion on the draft law on the election of members for the Parliament

At its 35th Plenary Meeting, the Commission discussed the draft law on the election of members to the Parliament in the presence of Mr Owen, Rapporteur. Mr Owen noted that there are certain practical problems in the draft law which may be difficult to resolve. He however considered that a balance between democracy and efficiency had been found in the draft law in the context of the electoral commission, which was divided between judges appointed by assemblies and party delegates (5 from the party in power and 5 from the opposition). In respect of the electoral system, Mr Owen noted that the current system is a majority and uninominal system based on two rounds. The draft law will allow for part of the seats to be allocated on the basis of proportional representation, with a threshold of 5%. Under the majority system, a successful candidate needs to obtain one third of voters registered in the first round. Mr Owen considered this participation threshold to be too low if the holding of a second round is to be avoided. Although in new democracies there is a tendency for the level of voter participation to decrease at first when the obligation to vote is taken away, it nonetheless rises subsequently. For this reason, Mr Owen considered it dangerous to fix thresholds at all.

17. CO-OPERATION WITH UKRAINE

Following a request from the Ministry of Justice, the Commission examined, at its 35th Plenary Meeting, a report drawn up by the Ukrainian authorities on the reform of the executive branch in Ukraine. The Commissions comments were forwarded to the competent Ukrainian authorities.

In addition the following seminars were organised in Ukraine during 1998 :

inar on The budget of the Constitutional Court : control and management - 19-20 January (Kiev)

kshop on the principles of constitutional control : techniques of constitutional and statutory interpretation in co-operation with USAID - 5-6 June (Kiev)

inar on the role of the Constitutional court in the implementation of constitutional law in co-operation with USAID - 7-8 October (Lviv)

18. SITUATION IN KOSOVO

The Venice Commission was contacted, first by the British and then by the Austrian Presidency of the European Union, with a view to a possible contribution to the solution of the Kosovo crisis.

The Commission set up a Working Group on Kosovo, chaired by Mr Scholsem (Belgium) and including the participation of a representative of the Congress of Local and Regional Authorities of Europe (CLRAE). Following meetings in Rome on 16 July 1998 and, at the invitation of the Austrian Presidency of the European Union, in Vienna on 21 August 1998, the working group approved a *Draft Outline of main elements for an agreement on Kosovo*. This text tried to outline a possible future status of Kosovo, taking into account both the realities on the ground, the constitutional developments on the territory of the former Socialist Federal Republic of Yugoslavia in particular as from 1974, applicable international law and relevant precedents from other countries. The main features for the proposed agreement between the Federal Republic of Yugoslavia, the Republic of Serbia and Kosovo may be summarised as follows:

- Kosovo would remain part of the Federal Republic of Yugoslavia;

Republic of Yugoslavia would exercise on the territory of Kosovo only such responsibilities as are defined by the agreement;

- The Republic of Serbia would no longer exercise any powers on the territory of Kosovo, responsibilities exercised elsewhere within the Federal Republic of Yugoslavia by the Republics would be exercised by Kosovo;

ovo would however not obtain the status of a third Republic of Yugoslavia;

- Kosovo would be represented within the Chamber of Citizens but not within the Chamber of the Republics of the Federal Republic of Yugoslavia, Kosovo would not be represented within the organs of the Republic of Serbia;

ovo would have its own constitution;

material provisions of the European Convention of Human Rights would be directly applicable within Kosovo;

rights of members of national minorities would enjoy particular protection within Kosovo, including the application of Council of Europe standards and specific additional rules;

Agreement would prevail over any inconsistent provision of the constitutions or laws of the Parties;

- A special Court with international participation would be set up to ensure that the Parties respect the provisions of the agreement.

The text approved by the working group was made available to the member States of the Council of Europe and representatives of the international community dealing with the Kosovo issue. The committee of Ministers took note of the text and encouraged the Commission and the CLRAE to pursue with their efforts.

Following the approval of the draft agreement prepared by Ambassador Hill as the basis for further negotiations, the working group was invited on several occasions to comment on various versions of the draft or certain aspects of it. A considerable number of these comments were taken into account by the negotiators, although the fundamental structure of the paper remained unchanged. The chairman of the Working Group took part in two sessions of the contact group at expert level on the Kosovo issue as part of the delegation of the EU Presidency.

B. Opinions of the Commission

i. Opinion on recent amendments to the law on Major constitutional provisions of the Republic of Albania, adopted by the Sub-Commission on Constitutional Reform on 15 April 1998

1. By letter dated 4 December 1997, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Birger Hagrd, asked the European Commission for Democracy through Law to give an opinion on recent amendments to the major constitutional provisions of Albania, concerning:

High Council of Justice (Article 15 of Chapter V of the Law on the Major Constitutional Provisions);

tional rules on the rotation of the judges of the Constitutional Court (Articles 18 and 18/1 of Chapter V of the Law on the Major Constitutional Provisions);

rules on the public administration of unlawful economic activity (Article 10 of Chapter I of the Law on the Major Constitutional Provisions).

2. The Minister of State for Legislative Reform and Parliamentary Relations of the Republic of Albania, Mr Arben Imami, addressed a further request to the Commission to examine these three issues.

3. The Commission held a preliminary discussion at the meeting of the Sub-Commission on Constitutional Reform on 5 March

1998 and at its Plenary Meeting on 6 to 7 March 1998, on the basis of written contributions by Mr Bartole (Italy), Mr Holovaty (Ukraine), Mr Lopez Guerra (Spain) and Mr Said Pullicino (Malta).

The present text was approved at the meeting of the Sub-commission on Constitutional Reform on 15 April 1998 in Paris with Mr Triantafyllides (Cyprus) in the chair.

TICLE 15 OF CHAPTER V ON THE HIGH COUNCIL OF JUSTICE

ıe new law

4. Article 15 of Chapter V of the Law on the Major Constitutional Provisions was amended on 27 August 1997.[1] The additions made are shown in italics in the following amended version of Article 15:

High Council of Justice is headed by the President of the Republic and is composed of the Chief Justice of the Court of Cassation, the Minister of Justice, the General Prosecutor, and nine lawyers distinguished for their abilities. They are elected once in five years as provided by Law, enjoying no right for immediate re-election, as follows:

ıbers are from the ranks of the Judiciary;

ıers are from the ranks of the prosecutors;

ɔers are elected by the Parliament out of whom two are from the ranks of lawyers, one from the professors of the Law Faculty and one from the ranks of the Judiciary.

ligh Council of Justice is the only authority which decides upon the nominating, transferring and disciplinary responsibilities regarding the judges of the first level, those of Appeal and prosecutors, as well.

ligh Council of Justice's way of operation and exercising its activity is defined in the internal rules it approves."

ıservations by the Commission

role of a High Council of Justice

5. Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. Obviously, such a Commission or Council could, if abused, be an instrument of undue interference by the Executive and a means for undermining the independence of the judiciary. This situation would be further aggravated where this body merely appears to have the legitimacy of a constitutional organ that should ensure the independence of the judiciary, but, in practice, it is used to subjugate the judiciary on behalf of the Executive.

6. The main task of such an institution is to exercise powers formerly attributed to the executive power and parliament concerning the administration of the judiciary. Among these powers, the Albanian Law includes "nominating, transferring and disciplinary responsibilities" with respect to judges.

7. Although from a comparative standpoint, the composition and powers of these Councils vary considerably, all of them share a common characteristic. The reason for their existence is due to a desire to safeguard the independence of the judiciary, i.e., to guarantee that the judge, in his or her capacity as the solver of conflicts, is subject only to the law and the Constitution and free from all other influences, be they public or private.

8. The Albanian Law on the Major Constitutional Provisions proclaims the independence both of the judicial power as a whole (Article 1, Chapter V: "The judicial power is separate and independent from the other powers") and of the individual judge (Article 8, Chapter V: "In exercising their competencies the judges are independent and subject only to the Law on the Major Constitutional Provisions and to other laws in general"). The collective independence of the judiciary as a whole must be considered as a guarantee of the individual judges independence with respect to the Executive. This collective independence is reflected in the powers vested in the High Council of Justice as an autonomous constitutional organ.

ıposition of the High Council of Justice

9. An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Councils objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Councils performance of this control will cause citizens confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

10. Another reason for including members other than judges in the Council of Justice is to counteract the tendency to protect ones group to the detriment of the common good.

11. Constitutional provisions often require other professionals apart from judges to be present in these entities. This is the case in Italy, Spain, France, Greece and Portugal. As far as the appointment of the members is concerned, a majority of constitutions provide for some of the councillors to be elected by members of the judiciary, but the provision that some members must be either ex officio or elected by the executive or legislative power is also common. A combination of these two elements may also be found, e.g. in France, Italy and Portugal.

12. However, no uniform standard rule appears to exist concerning the composition of the High Council of Justice. Nevertheless, a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members. The Commission has underlined the need for such a balance already in its opinion of 4 December 1995 on Chapter VI of the Transitional Constitutional of Albania (documentCDL(95)74 rev.).

13. The composition of the Albanian High Council of Justice seems to follow this pattern and the numerical balance struck appears to be substantially acceptable. It presents a reasonable mix as to the qualifications of its members, as well as a diversity of political backgrounds, the Councillors being integrated in, or emanating from, different powers of the State.

14. The High Council of Justice includes five judges (the President of the Court of Cassation and four other career judges), three prosecutors (the General Prosecutor plus two others), two lawyers, one professor of law and two high-ranking members of the Executive (the President of the Republic and the Minister of Justice). Therefore, from a professional viewpoint, judges and prosecutors are clearly in the majority (eight out of thirteen members). Experience and understanding of the problems confronted by judges and prosecutors are thus reasonably guaranteed.

ction and appointment procedure

15. Four members of the Albanian High Council of Justice are ex officio members. These are the President of the Court of Cassation, the Minister of Justice, the General Prosecutor and the President of the Republic.

16. The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government. It should be noted that in France the President of the Republic and the Minister of Justice do not participate in the debates concerning disciplinary sanctions.

17. Four other members are elected by Parliament and the five remaining members are elected, as provided by law, from the ranks of the judiciary (three) and of the prosecutors (two). Since only two members actually belong to the Executive branch (the President of the Republic and the Minister of Justice), sufficient independence from the Executive power is guaranteed. The members elected by Parliament are actually six, since it also elects two of the ex officio members: the President of the Court of Cassation and the General Prosecutor (under Articles 6 and 14 of Chapter V of the Law, respectively). This contrasts with only five members elected by the judges and prosecutors. The Commission would have preferred, in accordance with its opinion expressed already in documentCDL(95)74 rev., that a majority of the members be elected by the judiciary.

18. As for the five members elected from the ranks of judges and prosecutors, according to the information available to the Commission, they are elected in separate meetings of all judges and prosecutors. This is however not expressly provided for by the Constitution. While other matters may be left to ordinary legislation, this important issue should be addressed by the Constitution itself. A Statute might then specify that the three members who are elected from the ranks of the judiciary should represent the various judicial categories. Furthermore, the pool of judges from which the selection is made might also be specified, such as two from the Judges of the Court of Appeal and one from the judges of first instance.

19. The Albanian opposition has expressed concern about the high number of members of the Council to be elected by Parliament. In general, it seems legitimate to give Parliament an important role in designating members of the Council. Taking into account the highly confrontational nature of Albanian politics, a concern that all members elected by Parliament may tend to represent the point of view of the parliamentary majority can however not be dismissed out of hand. A solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate.

lection

20. Councillors who are not ex officio members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the Councils members.

21. Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Councils work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.

ctions and powers

22. The Albanian constituent power has opted to give the High Council of Justice an executive function, and not a consultative one. It is in fact the only authority which decides upon the nominating, transferring and disciplinary responsibilities regarding judges at ordinary and appeal levels, as well as prosecutors. Thus the Executive and Parliament have renounced these powers, delegating them to this Council. Some other countries have given to their Council in addition the possibility to render advisory opinions on envisaged legislative measures concerning the judiciary. The Albanian authorities might wish to examine this possibility.

23. Whereas judges of both stages and prosecutors are subject to the authority of the Council in matters of discipline, the President and members of the Court of Cassation may be removed from office only on the basis of a reasoned decision of the Peoples Assembly where it is certified that they have committed a serious criminal act, specifically provided for in law, or where they are mentally incapacitated (Article 6 of Chapter V). It is debatable whether the protection against removal accorded to the Judges of the Court of Cassation is preferable to the protection granted to other judges and to prosecutors under Article 15, since this article purports to have matters relating to their duties and discipline decided by a body which is essentially made up of their own peers.

edural matters

24. Taking into account the specific situation in Albania, it would seem appropriate to grant by statute to the members of the Council immunity from prosecution for acts carried out in the exercise of their functions.

25. Article 15 finally provides that the High Council of Justice defines its way of operating in the internal rules it approves. Any such rules should be well defined and accessible for verification, especially where proceedings regarding transferring and disciplinary responsibilities are concerned. In matters of discipline, these internal rules should provide adequate guarantees for the judges or prosecutors involved to have a fair and impartial hearing with proper and sufficient safeguards for their fundamental rights.

nclusions

26. The setting up of bodies such as the High Council of Justice is nowadays considered to be a means of achieving and strengthening the autonomy of the judicial power. The Venice Commission has reasons to expect that the amendments to Article 15 Chapter V, introduced by Law 8234 of 27 August 1997, provide for a High Council of Justice comparable to those found in other European countries. Some technical improvements should be made, such as providing for a gradual renewal of the Council. Taking into account the specific situation in Albania, it seems advisable to take steps to ensure that the parliamentary opposition also has a say in the designation of the members of the Council; if this is respected and if Article 15 is correctly applied, it should provide an effective tool for an independent judiciary in line with those existing in other democratic countries.

RTICLE 18 OF CHAPTER V ON THE ROTATION OF CONSTITUTIONAL JUDGES

ıckground

27. To understand the present conflict between Parliament and the Constitutional Court on this question, it is necessary to give a brief overview of the developments leading to the present situation.

28. Articles 18 and 23 of Chapter V of the Law on the Major Constitutional Provisions on the Composition of the Constitutional Court were worded as follows:

le 18

:onstitutional Court is composed of nine members, five elected by the People's Assembly and four by the President of the Republic.

ıembers of the Constitutional Court elect, through a secret ballot, their chairman, who holds this office for three years with the right of re-election.

erm of the three members of the Constitutional Court, selected in the first election, ends in three years. They are selected by casting lots among each group of judges elected by the People's Assembly and by the President of the Republic. After three other years, three other judges are replaced in the same way, by casting lot. The newly elected judges hold their offices for a 12-year term.

e 23

erm of a Constitutional Court judge ceases when:

does not exercise his duty for justified reasons for more than six months;

presents his resignation;

is appointed to another position which is not compatible with his judicial function;

term expires; in this case, the judge may continue to perform his functions beyond his term only if a case that has begun cannot be concluded within his term.

, for one of the above-mentioned reasons, the term of the Constitutional Court judge ends before the expiration of his stated term, either the People's Assembly or the President of the Republic, depending on the means by which the judge was initially elevated to the Court, elects a new judge who will remain in this office until the end of the term of the replaced judge."

29. The members of the Constitutional Court took their office in May 1992. Under section 3 of Article 18, the first rotation of Constitutional Court judges therefore should have taken place in May 1995.

30. In late 1994, three judges of the Constitutional Court resigned. These judges were replaced by three new judges in January 1995.

31. On 2 June 1995, the Constitutional Court, acting on its own initiative, took a decision that the object and purpose of section 3 of Article 18, to provide for a gradual renewal of the Constitutional Court, had already been achieved by the resignation of the three judges and their replacement and that therefore there was no necessity to proceed to a rotation in May 1995. In the decision the Court notes that the interpretation of constitutional laws is its prerogative and that therefore its decision does not violate the principle of *nemo iudex in causa sua* .

32. On 19 November 1997, Parliament adopted a Constitutional Law, Law No. 8257, adding further sections to Article 18 and introducing a new Article 18/1 into the text of the Major Constitutional Provisions:

le 18

eplacement of a judge of the Constitutional Court for the reasons provided by Article 23 is not considered as a rotation.

three-year term finishes or when one of the reasons provided by Article 23 is verified, the selection or the appointment of the new judge is done within 30 days.

on-execution of the rotation suspends the functions of the Constitutional Court.

r the execution of the rotation the new judges are not selected or appointed within the above-mentioned term, the Constitutional Court functions with the members left.

e 18/1

:onstitutional Court should accomplish the first rotation within 30 days of the entry into force of this law."

33. In a decision of the Constitutional Court of 5 December 1997 the reasons leading Parliament to the adoption of this constitutional amendment are described as follows:

e accompanying report justifying the law presented by a group of deputies, which was turned into law upon its approval by the People's Assembly, the reasons that dictated the need for the proposed law in question are set out. In summary, these reasons are:

: Constitutional Court has not carried out its duty, but has acted in contravention of the norms that require its renewal at the

end of the first three year term after its election;

Constitutional Court has continually, and especially with its last decision (the declaration of Article 7 of Law No. 8227 dated 30 July 1997 "On the financial control of judicial non-banking persons who have borrowed money from the general public" as unconstitutional) violated the major constitutional provisions and the spirit of those provisions;

cause the renewal that is ordered by law was not carried out, it is necessary to prohibit the Constitutional Court from the further performance of its functions, as constitutionally delegitimated;

mistaken interpretation made by the Constitutional Court of Article 18 of Law No. 7561 dated 29 April 1992 and the failure to perform the renewal show that it has a political character, something which is also demonstrated by the position that it has taken against measures of a social nature taken by the Government."

34. On 5 December 1997, the Constitutional Court, acting on its own initiative, decided that Article 2 of Law No. 8257, introducing the new Article 18/1 into the Major Constitutional Provisions, is unconstitutional since it repeals a decision of the Constitutional Court and delegitimises the Court.

bservations by the Commission

35. Both the actions of the Constitutional Court and of Parliament require a number of comments from the point of view of the Commission.

egards the decision of the Constitutional Court of 2 June 1995

36. The Commission does not in any way question the fact that the Constitutional Court of Albania is the body competent to interpret the major constitutional provisions of this country. Nevertheless, the decision taken seems unfortunate.

37. First of all, it is undisputed that the wording of Article 18 requires the replacement of three judges selected by the casting of lots after three years. The Constitutional Court relies on the purpose of Article 18 to arrive at a result which differs from the fairly clear wording. As a matter of principle, it is true that the Constitutional Court does not necessarily have to stick to the wording only but may take into account the object and purpose of provisions as well as other relevant factors. However, it always requires particular justification to arrive at a result which, at first sight, is in contradiction to a fairly clear wording. The arguments put forward by the minority of three judges, voting against the decision, seem convincing, in particular that Article 23 of Chapter V of the Major Constitutional Provisions provides that the term of office of a judge replacing another judge who has resigned runs until the end of the term of the replaced judge. The replacement of the judges did also not coincide with the date at which rotation should have taken place. There was therefore no gap in the text which required having recourse to general principles of interpretation.

38. The Constitutional Court should also have exercised self-restraint since the personal interests of the judges taking the decision were at stake. This necessarily diminishes the authority of the decision. The Court itself was obviously aware of the circumstance as is evident from its reference to the principle *nemo iudex in causa sua* .

39. It would therefore certainly have been better if the Constitutional Court had stuck to the wording of the constitutional provisions.

o the constitutional amendments adopted on 19 November 1997

40. It is the prerogative of the constituent power to adopt constitutional amendments. In the Albanian constitutional order there is no provision which would prevent the constituent power from amending the Constitution in order to make it clear that the interpretation given by the Constitutional Court to constitutional provisions may no longer be regarded as valid. A requirement of rotation of Constitutional Court judges, even though some of these judges have previously been replaced in a different manner, also in no way violates Council of Europe standards. It was therefore legitimate for the constituent power to change the Constitution after the Constitutional Court had rendered a decision in contradiction to the intentions of Parliament, especially as the amendment has an effect *ex nunc* with the first rotation taking place within a month after the entry into force of the amendment and not *ex tunc*.

41. However, a number of qualifications have to be made:

st of all, it has to be noted that, if it is in principle legitimate for Parliament to amend the Constitution to get around the consequences of a decision of the Constitutional Court, this possibility should be used sparingly. The authority of the Constitutional Court suffers if Parliament acts in this way. In the present case, having regard to the problematic character of the Constitutional Court's decision, the reaction by Parliament seems nevertheless entirely understandable.

s however disturbing that Parliament adopted these constitutional amendments not as a reaction to the Constitutional Court's decision soon after the decision but only 2 years and 5 months later. This gives the impression that the intention of the amendment is not to rectify an interpretation by the Court but to punish a Court which had rendered other decisions disagreeable to the parliamentary majority. The texts cited by the Constitutional Court in its decision of 5 December 1997 confirm this suspicion. In a constitutional democracy, the various State organs have to fulfil their role and such acts of one organ against the other do not contribute to the consolidation of the democratic institutions.

addition, the provision that "the non-execution of the rotation suspends the functions of the Constitutional Court" is inappropriate and might harm the constitutional order of Albania. It goes against the common interest both of the citizens and of the State, as the citizen is deprived of the protection of his/her constitutional rights and the State is deprived of the guarantees of one of its essential constitutional and democratic institutions. Other solutions which would safeguard the proper functioning of the constitutional order would have been more appropriate. An amendment of Article 18 could, for instance, provide that, in the event of the Constitutional Court failing to perform the rotation, there would be an alternative procedure, e.g. the President of the Republic and the Speaker of the People's Assembly would perform the drawing of lots for the rotation.

o the decision of the Constitutional Court of 5 December 1997

42. If the constitutional amendment adopted by Parliament deserves criticism, this decision of the Constitutional Court seems even more irresponsible.

43. First of all, the major constitutional provisions of Albania provide no basis for the Constitutional Court to control the constitutionality of constitutional amendments. The Constitutional Court could therefore not oppose a constitutional amendment which in no way violates fundamental principles. Secondly, the constitutional principle, that the decisions of the Constitutional Court are final and binding, does not prevent the constituent power from amending the Constitution and thereby depriving a previous decision of the Constitutional Court of its basis. The Constitutional Court therefore overstepped the limits of its authority and entered into a political dispute with the People's Assembly which can only be to the detriment of the functioning of both organs.

44. In this context the Commission noted that the President of the Constitutional Court, Mr Gjata, has been removed from his office because of alleged co-operation during the communist period with the Albanian security service and the security service of a neighbouring country. The Commission is not called upon to express an opinion on this issue and will not do so. It is also not in possession of all the facts. It wishes however to underline that in proceedings against a judge of the constitutional court any suspicion of a politically biased decision has to be avoided and that applicable procedures have to be scrupulously respected.

ınclusions

45. In conclusion, the Commission would appeal both to the Parliament and to the Constitutional Court of Albania to co-operate in a climate of mutual respect between the organs of the State, with each organ staying within the limits of its own powers. Each organ has its own functions and has to resist the temptation to become a mere instrument in the partisan struggle between political forces. Especially in a new democracy, such as Albania, it is important that the citizens learn to respect the constitutional organs of the State and do not regard them as simple emanations of political parties. This is only possible if the State organs themselves act responsibly and show respect for each other.

46. The Commission therefore calls on the Constitutional Court of Albania to respect the wish of the constituent power that the rotation of the judges should be performed. It calls on the Albanian Parliament to modify the provision leading to a suspension of the Constitutional Court. It expresses the hope that both organs will, in the future, co-operate with each other and not fight against each other.

ıRTICLE 10 OF CHAPTER I ON PUBLIC ADMINISTRATION OF UNLAWFUL ECONOMIC ACTIVITY

ıckground

47. Article 10 of Chapter I begins with a statement proclaiming the freedom of economic enterprise, with the provision that this freedom "should not affect the security, freedom and dignity of man". The following four sections were added to Article 10 on 19 November 1997.[2]

ınlawful activity of private subjects, which widely touches the interests of social groups or individuals, which opposes and damages the principles of the free market economy and of the national and international economic and fiscal policies, which infringes the economy and social stability of the country, is placed under specialised national and international public institutions for administration.

egree of intervention, as well as the control and administration of these private subjects by the above-mentioned institutions, is defined by the law.

se cases, the State has the right and the duty to take possession of the property of private subjects only for defence of the interests of injured parties.

ıe can be denied the right to file a complaint in court against the control measures, the administration and the disposal of his property, as well as to ask for full compensation of damages suffered.

It should be noted that the right to property appears in Article 27 of Chapter VI of the Major Constitutional Provisions.

48. The Minister of State for Legislative Reform and Parliamentary Relations of Albania, Mr Imami, has on two occasions provided the Venice Commission with explanations concerning the background for the adoption of this constitutional amendment. This amendment is, in fact, a reaction to problems caused by the so-called "pyramid financial schemes" in Albania. In accordance with the recommendations of the international financial institutions it proved to be indispensable to put these schemes under the control of State-appointed administrators to protect in particular the interests of the people having invested in these schemes. This was done by a special law. The Albanian Bankruptcy Law of 1995, is, according to the explanations given, a law drafted outside Albania which has never been applied within the country and which, under present conditions, it would be impossible to apply to the pyramids.

49. By a decision dated 13 November 1997 (Appendix III), the Constitutional Court of Albania declared this special law incompatible with Articles 3, 10 (before the amendment) and 11 of Chapter I of the Major Constitutional Provisions.

50. The constitutional amendment is destined to give a constitutional basis to the control of the pyramid schemes by State-appointed administrators.

ıservations by the Commission

51. There is no doubt that the social crisis precipitated by the pyramid scandal warrants direct State intervention to control and rectify the problem. The constitutional amendment therefore has a legitimate purpose. It would certainly have been preferable had the legal order in Albania, in particular the bankruptcy laws, provided a sufficient framework to cope with the scandal without the need for specific ad hoc legislation. Nevertheless, the argument that this was not possible in the Albanian case seems plausible.

52. The fact that the Constitutional Court had decided that there was no sufficient constitutional basis for such State intervention does not prevent the constituent power from introducing such a constitutional basis (see above, para. 43). The need for State regulation of private property is acknowledged in other constitutions and in Article 1 of the First Protocol to the European Convention of Human Rights.

53. The Commission sees therefore no reason to object to the principle and purpose of the constitutional amendment.

54. However, the issue is whether Article 10 as amended is the best means to achieve this purpose. The first section of the amendment, which provides the basis for the State intervention, uses a large number of broad concepts to which it is very difficult to give a precise legal meaning. The Commission notes that Minister Imami has confirmed that for the State intervention to be legal, all the various conditions have to be fulfilled cumulatively and not alternatively. Therefore, the vague character of only one or the other condition would not seem to matter so much. However, all three conditions, i.e. that the activity

a) widely touches the interests of social groups or individuals;

b) opposes and damages the principles of a free-market economy and of the national and international economic and fiscal policies;

c) infringes the economic and social stability of the country;

are difficult to define as a matter of law.

55. It has to be acknowledged that already the previous text contained general concepts, such as "the social interest". Nevertheless, these concepts were more appropriate since the social interest is linked to the general interest while now more problematic notions such as "interests of social groups or individuals" are introduced.

56. The Commission notes however that the statute providing for the administration of the assets of the pyramids contains a detailed definition of the entities concerned.

57. The fact that only unlawful activities are concerned according to the text introduces a more legal element. The exact meaning of "unlawful" remains however puzzling. An activity which is as such unlawful, e.g. drug-trafficking, can hardly be put under State administration. The meaning seems more to be an economic activity which has been unlawfully managed. If the unlawfulness resulted from the existing Albanian legislation, it would seem that the amendment does not add a lot to the possibilities of State intervention. It the unlawfulness does not result from existing legislation, the constitutional amendment does not provide any basis for State intervention.

58. The definition of the conditions for State intervention in this section therefore cannot be described as very successful. It has however to be admitted that the very broad and general terms of the decision of the Constitutional Court and the very succinct reasoning made the task of the Albanian legislature very difficult. It also had to act under time pressure.

59. It is certainly welcome that the further sections require that the degree of intervention is defined by law, that intervention should only take place for the defence of the interests of injured parties and that the control measures may be appealed to in court. The courts must have the possibility to intervene at the different stages of the procedure.

60. Nevertheless, the impression remains that the text, which responds to a pressing social need of the moment, is not viable as a long-term principle of the Albanian constitutional order. In fact, it would have seemed preferable, if indeed the Constitutional Court considers that the present constitutional rules do not allow for such an intervention, to introduce a provision on the right of the State to regulate private property into Article 27 of Chapter VI on the right to private property or to deal with this specific problem within the framework of Article 41 of Chapter VI on the temporary restriction of rights. A re-drafted Article 41 could specify conditions under which the State is allowed to interfere in the private affairs of individuals in order to preserve national security and to protect the public. Such restrictions would have to be temporary in character and be replaced afterwards by a comprehensive regulatory system designed to promote private sector development as well as to control abuse.

61. A well-functioning bankruptcy, securities, taxation and financial institutions framework will do more to stabilise Albania's society in the long-term than the open-ended threat of State administration and expropriation. Constitutions, by definition, should be difficult to change and the specificity with which the issue of control of economic activity is set out in the law may undermine the government's desire to restore public confidence in the stability of Albania's institution and economy.

C. Conclusions

62. The Commission therefore notes that the constitutional amendment has a legitimate purpose and may have been required by specific and temporary needs. It cautions however against the repeated use of such ad hoc constitutional amendments in the area of economic regulation and considers that the text actually chosen should not be integrated as it is into the future Constitution of Albania.

ii. Opinion on the competence of the Federation of Bosnia and Herzegovina in Criminal law matters adopted at the 34th Plenary Meeting (6-7 March 1998)

Introduction

1. In a letter of 25 September 1997,Mr Mato Tadic, Minister of Justice of the Federation of Bosnia and Herzegovina, requested the opinion of the European Commission for Democracy through Law (the Venice Commission) as regards the competence of the Federation in criminal law matters. The request should be seen in the context of the criminal code being drawn up by the Federal Ministry of Justice, with the Council of Europe's assistance.

2. The Commission considered this matter at its 32nd plenary meeting (Venice, 12-13 December 1997), on the basis of the preliminary opinion of Mr Scholsem, Rapporteur, and in the presence of Mr Van Lamoen, Deputy to the High Representative of the international community in Bosnia and Herzegovina. The Commission decided to resume its examination at its next plenary meeting and invited Mr Scholsem to present a draft report on the subject.

3. This opinion takes account of the views expressed at the 32nd plenary meeting, together with the explanations and clarifications supplied to the Rapporteur by the Office of the High Representative and the Council of Europe's Secretary General on the subject of the draft criminal code prepared by the Federation authorities and Council of Europe experts. It was adopted by the Commission at its 34th Plenary meeting (Venice, 6-7 March 1998).

Purpose of this opinion

4. The question is being interpreted in a broad sense to include the Federation's competence to legislate in the fields of substantive criminal law and criminal procedure, areas that are, to an extent, interlinked. The reply necessarily entails a examination of the division of competence between the State of Bosnia and Herzegovina (BH hereafter) and the two entities: the Federation of Bosnia and Herzegovina (FBH hereafter) and the Republika Srpska (RS hereafter). It also requires an examination of the division of powers in this area between the Federation and its cantons.

The competence of the FBH regarding criminal law vis--vis the State of BH

5. The fundamental rule for interpreting the constitutions of BH (Appendix IV of the Dayton Agreements), the FBH and the RS is that the two entities enjoy residual powers. The Constitution of BH assigns only certain specific areas of competence to the State, while the remainder lie with the federated entities (article III-3-a of the Constitution of BH). The entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competences of the State of BH in this area, as provided for in the Constitution of BH.

6. Of the areas of competence assigned to BH, only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives BH responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon BH in the area of criminal law and criminal procedure. Our task is to establish the scope of that competence as accurately as possible.

7. To assist in interpreting this provision, a comparison may be made between article III-3-a of the Constitution of BH and the equivalent provision of the Constitution of FBH (article III-1, as modified by amendment VIII: "It is an exclusive competence of the Federation ... stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime". The first version of the FBH Constitution granted the Federation powers in the field of international criminal law, which patently clashed with the Constitution of BH. Although the new version has rectified this situation, it has still left a certain ambiguity. The Venice Commission had stressed the need to avoid any overlap with the powers granted to the State of BH and proposed the setting up of joint institutions to guarantee co-operation between BH and the Federation in the enforcement of criminal law in international cases and cases involving more than one entity (Commission opinion on the compatibility of the Constitutions of the Federation of BH and the RS with the Dayton Constitution, CDL (96) 56 revised 2, 4 September 1996, p. 7; Venice Commission, Annual

Report 1996). The Commission does not appear to have identified in the wording of the two constitutions a risk of conflict with regard to the exercise of legislative power, but rather in the implementation of crime policy. The wording of article III-3-a of the Constitution of BH seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of BH, which expressly refers to relations with Interpol, is indicative in this respect.

8. Article III-1-g of the Constitution of BH does not therefore appear to undermine the competence in principle of the FBH in the field of substantive criminal law, that is the power to determine offences and penalties.

9. However, that does not mean that article III-1-g is the sole source of the competence of BH in criminal matters. BH may define certain acts as offences and provide for punishment insofar as it needs to use the machinery of criminal law to implement its powers and responsibilities. Although such competence is not explicitly provided for in any text, this is a logical consequence of the statehood of BH and the tasks entrusted to it. Customs policy, for example, is a prerogative of BH (article III-1-c of the Constitution of BH) and manifestly requires the existence and application of a range of criminal measures for which BH has competence and indeed sole competence. The same applies to criminal law relating to the currency and monetary policy, immigration and international transport and communication.

10. Similarly, it is clear that when the criminal law is intended to protect certain values that fall within the state's area of competence, BH must be responsible for enacting it. This will apply, for example, to the protection of the international frontiers of Bosnia and Herzegovina and its territorial integrity, the symbols of the state, such as its flags and emblems, and its constitutional system. The competences of the two entities in criminal law do not therefore cover this field.

11. The above-mentioned competence of BH is admittedly implicit, but this does not make it any less certain or exclusive. It is bound up with the nature of the state and cannot be exercised by, or even delegated to, the entities. If the two entities were to start legislating in place of the state, the same subject matter would be governed by different rules (leading, for example, to a conflict of rules for protecting the frontiers), which could result in absurd, or even dangerous, situations.

12. One suggestion is that the entities could legislate provisionally in this area to avoid any possibility of a legal vacuum created by the failure of the BH legislature to take action. For the reasons set out above, the Commission cannot support this interpretation. The Constitution of BH makes no provision for the entities to perform the functions of the state on a substitute basis and such an initiative on the part of the entities would appear to be in breach of the constitutional order of BH. It would in any case have little justification since there appears to be no danger of such a legal vacuum. Thus, article 2 of Annex 2 of the Constitution of BH ("Transitional Arrangements") clearly states that "all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

13. It should be noted, finally, that in another area the Constitution of BH itself establishes a rule of criminal law by providing for parliamentary immunity (article IV-3-j).

14. Subject to these reservations, it can be concluded that the entities' competence in substantive criminal law is clearly established in the constitutional system of Bosnia and Herzegovina.

15. Regarding criminal procedure, the conclusion that BH is not competent is strengthened by the fact that BH has no powers to establish courts, other than the Constitutional Court. It difficult to envisage BH establishing a system of criminal procedure before courts that do not come within its jurisdiction. Moreover, the Constitution of the FBH contains numerous provisions concerning criminal procedure, which have never attracted any criticism (articles II-2-1 (b) and (e)relating to habeas corpus and fair criminal proceedings; article IV-C-3 empowers the Federation to prescribe such rules of procedure as may be necessary to ensure uniformity with regard to due process[31]). Article IV-C-8 establishes a criminal police service responsible directly to the federal courts. Article V-11 institutes cantonal courts and article VI-7-1 establishes municipal courts with general jurisdiction in all civil and criminal matters.

16. It is clear from these provisions that criminal procedure lies within the competence of the entities.

17. It has been asked whether, in the areas of criminal law for which BH has exclusive competence, it should not also have the power to establish rules of procedure concerning their implementation, including the establishment of special courts. The Commission believes this would not be compatible with the Constitution of BH, which, as already noted, only provides for one court at state level: the Constitutional Court. Besides, there is nothing to prevent the entities' courts from enforcing the laws enacted by the BH legislature. Admittedly, in the absence of a court of ordinary instance at the state level, these laws might not always be uniformly interpreted. However, any divergences in the interpretation of state laws that might occur need not create significant or insurmountable problems. In any event, if variations in the interpretation of state laws by the entities' judicial institutions does raise serious problems, these could be seen as a threat to the constitutional order of BH and could thus be set aside by the Constitutional Court of BH.

