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The modern concept of confederation

Santorini, 22-25 September 1994

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Legal Department, Ministry of Foreign Affairs

OPENING STATEMENT

Introductory statement by Mr Constantin ECONOMIDES

Mr President,
Ladies and Gentlemen,

I have the honour, on behalf of the government of Greece, and more particularly the Ministry of Foreign Affairs, of welcoming you to Santorini. I hope that your stay will be pleasant and our work will be successful.

Allow me to say a few words on the topic chosen for the Unidem Seminar, namely the modern concept of confederation.

The topic was proposed by the President of the Venice Commission, Mr La Pergola, one of whose great talents is an ability to seize on ideas with potential. The proposal was warmly welcomed by Greece, essentially for two reasons:

a. First, because the sources of the federalist principle can be traced back to ancient Greece. The leagues that linked the Greek cities of antiquity, notably the amphictyonies, constituted the first application of the federalist concept in the broad sense. This question will be developed shortly by Prof. Kitromilides.

b. Second, the modern institution of confederation is of obvious relevance today. In a world profoundly shaken in the past years by radical and indeed revolutionary change, in a world undeniably in crisis and seeking to create a new order and equilibrium, the confederation as an institution has become increasingly topical and, given its flexibility, may in fact play an important regulatory role.

In particular, a confederation might halt or at least attenuate the phenomenon of disintegration, by far the predominant trend in countries of Eastern and Central Europe today, most often brought about by the pursuit of fanatical, not to say mindless nationalist policies. The countries of Western Europe, on the other hand, clearly reflect the reverse tendency, i.e. integration, even at the expense of the nation State, the European Union being the best example.

A confederation can also accommodate a union, association or assembly of two or more States wishing to co-operate closely without going as far as total fusion in a federal State and to retain their full sovereign national identity. Needless to say, confederations today can only be based on principles that all States accept, at least in Europe, such as pluralist democracy, the pre-eminence of the rule of law, respect for human rights and the market economy.

The Washington Agreements of 18 March 1994 mark a first official rough plan for a confederation between Croatia and the new Federation of Bosnia-Herzegovina, uniting the Muslims and Croats of that state. Several confederate elements are also present in the Commonwealth of Independent States, and even more so in the European Union, which to a certain extent is based upon the principle of confederation.

But I shall stop there, because I do not want to anticipate the papers scheduled for this seminar on the history, concept and applications of the confederation as an institution, to be presented by the outstanding specialists whom we have the good fortune to have among us.

Before commencing our work we would like to welcome to the seminar Mr H. Frank, member of the Parliamentary Assembly of the Council of Europe, Mr Toledano Laredo, who represents the European Union, Mr F. Quinn of the Office of Democratic Institutions and Human Rights of the CSCE, and the delegation from Bosnia-Herzegovina.

FIRST WORKING SESSION

Chaired by Mr Michael TRIANTAFYLLIDES

Historical Aspects

a. Greek precedents to the confederal organisation of states
Report by Prof. Paschalis M. KITROMILIDES

b. The historical development of confederations
Report by Prof. Jean-François AUBERT

a. Greek precedents to the confederal organisation of States - Report by Prof. Paschalis M. KITROMILIDES, *University of Athens*

The idea of a community of states, held together by shared principles, by commonly accepted rules of conduct and by the transaction of a significant range of their affairs through common institutions is mainly associated with the historical experience of the modern world, especially with the various attempts at supranational organisation or integration in the twentieth century. Yet at the origins of the European tradition, in the ancient Greek world, we can find precedents and practices of organised inter-state links which foreshadow through the centuries these modern projects and aspirations. These communities of independent Greek states in the archaic and classical period could be considered as anticipations of modern

attempts at integration and the creation of confederal institutions.

In this brief presentation it is not of course possible to narrate the rather complicated history of Greek attempts at the construction of confederal structures. These attempts stretch over a period of several centuries and extend all over the wide geographical space of the Greek world in continental and insular Greece, Asia Minor and Magna Graecia *in Southern Italy and Sicily. It may be more useful for our present purposes to develop a conceptualisation of the surviving evidence about Greek attempts at suprastate organisation in the hope that this will contribute to an understanding of some of the fundamental preconditions of viable forms of confederal structures.*

Interstate politics in the ancient Greek world was characterised by political fragmentation within a broad geographical space of cultural affinities, mostly religious and linguistic. In this context the unfettered independence and autonomy of individual units, the city-states, was jealously guarded and fiercely defended against external infringements. The ancient Greek concept of freedom _λευθερία*, it has long been recognized, was primarily understood as the autonomy of the collective entity of the* polis. *The Greeks understood themselves in terms of the independence of the individual* poleis *to which they belonged and they felt that this form of freedom distinguished themselves from other civilisations, especially from the world of the oriental empires. Within the* polis*, freedom was understood, as pointed out by Benjamin Constant long ago, not in terms of individual rights and civil liberties, but in terms of submission to the laws of the city. The meaning of freedom within the democratic Greek polis has been the object of intense debate in European political thought at least since the time of Rousseau and Hegel. This debate cannot in any way be resumed here. What is essential to retain for our present purposes is the fundamental understanding of Greek political life in terms of the autonomy of a multiplicity of independent city-states and the consequent reluctance to engage on*

projects of interstate cooperation and integration, with the exception of military alliances brought about either by external threats or by attempts to upset the interstate equilibrium within the Greek world. In both of these cases the major motivation derived from the overriding concern with the autonomy of the polis *and the defence of its collective freedom.*