18. Briefly, the FBH is competent in the criminal field in all the areas where BH has no specific competence. BH has competence regarding criminal law and criminal procedure :

a. under article III-1-g of its Constitution, for the implementation of a co-ordinated crime policy, both internationally and between the entities;

b. whenever the use of the criminal law is necessary for the exercise of one of its constitutional powers or to protect the values of the state.

In the absence of any other explicit granting of competences in this area, BH has no authority to lay down the general principles or basic rules of criminal law or procedure. The drawing up of a criminal code containing the above principles and rules is certainly outside its competence. It is thus an entity responsibility.

The competence of the FBH vis--vis the cantons

19. While the FBH is undoubtedly competent to draw up a criminal code and a code of criminal procedure, it still has to be decided whether this is the responsibility of the Federation itself or the cantons. According to the Constitution of the FBH, the cantons have residual powers (article III-4: "The cantons shall have all responsibility not expressly granted to the Federation Government. They shall have, in particular, responsibility for: ..."). Prima facie, therefore, the cantons have competence in criminal matters. However, a close examination of the FBH Constitution reveals that the FBH has broad competence in this area and that the constitutional logic points to a shared competence between the cantons and the Federation.

- **The Federation's competence regarding specific areas of criminal law**

20. Article III-1 of the Constitution lists the exclusive competences of the Federation and article III-2 those that are shared between the FBH and its cantons. These provisions, as modified by amendments VIII and IX of 5 June 1996, contain no specific references to the criminal law, apart from the aforementioned article III-1-f: ("stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime"). This article appears to give the FBH a certain measure of competence in the criminal field. Like the similar provision of the Constitution of BH, it gives the FBH special competence regarding situations exceeding the jurisdiction of cantons (inter-cantonal crime) or certain particularly serious offences (terrorism, organised crime and drug dealing). However, the competences of the FBH, unlike those of BH, are not confined to the problems of co-ordinating crime policy the term criminal law enforcement does not appear in the FBH Constitution. The FBH has the right to draw up the relevant substantive criminal law provisions (see article IV-20-d of the FBH Constitution). This is clearly a broad competence since it covers all the types of criminal offence likely to have inter-cantonal implications, which given the size of the cantons will not be

the exception.

21. Moreover, just as is the case with BH, the Federation's competence is not simply based on article III-1-f of its Constitution but extends, implicitly but unambiguously, to defining and punishing any act established by it as an offence within the exercise of its exclusive powers and responsibilities (for example with regard to the economy, land use or energy policy) or shared powers and responsibilities (for example with regard to guaranteeing and enforcing human rights, article III-2-a).

22. It also has exclusive competence to enact criminal legislation to protect values for example, symbols or territory - which, by their nature, it alone is capable of protecting (see also para 27 below).

- **The Federation's competence regarding criminal procedure and the criminal justice system**

23. It should also be borne in mind that the Federation has a constitutional responsibility for ensuring respect for human rights (article III-2-a) and for certain fundamental rules of criminal procedure. It can easily be inferred from several constitutional provisions that the FBH has numerous competences in the fields of criminal procedure and the criminal justice system. For example, there are several provisions of the FBH Constitution relating to criminal procedure (articles II-2-1 (b) and (e) are concerned with safeguarding habeas corpus and the right to a fair trial). It establishes courts with general and thus criminal jurisdiction, at both the federal and cantonal levels; it contains rules that are applicable to all federal and cantonal courts (articles IV-C 1 to 4) and makes fairly detailed provision for the election of judges (articles V-11 and VI-7). Finally, and above all, article IV-C-3 grants the Federation the particularly wide - power to determine "such rules of procedure as may be necessary to ensure uniformity with regard to due process and the basic principles of justice in the proceedings of all courts". On the other hand, the FBH Constitution makes cantonal legislatures responsible for laying down supplementary rules governing cantonal and municipal courts (ibid) and determining the jurisdiction of cantonal and municipal courts (article V-6-d, see also para 30 below).

24. It is clear from the foregoing that, as a matter of principle, competence to determine rules of criminal procedure in the FBH lies with the Federation itself, with the cantons' responsibility being confined to laying down supplementary rules.

- **The Federation's competence regarding general criminal law**

25. It has been shown that the FBH has a fairly considerable competence in the fields of special criminal law and criminal procedure. It remains to be considered whether the Federation or the cantons are competent to determine the general principles of criminal law (imputability, complicity, aggravating or mitigating circumstances, reoffending). This issue seems to be not covered at all in the FBH Constitution. A literal reading of the Constitution would suggest that this competence must lie with the cantons, since it is not referred to in either the exclusive competences of the Federation or those it shares with the cantons. However, this interpretation should be approached with caution, in that it would lead to a fragmentation of legislation which appears completely at odds with traditional practice (the matter was previously dealt with at the federal level in the former Yugoslavia). A reading of the Constitutions of the FBH and the RS gives the impression that competence for the basic principles of criminal law has been in some ways "forgotten". In this context, it may be considered that, by granting the Federation the right to establish courts with general jurisdiction and competence for criminal procedure, the Constitution of the FBH also makes the Federation competent for establishing the basic principles of criminal law. It is nevertheless true that this area of competence is not expressly listed in Articles III-1 and III-2. Were this situation to be regarded as a source of ambiguity or controversy, it will be desirable to revise the Constitution of FBH as regards this point.

26. It is clear from the foregoing (paras. 20-25) that competence in criminal law is in fact shared between the Federation and its cantons, despite the fact that it is not included in the list of shared competences in article III-2. This incompatibility with the exhaustive list in article III-2-a is more apparent than real. In practice, this provision grants the FBH and the cantons shared responsibilities regarding human rights and it can be validly maintained that a large part of criminal law and criminal procedure comes within the scope of "guaranteeing and enforcing human rights", in the broad sense of the term[4].

27. There can be no doubt that the FBH Constitution provides for substantive criminal legislation at the federal as well as the cantonal level. For example, article IV-B-7(a), sub-paragraph vii, on the power of pardon of the Federation's President, makes a clear reference to "pardons for offences against Federal law"; similarly, article V-9-d, on cantonal responsibilities, refers explicitly to the "prosecution of crimes against cantonal law".

28. Turning to the laws governing criminal procedure and the criminal justice system, the FBH Constitution grants the Federation responsibility for determining the rules of procedure (IV-C-3) while cantons are given the task of adopting supplementary rules and determining the extent of the jurisdiction of cantonal and municipal courts.

29. Finally, competence in this field is already shared between the Federation and the cantons for a completely factual reason, since it appears that many cantons have delegated their criminal law powers to the Federation, in accordance with article V-2 of the Constitution.

30. Article III-3 of the FBH Constitution establishes the rule that, in areas where competence is shared between the Federation and the cantons, it may be exercised separately. Under the powers granted to it by the Constitution, the FBH can enact its own criminal code and code of criminal procedure or legislation governing the criminal justice system. However, article III-3 of the FBH Constitution also requires it to respect cantonal prerogatives and the need for a certain flexibility in enforcing federal legislation. For their part, the cantons can also legislate in this field, but only to supplement federal legislation. With particular regard to the criminal justice system, the cantons must establish the rules governing the jurisdiction of cantonal and municipal courts (article V-6-(d)). In view of the Federation's responsibility for ensuring uniformity with regard to procedural safeguards including access to the courts (article IV-C-3) cantonal legislation must take into account the federally established rules governing the competence *ratione materiae* of the various cantonal courts; on the other hand, cantonal legislatures are free to determine the number and territorial jurisdiction of the courts operating within their canton.

31. Finally, it must be emphasised that, while recognising the shared competence that the FBH and the cantons have in this field, federal legislation is based directly on the Constitution itself and not on a delegation of powers from the cantons. Federal law is thus applicable in all the cantons, including those that have not delegated their competences to the Federation or that have revoked that delegation.

iii. Opinion on the number of municipal courts to be established in Mostar

I. INTRODUCTION

1. By letter dated 26 February 1998 the Office of the High Representative asked the Venice Commission to provide an opinion on the question of whether, within the City of Mostar, a separate court has to be established for each municipality unless the municipalities concerned agree to establish a common court. The City of Mostar is composed of six municipalities and one central zone.

2. Under the Constitution of Bosnia and Herzegovina, the two Entities are competent for the establishment of courts. The City of Mostar is within the territory of the Federation of Bosnia and Herzegovina (Herzegovačko Neretvanska Canton). The question is therefore to be decided on the basis of the Constitution of the Federation.

HE APPLICABLE CONSTITUTIONAL PROVISIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

3. Article VI.7 of the Constitution of the Federation of Bosnia and Herzegovina is worded as follows:

Each municipality shall have courts, which may be established in co-operation with other Municipalities, and which shall have original jurisdiction over all civil and criminal matters, except to the extent original jurisdiction is assigned to another court by this or the Cantonal Constitution or by any law of the Federation or the Canton.

Municipal courts shall be established and funded by the Cantonal government.

Judges of the cantonal courts shall be appointed by the President of the highest Cantonal Court after consultation with the Municipal Executive."

4. The first and the second sections of art. 7 might seem contradictory at first sight. Section 2 attributes the power to establish a court to the cantonal government, section 1 gives the impression that the municipalities are competent to establish courts. Both sections may however be reconciled by distinguishing between the power to decide on whether to establish a municipal court, which belongs to the municipality, and the establishment itself. Under section 1 a court common to several municipalities may be established only "in co-operation with other Municipalities". Co-operation is a voluntary process and the establishment of a court common to several municipalities therefore requires their consent. The importance of the role of the municipalities is confirmed by the fact that the municipal courts appear in the chapter of the Constitution on municipality governments.

5. One may wonder whether it is wise to give such an important role to the municipalities if the financial consequences are then borne by the cantons. But this corresponds obviously to the will of the constituent.

6. It may also seem surprising to foresee such a large number of courts. The provision that each municipality shall, in principle, have its own court is understandable only if one knows that municipalities in Bosnia and Herzegovina are fairly large. Nevertheless, it seems questionable whether this rule facilitates the establishment of an efficient court system. At least if, in accordance with certain intentions, a municipal reform is carried out in the Federation which would substantially increase the number of municipalities, this constitutional provision will have to be reviewed. These considerations however do not justify a departure from the clear wording of the existing Constitution.

PROVISIONS SPECIFIC TO THE CANTON AND TO THE CITY OF MOSTAR

7. With respect to the establishment of courts, the Constitution of the Herzegovačko Neretvanska Canton is less specific than the Constitution of the Federation.

Article 79

Municipal courts are established by the Law of the Canton.

Municipal courts are financed by the cantonal budget.

Article 80

Municipal court is established for the territory of the municipality. One municipal court can be established for two or more municipalities."

8. The second sentence of art. 80 does not explicitly provide that the establishment of a municipal court competent for more than one municipality requires the consent of the municipalities concerned. This article has however to be interpreted in accordance with the Constitution of the Federation (see art. V.4 of the Constitution of the Federation) and the consent requirement therefore also applies within this canton.

9. It remains to be considered whether the above-mentioned principle is also applicable within cities. It should be noted that initially the Constitution of the Federation did not provide for cities and that city authorities were created only by Amendment XVI to the Constitution. Amendment XVI does however not mention judicial matters among the powers of cities. The establishment of a city instead of a municipal court could therefore only be based on the provision that cities are responsible for "other competence the city is being entrusted with by the canton or municipalities". The canton may not entrust the city with a power not belonging to it, therefore only the municipalities concerned could jointly decide the establishment of a city court.

10. As regards the central zone of the City of Mostar, it does not have the status of a municipality. Article VI.7 is therefore not applicable and there is no obligation to establish a municipal court in this zone. The cantonal legislature is free to adopt a solution compatible with the general court structure of the Federation. If the central zone seems too small to justify a specific court, other solutions may be found. Possibilities include dividing the territory between neighbouring courts, detaching one judge from each of the other municipal courts of the City of Mostar on a part time basis (eg for one day a week) with a rotating chair or a rotating competence of the neighbouring courts for the central zone. Attributing competence directly to the cantonal court would seem less appropriate since parties would lose one instance.

CONCLUSION

11. In conclusion, the text of the Constitution of the Federation clearly requires the consent of the municipalities concerned for the establishment of a court competent for the territory of more than one municipality. The municipalities concerned would certainly be well advised to give this consent: otherwise Mostar may well be the only town of this size in Europe, if not the world, to have six courts of general jurisdiction.

iv. Opinion on inter-entity judicial co-operation in Bosnia and Herzegovina adopted at the 35th Plenary meeting (12-13 June 1998)

Introduction

1. When speaking before the Venice Commission at the 34th Plenary meeting in Venice on 6 March 1998, the High Representative to Bosnia and Herzegovina, Mr Carlos Westendorp, asked the Commission to provide an expertise on the issue of inter-entity judicial co-operation against the background of the complex federal structure of Bosnia and Herzegovina (BH).

2. By letter of 7 May 1998, the Office of the High Representative provided some background material of interest to this question, in particular the text of a draft agreement on the regulation of legal assistance between institutions of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS) and an opinion of the Ministry of Civil Affairs and Communication of BH of

16 February on the constitutionality of this draft agreement. The Office of the High Representative asked the Commission to provide an opinion, in particular on the following two questions:

ıtity judicial co-operation within the competence of BH?

ıtities entitled to conclude an agreement on inter-entity judicial co-operation?

3. It is recalled that the Commission has already given an opinion on the competence of the FBH in criminal law matters (documentCDL-INF(98)5

).

The competence of BH in the field of inter-entity judicial co-operation

4. The question of the competence of the State of BH in the field of criminal law and criminal procedure has already been addressed in the abovementioned opinion on the competence of the FBH in criminal law matters, although mainly from the point of view of substantive criminal law. The Commission came to the following conclusions:

he fundamental rule for interpreting the constitutions of BH (Appendix IV of the Dayton Agreements), the FBH and the RS is that the two Entities enjoy residual powers. The Constitution of BH assigns only certain specific areas of competence to the State, while the remainder lie with the federated Entities (article III-3-a of the Constitution of BH). The Entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competences of the State of *BH* in this area, as provided for in the Constitution of BH.

the areas of competence assigned to BH, only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives BH responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon BH in the area of criminal law and criminal procedure. Our task is to establish the scope of that competence as accurately as possible.

e wording of article III-1-g of the Constitution of BH seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the Entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of BH, which expressly refers to relations with Interpol, is indicative in this respect".

These considerations remain valid. They have however to be further refined with respect to the specific topic of this opinion, judicial co-operation, which was a topic not really envisaged in the previous opinion.

8. The reference in Article III-1-g to "enforcement" makes it clear that, as stated in the previous opinion, Article III-1-g in no way intends to give BH wide-ranging powers in the field of the adoption of substantive criminal law rules. With respect to criminal procedure, this is less obvious since criminal procedure is aimed at enforcement of the criminal law rules.

9. The term "law enforcement" in the English language is usually associated with the police and might therefore be understood in this context as referring mainly to police co-operation. A further indication in this respect is the reference to Interpol. Nevertheless, it does not seem possible to draw a very clear line between co-operation at the police and at the court and prosecution level. Law enforcement may also refer to the tasks of the Public Prosecutor's office and of the criminal courts and in many countries the police acts in the field of criminal law under the instructions of the prosecutor or an investigating judge. A very clear-cut distinction therefore cannot be made and it seems not possible to exclude any competence of BH at the level of co-operation between prosecutors and courts.

10. On the other hand, it seems also not possible to provide for an exclusive competence of BH for all matters concerning judicial co-operation in the criminal law field. The simple fact that all criminal law courts are courts of the Entities requires an active rule of the Entities in this field. The State of BH, which does not itself have the instruments to enforce criminal law, cannot claim to have a monopoly on regulating such matters. It would moreover be surprising if judicial co-operation in the criminal law field were an exclusive prerogative of BH, while judicial co-operation in the field of civil law undoubtedly is within the powers of the Entities.

11. Having regard to the situation that practical implementation is a task of the two Entities, the only possible interpretation seems to be that Article III-1-g intends to give to BH in the field of criminal procedure powers to coordinate, to harmonise and to initiate co-operation with respect to all cases involving the two Entities or other countries. The precise extent of these powers will have to be assessed on a case basis.

Power of the Entities to enter into an agreement on inter-entity judicial co-operation

12. The above-mentioned opinion of the Ministry of Civil Affairs and Communications of 16 February 1998 considers that thetwo Entities do not have the right to conclude agreements among themselves on inter-entity judicial co-operation. This position, and in particular some of the arguments used, is in contradiction with the modern theory of federalism which more and more emphasises the need for co-operative federalism.

13. The simple fact that the Constitution of BH does not explicitly provide for such agreements seems not relevant, provided that these agreements respect the basic principles on the division of powers.

14. It is also not true to say that such agreements would be similar to international agreements and would give to the Entities the attributes of sovereign States. In a large number of federal States (Belgium, Canada, Germany, United States) agreements and conventions between federated Entities (or between some or all the federated Entities and the federal State) are quite usual and nobody pretends that such agreements would give to the federated Entities the attributes of a sovereign State. In Belgium, certain co-operation agreements between Entities or between Entities and the federal State are even explicitly required by the laws on institutional reform.

15. The specific situation of BH and its Entities where the central State only has very few powers makes this "co-operative" approach to federalism particularly necessary, especially in the judicial field. In effect, even if one arrived at a different conclusion from the one set out above concerning the possible powers of BH in the criminal law field, judicial co-operation in the civil law field is entirely within the powers of the federated Entities and may therefore only be implemented by way of voluntary agreements.

16. The BH constitution is therefore no obstacle to such agreements. On the contrary, several of its provisions seem to invite (or even impose) the conclusion of agreements between the Entities. The following provisions may be cited:

-c requires that the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, inter alia, "by taking such other measures as appropriate". The conclusion of mutual agreements is one of the possible "other measures".

-d enables the Entities to enter, under certain conditions, into agreements with foreign States. This power is fairly rare in comparative law (it exists, for example, in Belgium). It would seem paradoxical that the Entities may conclude international agreements and may not

conclude mutual agreements although this last possibility is very frequent in most federal States.

f Article III-4, the BH Presidency may decide to facilitate inter-entity co-ordination on matters not within its responsibility (and which therefore are within the responsibility of the Entities). One way of achieving such co-ordination may be to conclude agreements between federated Entities on the exercise of their respective powers.

-a of the BH constitution provides that the State of BH may assume responsibility for such other measures as are agreed by the Entities. This provision therefore envisages the possibility of transfers in the exercise of powers resulting from an agreement between federated Entities. It would seem difficult to conceive that the constitution provides for this kind of agreement and does not permit the federated Entities to agree on the way of exercising their proper powers as is the case in the agreement to be concluded on judicial co-operation.

17. There seems therefore no doubt that the Entities may enter into an agreement on judicial co-operation.

v. Interim report on the distribution of competences and structural and operational relations in the Ombudsman Institutions in Bosnia and Herzegovina, prepared by the Working Group on Ombudsman Institutions in Bosnia and Herzegovina and approved at the 35th Plenary meeting (12-13 June 1998)

troduction

In the course of its work on the setting up of an Ombudsman institution in the Republika Srpska (Bosnia and Herzegovina) and the drafting of a law instituting the Ombudsman of the Federation of Bosnia and Herzegovina, the European Commission for Democracy through Law (Venice Commission) was requested by Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, to give an opinion on the distribution of competences between the Ombudsman institutions in Bosnia and Herzegovina. The Working Group set up by the Venice Commission and the Directorate of Human Rights to study the Ombudsman institutions in this country was entrusted with this task. The Working Group, composed of Mr J.C. Scholsem, Vice-President of the Venice Commission, Mrs Serra-Lopes, member of the Commission, Mr Gil Robles Gil Delgado, former *Defensor del Pueblo* in Spain, and Mr Bardiaux, who is in charge of international relations in the Office of the French *Mdiateur de la Rpublique*, has held two meetings, one in Strasbourg, on 19 and 20 May 1998 and one in Paris, on 27 May 1997. At these meetings it heard Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, Mrs V. Jovanovic, Mrs B. Raguz and Mr E. Muhibic, Ombudsmen of the Federation of Bosnia and Herzegovina, and Mrs M. Picard, President of the Human Rights Chamber of Bosnia and Herzegovina.

The Working Group would like to underline from the outset that the Ombudsman institutions in Bosnia and Herzegovina are still in a state of flux. The Human Rights Ombudsperson is now halfway through its first five-year term, and it has not yet been decided in what manner it will continue its work; the Ombudsman institution of the Republika Srpska is still at the project stage; finally, an Act defining the *modus operandi* of the Ombudsmen of the Federation of Bosnia and Herzegovina is currently in preparation. It is not possible at this time, therefore, to present a final report on the distribution of competences and structural and operational relations of these changing institutions. The conclusions contained in this interim report are therefore the provisional findings of the Working Group. They may be reviewed in the light of future developments.

2. The institutions and their functions

- The Human Rights Ombudsperson

The Ombudsperson of Bosnia and Herzegovina (instituted in conformity with Annex 6, Part B of the Dayton Agreement) is an independent institution constituting one of the two branches of the Human Rights Commission (provided for in Article II, para 1 of the BH Constitution and in Annex 6 of the Dayton Agreement, Chapter II, Part A), the other branch being the Human Rights Chamber. The two institutions are jointly responsible for investigating manifest or alleged violations of human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, and discrimination in the exercise of fundamental rights enshrined in other relevant instruments.

The Office of the Ombudsperson is empowered to investigate alleged or manifest violations of human rights. Upon receipt of a complaint, it may inform the accused party and ask it to comment. The applicant then has an opportunity to respond to these comments, following which the Ombudsperson invites the parties to reach a friendly agreement. If no such agreement is forthcoming, the Ombudsperson then drafts a report stating whether or not there has been any violation of human rights, and if so, it may make recommendations with a view to securing fair satisfaction. The party at fault must then state how it intends to comply with the findings of the Ombudsperson. Should that party fail to reply or refuse to comply, the Ombudsperson publishes its report and submits it to the High Representative and the Presidency. It may also refer the matter to the Human Rights Chamber. For the purposes of its investigation, the Ombudsperson must have access to all official documents, even those which are confidential. It may open an investigation at its own initiative (Annex 6, Article V, para 2). Under Article V, para 5 of Annex 6, the Ombudsperson may decide, at any stage in its examination of an allegation, to refer a case to the Chamber. According to Article 37 b), adopted in September 1996, it may also refer to the Chamber any case referred to it for this purpose by the Ombudsmen of the Federation of Bosnia and Herzegovina or by an equivalent institution of the Republika Srpska.

The Human Rights Chamber (instituted by Annex 6, Part C, Articles VII to XIII) is a court composed of fourteen members. Complaints of human rights violations are referred to it by the Ombudsperson, on behalf of the complainant, or directly by the complainant. It examines the admissibility and the level of priority of the complaints it receives and decides whether the complainant has exhausted the available domestic remedies. The rulings of the Chamber are final and binding.

The organisation of the Commission is similar in some respects to that of the European Human Rights Convention, the Ombudsperson being comparable to the European Commission of Human Rights and the Human Rights Chamber to the European Court of Human Rights. While Article VIII, para 1 authorises cases to be referred directly to the Human Rights Chamber, in principle all the complaints referred to the Human Rights Commission are first presented to the Ombudsperson (Article V, para 1), which may refer them to the Chamber when it considers that there has been violation of human rights.

- The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen a Bosnian, a Croatian and one other, currently a Serb are appointed for a term of office similar to that of the President and judges of the Supreme Court. Each appoints one or more assistants, with the approval of the President. In particular, they must appoint assistants at municipal level where the composition of the local population does not reflect that of the whole canton. The Ombudsmen form an independent institution. They are empowered to examine the activities of any federal, canton or municipal institutions, as well as complaints from people whose dignity, rights or freedoms have allegedly been violated, particularly by or in the wake of ethnic cleansing. In order to accomplish their task, Ombudsmen must have access to all official documents, even confidential ones. They may bring proceedings before the competent courts and take steps to settle pending cases. The Ombudsmen present their annual report to the Prime Minister and Deputy Prime Minister of the Federation, to the President of each canton and to the OSCE; at any time they may present special reports and enjoin the local institutions to reply.

- The Ombudsman of the Republika Srpska

The Ombudsman of the Republika Srpska has not yet been instituted. A preliminary draft law drawn up by the Venice

Commission and the Directorate of Human Rights of the Council of Europe, with the help of the OSCE and the Office of the High Representative, has been submitted to the authorities of the Republika Srpska for consideration (CDL (98) 12 def). The comments in the present report are based on this draft law. It provides for the institution to be composed of three Ombudsmen, belonging to the constituent peoples of Bosnia and Herzegovina. The Ombudsman of the Republika Srpska has competences both in the human rights field and in administrative affairs. Without being structurally related to the Ombudsperson of Bosnia and Herzegovina, it should (according to the draft law) be able to refer matters to the Human Rights Chamber via the Ombudsperson.

The Venice Commission proposed setting up this institution in its Opinion on the constitutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery (CDL-INF (96) 9). According to the Commission, setting up such an institution, equivalent to the Ombudsmen of the Federation of Bosnia and Herzegovina, will help to establish a balanced, coherent system of human rights protection throughout Bosnia and Herzegovina.

e parallel functioning of the ombudsman institutions in Bosnia and Herzegovina

In terms of their functions, there are as many similarities as there are differences between the three institutions mentioned above. All three may receive complaints from individuals or initiate investigations *ex officio* .

The Ombudsmen of the Federation and the Ombudsperson of Bosnia and Herzegovina are more human-rights-oriented, whereas the Ombudsman of the Republika Srpska also has the more conventional role of monitoring the proper functioning of the administration.

The Ombudsmen of the entities have dealings with all the administrative authorities in their respective entities, while the Ombudsperson of the Bosnia and Herzegovina has dealings only with the entities and the state, as such.

The Ombudsmen of the entities are competent only in matters concerning the administrative authorities of the entities concerned, while the Ombudsperson also deals with affairs concerning the state authorities of Bosnia and Herzegovina.

Whereas the powers of the Ombudsmen of the Federation seem to be unlimited in time, those of the Ombudsperson (and according to the Venice Commissions draft law, those of the Republika Srpska Ombudsman) apply only to events which occurred subsequently to the Dayton Agreement.

The main difference between the Ombudsmen of the entities and the Ombudsperson of Bosnia and Herzegovina, however, is the latters special relationship with the Human Rights Chamber, within the framework of the Human Rights Commission.

Indeed, the main activity of the Ombudsmen of the entities consists in seeking solutions acceptable to the parties in certain cases of human rights violation or maladministration. Although the FBH Ombudsmen are empowered to take matters before the ordinary courts and the RS Ombudsman may refer a case to the Constitutional Court, and both may refer cases to the Human Rights Chamber, their main activity is to seek settlements acceptable to the parties, in a spirit of respect for human rights. They tend to resort to the justice system only in exceptional cases, generally expressing their disagreement with the authorities reactions to their work by publishing reports, particularly special reports. So their action is mainly of a non-judicial nature.

The Ombudsperson of Bosnia and Herzegovina, on the other hand, is a hybrid institution. Set up very shortly after the peace agreement, the Office of the Ombudsperson was for a long time the only institution responsible for introducing the European Human Rights Convention into the legal system in Bosnia and Herzegovina. Whatever those who drafted Annex 6 had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. The Ombudsperson thus rules on the admissibility of the complaints it receives, seeks a friendly solution, investigates and communicates its findings to the party allegedly at fault and, if it is not satisfied with that partys response, refers the matter to the Chamber. At the same time, at the hub of the human rights machinery provided for in Annex 6, the Ombudsperson has a non-judicial activity when it decides, of its own accord, to conduct investigations and draw up special reports.

This difference between the institutions accentuates the confusion as regards their competences *ratione personae, materiae, temporis* and *loci* and the various means of action they tend to privilege (reports; referral to the competent courts; negotiations with political authorities, etc.). It also renders the structure of the whole ombudsman apparatus in Bosnia and Herzegovina particularly complex. The Venice Commission has already established that the human rights protection machinery in the legal system of Bosnia and Herzegovina is, on the whole, unusually complex. The co-existence, side by side, of judicial bodies responsible for specific human rights tasks, courts expected to rule on cases of alleged human rights violations which are brought before them, and non-judicial institutions for the protection of individual rights, evidently results in some overlapping of competences which, along with the large disparities in the human rights protection systems in the two entities, may undermine the efficacy of the protection provided. To guarantee a balanced and coherent system for protecting human rights throughout Bosnia and Herzegovina requires a certain equilibrium between the legal systems of the two entities, and a clear definition of the respective competences of the institutions operating within the legal systems of the entities and the state.

oposals concerning the distribution of competences and relations between the ombudsman institutions

4.1 The brief but conclusive experience of how the ombudsman institutions function in Bosnia and Herzegovina clearly shows how useful these institutions can be in a society still haunted by the trauma of war. By their flexibility and the flexibility of their procedures, and their multi-ethnic or international composition, the ombudsman institutions are able to react promptly and effectively to the urgent situations created by human rights violations.

4.2 The ombudsman structures of the constituent entities need to be more similar in terms of their composition, powers and means of action. As the laws governing these institutions are currently being drafted, care must be taken to avoid disparities in the manner in which they operate.

4.3 In the not-too-distant future, however, and if possible before the end of the Ombudspersons first term of office, a structural reorganisation of its *modus operandi* , and consequently that of the Human Rights Chamber, must be undertaken. The quasi-judicial sorting role now performed by the Office of the Ombudsperson should in fact be taken over by the judicial body responsible for protecting human rights. This would be in keeping with the trend in the organs of the European Convention on Human Rights, where the original Court and Commission have been merged into a single organ, the European Court of Human Rights provided for in Protocol No 11 to the Convention. The Ombudsperson could then concentrate more on its more conventional mediation functions, without so many procedural constraints (application deadlines, exhaustion of other remedies), which are uncharacteristic of the ombudsmans work. This should not prevent the Ombudsperson from referring cases to the proper courts (the Human Rights Chamber or even the Constitutional Court of Bosnia and Herzegovina).

Reorganising the work of the Ombudsperson in this way does raise certain practical difficulties.

The Chamber will have to be given the powers of investigation and examination currently enjoyed by the Ombudsperson, particularly the power to investigate and prepare cases brought before it. This means extending the powers of the Chamber (investigation, hearing of cases referred by the Ombudsmen of the entities, *locus standi* of same) and also its wherewithal (large secretariat with a good knowledge of the ECHR, judges to report on investigations). Indeed, such a move seems not only recommendable for the coherency of the ombudsman system but actually necessary for the functioning of the Chamber itself; many of the cases brought before the Chamber even now are brought not through the Ombudsperson but directly by the applicants.

4.4 The competence of the Ombudsperson should also be confined to matters concerning the State of Bosnia and Herzegovina and inter-entity questions. Clearly as the state institutions are gradually set in motion and begin effectively to exercise their powers under the Constitution of Bosnia and Herzegovina, the citizens will be increasingly concerned by the decisions of those

institutions. Similarly, the co-operation required in numerous areas under the Dayton Agreement -between the entities themselves or between the entities and the state - seems to point to a likely increase in the number of cases involving both entities. It is in this field that the Ombudsperson will have to develop its activities, while in the medium term questions concerning only one entity should fall within the exclusive ambit of the Ombudsmen of the entities.

In the interim, however, the Ombudsperson will have to have parallel competences to those of the Ombudsmen of the entities.

4.5 Clearly, therefore, there will be no hierarchical relationship between the three institutions; they will each function independently. In particular, there must be no possibility of appealing decisions of the Ombudsmen of the entities before the Ombudsperson.

4.6 However, the Ombudsperson must be empowered to organise co-operation and consultation between the institutions. It is important that there should be arrangements for communication, mutual information and consultation, or even co-operation in certain cases, particularly when a case is brought before the wrong institution, or where it emerges in the course of proceedings that an institution lacks jurisdiction. Regular meetings of the Ombudsmen of the entities and the Ombudsperson should be held in order to determine what form co-operation should take and, where necessary, decide on joint action to be taken. The initiative to convene these meetings and the form they should take, as well as the procedure for taking decisions and their scope, could be agreed jointly. The flexibility and the informal nature of the ombudsman institutions should favour this development.

4.7 The reform broadly outlined above will, of course, require the amendment of certain fundamental texts of the institutional apparatus in Annex 6. One should note, in this respect, that provision is actually made, in Article XIV of Annex 6, for revision of the *modus operandi* of the institutions concerned, starting five years after the entry into force of the Dayton Agreement. As responsibility for the continuation of the institutions provided for in Annex 6 lies, in principle, with the institutions of Bosnia and Herzegovina, it seems that the most appropriate means of carrying out the reform would be an organic Law to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina.

vi. Opinion on the competence of Bosnia and Herzegovina in electoral matters adopted at the 36th Plenary Meeting (16-17 October 1998)

In a letter dated 22 May 1998, the Office of the High Representative asked the Venice Commission to give its opinion on, inter alia, the competence of Bosnia and Herzegovina in electoral matters (CDL (98) 26 Add). A Working Group, composed of Mr Helgesen, Mr Scholsem and Mr Steinberger, was set up within the Commission to study the question. The group met during the Commission's 35th Plenary Meeting (Venice, 12-13 June 1998) and again in Heidelberg on 7 July 1998 . The Rapporteurs held an exchange of views with a delegation from the Office of the High Representative on the basis of preliminary reports. Following these meetings, the working group prepared the following opinion, which was adopted by the Venice Commission at its 36 th Plenary Meeting (Venice, 16-17 October 1998) and was sent to the Office of the High Representative.

I

In the Dayton Agreements, electoral matters are primarily dealt with in Appendix 3.

This Appendix includes an agreement between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska to establish a Provisional Election Commission, under the auspices of the OSCE, which would be responsible for organising the first election in the country.

It also includes an agreement between the same parties to create a Permanent Election Commission responsible for future elections in Bosnia and Herzegovina ("with responsibilities to conduct future elections in Bosnia and Herzegovina").

This commitment should be interpreted broadly, as applying to all elections held in Bosnia and Herzegovina, at whatever level (state, Entity or local event). In this respect reference may usefully be made to the competence of the Provisional Election Commission, from which the Permanent Commission is clearly to take over, and which, according to Article II(2) of Appendix 3, concerns the elections for the Parliamentary Assembly and the Presidency of the Republika Srpska and also cantonal and municipal elections.

By stipulating that an institution (the Permanent Election Commission) which emerged from the Dayton Agreements and which is independent of the Entities is competent in the conduct of all elections in Bosnia and Herzegovina, Appendix 3 accepts - tacitly but unavoidably - that the legislative framework for the elections in question, including the rules on the competence and working of the Permanent Election Commission, will be determined by a legislative text, to be adopted in Bosnia and Herzegovina at state level. In fact, since the Dayton Agreements and the Constitution of Bosnia and Herzegovina do not contain explicit and uniform regulations on the conduct of elections and on the competence and working of the Permanent Election Commission, the state legislator, namely the Parliamentary Assembly, is alone able to adopt this law.

This being so, the effect of Appendix 3, Article V, is to accord a certain competence to the state legislator in electoral matters, both for elections in the Entities and those at cantonal and municipal level. This must be understood in the special context of Bosnia and Herzegovina, where, given their crucial role in preserving the delicate balance underpinning the peace agreements, electoral matters are dealt with separately and given the same importance as the Constitution itself. In this respect, it is appropriate to recall that the Constitution of Bosnia and Herzegovina is contained in Appendix 4 of the Dayton Agreements, signed and approved by the same parties as Appendix 3 (see also Articles IV and V of the General Framework Agreement). The two annexes should be read in conjunction, and each interpreted in the light of the other.

II

The fact that the State of Bosnia and Herzegovina is competent to legislate in electoral matters does not infringe on the allocation of competence established in the Constitution of Bosnia and Herzegovina. Admittedly, Article III (3) states the principle that competence not expressly assigned to the State belongs to the Entities, and there is no general electoral competence listed among the state competence (see the list of exclusive state responsibilities in Article III (1)). However, the State of Bosnia and Herzegovina may assume responsibility for other matters on the basis of a joint agreement by the Entities (Article III (5) a), and it can reasonably be assumed that, as signatories to Appendix 3, the two Entities have tacitly but unavoidably admitted that the State has a certain competence in the matter.

III

The constitutional texts of Bosnia and Herzegovina and of the two Entities also contain rules concerning elections.

Thus, Article IV (2) of the Constitution of Bosnia and Herzegovina grants this state competence to legislate on elections to the House of Representatives.

In addition, Article IV (A) 1-3 of the Constitution of the Federation also contains certain fundamental provisions concerning

elections to the House of Representatives of the Federation: the Constitution of the Federation already establishes the principle of election by direct, universal, secret and equal ballot, in a single constituency based on proportional representation with a threshold of 5% of votes cast. Likewise, Article 71 of the Constitution of the Republika Srpska states that the electoral system for national Assembly- elections must be established by the parliament of the Entity.

Rightly, Articles IV (A) 1-3 of the Constitution of the Federation and Article 71 of the Constitution of Republika Srpska have not been viewed as encroachments on the competence of the State (see the Opinion of the Venice Commission on the compatibility between the Constitutions of the two Entities and the Constitution of Bosnia and Herzegovina, Annual Report on Activities for 1996)[5]. In fact, it seems natural that the entities in a federal state should be competent to administer their electoral system, especially when the state in question is highly decentralised, as is the case of Bosnia and Herzegovina. However, it is clear that the Entities' competence in this area is not unlimited. The electoral system of the federal entities must respect the fundamental regulations of the Federal State. This is especially so with regard to human rights regulations including non-discrimination, the principles of a democratic state (universal, secret and equal suffrage ensuring freedom of expression for the population) and those which guarantee the balance underpinning both the State itself and the peace.

IV

It is clear from the preceding remarks that competence in electoral matters is in fact divided between the Entities and the State of Bosnia and Herzegovina.

It is also clear that the State will have to adopt the electoral law on elections to State institutions. In this matter, the competence of Bosnia and Herzegovina is absolute.

It is also the State's duty to establish the principles of the country's electoral law, in legislation that will define the fundamental parameters applicable in all elections. As noted above, these refer on the one hand to human rights and democratic principles, and, at the same time, they guarantee the balance underpinning the State of Bosnia end Herzegovina.

Thus, in addition to the principle of universal, secret and equal suffrage, it is possible and highly desirable - if not essential - that certain aspects of the right to elect and be elected are regulated in a uniform manner for all elections. This is particularly relevant for issues such as the right of displaced persons and refugees to vote, the grounds for ineligibility; the choice of the electoral system (proportional representation); electoral lists and the procedure for establishing them; political parties and their registration, and registration of individual candidates and coalition parties; access to the media for candidates during electoral periods; funding of electoral campaigns; the voting procedure; complaints and the associated procedure; and publication of the results. Equally, the law must establish the membership, competence and working on the Permanent Election Commission and may delegate powers to it to enact the necessary regulations for the conduct of elections.

On the other hand, regulation of other questions, for example the creation of electoral constituencies, can be left to the competence of the Entities, or even to the cantons, as long as the principles established in the State law are respected. In addition, any special provisions regarding implementation of the parameters of State legislation can be adopted only at Entity - and possibly cantonal - level.

V

The question of which courts will have competence in the area of electoral disputes has also been raised.

There is no doubt that the courts of the Entities have jurisdiction with regard to elections at Entity level.

With regard to elections to the State institutions, this competence must be assigned to a court. The choice of court is left to the state legislator, who may decide to set up a new electoral chamber or to assign these disputes of a specialised division of the Constitutional Court. The practical details for the second option require careful consideration. Furthermore, if, as the High Representative's question suggests, an administrative jurisdiction had to be set up at state level in Bosnia and Herzegovina, competence in electoral matters could be assigned to it. However, it is worth noting that, due to the specific nature of the issues involved and the urgency of most of the decisions, separate courts, distinct from the ordinary courts of law, are frequently established to deal with electoral matters.

Appeals to the State electoral authority against decisions by courts in the Entities are also necessary: these would have the advantage of ensuring the development of case law and of standard approaches to interpreting the electoral law. However, for the reasons indicated above, time limits for appeals and for the proceedings must be very short.

vii. Opinion on the need for a Judicial Institution at the level of the State in Bosnia and Herzegovina adopted at the 36th Plenary meeting (16-17 October 1998)

At the 34 th plenary meeting of the Venice Commission (Venice, 6 and 7 March 1998), the High Representative of the international community in Bosnia and Herzegovina, Mr Carlos Westendorp, asked the Commission to give opinions on certain questions of constitutional law, including the need to establish a judicial institution at the level of the state of Bosnia and Herzegovina (see Mr Westendorp's address to the Commission, CDL (98) 26).

The Commission appointed a number of its members as rapporteurs, to examine the issues raised by the High Representative. The rapporteurs held meetings in Venice, on the occasion of the Commission's 35 th plenary meeting (12 and 13 June 1998), and in *Heidelberg (7 July 1998*). At these meetings, they also had an exchange of views with officials from the Office of the High Representative.

The opinion set out herein was adopted by the Commission at its 36 th plenary meeting on the basis of a paper submitted by Mr Jean-Claude Scholsem, rapporteur.

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Constitution's failure to provide for a supreme judicial institution at the level of the state of Bosnia and Herzegovina

The Commission has already found that the Constitution of Bosnia and Herzegovina (Annex IV to the Dayton Agreements) establishes a particularly weak federal state[6]. The Constitution defines the two entities of that state, the Federation of Bosnia and Herzegovina (hereafter the FBH) and the Republika Srpska (hereafter the RS), and allocates powers between those entities and the state of Bosnia and Herzegovina (hereafter BH). It also establishes BH citizenship. Lastly, it proclaims its own precedence over the laws and constitutions of the entities and sets up a Constitutional Court to guarantee the compatibility of those laws and Constitutions with the state Constitution. However, the state of Bosnia and Herzegovina has no own resources and is therefore

dependent on contributions from the entities. From a legal standpoint, its weakness is primarily apparent from the fact that all essential functions not expressly assigned to the state come within the competence of the entities, and from the lack of any express guarantee of the state's inherent powers. Another sign of this weakness is the complete separation of the entities' legal systems, discernible, inter alia, in the lack of a supreme judicial institution at state level responsible for guaranteeing uniform application and interpretation of the law.

It follows that the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is not an "oversight" on the part of the authors of the Constitution, who seem to have been convinced that such a Supreme Court would be superfluous in a system where the main spheres of public and community affairs are governed not by laws of the state but by laws of the entities. The legal system of Bosnia and Herzegovina in fact permits the existence of two sets of rules, even in such essential fields as criminal law and civil law. On the other hand, the Constitutional Court (Article VI of the Constitution) was established in answer to a real need to ensure consistency in the application and interpretation of the Constitution of Bosnia and Herzegovina.

The Commission accordingly considers that the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is not inconsistent with BH constitutional system, having regard to the latters particularities[7].

2. Does the BH Constitution allow for the creation of courts at state level?

Although the lack of a supreme judicial institution can be regarded as a specificity of BH's constitutional system, this does not mean that any state-level court is expressly banned under that system.

Under the Constitution of Bosnia and Herzegovina the state of BH is vested with own powers, in particular legislative ones, and must be capable of establishing the institutions necessary to guarantee the effectiveness of BH legislation. If the lack of a court at state level undermines that effectiveness, BH must have the authority to create one.

That authority must, however, be exercised in accordance with the Constitution, which does not make provision for any ordinary courts at BH level. To be compatible with the Constitution, the establishment of a judicial institution at state level must not be a merely useful or desirable measure but must satisfy a specific need, acknowledged in the Constitution itself or in the peace agreements.

The Commission has already held, for instance, that the state of Bosnia and Herzegovina is not bound to establish criminal courts at state level to apply the criminal law to be passed by the State of BH[8]. Actually, what is at stake in criminal proceedings is the individuals criminal responsibility and not the validity of acts performed by BH authorities. Therefore, there is indeed nothing to prevent the courts of the entities from applying the laws passed by the BH legislature, a situation to be found in a number of European federal states It is true that, given the lack of a supreme judicial institution at state level, the uniform interpretation of that legislation may not be fully guaranteed. However, as we have seen, the BH constitutional system allows for certain discrepancies. In any case, where a difference in legal interpretation by the judicial institutions of the entities poses serious problems, the view might be taken that this amounts to a breach of BH's constitutional system and could therefore be a matter for the BH Constitutional Court[9]. The same applies to offences perpetrated by BH public officials, who can therefore be tried by the entities' criminal courts according to the rules of jurisdiction laid down by BH law. This naturally does not concern several offences provided for in criminal legislation (e.g. high treason) committed by persons appointed to high government or political office (members of the presidency, ministers, members of the Constitutional Court, etc.) in the exercise of their functions. As in many other European states, special rules of procedure must be issued concerning such offences law.

It follows from the above that BH is empowered, or even bound (see below), to establish courts at state level provided that:

- courts in question are specific, in that they have special rather than general jurisdiction; allowing the establishment of courts with general jurisdiction would lead to the creation of a system of ordinary courts at BH level, which is clearly not what is intended by the BH Constitution; and

- are established in response to a constitutional need, in the sense that the constitutional system is weakened until such courts come into existence.

3. Areas where there is a need to establish a judicial institution at BH level

The Commission has identified a number of fields where the above conditions are met.

3.1 Electoral disputes

Elections are one such area.

In its opinion on the competence of BH in electoral matters (adopted on *), the Commission held that, with regard to disputes concerning elections to BH institutions, it was necessary to assign appellate jurisdiction to a court at state level. Indeed, the democratic nature of BH (which is enshrined in the preamble to its Constitution) and, above all, the requirement that BH (and the entities) organise "free and fair elections" (Article I, paragraph 1 of Annex 3 to the Dayton Agreements) make it mandatory that any electoral dispute be dealt with by an independent judicial institution. BH is therefore bound both by the peace agreements and by its own Constitution to refer such disputes to a judicial institution. The choice of institution is left to the state legislature, which might envisage giving jurisdiction in such matters to a special division of the Constitutional Court or might establish a separate court (ibid.). Whatever solution is adopted by the legislature, it will necessarily entail an addendum to the BH Constitution, which makes no provision either for the constitutional court to have jurisdiction in electoral matters or for the establishment of a separate court. This does not mean that the Constitution will not be observed, since, as we have seen, the existence of such an institution is a requirement of the Constitution itself.

3.2 Administrative disputes

Another field where the establishment of a judicial institution at BH level must be envisaged is that of disputes over administrative decisions.

The general principle that administrative authorities must abide by the law as well as the principle of the Rule of law, on which the BH Constitution is founded (Article I, paragraph 2), require that administrative decisions be subject to judicial review.

This general requirement takes an even more definite form in cases where administrative decisions affect individual rights. In such cases the requirement that administrative decisions be subject to judicial review comes within the ambit of respect for fundamental rights.

Article II of the BH Constitution provides that "the highest level of internationally recognised human rights and fundamental freedoms" shall be ensured in BH and that a Human Rights Commission shall be set up to that end, in accordance with Annex 6 to the peace agreements. The first article of Annex 6 itself makes reference to the European Convention on Human Rights (hereafter the ECHR), Article 6, paragraph 1 of which provides, inter alia, "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". (Also see Article II, paragraph 3 (e) of the BH Constitution.)

According to the established case-law of the European Court and the European Commission of Human Rights, the notions of "civil rights and obligations" and "criminal charges" are autonomous ones, specific to the ECHR, which are not to be interpreted by reference to the domestic law of the states bound by this convention. The European Court of Human Rights has consistently held that it is sufficient that the outcome of a dispute should be decisive for civil rights, that is to say that the rights in issue should be personal and economic rights of one of the parties to the proceedings. Disputes in fields traditionally governed by administrative law of member states have thus been regarded, in the context of the convention, as disputes over civil rights. Examples are disputes over the refusal of certain tax advantages (Editions Priscope v. France judgment of 26 March 1992, Series A No. 234-B); over entitlement to social security benefits (Deumeland v. Federal Republic of Germany judgement of 29 May 1986, Series A No. 100); over entitlement to a civil service pension (Lombardo v. Italy judgements of 26 November 1992, Series A Nos. 249-B and 249-C); and over the right to compensation for unlawful administrative acts (Tomasi v. France judgement of 27 August 1992, Series A No. 241-A). Similarly, certain administrative proceedings have been considered to involve a "criminal charge". Examples are cases concerning penalties imposed in economic matters (Deweer v. Belgium judgement of 27 February 1980, Series A No. 35); in tax matters (Commission report in the Sydow v. Sweden case); and for road traffic offences (zturk v. Federal Republic of Germany judgement of 21 February 1984).

There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.

The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act).

4. Conclusions

The Commission finds that:

ck of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is not inconsistent with BH constitutional system having regard to the latters particularities ;

· the Constitution of BH, the State of BH is empowered to establish state-level courts, which should be specific, in the sense that they should have special and not general jurisdiction, and be created in response to an established constitutional need ;

gards electoral disputes and administrative disputes, BH is empowered, and even obliged, to set up state-level courts.

viii. Opinion on the admissibility of appeals against decisions of the Human Rights Chamber of Bosnia and Herzegovina adopted at the 36th Plenary Meeting (16-17 October 1998)

At its 35 th Plenary Meeting (Venice, 12-13 June 1998), the European Commission for Democracy through Law (Venice Commission), accepted the proposal made by Mr. Paul Gewirtz, Observer for the United States, to issue an opinion on possible appeals against decisions given by the Human Rights Chamber of Bosnia and Herzegovina. The present opinion was adopted by the Commission at its 36th Plenary Meeting (Venice, 16-17 October 1998) on the basis of a report by Mr.Malinverni, Rapporteur.

** * **

1. The establishment of the Human Rights Chamber of Bosnia and Herzegovina

Annex 6 to the Dayton Peace Agreement provides for a Commission of Human Rights consisting of two bodies : the Office of the Human Rights Ombudsman and the Human Rights Chamber[10]. 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 (hereafter ECHR), 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 of Human Rights will continue its operation. 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).

The Human Rights Chamber is composed of fourteen members; four are appointed by the Federation of Bosnia and Herzegovina (FBH), two by the Republika Srpska (RS) 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.

The Chamber has jurisdiction to receive, either directly or 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.

sible conflicts of jurisdiction between the Constitutional Court and the Human Rights Chamber

Annex 4, Article VI, of the Dayton Peace Agreement (the Constitution of Bosnia and Herzegovina) also provides for a Constitutional Court. It is 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 has 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 judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). The Constitutional Court gives final and binding judgements.

In its opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection instruments[11], the Venice Commission found that the fields of respective competences of the Constitutional Court and the Human Rights Chamber were partially overlapping. The Venice Commission noted :

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 judgement 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 of 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.

The Venice Commission considered whether it would be compatible with the Dayton Agreement to allow appeals from one jurisdiction to the other, considering that one of these two judicial bodies is in a hierarchically superior position to the other. The Commission ruled out this possibility for the following reasons : A solution allowing appeals from one institution to the other would 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, allowing appeals from one jurisdiction to the other, would add a level of jurisdiction to the already long process of exhaustion of remedies.

Taking into account the need to ensure legal safety as to respect for human rights within a relatively short time and to avoid prolongation of human rights litigation, the Venice Commission suggested that the jurisdiction of either court should not extend to matters already dealt with by the other. Human rights litigation could be attributed, as a matter of principle, to the Human Rights Commission as long as it is in operation.

Constitutional Courts decision on the appeal introduced against a decision by the Human Rights Chamber

When the Venice Commission issued the above opinion, the Human Rights Chamber had not yet given any judgement and the Constitutional Court had not yet been set up. It was still possible to include in the Rules of Procedure of either bodies rules which would exclude overlapping and promote a clear distribution of cases, at least for the transitional period. This, however, did not occur.

On 31 December 1997, Mr Haris Siladjić, in his capacity as co-Chair of the Council of Ministers of Bosnia and Herzegovina, and Mr Plamenko Ćustović, as Public Attorney of Bosnia and Herzegovina lodged appeals with the Constitutional Court against two decisions of the Human Rights Chamber (Decision of 3 November 1997 on cases N 96/3,8 and 9 and Decision of 3 November 1997 on case N 96/22). The applicants claimed to represent the State of BH. They alleged that the Human Rights Chamber had violated the Constitution of BH and that the Constitutional Court should review the challenged decisions pursuant to its appellate jurisdiction over constitutionality issues arising out of judgements of any other court in Bosnia and Herzegovina. On 5 June 1998 the Constitutional Court decided to reject the appeal. The relevant part of the Constitutional Courts decision reads as follows :

Article VI, par. 3 (b) of the Constitution of Bosnia and Herzegovina provides that the Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgement of any other court in Bosnia and Herzegovina. The question therefore arises whether the Human Rights Chamber should be considered a court in Bosnia and Herzegovina according to this provision of the Constitution. It is significant to note in this context that, according to Article XI (3) of the Agreement on Human Rights which is Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the decisions of the Human Rights Chamber are final and binding, subject only to review by the Chamber itself in some cases.

The Constitutional Court, however, does not consider it necessary in this case to resolve the question whether a decision of the Human Rights Chamber can be appealed to the Constitutional Court, because, even if the Constitutional Court were considered to have jurisdiction with respect to such an appeal, the appeals filed in the present case would have to be rejected for the following reasons.

In both cases one of the defendants before the Human Rights Chamber was the State of Bosnia and Herzegovina. The Decisions of the Chamber indicate that the Chamber invited the State, both before and after it decided on the admissibility of the cases, to participate in the proceedings by submitting comments in writing. The State did not respond to the requests of the Chamber in any way. The State did not submit any comments, nor was it represented at the oral hearings in the two cases.

The Constitutional Court considers that, even if it should be possible to appeal against a decision of the Human Rights Chamber, it would not be permissible for the parties to present their comments and arguments for the first time in the appellate proceedings .

It follows from the above decision that the issue as to the admissibility of appeals to the Constitutional Court from the Human Rights Chamber is still open.

4. Opinion of the Commission

There are elements in the Constitution of BH which would support the position to allow appeals from the Human Rights Chamber to the Constitutional Court. Since the Human Rights Chamber is somehow integrated in the domestic legal order of Bosnia and Herzegovina it could be regarded as any other court in Bosnia and Herzegovina , whose decisions can be appealed against. It would also be consistent with the role normally attributed to constitutional courts in some European constitutional systems, namely the role of ultimate appeal court. The Venice Commission already referred to these arguments in its above-mentioned opinion.

However, a careful consideration of the role of the Human Rights Chamber in the context of the Dayton Peace Agreements clearly supports the opposite view.

Protection of Human Rights appears as the cornerstone of the Peace Agreement. In Article VII of the General Framework Agreement the parties to the Agreement expressly recognise that the observance of human rights and the protection of refugees and displaced persons are of vital importance for achieving a lasting peace . In this context, the experience of the European Convention on Human Rights seems determinant. The ECHR, an international instrument conceived as an effective legal reply to the atrocities of the Second World War, appears as a tool for achieving greater unity between European States by the maintenance and further realisation of Human Rights and Fundamental freedoms [12]. The key element in this instrument is not the list of rights set out in it but rather the implementation machinery which it establishes namely the monitoring bodies (the European Commission and the European Court of Human Rights) and the right of individuals to address these international bodies when they claim that their rights have been violated. This machinery is the realisation of the collective enforcement [13] of the rights set out in the ECHR and is indeed so closely related to these rights that the latter would not have the same scope if the implementation mechanism did not exist.

Article II of the Constitution of Bosnia and Herzegovina provides that the rights and freedoms as set forth in the European Convention on Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law . This provision would lose most of its meaning if the list of rights alone, and not the monitoring mechanism, were to apply in BH.

However, the ECHR monitoring machinery is only open to States which are parties to this convention and BH is not one of them, since only member States of the Council of Europe can become parties to the ECHR. It is therefore necessary, pending the accession of BH to the Council of Europe and the ratification of the ECHR by it, to provide for a provisional monitoring mechanism reproducing in BH the Strasbourg bodies (the European Commission and Court of Human Rights).

The idea of a transitional international human rights protection mechanism was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe, and Annex 6 to the Dayton Agreements, establishing the Human Rights Chamber, expressly refers to this Resolution.

The international elements in the composition of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina) underline this specific role of the bodies established under Annex 6. The Human Rights Commission appears as a quasi-international *sui generis* body integrated into the legal order of Bosnia and Herzegovina for a transitional period, until the effective integration of this State has been achieved and has acceded to the Council of Europe, ratified the European Convention on Human Rights and recognised the human rights protection mechanism of the Strasbourg organs. The transitional (provisional) character of the mechanism is also indicated in Annex 6 , which is scheduled to last for five years after the entry into force of the Dayton Agreement. 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 otherwise agreed. This provision has to be read in conjunction with Article 5 of Resolution (93) 6 which provides that the arrangements for a transitional human rights control mechanism integrated in the internal legal order of European States which are 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.

The provisions on jurisdiction of the Human Rights Commission further underline this quasi-international *(sui generis)* character of the mechanism established under Annex 6. Article 2 of Annex 6 states 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 also a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement.

Moreover, decisions of the Human Rights Chamber, as well as decisions of the Constitutional Court, are final and binding (see Article XI, para 3 of Annex 6 and Article VI, para 4 of the Constitution). This clearly shows that there should be no room for appeals from one body to the other and that there should be a distribution of competencies among them, as long as they are both in operation in the field of human rights. This distribution of competencies can rely on the difference in nature of these bodies: The Human Rights Chamber deals with applications (including individual applications) whereby it is alleged that the fundamental rights of persons in the jurisdiction of BH have been violated. Its decisions indicate whether a breach of the human rights provisions has occurred, imputable to a party to the Agreement and, if so, what steps shall be taken in order to remedy such breach (e.g. appropriate compensation, monetary relief, orders to cease and desist, provisional measures; see article VIII of Annex 6). The Constitutional Court deals with human rights issues when a question is referred to it by other courts in Bosnia and Herzegovina whether a legal norm is compatible with the Constitution or the ECHR (Article VI, para 3 (c) of the Constitution) . The Commission does not find it necessary to address in the present opinion the question as to whether the Human Rights Chamber can refer a case to the Constitutional Court under the provision of Article VI para. 3(c) of the Constitution of BH.

The above distribution of competencies and the exclusion of appeals from one court to the other further contributes to the effectiveness of human rights protection in the country, since it avoids adding another degree of jurisdiction to the already long process of exhaustion of legal remedies.

5. Conclusion

It follows from the above that the Human Rights Chamber, on account of its quasi -international *(sui generis)* and provisional character, cannot be regarded as a court of Bosnia and Herzegovina, within the meaning of Article VI, para 3 (b) of the Constitution of Bosnia and Herzegovina, at least as long as these characteristics remain[14].

Consequently, the Venice Commission is of the opinion that the Constitutional Court has no appellate jurisdiction in respect of decisions of the Human Rights Chamber.

ix. Opinion on the constitutionality of international agreements concluded by Bosnia and Herzegovina and/or the entities adopted at the 37th Plenary Meeting (11-12 December 1998

Introduction

By letter dated 4 August 1998 the Office of the High Representative asked the Venice Commission to examine the constitutionality of a number of Agreements, the list of which appears at Appendix I, concluded by the Republic of Bosnia and Herzegovina or by Bosnia and Herzegovina (BH) and/or the Federation of Bosnia and Herzegovina (FBH) with the Republic of Croatia on the one hand and by Republika Srpska (RS) with the Federal Republic of Yugoslavia (FRY) on the other.

The present opinion was adopted by the Commission at its 37th Plenary meeting on 11-12 December 1998 upon the proposal of the Sub-Commission on the Federal and Regional State. It was prepared by a working group of the Sub-Commission composed of Messrs Matscher (Austria), Scholsem (Belgium), Tuori (Finland) and Bartole (Italy).

The Agreements raise a number of difficult issues concerning both procedure and substance. As regards procedure, Agreements concluded after the entry into force of the BH Constitution appearing at Appendix IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) but before the establishment of the new institutions raise particular problems. As regards substance, all Agreements have to respect the division of responsibilities between BH on the one hand and the Entities on the other.

In the opinion, the Commission has limited itself to examining the constitutionality according to the Constitution of BH as set out at Appendix IV to the Dayton Agreement. It has not dealt with the constitutionality according to earlier constitutions of the Republic of BHor the constitutionality of Agreements concluded by the Entities under the Entity Constitutions. In addition, the consequences under international law of a possible unconstitutionality are not addressed in the present opinion. While, according to the provisions of Articles 27 and 46 of the Vienna Convention, provisions of internal law may only under very exceptional circumstances be invoked to contest the validity of an international treaty, the situation concerning the Agreements dealt with in the present opinion seems very specific in so far as the two other States concerned, i.e. Croatia and FRY, as co-Parties to the Dayton Agreement, were not only perfectly aware of the constitutional situation in BH but even formally endorsed the BH Constitution and agreed to fully respect the commitments made therein (Article V of the Dayton Agreement).

The present opinion also does not claim to deal exhaustively with all relevant constitutional questions. The Commission has concentrated on those questions which seem decisive for the validity of the agreements or for the further action to be undertaken by the BH authorities. In addition, the Commission is conscious that the decision on the constitutionality of the agreements belongs to the Constitutional Court of BH and that it may only provide a non-binding legal opinion of outside experts. While the Office of the High Representative has provided all information requested by the Commission, such information cannot replace an adversarial legal procedure. Therefore it does not seem impossible that the Constitutional Court of BH may in the future, when called upon to take a decision on the constitutionality of one or the other Agreement, dispose of additional elements and arrive at different conclusions with respect to certain issues.

Agreements ratified before the entry into force of the Constitution

General procedural considerations

Section 5 of the Transitional Arrangements appearing in Annex II to the Constitution contains the following rule on treaties:

Any treaty ratified by the Republic of BH between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any Member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.

The Commission was informed by the Office of the High Representative that both treaties mentioned below were disclosed to the Members of the Presidency in accordance with this provision and that no request to denounce either of the treaties was made.

There are therefore no procedural reasons to doubt the validity of these Agreements.

nary Agreement on the Establishment of a Confederation between FBH and the Republic of Croatia

The Commission considers the establishment of a confederation between an Entity and another State as clearly inconsistent with the sovereignty and territorial integrity of BH and therefore as unconstitutional. While the Agreement itself falls short of the establishment of a confederation, this purpose is not legitimate under the BH Constitution which provides as an alternative the possibility to conclude agreements on special parallel relationships. It is clear that, as from the entry into force of the new Constitution, the Washington Agreement may be used as a basis for the conclusion of agreements only to the extent it is compatible with the new Constitution.

This Agreement, which was concluded before Dayton, has to be regarded as superseded by the new Constitution.

nent on the Adoption of the Constitution of the FBH and Preliminary Agreement concerning the Future Economic and Military Co-operation between the FBH and the Republic of Croatia

The Commission notes that the commitments resulting from this Agreement were presumably to a large extent carried out already. The Commission is not aware to which extent the measures agreed by the Military Interim Team, to which reference is made, are still relevant and can therefore not provide a final opinion.

Agreements ratified (or signed without reservation as to ratification) between the entry into force of the Constitution (14 December 1995) and the elections to the new constitutional institutions (September 1996)

General procedural considerations

The Agreements in this category were ratified after the entry into force of the Constitution. Section 5 of the Transitional Arrangements is therefore not applicable, at least not directly.

The Commission was informed that these agreements, as well as all other agreements concluded between 1 January 1992 and 31 November 1996, had nevertheless been notified to the Members of the Presidency upon their taking office. This disclosure was motivated by the desire to ensure transparency and was not based upon a legal obligation under Section 5 of the Transitional Agreements.

The Agreements, with the exception of the *Agreement on the Establishment of the Joint Council for Co-operation* which was treated as an Agreement not requiring ratification, were all ratified in a procedure inconsistent with the provisions of the new Constitution. The Constitution provides that the Presidency is responsible for negotiating, denouncing and, with the consent of the Parliamentary Assembly, ratifying treaties of BH (Article V.3.d) and that the Parliamentary Assembly shall have responsibility for deciding whether to consent to the ratification of treaties (Article IV.4.d). In contradiction with these provisions, the Agreements were ratified by the government of the Republic of BH, without the involvement of the Parliamentary Assembly or the Presidency, on the basis of Article 34 of the 1994 Law on the Government of the Republic of BH adopted under the previous Constitution.

This disregard for the Constitution, which had already entered into force on 14 December 1995, seems due to the fact that the institutions provided for by the new Constitution had not yet been established and that the elections to them did not take place until September 1996. For this transitional period a solution therefore had to be found and this solution was not provided for directly by the text of the Transitional Arrangements.

The Commission was already consulted on this problem, not with respect to international treaties but with respect to ordinary legislation. In its *Opinion on legislative powers in BH in the period between the entry into force of the Constitution set out in Annex IV to the Dayton Agreement (14 December 1995) and the elections of 14 September 1996* (CDL (96) 94) it came to the following conclusions:

rticle IV of the new Constitution of Bosnia and Herzegovina contains provisions on a Parliamentary Assembly. This Parliamentary Assembly is different from the Assembly of the Republic of Bosnia and Herzegovina existing under the previous Constitution.

ollowing the rule on immediate entry into force of the new Constitution, contained in its Article XII.1, at first sight the Assembly of the Republic would lose its legal basis upon signature of the Dayton Agreement and therefore cease to be able to validly enact legislation or other decisions. A different conclusion may however result in particular from the Transitional Arrangements contained in Annex 2 to the Constitution.

ection 2 of the Transitional Arrangements on the continuation of laws is worded as follows: "all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

provision does not cover legislation adopted after the entry into force of the new Constitution, but only previously enacted legislation. The very absence of a provision on legislation adopted during the transitional period might however be regarded as an indication that such legislation was not envisaged.

n the other hand, section 4 of the Transitional Arrangements provides under the heading "offices" as follows: "until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law".

n the terminology of the Dayton Constitution, a parliamentary body may be covered by the expression "governmental offices, institutions, and other bodies". This results from Article III.1 where the word institution is applied to all State organs, including the Parliamentary Assembly. Moreover, section 2 of Annex 2 cited above calls "governmental" the competent body, which determines the continued validity of previous legislation.

ntrast, the application of the words "until superseded by applicable agreement or law" to a parliamentary body seems problematic since parliament has its main legal basis in the Constitution and the new Constitution has already superseded the previous Constitution.

he wording of the Transitional Arrangements therefore seems ambiguous and an answer has to be found by applying general principles to the interpretation of the Constitution contained in the Dayton Peace Agreement.

ccording to Article I.1 of the Constitution, Bosnia and Herzegovina is not a new State but it continues its legal existence under international law as a State. This also results clearly from Article XII.1 according to which the new Constitution enters into force "amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". It is therefore clear that the State of Bosnia and Herzegovina continued to exist throughout the whole period. As a State it had to exercise the attributes of State power proper to any State under international law. The organs of the State therefore had to be able to effectively exercise their powers. Since the new parliamentary organs did not come into existence before the elections on 14 September 1996, a denial of the continued existence of the Assembly of the Republic of Bosnia and Herzegovina would mean that for a period of 10 months no parliamentary or

legislative body would have existed at the level of the State of Bosnia and Herzegovina. This is difficult to conceive, and in the absence of any clear provision in the text itself, the principle of continuity requires the continued existence of a parliamentary organ of the State of Bosnia and Herzegovina.

owever, this continued existence would seem to be very limited.

rst of all, it is obvious that the Assembly of the Republic, acting as an organ of Bosnia and Herzegovina, could only act within the sphere of responsibilities given to the parliamentary organs of Bosnia and Herzegovina (as distinct from the Entities) by the new Constitution.

18. In addition, the powers of the Assembly were only justified on the basis of the principle of necessity. The Assembly was not a competent organ by virtue of the new Constitution, with the full powers given by the new Constitution to the new institutions. It only continued to exist to avoid the absence of the existence of any competent body and its actions were only justified to the extent that such a lack of a competent body had to be avoided. The Assembly of the Republic could therefore only deal with current matters and not take any measures going beyond what is necessary to ensure the continuity of the State. This limitation may be difficult to determine, as is for example the case for the current matters a government still can expedite during a governmental crisis. The limits can however be, if necessary, assessed by the Constitutional Court and, provisionally, by the High Representative under the conditions of Article 2.1.d of Annex 10 to the Dayton Agreement.

The same reasoning seems appropriate with respect to international treaties. As a general rule, the BH institutions were therefore justified to act on the basis of their previous constitutional attributions with respect to such Agreements which were necessary to ensure the continuity of the State and only within the limits of the responsibilities of BH as distinct from the responsibilities of the Entities. With respect to the following Agreements, the Commission will therefore be guided by the application of the principles of continuity and necessity.

Agreement on the Establishment of the Joint Council for Co-operation

This Agreement was signed on 14 December 1995, the day of entry into force of the new Constitution, by the presidents of the Republic of BH, Croatia and FBH. According to its Article 5, the Agreement comes into force on the day of its signing.

The main purpose of this Agreement is to establish a joint Council for co-operation. The Commission notes that a more recent *Agreement on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia* (see below) was already approved by the BH Parliamentary Assembly. This Agreement will replace the present Agreement. In addition it should be noted that the new Agreement on special parallel relations between FBH and Croatia also provides for the establishment of a joint Council for co-operation, in this case between FBH and Croatia.

Under these circumstances, the present Agreement is about to be superseded by subsequent developments and it does not seem necessary to examine it in detail.

'font-size:10.0pt'> Agreement between the Government of BH, the Government of FBH and the Government of the Republic of Croatia on Mutual Execution of Court Decisions in Criminal Matters

Procedural questions

This Agreement was signed on 26 February 1996 and subsequently ratified by the government of the Republic of BH according to the procedure under the law of 1994. The ratification was published on 4 April 1996. As set out above, the procedural validity of the Agreement will therefore depend on the question whether it was really necessary at the time to conclude such an Agreement to ensure the continuity of the State of BH.

It is certainly true that the establishment of law and order are a priority in a country just having experienced a war and that co-operation with a neighbouring State in such matters may well be decisive. Nevertheless, it should be noted that the Agreement only refers to the transfer of sentenced persons and to the supervision of conditionally sentenced persons in the other country. It is hard to see why the transfer of sentenced persons should have been so urgent and decisive for the reconstruction of the State and why it should not have been possible to wait for the establishment of the constitutional institutions. It was therefore not justified to conclude the agreement without respecting the procedural rules set out in the new Constitution.

Substantive questions

As regards the substance of the Agreement, it should be noted that both BH and FBH are parties to the Agreement. The Constitution of BH does not expressly provide for the joint conclusion of an international agreement by BH and an Entity. While Article III.2.d of the Constitution expressly grants to the Entities the right to conclude international agreements with the consent of the Parliamentary Assembly, it does not mention the conclusion of agreements jointly with BH. And, in general, the constitutional system of BH seems based on a strict separation between responsibilities of BH and responsibilities of the Entities. No express provision is made for joint or mixed responsibilities as are found in the constitutions of European federal States.

Nevertheless, this and subsequent Agreements were jointly concluded by BH and FBH and the respective institutions seem to have considered such a procedure appropriate and perhaps even necessary. This can be explained by the fact that BH is an unusually weak Federation. Most responsibilities are assigned to the Entities while the responsibility for foreign policy naturally remains with BH. Under these circumstances, it seems plausible that many international Agreements will touch upon responsibilities both of BH and of one of the Entities. Co-operative mechanisms therefore have to be found and a reasonable way of ensuring full harmony between the State and the Entity level seems to be the conclusion of such joint agreements. The Commission sees no reason to object to them in principle, provided the respective agreement touches upon the responsibilities both of BH and the Entity concerned.

In the present case, the participation of BH is in particular justified by the BH responsibility for international and inter-Entity criminal law enforcement under Article III.1.g of the Constitution and the participation of FBH by its overall responsibility for its criminal justice system.

As regards the substance of the Agreement, there seems therefore no reason to doubt its constitutionality.

on Customs Co-operation between the Government of Republic of BH, the Government of FBH and the Government of the Republic of Croatia

This Agreement was signed on 24 March 1995 before the entry into force of the Constitution and ratified in February 1996 during the transitional period, again without respecting the constitutional provisions on the ratification procedure. The substance of the Agreement is very technical, setting out not so much general rules of customs policy but regulating co-operation between authorities on the ground. Even taking into account the high importance of trade with a neighbouring State, the necessity of rapid ratification seems doubtful. This is confirmed by the fact that the Agreement was ratified eleven months after its signature. It would therefore have seemed possible to wait seven more months until the new institutions were established. In addition, according to its Article 18, the treaty was to be provisionally applied as from the day of its signing. Under these circumstances, it would have been perfectly possible to prolong this provisional application until the establishment of the new institutions and then submit the text to the newly elected Presidency and Parliamentary Assembly. The ratification of the Agreement can therefore not be regarded as valid.

Under these circumstances, it does not appear necessary to examine the substance of the Agreement in detail. Since at the time of ratification a customs policy of BH could not yet have been defined, it is difficult to see how an Entity could conclude such an

agreement without violating the responsibility of BH for customs policy under art. III.1.c of the BH Constitution. The reference to a customs region of FBH in art. 2 in particular seems unconstitutional.

Agreement on the Return of Refugees

This is again an Agreement signed in March 1995 and ratified in February 1996 by the government of the Republic of BHaccording to the procedure under the law of 1994. The return of refugees was and remains obviously of the highest importance for the reconstruction of BH. The Commission, while it does not have sufficient elements to assess the urgency of the Agreement in detail, cannot exclude that ratification during this period was justified having regard to the principles of necessity and continuity as set out above.

With respect to substance, the Commission notes that this is a further Agreement having both BH and FBH as parties. This again seems unobjectionable, taking into account that the *Agreement on Refugees and Displaced Persons* appearing at Annex VII to the Dayton Agreement obliges both BH and FBH to take all necessary steps for the return of refugees and that Article III.5.a of the Constitution provides that BH shall assume responsibility for such other matters as are provided for in Annexes V-VIII to the Dayton Agreement.

It should be noted that the Agreement is applicable to refugees coming from the whole territory of BH while, with respect to the return of refugees, Article 4 refers to the territory of the Federation only. While such arrangements may have been justifiable when the Agreement was concluded, it would now seem appropriate for the BH authorities to examine together with the Entities, and subsequently Croatia, the possibility of extending the application of this article also to persons wishing to return to RS.

Agreement on Waiving Visas

ol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH

Protocol on the Temporary Application of the Agreement on Waiving Visas

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The situation with respect to these three texts seems somewhat confusing. *The Agreement on waiving visas* was signed on behalf of the government of the Republic and Federation in March 1995. The *Protocol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH* was, on the Bosnian side, signed on the same day by the government of the Republic of BH only. According to its Article 4, the *Protocol* enters into force within fifteen days from the date of its signature and shall be applied until the *Agreement on Waiving Visas* enters into force. Nevertheless, both Agreement and Protocol were ratified together (publication on 23 February 1996) by BH. In addition, the *Protocol on the Temporary Application of the Agreement on Waiving Visas* was concluded between BH and Croatia on 26 February 1996 pending the entry into force of the *Agreement on waiving visas*. This *Protocol*, according to its text, entered into force on 4 March 1996 and temporarily limits the application of the provisions of the *Agreement on Waiving Visas* to citizens of BH residing on the territory of FBH. Despite the ratification of the Agreement by BH, it therefore does not seem to have become applicable and the original Protocol was replaced by the *Protocol on the Temporary Application of the Agreement on Waiving Visas* .

Having regard to the geographical situation of BH, it seems plausible that rules on transit of BH citizens through Croatia were of the utmost urgency. It also seems correct that only BH concluded the Protocols since BH is responsible for immigration, refugee, and asylum policy and regulation.

By contrast, the content of the *Protocol on the Temporary Application of the Agreement on Waiving Visas* as the only text presently in force meets with objections. The Protocol reserves the benefits of free travel exclusively to BH citizens residing on the territory of FBH while referring citizens residing on the territory of RS to a supplementary Protocol which does not seem to have been concluded. Such a discriminatory treatment of one part of the citizens of the State does not seem permissible within a federal State and the Protocol therefore has to be regarded as unconstitutional.

- Agreement on Economic Co-operation

This Agreement was again signed on behalf of the Republic of BH and FBH governments on 24 March 1995 and ratified by the government of Republic of BH under the law of 1994 during the transitional period in March 1996.

Trade with Croatia and economic co-operation with Croatia were obviously very important for BH during this period and a certain urgency cannot be denied. Nevertheless, the ratification during a transitional period of such a comprehensive Agreement with a neighbouring State and major economic partner cannot be justified as necessary.

In addition, the Agreement meets with objections of substance. It is not even very clear who are the parties to the Agreement. According to its Preamble, the Agreement was agreed by the two governments, i.e. Croatia on the one side and the government of the Republic and Federation on the other. Articles 1 and 15 seem to limit the applicability of the Agreement to FBH. It seems however inconceivable in a Federation to regulate major questions of foreign trade policy and customs policy with effect for one Entity only. Due to the principle of free movement of goods and services throughout BH enshrined by Article I.4 of the Constitution, any such agreement has major repercussions on the other Entity. The reference in the preamble to the Confederation Agreement between Croatia and FBH also shows that this Agreement is inappropriate following the new situation created by the Dayton Peace Agreement.

This Agreement therefore has to be regarded as unconstitutional.

Agreements concluded or to be concluded by BH and/or FBH with Croatia after the setting up of the institutions provided for by the new Constitution

nent on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia

With respect to this Agreement, the correct constitutional procedure seems to have been followed and the Commission sees no reason to doubt the constitutionality of this Agreement.

ol on the Establishment of Navigation on Internal Navigation Routes of the Sava River and its Tributaries between the Republic of Croatia and BH

Different versions of this Protocol were submitted to the Commission during the period of its consideration. Its text is difficult to assess without a more complete knowledge of both the legal and factual background. The Commission therefore refrains from expressing an opinion on this agreement.

greement between the Republic of Croatia and BH on the Establishment of a Motorway Construction Company for the Zagreb-Bihać-Dubrovnik and Ploče-Sarajevo-Osijek Motorways

This draft Agreement is to be signed by the governments of Croatia, BH and FBH. It involves the setting up of a joint company for the carrying out of construction work and does not address public law questions such as the necessary planning permits. It has a mainly private law nature.

Agreements concluded by the RS with the FRY

Precept on Temporary Regulations of Commodities and Services with the FRY

The Commission notes that this text is not an international agreement but an internal regulatory text. It may well also be already superseded by later texts, in particular the *Decree on Regulation of Traffic of Goods and Services with the FRY* (see below).

The Precept regulates trade and customs arrangements with the FRY. According to Articles III.1.b and III.1.c of the Constitution, foreign trade policy and customs policy are the responsibility of the BH institutions and this Precept therefore clearly violates the BH Constitution.

Protocol on the Trade of Goods and Services between the Republic of Serbia and the RS

This protocol regulates the trade between RS and the Republic of Serbia as the main component of the FRY. It again violates the BH responsibility for foreign trade and customs policy. Such agreements can also not be concluded by one Entity since they have important repercussions on the other Entity due to the free movement of goods and services within BH (see above).

In addition, the consent of the BH Parliamentary Assembly, which under Article III.2.d of the Constitution is required for Entity agreements, has not been sought or obtained (cf. below under *Trade Agreement* for the question whether a trade agreement may be an agreement on special parallel relations).

Draft Agreement on Special Parallel Relations between the FRY and the RS

It should be noted that this Agreement provides that its entry into force is subject to ratification by the Parliamentary Assembly of BH. Under the BH Constitution it seems questionable whether agreements of special parallel relations require the consent of the Parliamentary Assembly of BH. According to Article III.2.d of the Constitution this consent is required for international agreements in general. However, agreements on special parallel relationships are governed by a different provision of the Constitution, Article III.2.a, which does not mention the consent of the Parliamentary Assembly. The word "also" in Article III.2.d indicates that both procedures have to be considered separately. This is confirmed by the fact that Article VI.3.a gives to the Constitutional Court a specific responsibility to control, upon the request of the institutions mentioned in this article, the constitutionality of agreements on special parallel relationships. It is therefore the understanding of the Commission that the agreements on special parallel relations do not require the consent of the BH Parliamentary Assembly.

Nevertheless, the Agreement has not entered into force according to its text. In addition, according to press reports, a new such Agreement between RS and FRY is being prepared. It seems therefore sufficient to briefly identify the most problematic parts of the Agreement.

Article 5 of the Agreement provides that the member of the BH Presidency from RS is Vice-President of the Council for Co-operation. Since the members of the Presidency of BH act on behalf of BH, it is not possible for the Entities to adopt rules on the rights and obligations of members of the BH Presidency.

Article 6 establishes a list of fields for the activities of the Council for Co-operation. In particular, the following fields encroach upon BH responsibilities:

- emigration, immigration and asylum conflicts with the BH responsibility under Article III.1.f of the Constitution for Immigration, Refugee, and Asylum Policy and Regulation;
- the same consideration applies to regulating the crossing of State borders;
- harmonising foreign policy and the approach to third-world countries and international organisations conflicts with the BH responsibility on foreign policy under Article III.1.a of the Constitution;
- the same consideration applies to resolving the issue of succession of the Former Socialist Federal Republic of Yugoslavia.

The aim of creating a unified market and the commitment to the principle of the freedom of movement of people, goods and capital (Article 12) encroach in particular upon the BH responsibilities for foreign trade and customs policy and immigration. Other fields such as citizenship (under Article I.7 of the BH Constitution Entity citizenship only exists within the framework of BH citizenship) and the fight against terrorism and organised crime may also, depending on the scope of co-operation, encroach upon BH responsibilities. In this context it is to be regretted that there is no general provision limiting the activities of the Council for Co-operation to areas within the responsibility of RS under the BH Constitution.

Other parts of the Agreement, such as the non-aggression clause in Article 9, typical of agreements concluded between sovereign states, though in principle to be welcomed, may also be regarded as violating the foreign policy prerogative of BH and the responsibilities of the Standing Committee on Military Matters provided for by Article V.5.b of the BH Constitution..

Trade Agreement

As regards procedure, it is not foreseen to submit the draft Agreement to the BH Parliamentary Assembly for its consent, as required by Article III.2.d of the Constitution for international agreements concluded by the Entities. The only exception foreseen by the Constitution is that, according to Article III.2.a, special parallel relationship agreements are not subject to the consent of the BH Parliamentary Assembly (see above). The present Agreement claims to be based on this Article III.2.a.

It seems questionable, but may remain open here, whether an agreement limited to a specific field such as trade can be regarded as a special parallel relationship agreement. In any case, special parallel relationship agreements may only be concluded for areas for which the Entities are responsible. Since foreign trade policy is reserved to BH, the Entities cannot conclude trade agreements. The Agreement is therefore unconstitutional.

Decree on Regulation of Traffic of Goods and Services with the FRY

See the comments on the *Precept on temporary regulations of commodities and services with the FRY* .

on the Amendment to the Decree on Regulation of the Exchange of Goods and Services with the FRY

This decree amends other unconstitutional texts and has to be considered invalid together with them.

Agreement between the Government of the Republic of Montenegro and the Government of RS

This Agreement was not submitted to the BH Parliamentary Assembly. It is therefore unconstitutional unless it may be regarded as an agreement on a special parallel relationship. In principle, Article III.2.a provides for such special parallel relationships only with neighbouring States. Montenegro is an Entity of a neighbouring State. Having regard to the increasing tendency under international law to allow Entities to enter into international commitments, a tendency confirmed by the BH Constitution, and to the fact that agreements with neighbouring Entities do not seem to raise more risks for the interests of BH than agreements with neighbouring States, there seems to be no reason to deny the applicability of Article III.2.a to agreements with neighbouring Entities. As regards its substance, the Agreement covers wide areas of mutual co-operation and may be regarded as an agreement establishing a special parallel relationship. Article III.2.a is therefore applicable and the consent of the BH Parliamentary Assembly is not required.

However, again, the responsibilities of BH have to be respected. Since the provisions of the Agreement are very imprecise, it is not easy to determine whether provisions violate the BH Constitution. It is therefore to be regretted that no reference to the need to safeguard the responsibilities of BH is included in the text of the Agreement. Such a reference should be added. As the Agreement stands, in particular the closer integration in the field of telecommunications (cf. Article III.1.h of the BH Constitution) and air traffic (cf. Article III.1.j of the BH Constitution) seem problematic.

Protocol on the Procedure of Organised Return

There is no provision to submit this draft Protocol to the consent of the BH Parliamentary Assembly. The draft Agreement concerns a very specific area in which BH responsibilities exist and cannot be regarded as a special parallel relationship agreement which would have to be of a more general nature. In addition, there is no reference to the main agreement which would have to be supplemented by this Protocol. In the absence of such a main agreement, the Protocol seems to go beyond a purely administrative arrangement and to have to be considered as an international agreement in the meaning of Article III.2.d of the Constitution.

The consent of the BH Parliamentary Assembly is therefore required.

APPENDIX

Preliminary Agreement on the Establishment of a Confederation between FBH and the Republic of Croatia, signed on 18 March 1994

Agreement on the Adoption of the Constitution of the FBH and Preliminary Agreement concerning the Future Economic and Military Co-operation between the FBH and the Republic of Croatia, signed on 18 March 1994

Agreement on the Establishment of the Joint Council for Co-operation, signed on 14 December 1995

Agreement between the Government of BH, the Government of FBH and the Government of the Republic of Croatia on Mutual Execution of Court Decisions in Criminal Matters, signed on 26 February 1996

Treaty on Customs Co-operation between the Government of BH, the Government of FBH and the Government of the Republic of Croatia, signed on 24 March 1995

Agreement on the Return of Refugees, signed on 24 March 1995

Agreement on Waiving Visas, signed on 24 March 1995

Protocol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH, signed on 24 March 1995

Protocol on the Temporary Application of the Agreement on Waiving Visas, signed on 26 February 1996

Agreement on Economic Co-operation, signed on 24 March 1995

Draft Agreement on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia, signed on 30 March 1998

Protocol on the Establishment of Navigation on Internal Navigation Routes of the Sava River and its Tributaries between the Republic of Croatia and BH, signed on 16 October 1998

Draft Agreement between the Republic of Croatia and BH on the Establishment of a Motorway Construction Company for the Zagreb-Bihać-Dubrovnik and Ploče-Sarajevo-Osijek Motorways

Precept on Temporary Regulations of Commodities and Services with the FRY

Protocol on the Trade of Goods and Services between the Republic of Serbia and the RS, signed on 14 March 1997

Draft Agreement on Special Parallel Relations between the FRY and the RS, signed on 28 February 1997

Trade Agreement, signed in March 1997

Decree on Regulation of Traffic of Goods and Services with the FRY

Decree on the Amendment to the Decree on Regulation of the Exchange of Goods and Services with the FRY

Agreement between the Government of the Republic of Montenegro and the Government of RS, signed on 25 March 1998

Protocol on the Procedure of Organised Return

x. Opinion on the constitutional issues involved in Estonias accession to the European Union adopted at the 35th Plenary Meeting (12-13 June 1998)

1. Following the conference "five years of the Estonian Constitution", held in Tallinn on 26-27 September 1997, the Estonian Ministry of Justice asked the Commission to give an opinion on the constitutional issues involved in Estonia's accession to the European Union.

2. Opinions on this issue were provided by Mr Matti Niemivuo (CDL (97) 52) and Mr Luis Lopez Guerra (CDL (98) 5). These individual opinions were discussed at the 33rd and 34th meeting of the Commission in December 1997 and March 1998 respectively and they were made available to the Governmental Commission charged in Estonia to prepare proposals for changes to the Constitution of Estonia. This Governmental Commission made an Intermediary Report (CDL (98) 39) outlining proposals for changes to the Constitution of Estonia made necessary by accession to the European Union. Following this report, Mr Lopez Guerra made some additional comments (CDL (98) 5 Addendum).

3. The present opinion is based on the individual opinions by Mr Niemivuo and Mr Lopez Guerra and takes into account the Intermediary Report of the Governmental Commission as well as the discussions at the 33rd, 34th [and 35th] plenary meetings of the Commission.

e need for a general provision on transfers of powers to the European Union

4. Article 1 of the Estonian Constitution provides that "Estonia is an independent and sovereign democratic republic wherein the supreme power of the State is held by the people. Estonian independence and sovereignty is interminable and inalienable". Article 59 of the Constitution provides that "legislative power shall rest with the Riigikogu" and Article 86 that "executive power shall be held by the government of the republic". Article 121 establishes the treaty-making power of the Riigikogu which includes Estonia's joining international organisations. There is no provision on the transfer of powers to international or supra-national organisations nor on Estonia's participation in international co-operation in general. Article 123 specifically prohibits the conclusion of treaties which are in conflict with the Constitution.

5. The need for a general "empowerment" provision providing for the transfer of powers to the European Union is extensively discussed in the individual opinions by Mr Niemivuo (CDL (97) 52) and Mr Lopez Guerra (CDL (98) 5 rev.), taking into account the experience of other European countries already members of the Union. Since the Estonian Governmental Commission has also come to the conclusion that a revision of the Constitution should include a general empowerment clause, it seems not necessary to repeat these arguments in detail. The present opinion is therefore limited in this respect to an outline of the main arguments and the Commission refers for the details and the experience of other European States to the individual opinions by Mr Niemivuo and Mr Lopez Guerra.

6. In the opinion of the Commission, the decisive arguments in favour of introducing a general "empowerment" provision into the Estonian Constitution are the following:

cession to the European Union involves a substantial transfer of executive, judicial and in particular legislative power to the institutions of the European Union. The present provisions of the Estonian Constitution, such as "legislative power shall rest with the Riigikogu", would no longer reflect the actual legal situation.

cession would involve a limitation of the sovereignty of the republic, which is proclaimed in Article 1 of the Constitution, since several of the powers transferred may be considered as central components of the State's powers. It should be noted that these Community powers may be exercised without necessarily always obtaining the consent of all member States.

e introduction of an empowerment clause would contribute to the legal certainty of the binding force of European law in Estonia. Given the system of the diffuse control of the constitutionality of laws which exists in Estonia, the transfer or empowerment clause, by explicitly providing for the constitutionality of the transfer of competences, would confirm the direct and preferential binding force of European law (treaties, regulations, directives and decisions), and would preclude the possibility of European primary and secondary law not being applied by the Estonian courts on the basis of Article 152 of the Constitution which states that "if any law or other legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case".

e empowerment clause could include a provision guaranteeing the participation of the Riigikogu in the formulation of the European

policies of the Estonian Republic. The Estonian Constitution establishes that the Executive power shall "implement foreign policies" (Article 83). In the structure of the European Union, there is a strong presence of organs whose designation or composition depends on the proposals or decisions of the executive powers of the member States. Therefore, a constitutional mandate providing for the participation of the Riigikogu (as the State organ which represents the Estonian people) in the internal processes to define Estonia's position on European matters, and the proposals to be formulated by the Estonian representatives in the European Union institutions, would partially compensate for that predominance of the executive powers, sometimes considered to be a "democratic deficit".

7. The Commission therefore notes with satisfaction that the Governmental Commission in fact proposes the introduction of a general empowerment clause into the present Constitution of Estonia.

ıe actual wording of the empowerment clause

8. From a constitutional standpoint, the proposal contained in the Intermediary Report of the Governmental Commission clears the way for the integration of the Republic of Estonia into the European Union by means of the ratification of the corresponding treaty. The proposal entails the adoption of an empowerment clause, allowing the transfer (or delegation) of constitutional competences to the institutions of the European Union, as well as providing for an extended intervention of the legislative power in the formulation of Estonian European policy (the Government should "give due regard to the positions adopted by the Riigikogu on all related questions"). Some considerations may, nevertheless, be formulated:

a) The reference to the 7 February 1992Treaty might be considered as superfluous, and may prove a source of constitutional difficulties in the future.

It might prove superfluous because it does not add any new precision to the authorisation to become a member of the Union. The European Union is what it really and actually is; any empowerment clause related to the European Union does not need to enumerate the instruments by which this Union is created. It is understood that accession to the European Union is authorised to the Union in its present form. If a change of the structure and functions of the Union were to be introduced in the future, the agreement of its members would be necessary, by way of a new Treaty, whose compatibility with the Constitution would once again have to be considered.

But the reference to the Maastricht Treaty could also prove to be a source of future difficulties, since it restricts the empowerment clause exclusively to the accession to the Union as set forth in that Treaty, thus implying the exclusion of any future reform. In other words, the reference to the Maastricht Treaty could reasonably be interpreted as meaning that any amendment to the Union set forth by a subsequent Treaty would require a new constitutional empowerment clause in order to permit the Republic of Estonia to ratify that treaty, even if the reform of the Union did not, in any way, contradict the basic principles and tasks of the Estonian State. (Moreover, the Maastricht Treaty is on its way to being superseded by the Amsterdam Treaty.)

The empowerment clause, therefore, should not make reference to the Maastricht Treaty, but rather to the European Union without any specific reference to either its present or future form (notwithstanding the "safeguard clause" relating to the Preamble of the Constitution - see below).

b) The constitutional reserve clause included in the second item of the proposed reform article ("provided that this does not come into contradiction with the basic principles and tasks of the Estonian State the way they have been fixed in the Preamble of the Constitution") may be understood only as a safeguard clause against future modifications of the Union, not as a reserve referring to the present content of the Treaty of the Union. If it were understood otherwise, the Republic of Estonia's acceptance of its duties as a member of the Union would be a *sub conditione* acceptance, ie. conditioned by a permanent review of the compatibility of the dispositions of the Treaty with the Estonian Constitution on the part of the Estonian authorities. The elimination of the specific reference to the Maastricht Treaty would eliminate any interpretation of that nature. The "safeguard clause" would thus be a constitutional limit *pro futuro*, forbidding ratifications of future Treaties contrary to the Preamble of the Constitution.

ıpecific constitutional issues to be considered in the context of accession to the European Union

The publication of EU norms

9. Article 3 of the Estonian Constitution contains a relevant provision: "Laws shall be published in the prescribed manner. Only laws which have been published shall have obligatory force." At present, the provision only applies to national legislation. EU norms, on the other hand, are not published in the same manner. The only official channel of publication is the Official Journal of the European Communities (OJ) and the provisions enter into force on the date indicated or, failing an indication, on the 20th day after publication. EU legislation is published in all the official languages of the member States (excluding Irish Gaelic). Were Estonia to become a member State of the EU, the legislation would also be published in Estonian. The national provisions on the implementation of EU directives would be published like national legislation. It would appear that the publication of EU norms does not call for an amendment to the Estonian Constitution.

The division of powers between President and Government in EU matters

10. It is of special importance to determine the division of powers between the President of the Republic and the government in EU matters. The crucial provision is Article 78.1 of the Estonian Constitution: "[The President of the Republic shall] represent the Republic of Estonia in international relations." Does this mean, for instance, that it is the President who represents Estonia in the European Council? In any event, the essential point is to carry out a thorough debate on the issue and to formulate the pertinent provisions clearly and unambiguously.

The right to vote and be elected in local elections

11. Article 8B of the Treaty on the European Union gives to every Union citizen the right to vote in local elections and be elected in the State where he or she is resident. Article 57 of the Estonian Constitution limits the right to vote to Estonian citizens. While Article 156 of the Constitution extends the right to vote in local elections to all permanent residents, no such provision exists with respect to the right to be elected. An amendment to the Constitution is therefore necessary. This amendment would also have to make it possible for EU citizens residing in Estonia to participate as voters or candidates in the Estonian elections to the European Parliament in the terms set out in Article 8B.2 of the European Union Treaty.

The right to be a member of a political party

12. Article 48 of the Estonian Constitution states that "only Estonian citizens may be members of political parties." It is very doubtful that, given the inter-relation among all political rights, such a clause could be considered compatible with the free and equal exercise of voting rights (to vote and be candidate) in local elections, as well as in elections to the European Parliament. Article 8B of the EC Treaty provides that EU citizens shall have the right to vote "under the same conditions as nationals of that State," which would exclude discrimination based on factors as relevant as party membership. This interpretation is also reinforced in Article 6 of the Treaty which forbids discrimination for reasons of nationality when applying Treaty mandates. As a consequence, the Estonian Constitution should also be amended to allow EU citizens resident in Estonia to be members of political parties.

The right to issue currency

13. Another contradiction to be considered is the one existing between Article 111 of the Estonian Constitution ("the sole right to

issue currency in Estonia shall rest with the Bank of Estonia") and Article 105A of the EC Treaty providing for the emission of currency by the European Central Bank. Given the present rate of development of the European Monetary Union and the forecast for the future in monetary matters, (which will result in the unification of currencies in the European Union by the year 2002), the contradiction between the aforementioned clauses will soon be more real than hypothetical. Certainly, it might be assumed that the empowerment clause, providing for the transfer of constitutional competences to the EU, could also address this issue. But the categorical terms of Article 111 ("The sole right", in the English version) makes it advisable to amend the text. There would seem to be no more need for a currency clause once Estonia has joined the Monetary Union. An international comparison indicates that currency provisions seldom belong to the core of the national constitutions.

Conclusion

14. The Commission notes with satisfaction that the intermediary report of the governmental commission recommends the introduction of a general empowerment provision into the Constitution of Estonia. This provision, subject to some amendments as indicated above, provides a satisfactory solution for the main constitutional issues raised by Estonia's accession to the European Union. Further reflection seems advisable on the division of powers between President and Government in EU matters. In addition, some other provisions of the Estonian Constitution should be amended, in particular with respect to:

right of EU citizens to be elected at local elections;

right of EU citizens to be members of political parties;

right to issue currency.

xi. Opinion on the question of the reform of the system of constitutional control in Estonia adopted at the 35th Plenary Meeting (12-13 June 1998)

The Estonian Minister of Justice, in a letter dated 15 October 1997, asked the Commission to give an opinion on the revision of the Estonian Constitution with a view to the possibility of instituting a separate Constitutional Court, as opposed to the existing system of a Supreme Court with a Constitutional Review Chamber, in the context of proposals to allow individual complaints to be heard by the body of constitutional review.

Wtih the primary goal of preparing for accession to the European Union, the Estonian Government set up a Commission to review the Constitution and to propose necessay amendments. According to information provided by the Estonian Ministry of Justice, in its report this Commission proposed the establishment of a Constitutional Court with competence to examine individual complaints. The government report is to serve as a basis for further discussion in Parliament on amending the Constitution.

In parallel, the Estonian Supreme Court also informed the Commission that it was preparing a draft bill to replace the current Constitutional Review Court Procedure Act. This draft bill is available from the Venice Commission as documentCDL(98)48.

At its 32nd plenary meeting the Commission appointed Mssrs Bartole and Steinberger as rapporteurs to examine the question of the reform of constitutional justice in Estonia. During the 33rd meeting a written opinion by Mr Bartole (CDL (97) 53) was discussed also in the light of oral comments made by Mr Steinberger. The present text consolidates the written opinion, the oral comments and the discussion that ensued.

RMS OF CONSTITUTIONAL REVIEW IN ESTONIA

According to the Estonian Constitutional Review Court Procedure Act, the Supreme Court is the court of constitutional review. Constitutional review is undertaken by a chamber consisting of five members of the Supreme Court (Article 2.1). The Constitutional Review Chamber examines petitions directly in accordance with Article 6.1 of the Constitutional Review Court Procedure Act.

Under this article, abstract review of laws which have not yet come into force may be undertaken in two cases:

hen the *Riigikogu* (Parliament) approves for a second time, without amendments, a law which the President has returned to it, the President may directly petition the Supreme Court requesting that it declare the law to be in conflict with the Constitution. If, however, the Court declares the law to be in accordance with the Constitution, the President must then proclaim the law (Article 107 of the Constitution).

:cording to Article 142 of the Constitution, the Legal Chancellor shall apply to the Constitutional Court requesting a declaration that a legal act is invalid if the State legislative or executive power or local government which issued the act fail to comply with the Chancellor's request that the legislation be brought into line with the Constitution within 20 days.

A third form of constitutional review resulting from the concrete application of a law is possible on the basis of Article 5.2 of the Constitutional Review Court Procedure Act. In this case, a court which "has declared a law or other legal act to be in contradiction with the Constitution and has refused to apply it [...] shall so inform the Supreme Court and the Legal Chancellor, by which constitutional review proceedings in the Supreme Court shall be initiated".

It is not entirely clear from this article whether the Legal Chancellor must initiate proceedings or whether they are initiated *ex officio*, although the jurisprudence of the Court leans toward this second construction: see judgments III-4/A-12/94 and III-4/A-1/95 (reported in the Venice Commission's *Bulletin on Constitutional Case-Law* and CODICES database, with the identification EST-1995-1-001 and EST-1995-1-002 respectively). In any case it is this third form of constitutional review which gives rise to most commentary and which is discussed in more detail in section III below.

Currently, no provision is made in Estonian law for individual complaints to the Constitutional Review Chamber of the Supreme Court. However, the Supreme Court's draft bill (7) proposes widening the Chamber's competence to include this possibility as well as that of hearing petitions, in certain specified cases, from the majority of a local government, the Board or the Chairman of the *Riigikogu* or at least 21 members of the parliamentary minority. The draft also proposes widening the Court's jurisdiction to include *ex post facto* review of the constitutionality not only of legislation but also of electoral questions and referenda (3).

II. **COMPARISON WITH OTHER PROCEDURES OF CONSTITUTIONAL REVIEW**

In so far as any court of justice is entrusted with the power of refusing to apply a law which it declares to be "in contradiction with the Constitution", the system of judicial review of legislation is reminiscent of the system adopted in the United States of America. Under the Estonian system, however, such a decision by a court automatically initiates constitutional review proceedings, and decisions of the Supreme Court have binding force for all State and government bodies, local governments, courts, officials, legal persons and natural persons (Article 23 of the Constitutional Review Court Procedure Act). The American Supreme Court, in contrast, is an appellate jurisdiction, and constitutional review proceedings can only be instigated on the initiative of one of the parties to the case. Furthermore, its decisions are binding only on the parties to the case, while their general effects flow from the principle of *stare decisis*.

Constitutional review may also be instigated in Italy when the courts consider a norm to be in conflict with the Constitution. Italian courts do not rule on the matter themselves (as is the case in Estonia and the United States of America) but rather may implement a stay in proceedings and refer the matter to the Constitutional Court to be decided before making any ruling in the case before them. Nevertheless, in both the Estonian and the Italian systems, the starting point for constitutional review

proceedings is a decision by a judge or a court in the context of the concrete application of a law: refusal to apply a law declared to be in contradiction with the Constitution (Estonia), or referral of the question to the Constitutional Court before making a ruling in the case (Italy). In both countries, there is no provision for individual applications to the body of constitutional review.

A further comparison may be made with the Portuguese system of constitutional review. Here, the President of the Republic and Ministers may request the Constitutional Court to undertake preliminary review of the constitutionality of a legislative provision (Article 278 of the Portuguese Constitution) but the Court also has jurisdiction to hear appeals against decisions of lower courts which have refused to apply a legal rule on the grounds of its unconstitutionality or have applied a legal rule whose constitutionality was challenged during proceedings (Article 280 of the Portuguese Constitution). In the latter situation, the Portuguese Constitutional Court acts as an appellate jurisdiction in which, as is the case in the United States of America, proceedings may begin only at the initiative of one of the parties to the case before the lower court, whereas in Estonia, constitutional review commences automatically in such cases. A further distinction may be made between the two systems in that the Portuguese system is rounded out by the possibility of a general review of constitutionality in accordance with Article 281 of the Constitution.

Finally, in other countries where a separate Constitutional Court/Council exists, for example France and Germany, these bodies are competent to examine such questions as the conformity with the Constitution of procedures followed in elections and referenda (in France), the relations between and functioning of the constitutional bodies of the State, the distribution of powers between State organs and guaranteeing more directly the protection of human rights and fundamental freedoms within the State (in Germany). Constitutional criminal trials and questions of impeachment are further examples of matters that may fall within the jurisdiction of the body of constitutional review.

HE POSSIBILITY OF EXTENDING THE COMPETENCE OF THE ESTONIAN CONSTITUTIONAL REVIEW CHAMBER

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The Estonian system, as the above comparison shows, contains certain distinctive features, and it has already been noted (section II) that the competence of the Constitutional Review Chamber of the Supreme Court is limited to the judicial review (whether abstract preliminary review or concrete review of the application of laws) of the conformity of legislation with the Constitution.

Estonia is not alone, however, in providing for judicial review of legislation without establishing a separate Constitutional Court: this is a feature common to many Commonwealth and Nordic countries, and it has its own rationale. First, the preliminary review of constitutionality is aimed at avoiding the entry into force of legal acts which are not in conformity with the Constitution. In addition, constitutional review proceedings initiated under Article 5.2 of the Constitutional Review Court Procedure Act allow for the review of judgments by lower courts, as well as for the possible extension *erga omnes* of the effects of the declaration of unconstitutionality of a law which the lower court refused to apply on the grounds of its being in contradiction with the constitution.

In the context of reforming the system of constitutional justice, the possibility of allowing lower courts to address preliminary questions to the court undertaking constitutional review might also be considered. This would eliminate the need to annul decisions by lower courts, as their proceedings would be stayed pending the decision of the consitutional review body to which the question is referred.

As mentioned above (section II), there is currently no possibility of lodging an individual complaint with the Supreme Court for review of the constitutionality of a law. However, there appears to be a general consensus within the country that this possibility should be introduced, and it is true that individual complaints are possible in a large number of European countries. In the majority of countries where this is the case, there is a separate Constitutional Court (Albania, Croatia, the Czech Republic, Germany, Hungary, Malta, Portugal, Russia, Slovakia, Slovenia, Spain and "the former Yugoslav Republic of Macedonia"). In some countries, however, individual constitutional complaints are possible even though there is no separate Constitutional Court (Cyprus, Liechtenstein, Switzerland).[15]

Thus, clearly, the creation of a separate Constitutional Court is not a legal requirement for the introduction of the individual constitutional complaint. There is no technical or legal reason why individual complaints could not be made possible under the existing system: the chamber of the Supreme Court which is competent to deal with constitutional review proceedings could also be entrusted with jurisdiction over individual complaints, although this would be an unusual solution in the European context. In order to streamline such an arrangement the Legal Chancellor might be allowed to act as a filter for individual complaints. From a strictly logical and technical point of view, then, allowing the lodging of individual constitutional complaints would not of itself require the establishment of a separate Constitutional Court.

Granting wider powers to the Constitutional Review Chamber would lead to an increased workload for that body. The existing Chamber may have difficulty dealing with such an increase in its caseload, especially if its powers were to be extended to include not only individual complaints but also some of the powers of review exercised by other constitutional review bodies (see section II) and proposed in the Supreme Court's draft bill (see section I). Again, there are no legal or technical reasons which would prevent its having competence to examine all these matters; the question is more one of the logistical difficulties involved for an appellate court to resolve questions of constitutionality within a reasonable time, even if a separate chamber deals with these matters. From this point of view, the establishment of a separate Constitutional Court may be desirable.

A final matter to be borne in mind is the extra cost involved in running a separate court. The advantages which may be gained by the creation of a separate body of constitutional review, in particular the greater efficiency which could thus be achieved, need to be weighed against the extra cost to the State which such a body may create.

IV. **COMPOSITION OF THE CONSTITUTIONAL REVIEW BODY**

In the context of reforming the system of constitutional review, the composition of the body exercising this function must also be considered. The methods of appointment and criteria for selection of constitutional judges are of considerable importance in guaranteeing the independence of the body.

It should be borne in mind that in countries which have experienced a revolution, the appointment as constitutional judges and guarantors of the constitution of judges connected with the previous rgime "would seem contradictory".[16] Therefore the criteria for selection of members of a body charged with the constitutional review of legislation should be determined with great care. This is consistent with the comments of H. Kelsen about the links between constitutional justice and the politics of a State.[17] The necessary professional requirements of constitutional judges should be combined with political considerations.

According to the Estonian Constitution, the requirements for members of the Constitutional Review Chamber do not differ from those of the other members of the Supreme Court. All are elected by the Parliament upon nomination by the Chairman of the Supreme Court (Article 150). The general assembly of the Supreme Court elects the members of the Chamber in such a way that it includes one member from each of the civil, criminal and administrative panels of the Court; in addition, one member is elected from amongst the jurists in the Republic of Estonia (Article 26.3 of the Courts Act). The President of the Supreme Court is the fifth, *ex officio* member of the Constitutional Review Chamber.

This system does not provide for the direct influence of political parties for which Kelsen argued: it is true that constitutional review is conducted by judges elected by the Parliament, but the parliamentary choice is conditioned and restricted by the nominations submitted by the President of the Supreme Court.

Moreover, the law does not stipulate a need for any professional competencies other than those required for the election of all Supreme Court judges (Article 24.2 of the Courts Act).[18] It is a generally accepted idea that constitutional judges, faced as they are with special responsibilities and cases unlike those dealt with by other judges, need particular professional experience and capabilities. Thus in most countries there are selection criteria for constitutional judges including a minimum (and sometimes maximum) age and also legal experience requirements.[19]

These issues, relevant in any case, would merit closer attention if it were decided to reform the Estonian system so as to create a separate Constitutional Court in the context of widening the possibilities of constitutional review to include (amongst other possibilities) the competence to examine individual complaints.

V. **CONCLUSIONS**

In comparison with the full range of activities available to constitutional courts, the current jurisdiction of the Constitutional Review Chamber of the Supreme Court of Estonia can be seen to be quite limited, in that it is confined to the judicial review of legislation (although this includes both abstract preliminary review and concrete review of the application of legislation in specific cases). Indeed, its jurisdiction could be increased to include any or all of the competencies discussed above (section II).

It must be borne in mind that any widening of the scope of review of the Constitutional Review Chamber will be likely to create an increased workload for this body. In view of this expansion, and the need for cases to be dealt with in a reasonable time, the establishment of a separate Constitutional Court dealing exclusively with proceedings of a constitutional nature may be the preferable solution. This Court could also be charged with the power to decide individual constitutional complaints.

Granting the body of constitutional review the power to review individual complaints would not prevent lower courts from undertaking judicial review of legislation as provided for by Article 5.2 of the current Constitutional Review Court Procedure Act, as the Portuguese experience suggests. Decisions adopted by lower courts could be submitted to the appellate jurisdiction of the Constitutional Court under a system similar to the existing one, thus preserving what could be seen as a characteristic feature of the Estonian system of law.

xii. Consolidated opinion on the draft law on Referendum and Citizen Initiative drawn up on the basis of the comments by Ms Ana Milenkova (Bulgaria) and Mr Sergio Bartole (Italy).

1. Introduction

In 1997 the European Commission for Democracy through Law (Venice Commission) was asked by the authorities of the the former Yugoslav Republic of Macedonia to examine the draft law on referendum and citizen initiative of "the former Yugoslav Republic of Macedonia.

Following this request, the Venice Commission appointed Ms Anna Milenkova (Bulgaria) and Mr Sergio Bartole (Italy) to draw up an opinion on the draft law.

Having examined the draft law submitted by the Macedonian authorities, the rapporteurs formulated a number of observations. The most important of these are set out below.

2. The text

The status of a referendum varies. Under the constitution, a referendum may be either *mandatory* or *optional*, in so far as it is the Assembly of Representatives that decides whether or not a referendum must be called. The impact of this procedure also varies, depending on how easy it is to set in motion.

According to the Constitution of Macedonia, responsibility for organising a referendum rests with the Assembly of the Republic (cf Assembly below). A clear distinction is made in the constitution between referenda the Assembly is legally obliged to call and those which it has discretion to call. For example, the Assembly is obliged to issue notice of a referendum if one is proposed by at least 150 000 voters and in the case of decisions concerning any change in the borders of the republic (Articles 73 and 74 of the constitution).

Article 3 of the law on referendum also provides that the referendum shall be obligatory in cases when the Assembly is to adopt a decision for changing the borders of the Republic or for uniting into or disuniting from a federation or confederation with other states. The obligation on the Assembly to call a referendum if one is proposed by 150 000 voters is laid down in Article 21 of the law.

The law also provides for three kinds of referendum:

a. a *ratification referendum*, referred to in Article 14 of the law as a legislative referendum, on issues that are to be defined in a law. If the electorate votes in favour of the law, the Assembly is obliged to adopt it. If, on the other hand, the electorate votes against the law or against the solution offered for defining a certain issue, the Assembly is obliged to reject it (Article 25);

b. an *additional referendum* is called to confirm a law that has already been enacted (Article 14). A favourable response from the electorate results in promulgation of the law (Article 75 of the constitution), an unfavourable response in non-promulgation (Article 30);

c. an *advisory referendum* is called on general issues concerning the citizens of the Republic (Article 6). As the draft law lays down no organisational rules regarding advisory referenda, they are organised at the discretion of the Assembly according to rules decided by it on an ad hoc basis.

Articles 32 and 33 of the law provide that ratification of certain international treaties and certain other issues may be subject to a ratification referendum.

Article 8 of the draft law (together with Article 2 of the law on the procedure for collecting signatures for the purpose of organising a referendum) provides that referenda may be initiated by citizens, registered political parties or citizen associations. The question arises whether it is really necessary to include political parties on this list, given that (a) there are many other ways in which political parties can take part in the political life of the country, particularly through parliamentary debate. At the same time, in some Council of Europe member states political parties can themselves initiate a referendum.

3. Problems of interpretation of the law

1. According to the authors of the draft law, the constitution incorporates referenda in the countrys legal system and provides that responsibility for all decisions concerning the organisation of referenda rests with the legislative power. This interpretation is confirmed by the draft provisions of Article 15 banning the holding of referenda on:

:rgency bills that have been passed in states of emergency and war or on issues pertaining to national defence and security;

; relating to the budget of the republic;

ıl laws.

The question arises whether this interpretation is compatible with the Constitution.

On the one hand, the authors interpretation of the conditions governing the organisation of referenda limits not only the Assemblys ability to call a referendum, but also the right of citizens in this regard. According to the draft law, it will no longer be possible for 150 000 voters to propose a referendum on the issues listed in Article 15. There appears to be no such limitation under the constitution.

On the other hand, exclusion of the issues listed in Article 15 from the list of those that can be decided by referendum is fully in line with the approach adopted by many modern constitutions. It would be inconceivable to hold a referendum on either fiscal or emergency laws. Exclusion of referenda on budgetary and monetary issues is equally justified. When considering the draft, it is also necessary to bear in mind the political and economic problems currently facing the country, which might explain why the issues listed in Article 15 have been expressly excluded from those that can be decided by popular referendum.

At the same time, the provisions of the constitution regarding referenda leave a number of gaps. It is the existence of these gaps which seems to explain the wish, and the authority, of the legislature to introduce limitations into the draft law.

The fact remains, however, that there is a problem of compatibility here which will have to be solved at some point, either by the Constitutional Court or by an amendment to the constitution.

2. Furthermore, even if it is accepted that Article 15 of the draft law does not contradict the constitution, the absence of any rules establishing a judicial procedure for checking whether or not referendum proposals submitted to the Assembly are compatible with Article 15 poses a number of problems. As a political body, parliament should not be competent in this area. Admittedly, Article 19 of the law confers such powers on the Assembly, but there is no justification for doing so. As it stands, the Assembly has the power to change or reject a proposal by the electorate if it does not like it, whereas the whole point of a referendum is to impose the will of the electorate on the Assembly.

In Italy, for example, it is the Constitutional Court which is empowered to check whether or not referendum proposals are compatible with the rules. This solution would also be perfectly feasible in the case of "the former Yugoslav Republic of Macedonia, where the Constitutional Court already has jurisdiction in the protection of citizens rights and freedoms, and the authority to verify that measures taken by the public authorities are compatible with the constitution. Furthermore, since it is clear from the final paragraph of Article 19 that the organisation of referenda is governed by constitutional law, there is justification for involving the Constitutional Court in this matter.

Article 110 of the Constitution includes a provision intended to allow for a broadening of the powers of the Constitutional Court. This article also defines the power of the court to protect the rights and freedoms of the individual and the citizen relating to ... political associations and activities , thereby establishing a sufficient basis for guaranteeing citizens access to the Constitutional Court should the Assembly impose unlawful restrictions on referenda. If, however, this solution to the problem is unacceptable, the power to investigate complaints against Assembly decisions in this regard, as well as against voting irregularities, could be given to the Supreme Court (Article 65 of the draft law).

3. Articles 25 para. 2 and 31 of the draft law provide that if the Assembly calls a referendum on a question and its proposal is rejected by the electorate, a year must elapse before another referendum may be held on the same question. This period does not seem long enough. In this connection it would be better if the ban on holding another referendum on the same question lasted until the end of the Assemblys term of office.

4. According to Article 52 of the draft law, the ballot paper shall include the question that has to be decided on the referendum and voting instructions. It is not clear what is meant by instructions. If they are instructions on how to vote, their inclusion on the ballot paper could mislead voters.

On the other hand, if this reference to instructions links up with the final paragraph of Article 52, which states that the text of the question on the ballot paper shall be clearly and unambiguously formulated, it is very important. It is indeed essential that the question be absolutely clear to the electorate[20] . As it is so important, the clarity of the referendum question could be established in law as a condition for a referendums admissibility, and it could be made obligatory to have the question checked by an independent authority, such as the Constitutional Court. Without such a check, the authority organising the referendum (ie the Assembly) is the sole judge of whether or not the referendum question is clear, and experience has shown that the absence of checks and balances in this regard may entail risks. There would therefore seem to be a need for an impartial and neutral body to ensure that the rights of the electorate to cast their votes in an informal manner are upheld.

At all events, the criteria and conditions for drafting referendum questions should be incorporated in the law and the applicable rules should be made more specific.

5. Other observations

The constitution establishes no rule to the effect that voters must be capable of working, as stated in Article 39 of the draft law. This requirement is contrary to the constitutional guarantees in Section II of the constitution, particularly Article 22 which states that the [] right to vote is equal, universal and direct.

According to Article 42 of the draft law, the Polling Committee shall help illiterate citizens exercise their right to vote. This provision is open to misunderstanding because it can be interpreted as meaning that only the polling station is authorised to help illiterate citizens whereas, in principle, citizens who are either illiterate or incapable of voting are free to choose who accompanies them and helps them to cast their vote. The risk of the same person helping more than one or two illiterate voters must also be avoided.

The draft law contains a contradiction as to which body is responsible for fixing the date of the referendum. Article 35 confers this power on the Assembly, whereas from Article 44 it would seem that it is the governmental Polling Committee that determines the date of the referendum.

The third paragraph of Article 64, which concerns the possibility of appealing against a decision by the Polling Committee, is ambiguous: it is not clear which body is meant, the Polling Committee at the polling station, or the governmental Polling Committee.

6. Conclusions

On the whole, the draft law provides a good basis on which to establish the conditions for organising a referendum. The authorities have made a considerable effort to improve the initial draft law on referendum.

Nevertheless, there are a number of provisions in the new draft that could still be improved.

The Assemblys decision-making powers sometimes seem too broad. The Assembly decides not only whether or not a referendum should be held, but also the rules governing the way the in which it is organised. A more equal distribution of powers in respect of referenda would have been better. In particular, certain supervisory powers could be entrusted to the Constitutional Court.

In addition, the draft law should define the criteria and conditions for drafting the referendum question, and the rules applicable during a referendum should be clarified.

Many passages in the law, at least in the English translation, are unclear and consequently open to a rather broad interpretation.

II. Co-operation between the Commission and the statutory organs of the Council of Europe, the European Union and other international organisations

- Co-operation with the Committee of Ministers

At its 34th Plenary Meeting the Commission held an exchange of views with Ambassador Dohmes, Permanent Representative of Germany and Chairman of the Committee of Ministers' Deputies. Ambassador Dohmes, informed the Commission about recent developments in the Council of Europe. A major issue within the Council was the question of monitoring activities which was undertaken in parallel by the Parliamentary Assembly, the Congress of Local and Regional Authorities in Europe and the Committee of Ministers. Ambassador Dohmes considered that there was scope for improving the monitoring of the Committee of Ministers. New working methods were being discussed. The monitoring was conducted in a consensual, non-confrontational and non-discriminatory way. Further major tasks of the Committee of Ministers were the establishment of a Commissioner of Human Rights and the fight against organised crime. In the latter field a fruitful co-operation with the EU and OSCE had been established.

The 34th Plenary Meeting was also attended by Ambassador Hack, Permanent Representative of Austria who presented the achievements of the Council of Europe in the field of the protection of minorities. He underlined the importance of the role of the Venice Commission which had elaborated a draft convention on the protection of minorities that had served the First Summit of Heads of State and Governments in Vienna in 1993 as a basis for the elaboration of the Framework Convention. Following the recent entry into force of this Convention, its control mechanism needed to be established.

At the 35th Plenary Meeting Ambassador Carter, Permanent Representative of the United Kingdom informed the Commission that the United Kingdom authorities are giving active consideration to the possibility of joining the Commission.

At the same meeting Ambassador Gorea Costin, Permanent Representative of Moldova to the Council of Europe, participated in discussions regarding the Commission's opinion on the Statute of Gagaouzia. Mr de Matos Sequeira, Deputy Permanent Representative of Portugal took part in the discussions regarding co-operation with Mozambique.

At the 36th Plenary Meeting Ambassador Warin, Permanent Representative of France further informed the Commission about the priorities of the follow-up to the second Summit of Heads of State and Government of the Council and on the Council's Action Plan. The four main fields of this follow-up were (a) democracy, (b) human rights, (c) social cohesion, and (d) cultural values. Major activities in these areas were, *inter alia*, the establishment of the single Human Rights Court, the institution of a Human Rights Commissioner and a system of monitoring of commitments made by member States by the Committee of Ministers.

Moreover, at the 37th Plenary Meeting, Ambassador Pernyi, Permanent Representative of Hungary and Chairman of the Ministers Deputies informed the Commission that the Committee of Ministers had set up a Working Party on follow-up action on the final report of the Committee of Wise Persons. This group would deal, *inter alia,* with future co-operation between the statutory bodies of the Council of Europe and the Commission. The question would also be dealt with by the Follow-up Committee on the Second Summit of Heads of State and Government.

In addition, at the same Meeting Mr Andrei Vdovine, Permanent Representative of the Russian Federation informed the Commission of the Russian authorities' wish to become a member of the Venice Commission. It would be unfortunate if the fruitful co-operation between Russia and the Commission, which had begun before Russia had become a member of the Council of Europe, were to be discontinued. Russia needed the Commission's co-operation in its continuing legislative reforms. The Commission decided to continue co-operating with Russia on an *ad hoc* basis pending official membership.

operation with the Parliamentary Assembly of the Council of Europe

The Commission continued and intensified its close co-operation with the Parliamentary Assembly during 1998. Representatives from the Assembly were present at all the Commissions Plenary Meetings.

Once again the number of requests from the Assembly for the Commissions opinion increased. In particular, the Commission has co-operated with the Assembly on the following questions :

- Albanian Constitutional Law on the High Council of Justice

operation with Croatia - revision of the Constitutional law on rights of national minorities

arian law on the judiciary

arian law on the civil service

t Statute of Gagauzia

In addition the Commission also adopted reports on the following subjects during 1998 which were drawn up at the request of the Assembly.

trol of internal security services in Europe adopted at the 34th Plenary Meeting (6-7 March 1998) ;

nion on the legal problems arising from the coexistence of the Convention of Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention of Human Rights adopted at the 34th Plenary Meeting (6-7 March 1998) ;

The text of these two reports appears in Part B.

- Report of the Committee of Wise Persons

The Commission was kept informed throughout the year of the work of the Committee of Wise Persons by the presence of certain Ambassadors at its Plenary Meetings (see co-operation with the Committee of Ministers above).

In its final report to the Committee of Ministers the Committee of Wise Persons, of which both President La Pergola and Ms Suchocka had had the honour to be a member, proposed that the Commissions activities should be developed in the following directions - giving opinions on matters of constitutional importance or fundamental legal interest for the Council of Europe, at the request of the Committee of Ministers, the Parliamentary Assembly or the Secretary General; the interpretation of conventions and other legal instruments of the Council of Europe devoid of specific interpretation mechanisms, at the request of the Committee of Ministers; the promotion of the awareness of the importance of the rule of law, as understood in Europe, and its relevance to the development of democracy, as well as to pursue, in the furtherance of this objective, its co-operation with non-European countries and similar expert bodies from outside our continent.

- Exchange of Views with the Secretary General of the Council of Europe

Mr Daniel Tarschys, Secretary General of the Council of Europe attended the Commissions 36th Plenary Meeting. He underlined that both the Committee of Wise Persons of the Council and the member States had expressed their high esteem for the Commissions work as an authoritative source of expertise in the field of constitutional law. The Commission had a particular role to play in institution building and consolidation of democracy in societies in conflict. A seminar on this theme could be organised during 1999.

- Co-operation with the Congress of Local and Regional authorities of Europe

The Commission continued its close co-operation with the CLRAE in particular concerning Albania, Bosnia and Herzegovina, Croatia, Moldova and the situation in Kosovo.

- Co-operation with the European Union

The European Commission took an active part in the work of the Venice Commission and supported 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.

At its 37th Plenary Meeting (11-12 December 1998) the Commission adopted the report on Constitutional Law and European Integration drawn up on the basis of the replies from European Union member States to a questionnaire on this subject.

Mr Scholsem, Chairman of the VenicesCommissions Working group on the situation in Kosovo also took part in two sessions of the contact group at expert level on the Kosovo issue as part of the delegation of the EU presidency.

- Co-operation with other international organisations

Co-operation with ODIHR continued during 1998.

Close co-operation has also taken place with the OSCE on Albania, Bosnia and Herzegovina and Croatia.

operation with the Conference of European Constitutional Courts

Mr Safjan, President of the Constitutional Court of Poland which will host the next Conference of European Constitutional Courts in Warsaw in May 1999, attended the Commissions 36th Plenary Meeting. The Commission will assist in the preparation of this Conference.

B. <u>Reports adopted by the Commission</u>

i. Control of internal security services in Europe adopted at the 34th Plenary Meeting (6-7 March 1998)

Introduction

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe has decided to consult the Venice Commission on the question of constitutional relations between internal security services and other organs of the State.

The work of the Assembly Committee was initiated by two motions concerning internal security services: one by Mr Stoffelen and others (Doc. 7104), and the other by Mr Solonari (Doc. 7424). The Committee circulated a questionnaire among member States, and on the basis of the replies to the questionnaire and other materials, a Working Paper [AS/Jur (1996) 23] was prepared by Ms Monica Macovei. The replies to the questionnaire - from 30 States -and Ms Macovei's paper as well as Barbara Forbes's paper *Under surveillance; Critical citizenship and the internal security services in Western Europe*, prepared for the Quaker Council for European Affairs in 1994, were placed at the disposal of the Rapporteurs of the Venice Commission.

In her working paper, Ms Macovei makes a comparative evaluation of the legal framework governing internal security services in Europe and of their effect on individual rights. She also identifies significant differences between the systems in different member States which may give rise to recommendations for the consolidation of institutional elements consonant with the integration of the new European democracies.

The Office of the Clerk of the Assembly has subsequently, via the Secretariat of the Venice Commission, completed the Committee's request by specifying that the study should be based on constitutions and on general principles which are common to them and that the identification of common European standards might be the main objective of the opinion. The opinion being sought from the Venice Commission should therefore concentrate on questions of a constitutional nature concerning internal security services.

These matters should be addressed not only from the viewpoint of the State that has an interest and a right to protect its territorial integrity and internal security and stability but also from the viewpoint of the individual, who has an interest and a right to continue to enjoy his fundamental rights and freedoms that should only be limited in the interests of the common good of the society of which he forms part and for a valid and just reason. The Constitutional order should therefore find the appropriate legal framework within which the overriding interest of the internal and external security of the State can be reconciled with the fundamental rights of the individual. The studies already carried out to which reference has been made have adequately illustrated how national legislation and regulations in Europe differ greatly on the institutional aspects of the problem.

To address the issue of harmonising the organisational structure of internal security services existing in various European countries would be a mammoth task with obvious political overtones involving delicate issues of national independence and identity. It would go beyond the scope of the present report. As the request must be understood in the context of the definition of a common constitutional heritage of the whole European continent, the scope of the study will be to identify common European standards applicable to the internal security services in order to ensure the conformity of their activity to the three fundamental principles of the Council of Europe: democracy, human rights and the rule of law.

More precisely, in a first part, the opinion of the Venice Commission will focus on the general framework of the internal security services in a State governed by the rule of law, such as the legal (constitutional) basis of the existence of internal security services, budgetary questions or the powers of such services.

A second part will study the relations between the internal security services and other constitutional organs. First, it will focus on the judicial control of the respect of superior rules by these services as well as on the non-judicial control, which may concentrate on the practical or political feasibility of the acts (past or planned) of the services. Then, the emphasis shall shift to the cases in which the internal security services use the services of another organ, or vice versa, and to surveillance activities concerning members or officials of another State organ.

The third part, dedicated to the individual vis--vis internal security services, will examine the limited extent to which such services might be allowed to interfere with the fundamental rights of the individual, and in particular with the right of privacy, as defined e.g. by the European Convention on Human Rights.

Before addressing the various aspects of the question in greater detail, it may be useful to mention some peculiarities of the subject of internal security services.

Undoubtedly a variety of internal and external situations may arise in which the executive organ of the State must act quickly and decisively to protect the fundamental interests of the State and society. There must be a consensus that only this need may possibly justify the derogation from normal human rights standards which may sometimes be necessary to ensure the proper and effective functioning of National Security Services. It is this derogation that provokes the need for particular attention to be given to the manner in which these services must be set up, the regulation and control of their activities and their proper place within the constitutional framework of the country. Fewer problems might arise if these services did not sometimes require a peculiar framework within which to operate which might allow them more freedom than that which is accorded to a normal police force within the accepted definition of democratic societies. This freedom allows them to conduct their activities - at least initially and to a limited extent - free from the control of the constituted organs of the State, whose purpose is to ensure full protection of fundamental rights and freedoms.

This report does not address the issue of whether internal security services should exist at all. When carried out correctly, internal security services perform an important function within the constitutional order. Nor is it in dispute that internal security services have inbred in them a potential for the abuse of State power: there have been innumerable incidences of the most serious violations of human rights being committed in the name of internal security. Hence the need for the constitutional order to identify what should be the role of internal security services within a democratic society, what should be their place within the constitutional framework, their functions and limitations and what method of control should be exercised over their activities.

It is still necessary to mention that not all the materials are quite up to date. As this analysis is not intended to be a complete comparative study but rather a survey of problems and possible solutions, no updating of the materials has been attempted. Some of the examples presented may thus no longer be accurate.

The present consolidated opinion is based on the opinions of Messrs. Lundum, Said Pullicino and Suviranta (CDL (97) 30, 34 and 37), which were presented before the Venice Commission's 32nd plenary meeting in October 1997, on the discussion of the first draft consolidated opinion (CDL (97) 58) at the 33rd plenary meeting in December 1997, and, in particular, the comments made by Mrs Err, who represented the Parliamentary Assembly's Committee on Legal Affairs and Human Rights at this meeting.

neral issues

stitutional framework of the internal security services

There seem to be two schools of thought on the question of how security services should be organised. In some European countries, the security services are independent organisations which are not part of the ordinary police force, whereas in other European States the security services are one of many specialised branches of the general police force. From a constitutional point of view, there do not seem to be convincing arguments to give preference to one of these systems over the other. In many cases, the way a country organises its security services is probably as much due to convention as anything else. The main thing is for the organisation of the security services to give the service a clear and precise structure and for the head of the security service to bear the responsibility for all the actions of the service of which he or she is in charge: one could contemplate whether a recommendation should be made to this effect.

The head of the internal security organisation is usually appointed by the head of the State or of the Government. Some other high officials of the system may also be appointed by an executive authority, while other vacancies are filled internally. The appointing authority normally has discretion to dismiss the head of the organisation and other high officials. This power to hire and fire keeps the organisation under the tight control of the Executive.

gal basis of the existence of internal security services

The existence of internal security organs can be based on:

e Constitution;

dinary legislation;

vernmental decrees;

legislation at all.

(a) the Constitution

Constitutional norms bearing specifically on the internal security services are rare, and the existence of such specific constitutional norms does not seem necessary in general. What is essential is that legislation or regulations pertaining to internal security organs be in harmony with the Constitution.

In theory, of course, if the existence of internal security services is entrenched in constitutional provisions, built-in constitutional guarantees would increase the protection afforded to interests which are potentially threatened by the actions of internal security services. On the other hand, however, provision in the Constitution might lend undue constitutional legitimacy or status to such an institution.

(b) ordinary legislation

Most of the objectives of a constitutional provision on the internal security services can be attained even if the internal security services are set up through a legislative process that recognises the guiding principles mentioned above. What is essential is that the organic laws and other pieces of legislation pertaining to internal security organs are in conformity with the Constitution. Legislative control over the acts and actions of the internal security services in the exercise of these functions remains an essential means of ensuring that these services operate exclusively in the national interest for the realisation of democracy and the rule of law. This control can, however, only be exercised *a priori* by providing legal instruments ensuring adequate checks and balances that allow these services to operate efficiently, without overstepping their role, particularly where fundamental rights are concerned.

As a matter of fact, in most countries, the existence of internal security organs is based on parliamentary legislation. The same applies to the organisation and functions of these organs, or at least as far as the basic elements are concerned. In some instances (e.g. Spain), "organic laws" are used, i.e. legislation which is hierarchically at a lower level than the Constitution but at a higher level than ordinary legislation.

In several countries (e.g., Denmark, Finland, Ireland, Norway, Sweden and Switzerland) the security services are part of the general police. In these countries the legislation concerning police in general is also applicable to the security services. In Switzerland, however, a Federal Government Bill for specific legislation on internal security services was presented to the Federal Parliament in 1994. In Croatia and the Former Yugoslav Republic of Macedonia, an Internal Affairs Act is in force, covering all activities of the Ministry of Internal Affairs, including internal security services. In most countries the internal security services and the regular police are two (or more) distinct organisations. In Germany it seems even to be a constitutional requirement that the internal security services (the *Verfassungsschutz*) and the police be kept apart. Nevertheless, the German ordinary police has a branch (the *Staatsschutz*) which is said to work in close contact with the *Verfassungsschutz*.

(c) governmental decrees

In France, for example, there is no parliamentary legislation on the internal security services (comprising mainly the *Renseignements gnraux* and the *Surveillance du territoire).* The system is regulated in decrees issued by the Executive. This is in line with the constitutional prerogative of the Executive to organise public administration without recourse to parliamentary legislation. Parliamentary legislation on the internal security services is lacking also in Belgium, where the system is based on a Royal Decree (of 1929). The obvious drawback of the French and Belgian systems is that the Parliament has no direct influence over the internal security services. Nevertheless, one can hardly claim the regulation of internal security services by parliamentary legislation to be established as a common European standard, though it is undoubtedly the preferable option. A standard requirement could, however, be that the executive decrees be sufficiently clear and comprehensive.

Naturally, parliamentary legislation or decrees issued directly under the executive prerogative cannot be expected to regulate the internal security system in every detail. Subordinate regulations may thus be needed, normally issued by the Executive or by the Head of the security service in question. They must evidently be given within delegated powers, and also be sufficiently clear and comprehensive. In some countries, part of the regulations are secret. This cannot always be avoided. Such secrecy should, however, be kept within a minimum, be within publicly conferred powers, and not violate published norms.

(d) no legislation at all

The United Kingdom used to be farther still from any regulation of the internal security system by parliamentary legislation. Until 1989, the existence of any internal security service was officially denied. The obvious consequence was that the Parliament had no influence over the internal security system, nor were any details of the system publicly known or able to be discussed publicly. In 1989, however, the Security Service Act was passed. Britain is thus now within the mainstream of countries regulating the internal security system by parliamentary legislation.

(e) conclusion

It is true that regulating security services by laws of Parliament will ensure that Parliament has direct influence over them, but there does not seem to be a common basis in the States of the Council of Europe for such a requirement.

It is essential, however, that the regulations concerning the internal security services be as clear and concise as possible so that the tasks they can lawfully engage in are clearly defined and that the regulations should only be allowed to be kept secret to the extent that is absolutely necessary.

C. Budget

One aspect of the question of the regulation of internal security services is the budget of these services. In many countries it is an aspect of the division of powers that Parliament must approve the budget and that no expense can be paid by the Executive without this approval. The specificity of the budget varies, however, from country to country. The budget may not have particular headings for internal security organs. The functioning of these organs is then financed under more general headings, e.g. for the police or the Executive in general. Such general budgetary items are then divided between different recipients and used by the appropriate executive or administrative authority. This system, of course, diminishes the power of Parliament to direct the internal security system by budgetary means.

For reasons connected with the very nature of the security services, their budgets are often not very specific or might even be totally hidden within the budgets of the branch of the Executive in charge of the security service. Again, the role of Parliament is diminished if the budget of the security services are kept away from them. There does not, however, seem to be a common basis for a recommendation to change this. It might be worth considering whether a recommendation should be made to the effect that at least the member of Government responsible for the internal security services should be responsible for the budget allocated to the security services.

D. Internal Security Services in a State governed by the Rule of Law

As previously stated, what is essential is that the organic and other laws regulating internal security organs are in harmony with the Constitution. This assertion inevitably provokes the question whether there is the need for internal security services to be considered as a separate organ of the State and to be recognised and set up as such.

It is clear that if the internal security services of a country are a part and parcel of the police force entrusted with internal security, that specialised service would be subject to the constitutional controls over the activities of the entire police force. In that event, rather than examining whether and to what extent the relations between internal security services and other organs of the State are regulated in the Constitution, one would have to examine the validity and constitutionality of the exercise of specific powers within the special competence of the internal security service. In such an eventuality (and, as a matter of fact, a great majority of countries have opted for this solution) the internal security service would have no autonomous existence as a constitutional organ.

On the other hand, a few countries have opted to have internal security services with a separate existence independent from other police organisations entrusted with ensuring law and order. It is also true that in these cases the internal security services are rarely, if ever, recognised in the Constitution of a country as a separate constitutional organ. More often than not, they are set up and organised by legislation or regulations. In these cases again the issue would be whether the relevant legislation or regulations could be considered to be in conformity with the accepted democratic Constitution of the country. That would be a matter for that country's Constitutional Court to determine, naturally in the light of widely recognised principles that should govern a democratic society. The actions of the internal security services would be subject to the scrutiny of the Courts or other method of judicial or quasi-judicial control, e.g. the Ombudsman to establish whether or not they were carried out within the proper exercise of their functions and within the provisions of the Law and the Constitution.

In this respect the complexity of the issues involved and the diversity of the solutions proposed by the legislators of different countries, as evidenced by the Macovei report, suggest the need to establish guiding principles to which basic laws setting up internal security services should conform. These principles should be set out in an international instrument - a Convention or a protocol - which would allow each individual country to provide efficiently for its own internal security requirements while ensuring proper avenues of control in conformity with a uniform democratic standard: a standard that would ensure that the internal security service would act only in the national interest and not in favour of the party in Government, or for that matter any other party or institution, that it would not be used as a means of oppression or undue pressure and that it would operate in full respect of fundamental freedoms.

If such a solution were to be pursued - and one considers this to be a more possible and plausible alternative to expecting States to amend their *Constitution* to conform to expected declared standards - then the constitutional relations of the internal security service with other constitutional organs would also be governed by this international instrument, thereby ensuring national and/or international judicial control.

This issue of control deserves emphasis here because it should be clear that the protection of the State by the internal security services, apart from ensuring public order and the proper functioning of authorities and institutions, and apart from ensuring territorial integrity against outside aggression, should also aim at ensuring the constitutional order of the country, the proper functioning of democratic institutions of the State, the rule of law and the protection of fundamental rights. Any control exercised by appropriate constitutional organs of the State on the activities of the internal security services must necessarily be aimed at ensuring that these services properly and correctly carry out these duties.

The following conclusion of the Parliamentary Commission of the Swiss Federal Parliament graphically underlines this principle: *"Le Conseil fdral a confirm 'la ncessit de dployer une activit prventive ayant pour but de protger le citoyen et les institutions contre le terrorisme, l'extrmisme violent et le crime organis'. Cette remarque est galement valable pour le service de renseignements prohib. La protection de l'Etat doit s'effectuer dans le plein respect des droits fondamentaux: les atteintes ces droits ne sont tolres que dans le cadre des dispositions lgales et pour un intrt gnral majeur (principe de proportionnalit).*

wers and restrictions

On this point, there appear to be two different schools of thought. In some countries (e.g., Germany, Luxembourg, the Netherlands and Spain), the role of internal security services is limited to the gathering of intelligence and to the subsequent analysis and interpretation of the material. Any preventive or enforcement functions lie then with the ordinary police or other organs. In other countries internal security organs may have preventive and enforcement functions as well, especially with regard to actions directed against the security of the State. Particularly in the countries where the security services are part of the ordinary police, the security service police officers are allowed to perform the same acts as other police officers, *inter alia* performing arrests, tapping telephones etc. Again there seems to be no consensus in European countries on which to base a recommendation. Furthermore, there do not seem to be convincing constitutional arguments in favour of one of these systems over the other.

In either case, it is of the utmost importance that the regulations on the powers of the security services are clear and precise and that they are in conformity with the rights of the individual as protected under the Constitution of the State in question and/or with the international obligations to which the State in question has undertaken to adhere, such as the European Convention on Human Rights.

The mere reading of newspapers, periodicals and books, listening to public broadcasting and the observation of television programmes would probably be free from any regulation by other organs, as is the case for ordinary individuals. The filing and processing of the information so gathered may, however, already be subject to such regulations aimed at the protection of the privacy of individuals.

Publications, radio and television are evidently not the only source of information employed by security organs. Clandestine, forcible or intrusive methods may be used, such as the interception of telephone calls, house searches, surveillance from a distance with optic or auditory devices (concealed microphones, etc.), and infiltration into groups and organisations. The use of such methods is to some extent regulated in constitutions, international agreements and legislation. These regulations make the use of certain methods, e.g. interception and searches, subject to permission being granted, upon certain conditions only, by a court of law or another authority, e.g. a Government Minister in Croatia and the United Kingdom, three or four Ministers in the Netherlands, or a special prosecutor in Romania. These restrictions normally apply to internal security organs in the same manner as to the police in general. On the other hand, it seems almost inevitable that the use of some clandestine methods can neither be regulated nor denied to the security organs.

Preventive and enforcement functions often involve forcible means, especially the detention of people. Such means are in many cases unavailable to internal security organs. In any case, their use is most often strictly regulated in constitutions, international agreements (especially in the European Convention on Human Rights) and legislation. The regulations generally include the requirement of permits from other State organs, e.g. from a court of law, for police detention for more than two or three days. As a rule, there should be no discrepancy between the internal security service and the ordinary law enforcement practice, with respect to the form and duration of initial detention before a suspect is brought before a judge. Exceptions may be made in the strict interests of national security in accordance with prescribed norms. However, once a judge issues a remand order pending trial, the person charged must be detained in a normal remand centre, free of the control of the internal security services. There is no legitimate justification for a separate remand centre for internal security services, as any necessary precautions, such as solitary confinement, could effectively be taken in an ordinary remand centre.

It is not necessarily enough for the keeping and processing of information that legislation and regulations are abided by. Permits from, reports to, and supervision by, outside administrative agencies data protection authorities are often involved as well. Internal security organisations, or the police in general, are, however, in many cases free from such outside administrative interference. Compliance with legislation and regulations is then the responsibility of the organisation itself. Freedom from outside administrative supervision may also keep the activities in question rather effectively free from surveillance by the media, the general public, or interested or affected individuals. Secrecy may, indeed, to a certain extent be necessary for the success of security operations. It may, however, also harm important general or individual interests, which makes the regulation of these questions a delicate matter.

Internal security services may have a duty to perform tasks given to them by superior authorities (within the Executive power), e.g. to procure information concerning a certain person, or to follow his movements (in Finland, the internal security services used to be called "the President's police"). Such assignments should not in principle increase the powers of the security organs. This principle may, however, be difficult to apply, e.g. to the use of information from the files of security organs. The information is there for the protection of vital national interests, and superior authorities may indeed require such information for this very purpose. The leaders of the party in power should, on the other hand, not have access for party political ends to information which is denied to their political opponents. Detailed regulation is required for this delicate issue.

The problem should be simpler in regard to assignments which go beyond the use of existing information (or such information which security organs can procure by ordinary means). The assignment should not give any additional right to, e.g., telephone interception or house searches. Complications may ensue if the authority which assigns a task is also empowered to grant permits which are needed for the fulfilment of the task: e.g. a Government Minister may require information for which telephone interception is needed, and the same Minister may be competent to grant interception permits.

The question of the conformity of internal security service activities with human rights guarantees, and especially with the right of privacy, shall be developed later (section III).

elations with other State organs

ntrol of the internal security services

It appears to be common ground in European States that the control of the security services cannot be merely internal, i.e. carried out by the leaders of the service in question or by the ministries or agencies to which they belong. On the contrary it seems that an external control exists in all Member States from the Executive, from Parliament and/or from the judiciary in some form.

How the control of the security services is best carried out, differs from one area of their work to another. It is important, however, that the control is not limited to more general aspects - human resources, areas of interest, priorities etc - as a closer control of the working of the security services is necessary. It might be feasible to recommend that the task of controlling the security services be divided between the Executive, Parliament and the judiciary. The Executive could, for instance, be responsible for the legality of the work of the security services and for their efficiency. Parliament (or an independent body appointed by and accountable to Parliament) could be responsible for monitoring whether the internal security services confine themselves to operations that fall within their mandate and confine themselves to using the methods they are allowed to use. The judiciary could be given the role of deciding whether actions on the part of the security services that involve intrusions into the fundamental rights and freedoms of individuals should be allowed.

dicial control

The Rule of Law requires that government be able to show legal justification for its actions. The ordinary courts, the traditional redressors of grievances, are seen to stand between the citizen and the State, concerned to protect individual rights and freedoms when scrutinising administrative activity, keen to ensure that legal powers are not exceeded in terms of substance and procedure, and to apply principles of natural justice.

An independent judiciary is an indispensable requisite of a free society under the Rule of Law. This implies freedom from interference by the Executive or the Legislature in the exercise of the judicial function. It does not mean that the judge is entitled to act in an arbitrary fashion. In the concept of independence, provision should be made for the adequate remuneration of the judiciary, so that, e.g. a judge's salary should not, during his or her term of office, be altered to the disadvantage of the judge. Furthermore, rules as to the appointment and dismissal of judges, and their transfer to other judicial duties are of the essence.

As previously noted the role of the courts in respect to secret surveillance is the inherent, supervisory one of ensuring that all officials act within their powers and according to the law.

Persons who feel that their rights have been violated by acts (or omissions) of security organs may in general seek redress before courts of law or other judicial bodies. The right to a judicial remedy may be secured in the Constitution (e.g. in Sec. 16, as amended in 1995, of the Finnish Constitution: "Everyone shall have... the right to have a decision concerning his rights and obligations reviewed by a court of justice or other independent judicial organ."). To a considerable extent, guarantees can also be found in international agreements, notably in Art. 13 of the European Convention on Human Rights ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

In addition to constitutional and international guarantees, judicial remedies are usually regulated in ordinary legislation, which may well go beyond the constitutional and international requirements.

Legislation can provide that the internal security organs be open to scrutiny by established specialised organs (appeal authorities for complaints against internal security organs, e.g. in Ireland, and in the United Kingdom as provided for in the Interception of Communications Act, 1985 and the Security Service Act, 1989). Such specialised organs should be guaranteed the right to deliver enforceable decisions and not merely furnish recommendations to the Executive. They should be kept separate and autonomous from the Executive acting on their individual judgment and not subject to the direction or control of any other person or authority, thereby ensuring effective redress to the aggrieved party. Thus, an office headed by a judge/magistrate enjoying the above-mentioned guarantees would certainly serve to provide adequate redress to the aggrieved party.

In the absence of such specialised organs, the general rules for challenging administrative actions (and omissions) should apply. Grievances must be referred to the courts of law since the protection of human rights is unanimously considered as essential to the very existence and survival of a democratic State. In many countries a citizen's fundamental rights and freedoms are nowadays enshrined in a bill of rights, which is enforceable by national courts; where the country is a State Party to the European Convention on Human Rights and has recognised the compulsory jurisdiction of the European Court, the citizen also has the added ultimate protection of the control organs of the Convention, the Commission and the Court of Human Rights.

One must accept that there may be limitations regarding the extent of judicial control over the activities of internal security services. However, it is noted that these controls are twofold. On the one hand, there are those controls that are proper to judicial review of the acts or actions of these services that have already been completed and which therefore invite an investigation into their legitimacy or constitutionality. In this respect a proper balance must be struck between the interests of the individual and the interests of society at large. The principle of proportionality must be applied to assess whether a particular act that could impinge on the right of the individual citizen could be justified as acceptable in a democratic society as a necessary measure to ensure the rule of law. The overriding principle should also be that the Courts should have jurisdiction to determine whether the actions complained of were within the powers and functions of the internal security services as established by law. Within the limitations laid down by law, the Court should have the right to determine whether there was undue harassment of the individual or abuse of administrative discretion in his or her regard. Judicial review of the executive acts, even with proper safeguards essential in the circumstances to ensure the integrity of the State, should not be unduly withheld.

Another form of control refers to the requirement imposed on internal security services to seek authorisation from a Court or other specialised organ before proceeding with actions which might be construed as infringements or a threat to the fundamental rights and freedoms of individuals. The term 'individual' is meant to include private individuals and legal persons such as political parties and commercial companies. In this case the same principles of proportionality apply.

A special aspect of the work of the security services is, however, that many of the actions that they undertake are carried out clandestinely so that the person who is the target of their operation will often not be aware of their actions. This makes it impractical to rely on judicial control at the initiative of the person who has been the target of an operation of the security services. As such a judicial control could be seen as a vital safeguard of the rights of the individual, it might be advisable to make a recommendation that operations of the security services that involve intrusions into rights and freedoms protected by the Constitution or the European Convention on Human Rights can only be carried out under judicial control.

It should be clarified that what is being discussed is not a situation of existing, imminent or potential public emergency. In such a situation other considerations might apply [see, eg. the European Commission for Democracy through Law's publications in this area in its series *Science and Technique of Democracy* Nos. 12 and 17]. What is being considered here are the operations of internal security services in a normal situation in which the circumstances might indeed be very serious and constitute a threat to the Rule of Law and democratic institutions, but fall short of a public emergency.

Officials of the security services who violate their official duties are, as a rule, liable to a punishment (or to a disciplinary sanction). The State may also be ordered to pay compensation to persons whose rights have been infringed.

ntrol by non-judiciary organs

The internal security organs are normally supervised by their hierarchical superiors, at the top level by the appropriate Government Minister or even by the Prime Minister or the Head of State. The supervision often includes regular reports from the security services. It may even include the need for a supervising person or body to authorise the commencement of investigations in individual cases.

This hierarchical control is often supplemented by parliamentary supervision. In many countries parliamentary committees have been created specifically for the supervision of internal security organs. Regular reports shall be made to the committee, which is also entitled to be provided with any additional information it requires and to issue its opinions on the activities of the security organs (in Italy the Committee may not, however, be furnished with any information on pending operations; but in Germany, the Parliamentary Control Committee shall be informed about any interception of postal and telephone communications and other instances of covert gathering of information). The committee is not, however, a hierarchical superior to the security organs. Hence, it cannot give them any orders.

In the absence of such a specialised committee, the Parliament or its appropriate committees may discuss internal security matters on the basis of the Government's regular reports or of questions presented by Members of Parliament as well as in the context of the annual budget debate. In Sweden, the Board of Directors of the National Police Board, heading the whole civilian police organisation, including security services, is partly composed of lay members, who are usually Members of Parliament and its Committee on Justice. A corresponding system exists for military intelligence, with the qualification that the lay members are usually elected among the members of the Parliament's Committee on Defence.

Various other more or less independent organs may also have a right or even a duty to keep an eye on the security organs. This applies especially to the now common Parliamentary Ombudsmen with a general competence to supervise legality in administration. The Ombudsperson may act on his or her own initiative or on the basis of complaints of individuals (or of legal persons, etc.). The Ombudsperson may make inspections, demand explanations, admonish or prosecute officials, make reports to the Parliament, etc.; but he or she can neither give orders to official organs nor rectify their actions.

In addition to Parliamentary Ombudsmen with general competence, a specialised ombudsperson may have competence with regard to internal security organs, e.g. privacy ombudsmen or data protection ombudsmen. In addition to the Ombudsperson elected by the Parliament, in some countries (Sweden, Finland) there is a high Government official (the Chancellor of Justice) whose competence more or less overlaps with that of the Ombudsperson. A Government official or body with similar tasks may also exist in countries without Parliamentary Ombudsmen (the Office of the Republic's Prosecutor in Belarus, the Chancellor of Justice in Estonia, the General Prosecutor of the Swiss Confederation).

The main rules on the organisation, functioning, competence and tasks of the highest State organs are normally included in the Constitution. This applies, as a rule, also to the Parliamentary Ombudsperson (and to the Chancellor of Justice). The supervision of internal security organs by the highest State organs is accordingly covered by these main constitutional rules, even though the internal security organs are not specifically mentioned in those rules. More detailed rules as well as provisions on specialised ombudsmen (on privacy, etc.) are principally a matter for ordinary legislation (despite the fact that in Belgium there is no parliamentary legislation on the internal security services themselves, there is an "organic law" containing provisions on the Permanent Parliamentary Committee on Intelligence Services).

her relations

rvices to other State organs

Internal security organs may provide other State organs with services which are similar to the services the security organs perform for private firms or individuals. In such a case, services performed for State organs do not appear to involve special problems.

State organs may, however, also have access to such services which are not performed for private individuals or entities. Here we encounter problems which are similar to those related to services performed pursuant to superior orders (see section I.E, *supra).* However, the responsibility for discriminating between services rendered for the protection of vital national interests and services for which State organs should not receive any privilege could be more easily attributed to the internal security organs themselves.

rvices from other State organs

Here, too, the problems that arise concern services which may not be performed for private individuals or entities. As already mentioned above, in some countries the internal security organs do not have any preventive or enforcement functions. Furthermore, where the security organs themselves may act, they may have the alternative possibility of requesting the ordinary police to, e.g., arrest and detain a suspect or search a dwelling. The request from the security organ should neither enlarge nor restrict the powers or the responsibility of the ordinary police. In Germany, the security services may not request cooperation from the ordinary police in taking measures to which they are themselves not authorised. Upon information provided by the German security services, the police may only take action if they consider that the information provided justifies it. In countries without such express provisions it might, however, be unreasonable to require, especially in urgent cases, that the well-foundedness of the request be verified in detail by the ordinary police.

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The security organs may require information not only from the ordinary police but from many other public organs as well. Information may be requested by a security organ, but the other organ may also provide information on its own initiative. In principle, the restrictions which are included in the data protection or privacy legislation are also applicable to the transfer of information to internal security organs. In order to fulfil their duties in the protection of vital national interests, security organs may require privileged access to protected information. Such privileges must obviously have a legal basis and, as far as the restrictions of access are included in the Constitution or an international agreement, they must also have a basis in the Constitution or agreement ("necessary in a democratic society in the interests of, e.g., State security," in the words of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data). In drafting the privileges, the possibility of misusing information for party political or other non-privileged ends must be kept in mind.

her State organs as targets

Internal security organs, or their individual officials, may consider it their duty or right to procure, keep and process information on the opinions, activities and whereabouts of other State organs and their members and officials. An extreme example is mentioned in Barbara Forbes's study: a Swedish ambassador (and former Government Minister), who was chairing a Government commission investigating the activities of the Swedish security police, found reason to believe that he was himself at the same time under the covert surveillance of the security police. Surveillance of persons belonging to State organs is a more sensitive matter than the surveillance of individuals in general. Security organs, or persons or instances acting through them, may try or seem to try to influence the actions of other State organs either by a direct use of the information gathered or by using the surveillance operations to intimidate or harass the persons in question.

However, even high Government officials can act as spies for foreign powers, and Members of Parliament or official boards can plan and carry out violent and even revolutionary acts. Security organs should be able to discover and combat such tendencies without, however, taking steps which hamper or even seem to hamper the interplay between different democratic political forces or the normal functioning of State organs. Detailed legal rules may be needed for a proper balance to be achieved. It is probably more important that the security organs themselves respect democratic society and serve it impartially as a whole; but appropriate legal rules may help in creating and preserving this democratic spirit within the internal security service.

he individual vis--vis Internal Security Services

troduction

It is pertinent to investigate from the outset what limitations should in principle be made on the activities of internal security services - irrespective of their particular organisational setup in different countries - to ensure the minimum of respect for fundamental human rights. It is accepted that by definition an internal security service is expected, in the course of its legitimate activities, to exercise a measure of control within the territorial limits of the country ('internal' interest) with the aim of ensuring the safety of its citizens in various aspects e.g. political and economic stability, and rule of law ('security' interest). It is also

recognised that these activities, even when legitimate, may sometimes have to be carried out outside the accepted controls of other constitutional organs (legislative or judicial) and that, therefore, the individual might not have an absolutely guaranteed opportunity to object to or oppose such activities and ask for protection. There should be absolutely no question of allowing a person or authority to be above the law or of giving a person or authority any licence to violate fundamental rights and freedoms. Exceptions and limitations in the interest of the common good of society can only be tolerated within the limitations accepted in democratic societies as expressed in international conventions and subject to close scrutiny and control by the appropriate organs.

It goes without saying that all countries that are signatories to the European Convention on Human Rights and who recognise the jurisdiction of the European Court are bound to be guided by the principles of the Convention and the decisions of its organs. It is also clear that these countries' legislations and regulations governing internal security services are subject to the scrutiny of the Court, which has full jurisdiction to determine whether, in particular cases brought before it, the state of the law was such as to ensure that the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society was present and not found to be lacking. This in itself can be considered to be an available judicial safeguard against inadequate national legislation or arbitrary interference.

The matter of the conformity of legislation setting up internal security services in individual countries with the European Convention on Human Rights has on occasion been investigated by the European Court and Commission. Reference is made to the case *Klass and others vs FRG* , in which it was held that the Government's "interference" was in accordance with the law in that the Act not only defined precisely the purposes for which the State could impose any restrictive measures but required that any individual measure of surveillance had to comply with the strict conditions and procedures laid down in the Act itself. Other decisions dwelt on the principle that State action through its internal security services should be proportionate to the legitimate aim, to the right of the State to undertake the secret surveillance of subversive elements, to the need for adequate and effective guarantees against abuse, to the duty to give citizens an adequate indication as to the circumstances in which, and the conditions on which, public authorities are authorised and empowered to resort to secret and potentially dangerous interference with the right to respect for life and correspondence and to the need to give the individual adequate protection against arbitrary interference.

ıe Right to Privacy

An area that is obviously exposed to the particular activities of internal security services is the "privacy" of the individual. "Privacy" is intended here in the widest meaning of the word, extending to the full enjoyment of life in its various aspects. It is useful to consider this aspect in some detail since this would help us in the identification of recommendations that could be made concerning the relations between internal security services and other organs within the constitutional order.

More precisely, many types of police work, such as home searches and wire-tapping, involve fundamental rules on the protection of privacy included even in the Constitution or in international agreements, e.g. in the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981. Such constitutional and international rules shall evidently be respected when legislative or other rules of lower degree are issued; and the constitutional, international or inferior rules shall normally also be applied to the operations of internal security organs. The rules may also include derogations in favour of internal security operations. It is, however, rare for such derogations which are included in constitutional or international rules to give privileges directly to internal security organs. Instead, exceptions may, as granted in constitutional or international norms, be included in ordinary legislation (or executive decrees, etc., as the case may be), to be then applied by internal security organs. Furthermore, such authorisations may be narrowly circumscribed. The European Convention just mentioned above thus requires not only that any derogation must be provided for by law but also that the derogation is a necessary measure in a democratic society in the interests of, *inter alia*, protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences.

The principle of a right to privacy emerged from a famous article published by Warren and Brandeis (*The Right to Privacy,* 4 Harv. Law Rev. 192) in 1890. Drawing primarily on the law of intellectual property the authors argued that:

ry early times the law gave a remedy only for physical interference with life and property, for trespass vi et armis. Thus the 'right to live' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; now the right to life has come to mean the right to enjoy life - the right to be let alone, the right to liberty securing the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession - intangible, as well as tangible."

According to Article 8(1) of the European Convention:

ryone has the right to respect for his private and family life, his home and his correspondence."

This Article evolved from Article 12 of the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations on 10th December, 1948) which reads as follows:

one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

This same right is reiterated in Article 17 of the International Covenant on Civil and Political Rights (1966) of the United Nations, though here the *unlawfulness* of the interference also comes into play:

le 17

1 one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

veryone has the right to the protection of the law against such interference or attacks.

Throughout the years various attempts have been made in order to find an all-encompassing legal definition of this right. Thus, for example, the Nordic Conference of Jurists on the Right to Privacy (May, 1967) defined the 'right to privacy' as *"the right to be let alone to live one's own life with the minimum degree of interference"*. It elaborated this definition and held that the right to privacy means:

"The right of the individual to lead his own life protected against:

(a) interference with his private, family and home life;

(b) interference with his physical or mental integrity or his moral or intellectual freedom;

(c) attacks on his honour and reputation;

(d) being placed in a false light;

(e) the disclosure of irrelevant embarrassing facts relating to his private life;

(f) the use of his name, identity or likeness;

(g) spying, prying, watching and besetting;

(h) interference with his correspondence;

(i) misuse of his private communications, written or oral;

(j) disclosure of information given or received by him in circumstances of professional confidence.

A more recent definition was given in the Declaration concerning the Mass Media and Human Rights (Resolution 428 [1970] of the Consultative (Parliamentary) Assembly of the Council of Europe), in which the right to privacy was defined as consisting: "essentially in the right to live one's own Life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially".

Notwithstanding the above, the State, as a result of the extensive field of regulation entrusted to it, is constantly in need of acquiring, monitoring and evaluating information. In fact, the work of internal security services is a guarantee for the continued existence of the State itself and for the democratically regulated life of society. Such services also have the task of safeguarding the economic well-being of the country against threats posed by the actions and intentions of individuals.

The aim of such services should also be to provide protection from possible espionage, terrorism and sabotage from foreign powers, to investigate actions which aim at undermining democracy and to undertake the secret surveillance of subversive elements operating within a country's jurisdiction.

However, the above-mentioned freedoms can never be properly guaranteed if domestic security surveillances may be conducted within the absolute discretion of the Executive. It is an established fact that where there is unreviewed executive discretion this may very well lead to imposing pressure in order to obtain incriminating evidence and thereby overlook potential invasions of privacy. Thus, the services cannot operate uncontrolled. There have been various instances where security services have attempted to influence the political scene in the countries in which they operate.

It must be emphasised that the fundamental freedoms and rights of individuals cannot be adequately protected if the acts of such institutions are not made susceptible to judicial review. Furthermore, the regulation of internal security services can only be made effective by having specific legislation. If the position is regulated by administrative practice, however well adhered to, it will never provide the guarantees required by law. Being an administrative practice, it can be changed at any time and thereby clarity as to the scope or the manner in which the discretion of the authorities is exercised would undoubtedly be lacking.

The enactment of legislation would give citizens an adequate indication of the instances and conditions in which such surveillance is admissible. It should also provide for an indication of the scope of any executive discretion and the manner of its exercise so as to afford protection against arbitrary interference. In the United Kingdom, prior to the Security Service Act, 1989, which legitimised for the first time the activities of the Security Services, the position was regulated by common law. During this period it was firmly believed that the most effective remedy was an application under the European Convention on Human Rights.

The appointment of judges or magistrates, whose independence and impartiality would be guaranteed by the Constitution, to investigate and monitor the activities of security services could ensure that such services do not abuse the powers with which they are entrusted (having a judiciary independent of the Executive is a vital component of the rule of law). Thus, for example, in the *United States* vs *United States* District Court [1972], the Supreme Court held certain wiretapping to be improper which had been approved only by the Attorney-General. The view was expressed that the freedoms guaranteed by the Constitution cannot be properly guaranteed if domestic security surveillances are conducted merely on the discretion of the Executive. Furthermore, the official is to draw up an annual report of the activities undertaken by the service, a copy of which is to be presented to Parliament.

However, when investigations to be carried out concern foreign relations, different considerations of the Executive come into play.

In cases concerning telephone tapping, listening and visual surveillance including e.g. the planting of electronic devices and the use of video cameras to observe the activities of persons in private places, the introduction of specific legislation would ensure that, whilst the security services are provided with the necessary tools they do not exceed their powers. Although the State requires powers of interception in order to gather information about serious crime and terrorism, these powers should not be unlimited. By establishing such an institution which is distinct and separate from the executive branch it would be ensured that:

a) An individual who believes his communications have been intercepted can apply to such office for redress and request an investigation on unauthorised interceptions;

b) The judge/magistrate who carries out the investigation should be guaranteed full access to information and thereby be in a position to assess whether the order for interception was justified or vexatious.

c) The judge/magistrate could give orders on how the intercepted material is handled such that he could make arrangements as to the extent to which the material is disclosed, the number of people to whom it is disclosed, the extent to which it is copied and the number of copies made.

d) Copies of the material are destroyed as soon as the storing of the material is no longer necessary for the purpose for which it was issued.

e) The service is kept under review and a provision could be introduced stipulating that an annual report is to be drawn up and presented in Parliament.

An interesting proposal made in the United Kingdom was that of the Royal Commission on Criminal Procedure, which recommended in 1981 that no warrant for telephone tapping should be issued until an Official Solicitor who acts on behalf of the unsuspecting suspect, has had an opportunity to consider and question in court the grounds for a request to intercept communications.

An advantage in having interception warrants issued by courts would also serve to dismiss any objection to introducing the transcripts as admissible evidence in a prosecution case. In countries such as the United States, experience has suggested that this type of evidence can be crucial to the conviction of so called *"inside dealers"*.

Another recommendation is that a phone tap be installed where the judge/magistrate is satisfied that there is imminent danger of *serious crime* and that more routine methods of investigation would be unlikely to succeed. Provision should also be made for the transcripts to be handed first to the judge/magistrate, who then releases to the Services such portions as he or she deems relevant to the investigations being carried out. When investigations are concluded the destruction of the transcripts could be ordered.

Certainly, it would not be sufficient to satisfy the above-mentioned principles merely by writing unlimited administrative powers into formal law. Thus, for example, the British response to the judgment in *Malone vs United Kingdom* (1984) was the enactment of the Interception of Communications Act 1985, which provides a statutory basis for telephone-tapping, with the warrant of the Home Secretary. Furthermore, it sets mechanisms for control over this power but unfortunately excludes the courts from this process. An individual may complain to an independent tribunal from which there is no appeal, and a Commissioner, a senior judge, is charged with overall supervision of telephone-tapping. It is interesting to note that in the case of *Christie vs United Kingdom* [No. 21482/93] the European Commission of Human Rights confirmed that the scheme of the Interception of

Communications Act satisfied the substantive as well as the formal requirements of law.

As was stated in the *Malone* case:

ould be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

It must be emphasised that any enactment should provide guarantees against the arbitrary use of the power it confers. Adequate protection is to be afforded as such cases involve an intrusion into private life. The relevant legislation must provide answers to such questions as: Whose telephones might be tapped? For what offences? For how long? How are the results to be used? What are the rights of the defence of access to such recordings? What happens to the tapes and records on conclusion of the proceedings?

Furthermore, such legislation could provide for certain offences which would act as a deterrent and aim at protecting the citizen's right to privacy. This would include a provision that it is an offence for a person to:

ntionally intercept or interfere with a communication in the course of its transmission;

:close the contents of any communication which has been intercepted in the course of transmission, where the perpetrator knows that such contents have been unlawfully obtained;

The law should also provide for the prosecution of security services officials in the case of abuse of their powers.

Another area which requires regulation refers to the collection and dissemination of secret information concerning individuals and effected by secret services. The invasion of an individual's privacy by the secret collection of information about him or her by organisations which have no legal powers or for that matter legal existence, and against whose behaviour there may be no remedy, is a problem that necessarily must be dealt with. There have been recorded cases where such information has been collected with the aim of damaging careers. A case in point is the *Spycatcher case,* in which Peter Wright confessed to *"burgling and bugging his way around London"* in the service of MI5. It was shown that Wright had collected private information about a large number of left-wing politicians, trade-union leaders and friends of Harold Wilson with this scope (vide, *Freedom, the Individual and the Law* by Geoffrey Robertson pg. 109).

The gathering of such information should be effectively monitored by an independent institution and thereby ensure that effective investigations are carried out where members of the public are believed to have been black-listed. The decision whether an individual requires investigation should certainly not be made exclusively within the service.

The law should further provide for the prohibition of any security service from taking any action to further the interests of a political party.

Certainly, security measures should be taken against unauthorised access or alteration, disclosure or destruction of such personal data. Other proposals include:

ere information concerning an individual has been collected and stored without his knowledge, he should be informed, where practicable, that information is held about him as soon as the activities of the security services are no longer likely to be prejudiced.

e collection of information on individuals solely on the basis of their particular racial origin, religious convictions, sexual behaviour or political opinions or association with particular movements or organisations should be prohibited, unless their behaviour is proscribed by law.

ommunication of data to private parties should only be permissible where a legal obligation requires it or with the authorisation of a supervisory authority.

supervisory authority or other independent body should ensure that only specifically authorised personnel have access to terminals containing information and that the communication of data is duly authorised.

iodic reviews of all files should be undertaken to ensure that they are kept up to date and free of superfluous and inaccurate data.

ıe transfer of data to other bodies should be regulated by specific provisions, for example where the communication is necessary so as to prevent a serious and imminent danger.

The above examples of restrictions on the activities of internal security services obviously necessitate a measure of control through other constitutional organs. It is therefore advisable to set up a committee which would perform supervisory control with ultimate judicial review where an individual complaint arises over the data retained by the security services.

Legislation should ensure, with certain reservations, public access to such information. This:

ıids a direct attack on the good faith of the administration;

rves as a redress to the imbalance between the State and the private organisation;

: of the essence of democratic government: the public should have the right to be aware of the holding of such data.

Where, due to such access, it is shown that data collected is inaccurate, irrelevant or excessive, then it should be ensured (even via the supervisory authority) that the relevant file is put in order. This can be done by erasing inaccurate data, or rectifying the information so as to make it correspond to the correct situation.

Another proposal is that such data should not be accessible to the public in general but the person requesting to have access must prove a specific interest in the said information.

Conclusion

The opinion of the Venice Commission was requested on the *constitutional* relationship between internal security services and other organs of the State. There are very few constitutional rules specifically regulating the relations between internal security services and other organs of the State. These relations are, however, affected by constitutional rules on the organisation and functioning of the highest State organs, determining how and by whom the organisation, functioning and powers of Government organs, including security organs, are set, and on fundamental and human rights, limiting the competence of the highest State organs to grant powers to other Government organs, again including security organs. Especially in the latter respect, constitutional rules are to a large extent supplemented and reinforced by international agreements and by the international organs monitoring the application of these agreements.

Despite the influence of the (mainly general) constitutional and international rules, the more detailed rules of ordinary (and "organic") legislation and executive and administrative regulations on the organisation, functioning and powers of internal security services are of fundamental importance in enabling the services to perform their tasks effectively but at the same time under the rule of law and respecting the democratic integrity of all people.

The following more detailed conclusions can be drawn from the above considerations:

is recognised that an internal security service exists for the protection of a State, and that this service, by its very nature and scope, sometimes has to act outside the accepted standards of an ordinary police force.

ıch a service can be conceived as an autonomous body and a separate organ or as part of the Executive directly responsible to a Minister or appropriate committee. In any case, however, the internal security services must be made accountable for their actions within the provisions of the law that regulates them.

hile the Internal Security Service must be given the right space within which to operate effectively and the necessary means to obtain results, there should be consensus that these services should be legitimated in so far as their role, functions, powers and duties should be clearly defined and delimited by the legislation that sets them up or by the Constitution.

would be preferable that the rules concerning security services be enshrined in the laws of Parliament or possibly even in the Constitution. It is absolutely essential, however,

concerning the internal security services be as clear and concise as possible so that the tasks they can lawfully engage in are clearly defined;

e legislation pertaining to internal security services be in harmony with the Constitution and the international obligations of the State, and in particular with the rules protecting human rights.

ɔrms applicable to internal security services should only be allowed to be kept secret to the extent that is absolutely necessary.

ıere must be an appropriate control of the budget of the internal security services. As their budget, as approved by the Parliament, is often not very specific or might even be totally hidden within the budget of the branch of the Executive in charge of the security service, it would be suitable, at least for the member of Government responsible for the internal security services to be responsible for the budget allocated to the security services.

ternal security services must act only in the national interest and not in favour of the party in Government, or any other party or institution. They must not be used as a means of oppression or undue pressure.

ıere is common ground in Europe that the control of the security services cannot be merely internal; on the contrary, it seems that an external control exists from the Executive, from Parliament and/or from the judiciary in some form in all member States. A close, and not only a general, control of the activity of the security services is necessary.

s imperative that these services operate within an administrative/legal structure that provides for adequate control of their activities. Whereas it would be unrealistic to require their activities - if they are to be effective - to be fully transparent at all times, it is, however, expected that internal security services be accountable for their acts and activities within the legal framework in which they operate. To that extent they must be transparent in the sense that their actions should be verifiable and subject to control to establish whether they had correctly exercised their functions and powers intra vires. This control must be a judicial one either by an *ad hoc* judicial authority, or by the ordinary courts. This is especially so where fundamental rights are involved.

the exercise of this judicial control, great care should be taken to protect the overriding interest of the State and therefore appropriate legislative provision must be made to ensure confidentiality, secrecy, lack of publicity, protection of preserved information and data, protection of witnesses, etc.

order to avoid any abuse, detailed regulation is needed on the power of other authorities to ask the internal security services for information or other services not available to private firms or individuals.

ɛrnal security services must not interfere with the activity of other State organs. However, the surveillance of persons belonging to such organs may be necessary (e.g. if they are suspected of espionage). Detailed legal rules may then be required for a proper balance to be achieved.

: is recognised that internal security services should be accorded the opportunity to operate swiftly, effectively and preventively with the least possible interference as to the method and the means at their disposal, but their actions must be such as to ensure that derogations of fundamental rights and freedoms of individuals subjected to their activities and investigations be kept at a minimum. It is to be expected that the actions of internal security services may sometimes have to be unconventional. However, they must always be accountable for their actions when these unduly infringe on fundamental human rights or when they wrongfully and unwarrantedly have a destabilizing effect on democratic institutions and the rule of law.

aving established that the unorthodox means by which internal security services must be allowed to operate can have this negative effect, it is imperative that these extraordinary measures and restrictions of fundamental rights and liberties should be proportionate to the danger involved. The same principle applies when the internal security services intervene out of necessity in the defence of the State in the political/democratic process. These services are only authorised to intervene in this manner as long as the danger their action is meant to prevent persists and with the minimum involvement for a definite and determinate purpose.

ıe can deny that certain restrictions of fundamental rights can take place, especially in relation to information concerning international relations and national security where the very well-being of the nation is at issue. Without doubt such measures must be proportionate to the prevailing situation in the country concerned. This concept of proportionality is to be found in the constitutional law of countries such as Germany, the USA and Canada as well as in French administrative law. A restriction on a fundamental right cannot be regarded as necessary in a democratic society unless, amongst other things, it is proportionate to the legitimate aim pursued. Thus, if for example there is a need for action to limit freedom of expression, the interference with such a fundamental right must be necessary and proportionate to the damage which such a restriction is designed to prevent.

ii. Opinion on the legal problems arising from the coexistence of the Convention of Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention of Human Rights adopted at the 34th Plenary Meeting (6-7 March 1998)

INTRODUCTION

On 4 July 1997, the President of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr B. Hagrd, submitted a request to the Venice Commission for an opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights.

The Venice Commission invited Mr Malinverni, Rapporteur, to prepare a preliminary opinion on this question. At its 33rd plenary session (Venice, 12-13 December 1997) the Commission held an initial exchange of views on the basis of this opinion. Following this discussion, the Rapporteur and the sub-Commission on International Law were charged with presenting a draft consolidated opinion on the question at the next plenary session.

The Sub-Commission on International Law met in Venice on 5 March 1998. It decided to submit to the Commission the revised opinion of the Rapporteur.

At its 34th plenary session (Venice, 6-7 March 1998), the Commission adopted the present opinion and decided to forward it to the Committee on Legal Affairs and Human Rights of Parliamentary Assembly.

E CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF THE COMMONWEALTH OF INDEPENDENT STATES

On 26 May 1995, in Minsk, seven of the twelve member states of the Commonwealth of Independent States (CIS) signed a new Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as "the CIS Convention").

According to the information available to the Venice Commission, the CIS Convention, of which the Regulations on the Human Rights Commission of the Commonwealth of Independent States (hereinafter referred to as "the CIS Regulations") are an integral part, has not yet come into force. It will do so as soon as the Contracting Parties have deposited the third instrument of ratification (Article 38 of the CIS Convention).

Three CIS member states are also members of the Council of Europe: Ukraine, not a party to the CIS Convention, has been a member since 9 November 1995; Moldova, which has signed the CIS Convention, since 13 July 1995; and the Russian Federation, which has ratified the CIS Convention (in November 1995), since 28 February 1996[21].

Ukraine and Moldova have now ratified the European Convention on Human Rights (hereafter: ECHR) and some of the protocols thereto and made declarations under Articles 25 and 46 accepting individual complaints and the compulsory jurisdiction of the European Court of Human Rights. The Russian Federation has signed the ECHR and stated its intention to ratify the convention in the future.

In a 1995 report on the conformity of the Russian Federation's legal system with Council of Europe standards a group of experts expressed doubts about the relevance of the CIS Convention, then in draft form, and its compatibility with the ECHR[22].

The Parliamentary Assembly of the Council of Europe shared the experts' concerns and raised the question of the legal consequences and implications if these states were to ratify both the ECHR and the CIS Convention. It asked two eminent human rights experts to prepare a legal opinion on the subject[23].

Subsequently, in its Opinions on Moldova, Ukraine and the Russian Federation's accession to the Council of Europe, the Parliamentary Assembly insisted on a commitment by Moldova that it would not ratify the CIS Convention until the problems of the convention's co-existence with the ECHR had been clarified and that it would not do so without the agreement of the Council of Europe (Opinion No. 188 (1995), para. 11 (e)). Likewise, the Parliamentary Assembly called on Ukraine to refrain from signing the CIS Convention in the present circumstances (Opinion No. 190 (1995), para. 12 i)[24], and asked the Russian Federation to ensure that the CIS Convention did not in any way interfere with the guarantees and procedure of the ECHR (Opinion No. 193 (1996), para. 10 xvi).

The essential question is whether the coexistence of these parallel instruments of human rights protection will improve the protection of victims of possible human rights violations. The credibility and utility of any new effort in the human rights domain must meet the test of whether the procedures created are victim-oriented, whether the framework of the universality of human rights is enhanced and whether other norms, treaties or regimes in the area are reinforced rather than undermined. It is in this context that the viability and utility of the CIS Convention must be judged.

)MPARISON OF THE SUBSTANTIVE PROVISIONS OF THE CIS CONVENTION AND THE ECHR

The civil and political rights guaranteed by the CIS Convention, which clearly draws on the corresponding provisions of the ECHR, the United Nations Covenant on Civil and Political Rights and the American Convention on Human Rights, scarcely diverge from the rights guaranteed by the ECHR.

Roughly speaking, the main substantive differences are as follows[25]:

- The right to life (Article 2 of the CIS Convention; Article 2 of the ECHR; Protocol 6 to the ECHR)

Whereas Article 2, para. 2 of the ECHR sets out in full the cases of necessity in which deprivation of life shall not be regarded as a violation of this right, Article 2, para. 4 of the CIS Convention merely refers to cases of extreme necessity and necessary defence provided for in the national legislation of the member states. It is thus left entirely to the discretion of the respective legislatures to fix these cases. Protection of the right to life may therefore be more extensively curtailed under such national legislation than pursuant to the ECHR.

As regards capital punishment, it should be noted that the CIS Convention provides that women shall not as a rule be sentenced to the death penalty, and it absolutely forbids the imposition or execution of the death penalty in the case of pregnant women as well as its imposition for crimes committed before the perpetrator reached the age of 18 (Article 2, paras. 2 and 3). Protocol 6 to the ECHR abolishes the death penalty entirely. This Protocol has not yet been ratified by all the states parties to the ECHR. However, although protection of the right to life afforded under the ECHR may thus seem lower, at first glance, than that afforded by the CIS Convention, it must not be forgotten that the intention to ratify Protocol 6 has become one of the conditions of a state's accession to the Council of Europe.

- Deprivation of liberty (Article 5 of the CIS Convention; Article 5 of the ECHR)

Whereas Article 5, paras. 1 (a) to (f) of the ECHR restrictively lists the cases where detention is lawful, Article 5, para. 1 (b) of the CIS Convention merely requires that a person's arrest or detention be lawful, a concept referring to the legislation of the member states, which are apparently free to determine an unlimited number of cases where detention or arrest is possible. Personal freedom is therefore afforded far less protection by the CIS Convention than by the ECHR.

Furthermore, the case-law of the European Court of Human Rights has firmly established that the provisions of Article 5 para.1 of the ECHR must be interpreted narrowly, and account must also be taken of the fact that any deprivation of liberty must, as well as conforming with domestic laws, be in keeping with the purpose of Article 5 of the ECHR, which is to protect individuals against arbitrary deprivations of liberty.

As to an examination of the lawfulness of pre-trial detention, under Article 5, para. 3 of the CIS Convention such an examination depends on its being requested by the detained person, whereas under Article 5, para. 3 of the ECHR it is automatic, immediate and mandatory.

- Fair trial (Article 6 of the CIS Convention; Article 6 of the ECHR)

Whereas Article 6, para. 1 of the ECHR includes the interests of "national security in a democratic society" among the grounds for excluding the press and the public from all or part of a trial, Article 6, para. 1 of the CIS Convention uses the vaguer and doubtless far broader term "state secrecy" and leaves its interpretation to the member states' discretion. The rules governing proceedings in camera are therefore less strictly defined under the CIS Convention.

Article 6, para. 3 (d) of the ECHR confers on persons charged with a criminal offence the basic right to call and question prosecution and defence witnesses. On the other hand, Article 6, para. 3 (d) of the CIS Convention merely allows a person charged with an offence to make an application to the court to that end. Here, too, the guarantees afforded by the CIS Convention are less extensive than those of the ECHR.

- State of emergency (Article 35 of the CIS Convention; Article 15 of the ECHR)

Whereas under the ECHR exceptional measures can be taken only "in time of war or other public emergency threatening the life of the nation", the CIS Convention permits them "in time of war or other emergency situation threatening the higher interests of any Contracting Party", which is obviously a vaguer, far broader concept. The CIS Convention therefore allows measures derogating from its guarantees to be taken at what is clearly an earlier stage than is possible under the ECHR.

In more positive terms, it should be noted that the CIS Convention enshrines certain economic and social rights (the right to work, health protection, the right to social security, protection of disabled persons) or collective rights (protection of persons belonging to national minorities), which are not to be found in the ECHR.

In general, a comparison of the substantive provisions of the two conventions shows that the human rights guaranteed by the CIS Convention are less extensive and more open to restrictions than under the ECHR.

However, where the victim of an alleged human rights violation chooses to lodge an application with the European Commission of Human Rights, the most favourable treatment rule set out in Article 60 of the ECHR will make it possible to prevent the scope of the rights conferred by the ECHR from being diminished by the generally lower standards of protection afforded by the CIS Convention. Moreover, this most favourable treatment clause also appears in Article 33 of the CIS Convention, the wording of which is almost identical to that of Article 60 of the ECHR.

Nevertheless, the impact of such clauses is mainly negative: their effect is not to incorporate the most favourable provisions of one convention into another, but to preclude the scope of one instrument from being limited by the provisions of another[26].

Accordingly, if the alleged victim applies to the CIS Commission, there is a risk that the latter will examine the case solely in the light of the lower protection standards of the CIS Convention.

III. CONTROL MECHANISMS OF THE CIS CONVENTION

According to the CIS Regulations, which are an integral part of the CIS Convention (Article 34), the CIS Commission is composed of representatives of the Parties. These representatives are not elected but appointed by the parties (Section I, para. 2 of the CIS Regulations).

Moreover, no judicial form of procedure is provided for in the case of applications from individuals. Section III, para. 3 of the CIS Regulations merely states that the Commission may, if it so wishes, hear applicants whose cases it is considering.

Inter-state applications concerning matters not resolved to the Parties' satisfaction may be referred to a special conciliatory sub-commission composed of representatives of the Contracting States. The sub-commission is required to submit its conclusions to the Commission for transmission to the interested Parties (Section II, para. 5 of the CIS Regulations).

Finally, the Commission's powers are reduced to a bare minimum. Its decisions "shall take the form of understandings, conclusions and recommendations". It is not specified whether such decisions are binding on the Parties; they are of a public nature "unless decided otherwise by the Parties" (Section I, para. 10 of the CIS Regulations).

In view of its membership and limited powers, there seem to be serious grounds for fearing that the CIS Commission will be unable to fulfil its role as an international supervisory body in the field of protection of human rights in a completely effective manner.

In conclusion, the intergovernmental and political nature of the CIS Commission raises serious doubts about its quasi-judicial status. In this respect it is very different from the European Commission of Human Rights. The two systems' dissimilarity becomes fully apparent when one considers that the CIS Convention does not provide for the setting up of a Court of Human Rights.

The Strasbourg system has greatly helped to "realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe"[27], and the European Court of Human Rights has become as it were, the constitutional court of Western Europe[28]. It seems that such will never be true of the CIS Convention system in view of the substantially inferior control mechanisms it provides in respect of the republics of the former Soviet Union.

The contrast between the two systems will only become greater with the entry into force on 1 November 1998 of Protocol 11 to the ECHR. As from this date all the supervisory functions of the European Court and Commission of Human Rights will be assumed by the European Court of Human Rights. The examination of alleged violations of human rights will thus be conducted entirely under a judicial form of procedure.

IV. EXHAUSTION OF DOMESTIC REMEDIES (ARTICLE 26 OF THE ECHR)

The question has been raised as to whether the control mechanisms established by the CIS Convention should be regarded as affording a domestic remedy within the meaning of Article 26 of the ECHR.

In the context of its examination of the conformity of the Russian Federation's legal system with Council of Europe standards, the above-mentioned group of legal experts was told during a meeting at the Institute of State and Law of the Russian Academy of Science that an individual complaint concerning a human rights violation should be dealt with under the CIS Convention system before being brought before the European Commission of Human Rights[29].

The group of experts then expressed concern about the draft CIS Convention in so far as its implementation mechanism might jeopardise the operation of the Strasbourg mechanism, especially if an approach to the CIS Commission were to be regarded as a prerequisite for the lodging of an application with the European Commission of Human Rights[30]. Such a requirement would in effect cause an unacceptable increase in the time taken to resolve cases of alleged violations of human rights.

However, the experts' fears scarcely seem founded. The requirement in Article 26 of the ECHR regarding the exhaustion of domestic remedies, which is a customary rule of international law, means that a state should not be held accountable for its actions at international level unless persons considering themselves prejudiced by one of its actions have unsuccessfully sought redress by all the means available to them under that state's domestic law. Such persons must therefore submit their cases to a domestic court, lodge an appeal if necessary, and then apply to the highest court in the country concerned[31].

The view has never been taken either in international practice or by legal writers that recourse to an international supervisory body is subject to exhaustion of another international remedy, even in the relationship between a regional system (such as that of the ECHR) and a universal system (such as that of the Covenants)[32].

This follows, in particular, from the lack of any hierarchy between the different human rights protection systems, from their complementary nature and from applicants' freedom to choose whichever system they consider to provide the most effective protection. Furthermore, the very existence of provisions such as Article 27, para. 1 (b) of the ECHR and Article 5, para. 2 (a) of the Optional Protocol to the International Covenant on Civil and Political Rights shows that there is no hierarchy between the different human rights protection systems.

The rule regarding exhaustion of remedies has therefore always applied solely to a state's domestic remedies, not regional remedies. The wording of Article 26 of the ECHR is perfectly clear in this respect, as it provides that the European Commission of Human Rights can only deal with a matter after all domestic remedies have been exhausted.

It is therefore wrong to contend that an application from an individual must in all cases be lodged with the CIS Commission before it can be examined by the European Commission of Human Rights.

ALIBI PENDENS AND THE NON BIS IN IDEM PRINCIPLE (Article 27, para. 1 (b) of the ECHR)

The protection and control mechanisms established by the CIS Convention, which seem likely to be fairly ineffective and are already unsatisfactory in themselves, raise yet another problem: the risk that a complaint concerning an alleged violation of human rights may be found inadmissible by the European Commission of Human Rights if it has already been brought before the CIS Commission.

This is because under Article 27, para. 1 (b) of the ECHR the Commission may not accept an application that is "substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement".

The purpose of this provision is to rule out duplication of international proceedings. It is not confined to the "non bis in idem" principle but also covers cases of "lis alibi pendens" since, for the Commission to declare an application inadmissible, it suffices that the same application, relating to the same facts constituting an infringement of the same rights, should previously or simultaneously have been lodged with another international institution by the same person[33].

The following have so far been regarded as institutions affording procedures of international investigation or settlement within the meaning of Article 27, para. 1 (b)[34]:

- the International Court of Justice, in The Hague,

Human Rights Committee established by the International Covenant on Civil and Political Rights,

Committee set up under the United Nations Convention on the Elimination of All Forms of Racial Discrimination,

Committee set up under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

- the institutions established within the International Labour Organisation,

. last, at regional level, the Court of Justice of the European Communities, in Luxembourg.

The concept of "procedure of international investigation or settlement" therefore encompasses a variety of procedures functioning in widely differing ways and providing the parties with very unequal guarantees.

In particular, although the crucial factor is not whether or not the procedure concerned is judicial in nature, the institution in question should at least have the means to conduct a thorough, objective investigation without hindrance, or even to apply a regulated conciliation procedure without being restricted by political considerations or hamstrung by irrefutable objections based on respect for sovereignty[35].

To this extent, given the non-independence of the members of the CIS Commission, who are mere appointees of the states parties to the CIS Convention and representatives of those states (Section I, para. 2 of the CIS Regulations), and the fact that the Commission's decisions are not binding (Section I, para. 10 of the CIS Regulations), added to the non-judicial nature of the Commission's procedure, it might be argued that the CIS Commission does not qualify as an institution operating a procedure of international investigation or settlement within the meaning of Article 27, para. 1 (b) of the ECHR[36].

This possible interpretation of Article 27, para. 1 (b) of the ECHR would be a means of preventing the CIS Convention system from constituting an obstacle to applicants wishing to have their human rights complaints examined by the European Commission of Human Rights.

However, the argument based on the non-judicial nature of the control procedure set up by the CIS Convention does not appear decisive if the procedures currently deemed to be covered by the expression "another procedure" are taken into account.

It is therefore highly probable that the European Commission of Human Rights (as from 1 November 1998, the Court) will indeed consider that, despite its inadequacies, the CIS Commission should be regarded as "another procedure of international investigation or settlement" and will refuse to deal with applications that have already been or are currently being examined by it[37].

It should be noted that Section III, para. 2 (a) of the CIS Regulations contains a provision similar to that of Article 27, para. 1 (a) of the ECHR. An application lodged simultaneously with the CIS Commission and the European Commission of Human Rights will therefore be declared inadmissible by both these institutions.

HE NEED FOR CO-ORDINATION BETWEEN THE CONTROL MECHANISMS OF THE CIS CONVENTION AND THE ECHR

Difficulties due to the coexistence of different international human rights protection systems arose even in the 1970s, with the adoption of the Optional Protocol to the United Nations Covenant on Civil and Political Rights. The solutions recommended by the Council of Europe in that connection, imbued with a concern to avoid duplication of proceedings, may indicate an answer to the problem of the coexistence of the CIS Convention and the ECHR.

1. With regard to inter-state applications, Article 62 of the ECHR may be said to mean that, failing a special agreement, the Contracting Parties are under an obligation to submit disputes arising from the interpretation or application of the ECHR solely to the supervisory bodies established under that convention[38]. This interpretation has, however, been criticised and sometimes deemed incompatible with the universal nature of human rights.

These uncertainties led the Committee of Ministers of the Council of Europe to stipulate that any states parties to the ECHR that have also recognised the right of interstate applications under Article 41 of the United Nations Covenant on Civil and Political Rights should normally utilise only the procedure established by the European Convention in order to complain of another state's violation of a right guaranteed by both the Covenant and the Convention[39].

It is therefore clear that the Council of Europe wished to give precedence to the regional system of the ECHR and emphasise its independence in relation to other international institutions, thus making the European Court a sovereign tribunal whose judgments are final[40]. This solution is designed to prevent an applicant state from choosing between the two procedures and obviate the risk of duplication of proceedings[41].

The CIS Regulations, for their part, provide that they shall not " prevent the Parties from resorting to other procedures for settling disputes on the basis of international agreements applying to them" (Final Section, para. 1 of the CIS Regulations). In the case of inter-state applications, therefore, it does not seem that the control mechanism of the CIS Convention should interfere with the European Convention's system.

However, given the absence of a hierarchy as between the two conventions, it would be desirable if any states parties to the ECHR that consider they should nevertheless ratify the CIS Convention were to make an interpretative declaration when doing so, giving absolute priority to the ECHR's tried and tested control mechanisms so as to avoid weakening them and, above all, prevent duplication of proceedings.

2. As for applications from individuals, the Committee of Ministers, referring to the co-existence of the ECHR and the Optional Protocol to the United Nations Covenant on Civil and Political Rights, took the view that victims of a violation of a right covered by both instruments should be fully free to submit the matter to whichever international procedure they chose.

At the same time, the "lis alibi pendens" and "non bis in idem" principles set forth in Article 27, para. 1 (b) of the ECHR expressly preclude the duplication of proceedings[42]. It follows that an application lodged by the complainant with the CIS Commission either earlier or simultaneously will be declared inadmissible by the European Commission.

It would be desirable to prevent the far from perfect CIS Convention system from standing in the way of an examination by the ECHR institutions violation of a right covered by both conventions. In a word, the main problem arising from the coexistence of the two conventions lies in this risk of the ECHR control mechanism being blocked - and hence weakened - by the lodging of an application with the CIS Commission. In view of the terms of Article 27, para. 1 (b) of the ECHR, it is difficult to eradicate this possibility of the Strasbourg system being excluded.

From a theoretical point of view, it is doubtless reassuring to assume that the freedom of choice of a procedure enjoyed by the applicant, who will have to bear the consequences of that choice, combined with the most favourable treatment principle (Article 60 of the ECHR; Article 33 of the CIS Convention) will enable the scope for conflicts of rules between the two systems to be reduced[43].

However, this thought will seem somewhat less soothing if one remembers the CIS member states' legal culture and institutions, their lack of judges and lawyers with experience in this domain, their lack of a tradition of judicial protection of human rights and freedoms and, in general, the fact that the very concept of the rule of law has not yet gained full acceptance[44]. There is thus a genuine risk that parallel institutional mechanisms affording fewer guarantees than those provided by the ECHR will confuse victims in the post-Soviet states who do not yet have sufficient knowledge of the rights they have acquired, and will act as a further obstacle to redressing alleged abuses.

In such circumstances it seems illusory to assume that alleged victims will be sufficiently well informed and advised to be able to choose to submit their complaints to the international body offering the best level of protection and effectiveness, ie the European Commission of Human Rights (as from 1 November 1998, the Court). As to the most favourable treatment principle, because of its mainly negative effect it will not help to raise standards of protection under the CIS Convention.

VII. CONCLUSIONS

The following conclusions can be drawn from the above analysis:

fundamental rights set forth in the CIS Convention are generally more limited in scope than the corresponding rights under the ECHR, which affords higher standards of protection.

control mechanisms established by the CIS Convention do not appear adequate for guaranteeing effective compliance with the human rights obligations entered into by states parties and are very different from the judicial machinery of the ECHR.

application lodged with the CIS Commission should not be regarded as a domestic remedy to be exhausted under Article 26 of the ECHR before an application is made under the Strasbourg system.

CIS Commission should undoubtedly be deemed another procedure of international investigation or settlement within the meaning of Article 27, para. 1 (b) of the ECHR; the European Commission (as from 1 November 1998, the Court) will therefore declare inadmissible an individual application lodged earlier or simultaneously with the CIS Commission pursuant to that article.

ould be desirable if CIS member states were, if they choose to ratify the CIS Convention, to make an interpretative declaration or reservation giving the ECHR system clear precedence over that of the CIS Convention in the case of inter-state applications.

Regional cooperation a pursuit generally to be encouraged has little or no worth unless the result of the cooperation is to lead to improvements in the domain which is the subject of actions taken. As a general rule, in the field of human rights, a regional convention is meaningful only if it adds something new to the universal human rights protection system, whether from the point of view of the law (new substance) or from that of implementation (new procedure)[45]. The above analysis shows that this is not the case with the CIS Convention which indeed has rather the effect of lowering the existing standards.

For those States which are members of the Council of Europe or candidates to become members, ratification of the ECHR is mandatory and the ECHR should have priority over other European systems for protection of human rights.

For CIS countries which are not and will not become candidates for Council of Europe membership, the CIS Convention provides some international protection of human rights at the regional level.

In the light of these comments, it is desirable that CIS member states which have acceded to the Council of Europe, which ratify the ECHR and also ratify the CIS Convention, fully inform the people within their jurisdiction, particularly those people working in relevant professional milieus (lawyers, non-governmental organisations etc.) that the guarantees provided by the ECHR system are more complete than those provided by the CIS Convention.

III. Studies of the Venice Commission

1. Prohibition of Political parties and analogous measures

At the request of the Secretary General of the Council of Europe, the European Commission for Democracy through Law conducted a survey on the prohibition of political parties and analogous measures.

It was urgent to take a closer look at this issue because of the importance of political parties in cementing the foundations of democracy, particularly in states governed until recently by authoritarian regimes. Elections, which are the very foundation stone of democracy, are inconceivable without the active participation of freely constituted political parties. And freedom of political association is the political form of a general fundamental rights : freedom of association.

This comparative survey of the legislation and practice in the states participating in the Venice Commission's work identifies common values in the European constitutional heritage in this field, with a view to improving information on the subject and, where appropriate, learning from solutions implemented abroad. It is based on replies to a questionnaire (documentCDL-PP(98)1) on the prohibition of political parties, covering both the existence of rules prohibiting political parties or providing for similar measures and the extent to which they are applied.

Responses were received from the following countries: Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrghyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, Uruguay (see documentCDL-PP(98)2).

At its 35th Plenary Meeting, 11-12 June 1998 the Commission adopted the report on the prohibition of political parties and analogous measures and decided to forward it to the Secretary General of the Council of Europe.

The report is split into three parts : dealing respectively with the applicable legal rules, the cases of application and the competent authorities.

The first part concerns the restrictions on political parties in national law to which there are a wide variety of national solutions. Certain countries provide even for no restrictions on the activity of political parties at all. The first chapter deals with formal restrictions, in particular in the field of registration of political parties. Although such restrictions vary greatly, they are not the most serious ones, since they are rarely irremediable. The second - and most important - chapter deals with the material restrictions on the activity of political parties. There, too, a large variety of national solutions can be observed. Some legislators have not adopted any rule on the question, whereas others prohibit for example parties which endanger freedoms or are extremist, subversive or incite hatred. Several laws provide that political parties must be organised in a democratic way. A common feature of the national solutions which can be considered as a part of the European cultural heritage is however that they focus on respect of the freedom of association.

The second part of the report, relating to the practical application of the norms restricting the activities of political parties, shows that the most serious restrictions of the freedom of association, that is those of a material character, are quite rare; the prohibition or the dissolution of a political party is exceptional and should only happen in accordance with full respect for the principle of proportionality.

In the third part, the report underlines that prohibition of political parties and analogous measures can be decided only with the consent of an independent and impartial judicial authority or a tribunal.

The following conclusions were reached :

The diversity of the legal provisions governing party activities in the countries which answered the questionnaire makes it difficult to define a European standard. A number of common features do stand out, however:

a. Party activities everywhere are guaranteed by the principle of freedom of association.

b. The fact that certain measures are lacking in many, if not most, of the states concerned leads to the conclusion that they are not essential to the smooth functioning of democracy. Examples include:

stration of political parties: no registration is required, even as a formality; this does not mean, however, that candidates for elective office do not have to meet certain formal requirements;

:tions, including prohibition and dissolution, against political parties which fail to abide by certain rules. This does not, of course, preclude the punishment of criminal behaviour by individuals in the context of political activities.

c. Even in those states which do provide for sanctions against political parties, there is still considerable diversity. The same

situations are not sanctioned in the same way or with the same severity in the different states.

d. The fact that it is so difficult - perhaps even impossible - to define behaviours which would generally warrant such serious sanctions as the prohibition or dissolution of a political party highlights the need to apply the principle of *proportionality* when enforcing legislation restricting freedom of association.

The way in which the often vast legal arsenal governing the activities of political parties is actually applied in practice reflects a genuine determination to respect this principle. There are very few democratic states in which the sanctions covered by the questionnaire have actually been imposed on political parties in the recent past other than for formal reasons.

With the exception of restrictions of form, particularly those designed to avoid confusion between party names, measures designed to prevent the activities of political parties - which do not exist at all in certain states and are reserved in others to wartime situations - should be permitted only in exceptional circumstances. The extreme restraint shown by the vast majority of national authorities confirms this.

e. Finally, a recurrent feature in the national legislations studied was the guarantee of being heard by an independent and impartial judicial authority or tribunal. This is a clear sign of concern to keep something as politically important as the fate of political parties out of the control of the executive or administrative authorities, whose impartiality is often open to doubt.

At the Commissions 36th Plenary Meeting, Mr Daniel Tarschys, Secretary General of the Council of Europe, invited the Commission to continue its work concerning the Prohibition of Political Parties and Analogous Measures with a view to drawing up guidelines or recommendations.

The Commission is also carrying out a study on the financing of political parties.

2. Legal Foundations of Foreign policy

A preliminary report on this question had been adopted during 1997. The Commission continued its work during 1998 in particular concerning the set of recommendations. At its 35th Plenary Meeting the Commission adopted the report on the legal foundations of Foreign Policy and decided to publish it. The report is part of Publication N. 24, entitled Law and Foreign Policy , in the series Science and Technique of Democracy.

The purpose of the report is to present the legal foundations of foreign policy in a large number of States with different legal cultures, in order to show their diversity and identify the main trends in this sphere. It primarily consists of replies to the Sub-Commissions questionnaires, received from the following countries: Albania, Armenia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine and United States of America.

Foreign policy unquestionably serves the national interest in the broadest sense. However, nowadays it is no longer left entirely to the discretion of governments. It has ceased to be uncontrollable. On the contrary, it obeys certain legal rules which are, in a sense, its foundations and which act as curbs on States' freedom of action, in the interests of the international community and of all the countries belonging thereto. The legal foundations of foreign policy are therefore made up of both rules of international law and rules of domestic law.

Although the report was above all intended to be a study of the aspects of domestic law that affect foreign policy, it very quickly became apparent that a comparative study confined to domestic law alone would be incomplete, so closely do national legal systems mesh with the international one, in particular in the context of European integration. It therefore proved necessary to take into consideration the cardinal principles of international law and certain facets of the European Union's common foreign policy. The Sub-Commission consequently devoted part of the round-table on the legal foundations of foreign policy, held on Santorini on 26 and 27 September 1997, to those matters.

It is only natural that foreign policy concerning relations between States should, first and foremost, be governed by international law, the very purpose of which is to regulate inter-State relations. As members of the international community, States enter into an obligation to conduct their foreign policy with due regard for and in full compliance with international law, that is to say treaties binding them, international custom, the general principles of law, the binding decisions of international organisations and even, under certain conditions, unilateral decisions by States, which may also give rise to international obligations. To be more precise, States must observe the three cardinal principles of the present international system instituted by the Charter of the United Nations: the principle of settlement of international disputes solely by peaceful means (Article 2, paragraph 4), the principle of refraining from the threat or use of force in international relations (Article 2, paragraph 4), and the obligation to comply with resolutions passed by the Security Council in matters of international security under Chapter VII of the Charter of the United Nations. In their mutual relations States are likewise required to observe the principles and rules of good-neighbourliness. These obligations, incumbent on all States, serve a higher legal interest of the international community, that of restoring global peace and security. At a time when the spectre of war has again begun to haunt Europe, posing a threat to democratic societies and to the process of European integration, the Commission cannot overstate the need for scrupulous observance of these fundamental obligations arising from the present international system, which should moreover constitute the main thrust of States' foreign policy.

The primary focus of the foreign policy of Council of Europe member States, and of other States sharing the same values, should be to defend the democratic ideal and all that it entails: the rule of law and protection of human rights and individual freedoms. These objectives are not just pursued and developed within States' national legal systems under the supervision of the judiciary, in particular the constitutional courts, but also increasingly at an international level, above all in the context of European integration. It is the very same principles, which make up the common constitutional heritage on which the European integration process is founded. In its 1993 study on the relationship between international and domestic law, the Venice Commission recommended that "more encouragement should be given to the incorporation of the principles of democracy, human rights and the rule of law in the international legal system" (recommendation 7.5.e). It can but reiterate that recommendation, while stipulating that these values must also be reflected in States' foreign policy.

As to national law, the main focus of the study, the report sets out the rules applicable, country by country. The aim is to make it easier to compare different countries' legal systems and to allow an assessment of present trends in this sphere. It was decided to present the legal foundations of foreign policy in each of the different States according to a standard layout, corresponding to the main themes addressed. Therefore, for each country, a first section describes the principles observed when defining foreign policy (A. Principles). The aim is, firstly to identify those principles (1. Identification), their sources, their scope and their substance, and, secondly, to consider their effectiveness, in particular by examining the control mechanisms guaranteeing their observance (2. Control mechanisms). Since this facilitates comparisons between the different countries' legal systems, conclusions might be drawn as to the existence of higher legal principles binding on the public authorities, which lead them to define foreign policy not only with regard to political considerations but also in the light of legal constraints. A second section describes the legal standards governing the implementation of foreign policy (B. Implementation). It deals with the respective responsibilities of the legislature (1.), the executive (2.), the people (3.) and decentralised authorities (4.).

By analysing the replies it is possible to make an inventory of the legal foundations of foreign policy and, hence, to bring to light a dual trend.

Firstly, there are a growing number of increasingly tangible rules governing who is responsible for foreign policy, how it is implemented and the options taken. At the same time, a certain tendency to enforce compliance with the rules in question is becoming perceptible. The judiciary was long reluctant to review decisions taken by the public authorities in the foreign policy sphere. In a number of countries the "Actes de Gouvernement" theory has meant that action taken by the public authorities in foreign policy matters lies outside the courts' supervision. Under that theory, where the government takes action at an international level which is recognised as coming within its prerogative it is not fulfilling administrative functions, and the exercise

of governmental authority therefore does not fall under the supervision of the courts, but under the political supervision of parliament. This applies in France, Greece, Croatia and Slovenia, for instance. In yet other countries judicial review of action taken by certain organs is banned. This is the case in Finland with regard to presidential decisions and Acts of Parliament. In the Netherlands, the constitution forbids the courts to rule on the constitutionality of international treaties. In Switzerland, they are prohibited from performing any constitutional review of federal laws and international treaties.

However, the ban on judicial review is becoming less absolute in nature. Firstly, it is open to review whether in taking a foreign policy decision a given organ of the State exceeded the powers conferred on it by the constitution. The case-law of the United States Supreme Court is of significance here (see the US contribution in section 38 of the report). Secondly, certain constitutional courts have established precedents for reviewing not only whether decision-makers acted within the bounds of their authority, but also the very substance of the decision itself. This is true of preventive review of treaties' conformity with the constitution but also - and above all of the concept whereby the executive is deprived of its traditional freedom of action whenever fundamental human rights are in issue. An example of this unobtrusive but important development is to be found in the constitutional case-law relating to transfers of sovereignty to the institutions of the European Union and in particular to ratification of the treaty of Maastricht by certain EU member States (such as Germany and France). The unprecedented boom which constitutional law is undergoing at the end of the 20th century can but strengthen this trend.

Secondly, as a corollary to the emergence of legal rules governing foreign policy and its supervision, there is a move towards a degree of democratisation and decentralisation of the conduct of foreign affairs. As globalisation progresses, the number of legal standards laid down within international organisations or as a result of multilateral negotiations is on the increase. Nowadays, conduct of foreign policy sometimes has direct, immediate repercussions on the lives of ordinary citizens and can hence no longer be left to the executive's sole discretion. This tendency is apparent from the arrival of new players on the foreign policy stage. The executive naturally continues to have chief responsibility in this sphere but it is being joined by other actors, such as parliament and sometimes the people themselves. Long excluded from the conduct of political affairs, in strict compliance with the principle of representative democracy, the grass roots have gradually succeeded in obtaining a direct say in such matters. Their arrival on the political scene is, inter alia, reflected in the forms of semi-direct democracy introduced by many States, including with regard to determination of foreign policy. Moreover, in response to demand that power be exercised at a level closer to the citizen, greater responsibilities have been assigned to decentralised authorities and, sometimes, to socio-professional groups or non-governmental organisations, including in the foreign policy sphere. The emergence of these new players on the international scene is a sign of the present tendency to overstep the traditional limits within which foreign policy was conducted.

On the strength of the information which it has gathered, the Venice Commission considers that it is in a position to draw a number of conclusions in the form of guidelines for member States of the Council of Europe and other States sharing the same values concerning the implementation of their foreign policy. These have their basis in both international law and the fundamental values of the democratic societies making up the Council of Europe and also reflect the trends of national law in the field of foreign policy.

Those conclusions are as follows:

I. International law

States are under an obligation to respect and to implement international law in good faith, including jus cogens rules, treaties binding them, customary law, general principles of law and binding decisions of international organisations. In particular:

ıe conduct of their foreign policy States shall respect the three fundamental principles of the international legal system, namely resolution of international disputes solely by peaceful means, refraining from the threat or use of force in international relations and compliance with resolutions passed by the United Nations Security Council in matters of collective security.

- In their mutual relations States shall act in accordance with the principles and rules of friendly, neighbourly relations, which must guide their action at the international level, particularly in the local and regional context.

II. Democracy, Human Rights, the Rule of Law

In determining their foreign policy member States of the Council of Europe and all States sharing the same ideals shall take due account of the essential values on which they are founded, namely democracy, the rule of law and protection of human rights.

III. Democratisation of foreign policy

In their activities relating to foreign policy States shall enforce compliance with the constitutional system and the law, and facilitate supervision of government action by the relevant constitutional institutions, namely the legislature and, if need be the judiciary.

Parliaments' interest in their countries' foreign policy is, at first glance, a positive phenomenon, which should be given approval and encouragement. In particular, parliaments shall be fully informed of such policy and examine it periodically in order to participate in setting its principal directions.

The judiciary, especially the higher courts, shall enforce compliance with the above-mentioned essential principles of foreign policy, in particular as regards the application of international law in the domestic legal system.

States shall inform individuals, as widely as possible, of the main lines of their foreign policy and shall not impede free circulation of information about foreign affairs and international relations. They shall inform them of any action they can take to defend their rights before the international courts.

It is desirable that States take steps to ensure that the people and the relevant decentralised authorities or non-governmental organisations are consulted about and, when necessary, even directly involved in the determination and implementation of foreign policy.

3. Constitutional law and European integration

At its 37th Plenary Meeting (11-12 December 1998) the Venice Commission adopted the report on Constitutional Law and European Integration drawn up on the basis of the replies from European Union member States to a questionnaire on this subject.

In the report the main thrusts of the replies to the questionnaire had been identified and placed in the context of the European Community, ie by bringing together the main ideas underlying European construction. One of the implicit conditions for membership of the European Union was accession to the European Convention on Human Rights.

The requirements for membership of the European Union have changed over the years, reflecting the development of a European identity, achievement of the aims of the founding treaties and the contribution of the new treaties, as well as a greater awareness of the need to protect human rights and fundamental freedoms and, with it, greater insistence on democratic values.

The questionnaire on Constitutional Law and European Integration - which set out to identify changes made in the legal systems of European Union member states in order to bring them into line with the new realities of membership - attracted replies from

13 countries.

The exercise is undoubtedly useful both to the member states and to countries that have applied for membership or hope to do so. The former can make instructive and worthwhile comparisons, while the latter gain a valuable source of information for the process of constitutional review in which they must engage in order to establish a firm and problem-free basis for building a relationship between their various national legal systems and that of the Community.

The questionnaire brings to an end the first phase of the Venice Commissions work, during which it has provided advice and guidance to central and eastern European countries in the process of marking their new-found freedom by adopting constitutions more imbued with democratic principles. It also signals the start of a new phase in which the Commission, at the request of some of those countries, will assist them as they move towards membership of the major modern international organisations.

Non-member States of the European Union have been invited to reply to a revised questionnaire.

4. Participation of persons belonging to minorities in public life

The Commission continued its work on the participation of persons belonging to minorities in public life during 1998.

During its 34th Plenary Meeting the Commission took note of a report on the subject drawn up by the Secretariat.

IV. Documentation Centre on Constitutional Case-Law

Co-operation with constitutional courts and courts of equivalent jurisdiction further deepened during the year 1998. In addition to the regular publication of the *Bulletin on Constitutional Case-Law* and the database CODICES, the series of seminars in co-operation with constitutional courts (CoCoSem) have become a well established programme of the Venice Commission.

Bulletin on Constitutional Case-Law

In 1998, the newly established Constitutional Court of Azerbaijan joined the endeavour of publishing the *Bulletin on Constitutional Case-Law* three times a year. 45 courts now contribute to this publication. A publicity campaign was undertaken to increase the number of subscriptions to the *Bulletin* and the database CODICES.

Another issue of the series of Special Bulletins on Basic Texts (extracts of constitutions and laws on the courts) has been published, bringing the number of countries covered to 42.

A new series of special Bulletins on leading cases of participating courts prior to their participation in the Bulletin has been undertaken. A first issue in this series on the case-law of the European Court of Human Rights was published towards the end of 1998.

CODICES

In 1998 two up-dated versions of the database CODICES were published on CD-ROM and via Internet (http://www.coe.fr/codices). CODICES contains all previous regular issues of the *Bulletin*, together with over 1500 decisions in full text and many constitutions. All the special *Bulletins* have been integrated into CODICES as well. In addition to the indexing of summaries of decisions according to the Systematic Thesaurus of the Commission, a project was undertaken to index constitutions article by article according to the Thesaurus to make them searchable.

Documentation Centre

Due to generous contributions from participating courts, the stock of documentation in paper form of the Documentation Centre has continued to increase in 1998. A project was set up to give access to the resources of the Centre to the public via the database of the Central Library of the Council of Europe.

Seminars in co-operation with constitutional courts)

Partly in co-operation with other bodies (OSCE, PHARE, ABA, COLPI, USAID) seminars were organised on the budget of constitutional courts (Kyiv, January 1998), two round-tables of constitutional courts of the State and the entities of Bosnia and Herzegovina (Sarajevo, April and Banja Luka, October 1998), seminars on judicial independence (Bishkek; May 1998), on techniques of constitutional interpretation (Kyiv, June 1998) and on the implementation of international treaties by the constitutional court (Lviv, October 1998).

Constitutional Court seminars are primarily intended to assist recently created constitutional courts in the fulfilment of the important tasks which the democratic constitutions have confined to them. The fact that these seminars build upon a mutual exchange of experience of judges from 'older' and more recently established constitutional courts has very much contributed to the esteem in which these seminars are held with the courts.

V. The UniDem (Universities for Democracy) Programme

The Commission organised four seminars within the framework of this programme during 1998 :

1. Seminar on New Trends in electoral law in a pan-European context 18-19 April (Sarajevo)

The Commission organised, in co-operation with the University of Sarajevo and the Central European Initiative, on 16-17 April in Sarajevo a Seminar on New trends in electoral law in a pan-European context.

The seminar was opened by Mr Westendorp, High Representative in Bosnia and Herzegovina and Mr Barry, Head of the OSCE Mission in Bosnia and Herzegovina. It brought together electoral law specialists from four continents, who discussed general aspects of electoral law as well as specific situations in particular States.

The participants showed that electoral law is not the exclusive preserve of political machinations and bizarre mathematical formulae but rather one of the pillars of democracy.

The reports presented during the seminar included : the constitutional principles for a democratic election - universal suffrage, equal, free, secret and direct voting; the organisational means of guaranteeing the legality of elections; the recent evolution, between change and continuity, of electoral systems in Europe; the effects of different electoral systems in new democracies. In addition, national reports (Russia, Italy, South Africa) were presented covering States in which there is currently debate over reforms to be made to the electoral system.

The final part of the seminar was devoted to Bosnia and Herzegovina. The introductory report concerned electoral systems in post-conflict societies and was followed by reports on the electoral debate in Bosnia and Herzegovina and the principles applicable to elections in Bosnia and Herzegovina as well as the importance of electoral processes.

The proceedings of the seminar will be published in the series Science and Technique of Democracy.

2. Conference on Democratic Institutions and Civil Society in South-Eastern Europe 5-6 May (Strasbourg)

Following a proposal by the Greek Presidency of the Committee of Ministers of the Council of Europe, the Commission organised, in co-operation with the Institute of International Relations of the Panteion University and with the assistance of the Greek Ministry of Foreign Affairs, in Strasbourg on 5-6 May a Conference on Democratic Institutions and Civil Society in South Eastern Europe. More than a hundred persons participated in the Conference, among them prominent figures of politics, diplomacy, art, religion and science.

The Conference was opened by Mr Rexhep Meidani, President of Albania and Mr George Papandreou, Minister of Foreign Affairs and Chairman in office of the Committee of Ministers. Ms Leni Fischer, President of the Parliamentary Assembly, Mr Daniel Tarschys, Secretary General and Mr Dimitris Constas, Permanent Representative of Greece to the Council of Europe and Director of the Institute of international relations of the Panteion University welcomed the participants.

In his opening speech President Meidani stressed the importance of civil society as an element of public participation in the decision-making process and observed that this element will be decisive in the context of global governance.

Reports were heard on subjects including, the new European constitutional environment; trade Unions in the Transition to Democracy; the individual and the State Institutions; artistic creation in a changing world; political parties and political organisations in the New Era; the new role of the Parliament; democratic citizenship; the citizen as a new economic actor; mass media and State authority; aspects of protection of human rights and minorities in South-Eastern Europe; democratic institutions and civil society: the viewpoint of minorities; the contribution of religion; cultural heritage and identity; interethnic relations and artistic creation.

Democracy has come a long way since the breakdown of totalitarian regimes in Central and Eastern Europe only a few years ago. Within the framework of the enormous task of constitutional reforms, the establishment of democratic institutions and the protection of human rights is well advanced. The Council of Europes growth is one witness, amongst others, of this historical evolution and of the construction of democratic stability in Europe. How do citizens identify with this evolution, what is their role and responsibility in the creation of the Europe of tomorrow, what can they expect from those citizens, as the principal players in a society in constant evolution? These are just some of the questions which were raised throughout the Conference.

Concluding the Conference, Ambassador Constas observed that in a region where State power has been so strongly present for decades, citizens may be reluctant to take up their role as political, social and economic actors. In parallel, identity crises after the fall of the iron curtain may have led to the development of nationalism and religious fundamentalism. Increased co-operation, with the help of international organisations such as the Council of Europe, is necessary to find a common approach and solution to this problem.

3. Seminar on The principle of respect for human dignity in European case-law 2-6 July (Montpellier)

The Commission organised, in co-operation with the University of Montpellier, on 2-6 July in Montpellier a Seminar on The principle of respect for human dignity in European case-law.

The seminar was opened by Mr Dugrip, Dean of the Law Faculty, University of Montpellier and Mr Pujol, President of the Pole European University of Montpellier and of the region Languedoc-Roussillon. style='mso-spacerun:yes'> It brought together high level specialists, in particular judges or former judges of constitutional courts who debated the seminars theme in a comparative perspective.

The seminar was divided into two distinct parts. In the first part the participants worked on the basis of a questionnaire on the definition and the legal value of the principle of human dignity. National reports were presented.

The second part was devoted to the study of a fictitious case : Law aimed at protecting minors under seven years of age from paedophile offences and at limiting re-offending.

The seminar examined the analogies of constitutional protection of human dignity in the States represented and found common values on the European continent and beyond. The fictitious case added a concrete aspect to the seminars academic dimension. The work done in this seminar could serve as a basis for national jurisprudences taking into account rules which are common in European constitutional heritage.

The proceedings of the seminar will be published in the series Science and Technique of Democracy.

4. Seminar on Constitutional developments in the Transcaucasian States : the Division of powers 7-11 September (Baku, Tblissi) / 13-14 October (Yerevan)

The Commission organised, in co-operation with the Constitutional courts of Armenia, Azerbaijan and Georgia, and with the financial support of the Japan Foundation, on 7-11 September in Baku and Tblissi and on 13-14 October in Yerevan, a Seminar on Constitutional developments in the Transcaucasian States : the Division of powers.

This itinerant seminar focused on the specific situation in each of the visited countries : experts from Western European States participated and discussed with local specialists and practitioners the questions that arise in the field of division of powers and the way to solve them.

A number of experts from the Venice Commission presented papers based on the distribution and separation of powers and the independence of the judiciary in relation to the situation in each of the States visited.

These seminars gave an opportunity to become acquainted with the specificities of the constitutional regime of each State, for meetings and discussions not only between constitutional law specialists but also, beyond the academic sphere, between practitioners, and in particular between representatives of each branch of power, so as to become familiar with and study more closely all the questions which may arise in the area of the separation of powers.

There was fruitful discussions amongst the participants, all of whom showed a keen interest in the many issues raised by this theme. In each country the seminar was widely covered by the media.

4. Preparation of forthcoming seminars

It is envisaged to hold the following UniDem seminars during 1999 :

- Seminar on Federal and Regional States in the perspective of European Integration in co-operation with the University Johns Hopkins and the University of Bologna (Bologna, 18-19 March 1999)

- Seminar on the right to a fair trial in co-operation with the Czech Constitutional Court (Brno, 23-25 September 1999)

inar on Democracy in a society in transition (Stockholm, date to be fixed)

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 Ergun ZBUDUN (Turkey), Vice-President, Professor, University of Bilkent, Vice President of the Turkish Foundation for Democracy

Mr Jean-Claude SCHOLSEM (Belgium), Vice-President, Professor, Law Faculty, University of Lige

Mr Cyril SVOBODA (Czech Republic), Vice-President, Member of Parliament

* * *

Mr Constantin ECONOMIDES (Greece), 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 Giovanni GUALANDI (San Marino), Vice-President of the Council of Presidency of the Legal Institute of San Marino

Mr Giorgio MALINVERNI (Switzerland), Professor, University of Geneva

Mr Franz MATSCHER (Austria), Professor, University of Salzburg, Judge at the European Court of Human Rights

(Substitute: Mr Klaus BERCHTOLD, Head of Division, Federal Chancellery)

Mr Grard REUTER (Luxembourg), President of the Board of Auditors

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), Honorary President of the Paris University of Law, Economics and Social Science, Former Member of the Constitutional Council

Mr Jan HELGESEN (Norway), Professor, University of Oslo

Mr Gerard BATLINER (Liechtenstein), Member, Academic Council of the Liechtenstein Institute

Mr Godert W. MAAS GEESTERANUS (The Netherlands), Former Legal Adviser to the Minister of Foreign Affairs

Mr Joseph SAID PULLICINO (Malta), Chief Justice

Mr Jn KLUCKA (Slovakia), Judge, Constitutional Court

Mr Peter JAMBREK (Slovenia), Former President of the Constitutional Court, Judge at the European Court of Human Rights

(Substitute: Mr Anton PERENIC, Professor of Law, former Judge of the Constitutional court)

Mr Kestutis LAPINSKAS (Lithuania), Judge, Constitutional Court

Mr Asbjrn JENSEN (Denmark), Judge, Supreme Court

(Substitute: Mr John LUNDUM, High Court Judge)

Mr Armando MARQUES GUEDES (Portugal), Former President of the Constitutional Tribunal
Mrs Maria de Jesus SERRA LOPES (Portugal), State Counsellor, Former Chairman of the Bar Association

Mr Aivars ENDZINS (Latvia), Acting Chairman, Constitutional Court

Mrs Hanna SUCHOCKA (Poland), Minister of Justice

Mrs Ana MILENKOVA (Bulgaria), Advocate, Former Member of the National Assembly
(Substitute: Mr Alexandre DJEROV, Advocate, Member of the National Assembly)

Ms Carmen IGLESIAS CANO (Spain), Director of the Centre for Constitutional Studies

Mr Rune LAVIN (Sweden), Parliamentary Ombudsman
(Substitute : Mr Hans Heinrich VOGEL, Professor in Public Law, University of Lund)

Mr Stanko NICK (Croatia), Ambassador, Ministry of Foreign Affairs
(Substitute: Mrs Marija SALECIC, Legal Adviser, Constitutional Court)

Mr Serhiy HOLOVATY, (Ukraine), Member of Parliament, President of the Ukrainian Legal Foundation
(Substitute: Mr Volodymyr SHAPOVAL, Judge, Constitutional Court)

Mr Heiki LOOT (Estonia), Rector, Public Service Academy

Mr Vladimir SOLONARI (Moldova), Chairman of the Committee on Human Rights and National Minorities, Parliament of Moldova

Mr Tito BELICANEC, ("The former Yugoslav Republic of Macedonia"), Professor, Faculty of Law, University of Skopje
(Substitute: Mr Igor SPIRKOVSKI, Counsellor, Constitutional Court)

Mr Kaarlo TUORI (Finland), Professor of Administrative law, University of Helsinki
(Substitute: Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice)

Mr James HAMILTON (Ireland), Director General, Office of the Attorney General of Ireland

Mr Valeriu STOICA, (Romania) Minister of State, Minister of Justice
Mr Alexandru FARCAS (Romania), Counsellor, Embassy of Romania in Geneva

Mr Luan OMARI (Albania), Vice President, Sciences Academy of Albania

Mr Hjrtur TORFASON (Iceland), Judge, Supreme Court of Iceland

Mr Lszl SLYOM (Hungary), President, Constitutional Court

ASSOCIATE MEMBERS

Mr Avtandil DEMETRASHVILI (Georgia), Chairman of the Constitutional Court

Mr Anton MATOUCEWITCH (Belarus), Deputy President, Belarussian Trade Union Federation

Mr Vladimir TOUMANOV (Russia[46]), Former President of the Constitutional Court

Mr Khatchig SOUKIASSIAN (Armenia), Chairman, Armenian Law Centre

Mr Khanlar I. HAJIYEV (Azerbaijan), Chairman, Constitutional Court

Mr Cazim SADIKOVIC (Bosnia and Herzegovina), Dean, Faculty of Law, University of Sarejevo

OBSERVERS

Mr Grald BEAUDOIN (Canada), Professor, University of Ottawa, Senator
(Substitute : Ms Ruth BARR, Acting/General Counsel, International Law and Activities Section, Ministry of Justice)

Mr Vincenzo BUONOMO (Holy See), Professor of International Law at the Latran University

Mr Oljas SOULEIMENOV (Kazakhstan), Ambassador of Kazakhstan in Rome

Mr Serikul KOSAKOV (Kyrgyzstan), Director General, Committee on Science and New Technologies

Mr Akira ANDO (Japan), Consul, Consulate General of Japan, Strasbourg

Mr Hector MASNATTA (Argentina), Ambassador, Executive Vice-Chairman, Centre for constitutional and social studies

Mr Miguel SEMINO (Uruguay), Ambassador of Uruguay in Paris

Mr Paul GEWIRTZ (United States of America), 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 Thomas MARKERT

Mr Pierre GARRONE

Mr Rudolf DRR

Mr Sergue KOUZNETSOV

Ms Helen MOORE

Ms Caroline MARTIN

Ms Michelle REMORDS

Ms Helen MONKS

Ms Brigitte AUBRY

Ms Agns READING

Ms Marian JORDAN

Ms Emmy KEFALLONITOU

APPENDIX II - OFFICES AND COMPOSITION OF THE SUB-COMMISSIONS

ident : Mr La Pergola

-Presidents : Mr zbudun, Mr Scholsem, Mr Svoboda

eau : Mr Batliner, Mr Helgesen, Mr Holovaty, Mr Nick

irmen of Sub-Commissions : Mr Economides, Mr Maas Geesteranus,

alinverni, Mr Matscher, Mr Reuter, Mr Robert, Mr Steinberger, Mr Triantafyllides

stitutional Justice : Chairman: Mr Steinberger - members: Mr Bartole, Mr Batliner, Mr Demetrashvili, Mr Djerov, Mr Endzins, Mr Hamilton, Mr Jambrek, Mr Jensen, Mr La Pergola, Mr Lapinskas, Mr Lavin, Mr Loot, Mr Marques Guedes, Ms Milenkova, Mr zbudun, Mr Reuter, Mr Robert, Mr Said Pullicino, Mr Slyom, Mr Soukiassian, Ms Suchocka, Mr Torfason, Mr Triantafyllides, Mr Tuori

eral State and Regional State : Chairman: Mr Malinverni - members: Mr Bartole, Mr Economides, Ms Iglesias, Mr La Pergola, Mr Matscher, Mr Nick, Mr Sadikovic Mr Scholsem, Ms Serra Lopes, Mr Steinberger, Mr Triantafyllides; Mr Tuori Obs. : Canada, USA

rnational Law : Chairman: Mr Economides - members: Mr Djerov, Mr Farcas, Mr Helgesen, Mr Holovaty, Mr Jambrek, Mr Klucka, Mr La Pergola, Mr Malinverni, Mr Marques Guedes, Mr Matscher, Ms Milenkova, Mr Nick, Mr Soukiassian, Mr Steinberger, Mr Triantafyllides

ection of Minorities : Chairman: Mr Matscher - members: Mr Bartole, Mr Economides, Mr Farcas, Mr Gualandi, Mr Helgesen, Mr Maas Geesteranus, Mr Malinverni, Mr Nick, Mr zbudun, Mr Scholsem, Mr Slyom

stitutional Reform : Chairman: Mr Triantafyllides, Vice-Chairman: Mr Batliner -members: Mr Bartole, Mr Djerov, Mr Economides, Mr Endzins, Mr Farcas, Ms Iglesias, Mr La Pergola, Mr Lapinskas, Mr Omari; Mr Maas Geesteranus, Mr Malinverni, Mr Marques Guedes, Ms Milenkova, Mr zbudun, Mr Reuter, Mr Robert, Mr Scholsem, Ms Serra Lopes, Mr Soukiassian, Ms Suchocka

ocratic Institutions : Chairman: Mr Steinberger - members: Mr Djerov, Mr Economides, Mr Farcas, Mr Hamilton, Ms Iglesias, Mr Jambrek, Mr Klucka, Mr Lapinskas, Mr Lavin, Mr Marques Guedes, Ms Milenkova, Mr Omari, Mr zbudun, Mr Reuter, Mr Robert, Ms Serra Lopes, Mr Svoboda, Mr Triantafyllides, Mr Tuori

Dem Governing Board : Chairman: Mr Maas Geesteranus, - members: Mr Batliner, Mr Djerov, Mr Gualandi, Mr Helgesen, Ms Iglesias, Mr La Pergola, Mr Lavin, Mr Malinverni, Mr Marques Guedes, Ms Milenkova, Mr zbudun, Mr Reuter, Mr Robert, Mr Scholsem, Mr Steinberger, Mr Svoboda; Mr Tuori Obs. : Holy See, ODIHR : Co-opted members : Prof. Evans (Johns Hopkins University, Bologna), Prof. von der Gablentz (College of Europe, Bruges), Prof. Masterson (European University Institute, Florence), Mr Koller (Federal Office of Justice, Berne)

th Africa : Chairman: Mr La Pergola - members: Mr Hamilton, Mr Helgesen, Mr Lavin, Mr Maas Geesteranus, Mr Malinverni, Mr Scholsem, Mr Torfason, Mr Triantafyllides; Mr Tuori, Obs. : Canada, USA

iterranean Basin : Chairman: Mr Robert - members: Mr Batliner, Mr Economides, Ms Iglesias, Mr La Pergola, Mr Malinverni, Mr Nick, Mr zbudun, Mr Said Pullicino, Mr Triantafyllides

inistrative and Budgetary Questions : Chairman: Mr Reuter

APPENDIX III - MEETINGS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW IN 1998 [47]

Plenary Meetings

34th meeting 6-7 March

35th meeting 12-13 June

36th meeting 16-17 October

37th meeting 11-12 December

Bureau

16th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 5 March

17th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 11 June

18th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 15 October

SUB-COMMISSIONS

Constitutional Justice

14th meeting - 15 June (Ljubljana)

(Meeting with Liaison officers from Constitutional Courts)

15th meeting - 15 October

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International Law

16th meeting - 5 March

17th meeting - 11 June

UniDem Governing Board

19th meeting - 4 March

20th meeting - 15 October

21st meeting - 10 December

Federal and Regional State

7th meeting - 19 June

8th meeting 15 October

9th meeting 10 December

Democratic Institutions

5th Meeting 4 March

6th Meeting 10 December

Constitutional Reform

2nd Meeting 5 March

3rd Meeting 11 June

4th Meeting 17-18 July (Rome)

5th Meeting 15 October

Administrtive and Budgetary questions

2nd Meeting 4 March

Constitutional Court of Croatia - Meeting of the International Advisers

15 June (Zagreb)

7 July (Zagreb)

15-16 December (Strasbourg)

Working Group on the Ombudsman Institutions in Bosnia and Herzegovina

4 February (Paris)

19-29 March (Strasbourg)

4 May (Strasbourg)

27 May (Paris)

14-15 September (Lisbon)

23 October (Sarajevo)

3-4 December (Sarajevo)

Meetings on opinions concerning Bosnia and Herzegovina :

Working Group on Competence of the Federation of Bosnia and Herzegovina in penal matters

23 January (Brussels)

Working Group on electoral law Bosnia and Herzegovina

25-26 May (Strasbourg)

Working Group on the competence of Bosnia and Herzegovina in electoral matters

7 July (Heidelberg)

Working Group on Restitution of Property in Bosnia and Herzegovina

10-11 November (Strasbourg)

Working Group on the Constitutionality of international agreements concluded by Bosnia and Herzegovina and the entities

14 November (Paris)

Working Group on the Albanian Law on the organisation of justice

19 February (Paris)

26-27 February (Tirana)

Working Group on the draft Constitution of Albania

8-10 January (Tirana)

(Meeting with the Albanian authorities responsible for the constitutional process)

15 April (Paris)

20-21 May (Lezhe, Albania)

7-8 September (Tirana)

Working Group on constitutional control in Armenia

22-26 May (Yerevan)

Exchange of views on constitutional reform and in particular the introduction of individual complaint to the constitutional court

Working Group on the situation in Kosovo

21 April (Brussels)

(Meeting with the Presidency of the European Union)

16 July (Rome)

21 August (Vienna)

10-11 November (London)

8 December (Brussels)

Working Group on the Draft Statute for Gagaouzia

17 March (Chisinau)

1 July (Chisinau)

CONSTITUTIONAL JUSTICE SEMINARS

Seminar on the budget of the Constitutional Court : control and management with the financial support of the joint programme European Commission/Council of Europe for Ukraine

19-20 January (Kiev)

Round Table on the functioning of the system of constitutional control in co-operation with the Constitutional Court of Bosnia and Herzegovina, the Office of the High Representative, the American Bar Association and the Phare programme of the European Union

4-5 April (Sarajevo)

Workshop on Judicial independence and incompatibilities of the function of judge with other activities in co-operation with COLPI

20-21 April (Bishkek, Kyrgyzstan)

Workshop on the principles of constitutional control : techniques of constitutional and statutory interpretation in co-operation with USAID and with the financial support of the joint programme European Commission/Council of Europe for Ukraine

5-6 June (Kiev)

Seminar on the role of the Constitutional court in the implementation of constitutional law in co-operation with USAID, the OSCE and with the financial support of the joint programme European Commission/Council of Europe for Ukraine

7-8 October (Lviv, Ukraine)

Seminar on electoral disputes before the Constitutional Court

15-16 October (Yerevan)

Round Table on Constitutional Justice in co-operation with the American Bar Association and the Phare programme of the European Union

23-24 October (Banja Luka, Bosnia and Herzegovina)

UNIDEM SEMINARS

UniDem Seminar on New Trends in electoral law in a pan-European context

16-17 April (Sarajevo)

Conference on Democratic Institutions and Civil Society in South-Eastern Europe in co-operaton with the Greek Presidency of the Committee of Ministers

5-6 May (Strasbourg)

UniDem Seminar on The principle of respect for human dignity in European case-law

2-6 July (Montpellier)

UniDem Seminar on the Constitutional developments in the Transcaucasian States : Distribution of powers with the financial support of the Japan Foundation

7-11 September (Baku, Tblissi)

13-14 October (Yerevan)

PROGRAMME DEMOCRACY FROM THE LAW BOOK TO REAL LIFE

Workshop on local government training

19-20 January (Pretoria)

Workshop on local government elections

23 January (Pretoria)

Seminar on Equality Jurisprudence

1-2 February (Cape Town)

Seminar on National and International Human Rights Law with particular reference to Customary Law and the Freedom of Expression

1-3 October (Johannesburg)

Workshop on rationalisation of laws

13-14 October (Johannesburg)

OTHER SEMINARS AND CONFERENCES

Participation in a Colloquy on Le mdiateur, quel avenir?

5 February (Paris)

Participation in a Seminar on Constitutional Courts

22-23 May (Istanbul)

Participation in the seminar on Teaching constitutional law in comparative law

19-20 June (Lausanne)

Participation in a meeting on the Revision of the Constitution of Georgia

14-15 July (Tblissi)

Participation in the UNESCO Seminar on Democratic governance in a multi-cultural and multi-ethnic society

7-11 September (Bishkek)

Participation in a meeting with the Association of Constitutional Courts using the French language (ACCPUF)

10-12 September (Beirut)

Participation in the 6th Annual Judicial Conference organised by the Center for Democracy (USA)

1-3 October (Warsaw)

Participation in a meeting of the Scientific Council of the Foundation Venice for Peace

3 October

Participation in a meeting of the Friends of Albania Group

23 October (Rome)

Participation in a briefing of parliamentarians responsible for observing the elections in Albania

20-21 November (Tirana)

Participation in the Conference on Self-determination in international law : applications to the Kosovo case organised by the Helsinki Committee for Human Rights

21-22 November (Belgrade)

Participation in the Seminar on Federalism and Transnational fruition of fundamental rights organised by the University of Padova

12 December (Padova)

APPENDIX IV - LIST OF PUBLICATIONS OF THE VENICE COMMISSION

Collection[48] - Science and technique of democracy

ing with the presidents of constitutional courts and other equivalent bodies Piazzola sul Brenta, 8 October 1990[49]

els of constitutional jurisdiction

teinberger[50]

titution making as an instrument of democratic transition

0 October 1992

sition to a new model of economy and its constitutional reflections

19 February 1993

relationship between international and domestic law

21 May 1993

relationship between international and domestic law

n Economides[3]

of law and transition to a market economy

October 1993

titutional aspects of the transition to a market economy

ts of the European Commission for Democracy through Law

Protection of Minorities

ts of the European Commission for Democracy through Law

role of the constitutional court in the consolidation of the rule of law

modern concept of confederation

-25 September 1994

No. 12 : Emergency powers[51]

udun and Mehmet Turhan

plementation of constitutional provisions regarding mass media in a pluralist democracy

8 December 1994

stitutional justice and democracy by referendum

23-24 June 1995

protection of fundamental rights by the Constitutional Court class='MsoFootnoteReference'>[52]

ia, 23-25 September 1995

l self-government, territorial integrity and protection of minorities

Lausanne, 25-27 April 1996

an Rights and the functioning of the democratic institutions in emergency situations

5 October 1996

constitutional heritage of Europe

22-23 November 1996

eral and Regional States

: composition of Constitutional Courts

Citizenship and state succession

16-17 May 1997

Transformation of the Nation-State in Europe at the dawn of the 21st century

5-8 November 1998

Consequences of state succession for nationality

Law and foreign policy

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ptions of the Courts)

nstitutions and laws on Constitutional Courts)

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[1] By Law No. 8234.

[2] Article 1, Law No. 8255 For an Addition to Law No. 7491 on the Major Constitutional Provisions.

[3] The Constitution of the RS also refers to the basic rules of criminal procedure (inter alia in Articles 11, 12, 14, 15, 18, 19 and 20) and institutes courts with general jurisdiction as well as the state counsel (Art. 133).

[4] Article III-2-a differs from the provision in the Constitution of Bosnia and Herzegovina (article II-3), where human rights are guaranteed as general principles. Article

III-2-a of the FBH Constitution, as opposed to the above provision of the Constitution of BH and article II-2 of the FBH Constitution, attributes specific competence for implementation ("guaranteeing and enforcing") of human rights.

[5] *The constitutionality of other relevant provisions of the constitutions of the Entities is worth being examined with respect to further issues such as respect for the principle of non-discrimination. The Commission will turn its attention to these issues at a later stage.*

[6] *Opinion on the compatibility of the Constitutions of the entities with the Constitution of Bosnia and Herzegovina, see the Commission's annual report for 1996, pp. 60 73, and document CDL-INF(98)15, pp. 54 and 55*

[7] *According to the opinion of the associate member for Bosnia and Herzegovina, Prof. Sadikovic, the lack of a Supreme Court in Bosnia and Herzegovina is a major impediment to the realisation of the Rule of Law, which is one of the founding principles of the Constitution*

of Bosnia and Herzegovina. Consequently, the State of Bosnia and Herzegovina should establish a Supreme court of general jurisdiction at the level of Bosnia and Herzegovina.

[8] Opinion on the competence of the FBH in criminal law matters, adopted at the Commission's 34th meeting, 6 and 7 March 1998, CDL-INF (98) 5 and CDL-INF (98) 15, pp. 85 ff., paragraph 17.

[9] See Article VI, paragraph 3(b) of the Constitution of Bosnia and Herzegovina establishing the appellate jurisdiction of the Constitutional Court.

[10] Annex 6 to the Dayton Agreement, Chapter Two, Part A and Part C Articles VII to XIII. See also, Article II, para 1 of the Dayton Constitution.

[11] Venice Commission, Annual Report of Activities for 1996, pp. 44-60; CDL-INF(98)15.

[12] Preamble to the ECHR.

class='MsoFootnoteReference'>
[13] Ibid.

[14] The situation may of course change if the Human Rights Commission becomes a permanent constitutional institution of Bosnia and

Herzegovina, i.e. when the responsibility for the operation of the Commission will be transferred to the State of BH (see Annex 6, Article XIV).

[15] Arne Mavčič, "The Citizen as Applicant before the Constitutional Court", in the Proceedings of the Seminar on Contemporary Problems of Constitutional Justice" organised by the Venice Commission in conjunction with the Constitutional Court of Georgia, Tbilissi, 1-3 December 1996. (Document CDL-INF(97)7, pp. 26-39, at pp. 29-30.) See also the Special Editions of the Venice Commission's Bulletin on Constitutional Case-Law.

[16] Helmut Steinberger, Models of constitutional jurisdiction, no. 2 in the collection Science and technique of democracy, Venice Commission, at p.42.

[17] H. Kelsen, "La garantie juridictionnelle de la Constitution" in Rev. dr. publ. et sc. pol. 1928, 197, and Ann. Inst. intec dr. publ. 1929.

[18] "The Chairman of the Supreme Court shall be appointed by the Riigikogu, on proposal by the President of the Republic. Members of the Supreme Court shall be appointed

appointed by the Riigikogu, on proposal by the Chairman of the Supreme Court."

[19] A comprehensive survey of the composition of constitutional courts in Europe is given in vol. 20 of the collection Science and technique of democracy, "The composition of constitutional courts".

[20] The aforementioned Italian experience may be very helpful. For more details, see the Proceedings of the UniDem seminar on Constitutional Justice and Democracy by Referendum held in 1996 in Strasbourg (pp. 59-61).

[21] The forty member states of the Council of Europe in order of accession, situation as at 20 December 1996, RUDH (Revue universelle des droits de l'homme) 8 (1996), p. 340; A. Drzemczewski, CIS Convention on Human Rights, Minsk 1995, introductory remarks, HRLJ (Human Rights Law Journal) 17 (1996), p. 157.

[22] Parliamentary Assembly of the Council of Europe, "Rapport sur la conformit de l'ordre juridique de la Fdration de Russie avec les normes du Conseil de l'Europe", RUDH 6 (1994), p. 328.

[23] Resolution No. 1126 (1997), paras. 5 and 6; A. Canada

Cançado Trindade and J. Frowein, Analysis of the legal implications for States that intend to ratify both the European Convention on Human Rights and its protocols and the Convention on Human Rights of the CIS, HRLJ 17 (1996), pp. 164 and 181 respectively.

[24] " pending further research on the compatibility of the two legal instruments, [Ukraine should] not sign the Commonwealth of Independent States (CIS) Convention on Human Rights and other relevant documents, given the fact that individual applications submitted under this Convention might render impossible the effective use of the right to individual application under Article 25 of the European Convention on Human Rights ", the Parliamentary Assembly's concerns are here voiced in clear terms.

[25] For a more detailed analysis of the differences, see J. Frowein, op. cit. (see footnote 3 above), pp. 182 et seq.

[26] L-E. Pettiti, E. Decaux and P-H. Imbert, "La Convention europenne des droits de l'homme", Paris 1995, pp. 900 et seq. on Article 60, of the ECHR.

[27] Decision by

the European Commission of Human Rights in the case Austria v. Italy, Application No. 788/60, Yearbook, 1961, p. 116.

[28] T. Brgenthal and A. Kiss, "La protection internationale des droits de l'homme", Strasbourg, 1991, p. 79.

[29] Parliamentary Assembly of the Council of Europe, op. cit. (see footnote 2 above), p. 328.

[30] Parliamentary Assembly of the Council of Europe, op. cit. (see footnote 2 above), p. 366.

[31] T. Brgenthal and A. Kiss, op. cit. (see footnote 8 above), p. 64.

[32] One dissenting opinion has nevertheless been expressed, concerning the link between regional remedies (the ECHR and ACHR) and applications to the United Nations Human Rights Committee - see T. Meron, "Human Rights in International Law", Oxford, 1984, p. 394: "The Optional Protocol, however, may be interpreted as giving precedence to regional procedures ( ) Perhaps regional remedies should also be exhausted unsatisfactorily before the matter can be submitted to the UN Human Rights Committee."

[33] L-E. Pettiti, E. Decaux and P-H. Imbert, op. cit.

(see footnote 6 above), p. 627 in respect of Article 27 of the ECHR; G. Cohen-Jonathan, "La Convention europenne des droits de l'homme", Aix-en-Provence, 1989, p. 143.

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[34] H. Golsong and W. Karl, "Internationaler Kommentar zur Europischen Menschenrechtskonvention", Cologne, 1996, on Article 27, Nos. 31 ff.

[35] E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 627; G. Cohen-Jonathan, op. cit. (see footnote 13 above), p. 150.

[36] A. Canado Trindade, op. cit. (see footnote 3 above), p. 170.

[37] J. Frowein, op. cit. (see footnote 3 above), p. 183, according to whom the CIS Commission undoubtedly amounts to "another procedure of international investigation or settlement" within the meaning of Article 27, para. 1 (b), of the ECHR.

[38] J. Velu and R. Ergec, "La Convention europenne des droits de l'homme", Brussels, 1990.

[39] Committee of Ministers of the Council of Europe, Resolution (70) 17

of 15 May 1970.

[40] L-E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 914 in respect of Article 62 ECHR.

[41] G. Cohen-Jonathan, op. cit. (see footnote 13 above), p. 144.

[42] The Committee of Ministers has constantly been concerned to prevent duplication of proceedings. To rule out the possibility of individual applications being simultaneously or successively lodged with the European Commission and the United Nations Committee, the Committee of Ministers suggested in 1968 that states parties which signed or ratified the Optional Protocol to the United Nations Covenant should specify in a reservation or an interpretative declaration that the provisions of paragraph 2 of Article 5 of the Optional Protocol were construed as meaning that the Committee should not examine any communication from an individual without having ascertained that the same issue was not being examined or had not already been examined under another international investigation or settlement procedure.

[43] A. Canado Trindade, op. cit. (see footnote 3 above), p. 179.

[44] A.

[...] Ametistov, "A propos de la mise en oeuvre interne de la CEDH en Union Sovitique: perspectives et problmes" in RUDH 4 (1992), p. 388; see also the report of 30 January 1995 by M.S. Kovalev, a member of the Russian parlamentary delegation to the Council of Europe, who had the following to say about the lack of respect for the rule of law in Russia: " The cause lies not only, or not so much, in ill will from the part of the authorities, whether local or federal. Nor does the problem lie merely in unsatisfactory laws. It is rooted above all in the extremely low level of legal awareness of both the authorities and the people. After all, what is the point of proclaiming civil rights and freedoms in the Constitution if the people are incapable of ascertaining them and unaccustomed to doing so? What purpose is served by good laws if the individual citizen is not prepared to obey them? What is the point of reforming judicial procedures if people prefer

not to go to court but to defend their interests through other, often criminal, channels? It would take years of intensive work before the majority of the population arrived at the necessary level of legal awareness", cited in HRLJ 17 (1996), p. 189.

[45] K. Vasak, "La dimension internationale des droits de l'homme", Paris, 1980, p. 35.

[46] Associate member until its accession to the Council of Europe on 28 February 1996.

1 All meetings took place in Venice unless otherwise indicated.

[48] Also available in French

[49] Speeches in the original language

[50] Also available in Russian

[51] Also available in Russian.

[52] An abridged version is also available in Russian.

[23] Resolution No. 1126 (1997), paras. 5 and 6; A. Cançado Trindade and J. Frowein, Analysis of the legal implications for States that intend to ratify both the European Convention

on Human Rights and its protocols and the Convention on Human Rights of the CIS, HRLJ 17 (1996), pp. 164 and 181 respectively.

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[32] One dissenting opinion has nevertheless been expressed, concerning the link between regional remedies (the ECHR and ACHR) and applications to the United Nations Human Rights Committee - see T. Meron, "Human Rights in International Law", Oxford, 1984, p. 394: "The Optional Protocol, however, may be interpreted as giving precedence to regional procedures (/_/ /) Perhaps /_/ / regional remedies should also be exhausted unsatisfactorily before the matter can be submitted to the UN Human Rights Committee."

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[34] H. Golsong and W. Karl, "Internationaler Kommentar zur Europi½ischen Menschenrechtskonvention", Cologne, 1996, on Article 27, Nos. 31 ff.

[35] E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 627; G. Cohen-Jonathan, op. cit. (see footnote 13 above), p. 150.

[36] A. Cani½ado Trindade, op. cit. (see footnote 3 above), p. 170.

[37] J. Frowein, op. cit. (see footnote 3 above), p. 183, according to whom the CIS Commission undoubtedly amounts to "another procedure of international investigation or settlement" within the meaning of Article 27, para. 1 (b), of the ECHR.

[38] J. Velu and R. Ergec, "La Convention europi½enne des droits de l'homme", Brussels, 1990.

[39] Committee of Ministers of the Council of Europe, Resolution (70) 17 of 15 May 1970.

[40] L-E. Pettiti, E. Decaux and

P-H. Imbert, op. cit. (see footnote 6 above), p. 914 in respect of Article 62 ECHR.

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[42] The Committee of Ministers has constantly been concerned to prevent duplication of proceedings. ¿½ To rule out the possibility of individual applications being simultaneously or successively lodged with the European Commission and the United Nations Committee, the Committee of Ministers suggested in 1968 that states parties which signed or ratified the Optional Protocol to the United Nations Covenant should specify in a reservation or an interpretative declaration that the provisions of paragraph 2 of Article 5 of the Optional Protocol were construed as meaning that the Committee should not examine any communication from an individual without having ascertained that the same issue was not being examined or had not already been examined under another international investigation or settlement procedure.

[43] A. Cançado Trindade, op. cit. (see footnote 3 above), p. 179.

[44] A. Ametistov, "A propos de la mise en oeuvre

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de
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CEDH
en
Union
Sovié½tique:
perspectives
et
problè½mes"
in
RUDH
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(1992),
p.
388;
see
also
the
report
of
30 January
1995
by
M.S.
Kovalev,
a
member
of
the
Russian
parliamentary
delegation
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