This fragmentary world of independent city states, nevertheless, was held together by a broad sense of cultural affinity, expressed especially in the distinction the Greeks felt to separate them from the world of the barbarians. The cultural affinity was a matter of language and shared religious values. Despite the diversity of dialects and idioms, the Greeks knew that they spoke a common language and it was this linguistic identity that they felt distinguished them from the barbarians, whose language they could not understand. The distinction Greek versus barbarian was originally a linguistic distinction and acquired a political meaning later as a result of the Persian wars, the monumental confrontation of Asia and Europe on Greek soil in the fifth century B.C. A common Greek linguistic and cultural identity was cultivated especially through a shared literary heritage that formed the basic ingredient of Greek education, the Homeric epics. Homer's poems, the Iliad *and the* Odyssey*, was what all literate Greeks had in common in terms of intellectual make-up. Beyond language and literature, however, ancient Greek society was primordially held together by a common religion and a common theology. In this regard, the first codifier of this shared theology, Hesiod, was as important as Homer in the definition of the cultural identity of the Greeks. Thus was formed the consciousness of an overarching Hellenic identity, whose ingredients were so epigrammatically recorded by Herodotus as common blood, common language, common temples and sacrifices to the gods, and commonly oriented customs (VIII, 144, 2).*

As in all archaic and primitive societies, in ancient Greece religion was the substratum shaping political life. The democratic polis *grew out of the effort to tame*

traditional religious beliefs and fears by literally politicising them, by subsuming them to the civic ends of the polity. It was precisely the broader religious framework of Greek political life that motivated the earliest attempts at inter-state organisation and cooperation to emerge on European soil. These attempts were the amphictionies of ancient Greece. Literally "amphictiony" means "union of dwellers around" and the term denoted a religious association of a number of autonomous states. Its primary aim was the common provision for the festivals, sacrifices and other rituals required by the cult of a patron god. These common religious ties inevitably affected the political and economic relations of the member states of an amphictiony. The greatest of these religious communities of states, the Delphic Amphictyony, went further than that. Through the moral authority of the Delphic oracle in Greek society as a whole, the common cult sustained certain rules and norms of behaviour between different states, rules that essentially amounted to the earliest attempt at the creation of a form of normative order in inter-state relations in European history. (E.g. the maintenace of peace at the time of the festival, the so-called "truce of god", the recognition of the seat of the cult as "sacred land" and inviolable asylum, the assumption of certain forms of solidarity between member states of the Amphictyony). Within the limits of the rules of the Amphictyony each member state retained its complete independence and autonomy in politics and in war. So we can more or less recognise in the Delphic Amphictyony a precocious model of coordination of interstate interaction, foreshadowing modern forms of international organisation.

Although it is difficult to recognise this form of suprastate organisation as a confederal structure since it lacked a kernel of central executive or legislative authority, nevertheless some political aspects of the Delphic Amphictiony posssessed considerable significance from the point of view of fostering interstate order. These political aspects of the Amphictyony included the recognition of the basic equality of the twelve member states and gradual acceptance of certain

binding rules in interstate conduct, which aimed at the approximation of some basic principles of international justice. This aspiration is reflected in the decision whereby the members of the Amphictyony undertook not to destroy cities on each other's territory and not to deprive each other's population of water. This decision had important religious and secular sanctions attached to it. The recognition of the binding moral force of such norms in the military behaviour of Greek states toward each other is echoed characteristically in Plato's remarks on the appropriate conduct of the guardians in war (Republic 469b-471c).

Over time, the Amphictiony's political authority grew and it could occasionally, especially under Athenian leadership, engage in a common foreign policy. Its council, composed of two representatives from each member state, could impose sanctions on members who failed to abide by established rules or decisions and with the co-operation of local authorities it could impose sanctions upon individuals within member states. Especially in cases of religious offences it was difficult for anyone to escape the sanction of the Amphictyonic council. In extreme cases the Amphictyony could even declare a "holy war" to impose a decision upon a recalcitrant member. The Amphictyony survived as a political entity for as long as the basic norms binding the behaviour of its members remained operational. When its internal balance was upset by the admission of a superior power in 346 B.C., when Macedonia under Philip became a member, the Amphictyony could no longer function as an agent of inter-state order. At least so it seemed to Demosthenes, who thought it useless for Athens to fight for "the shadow in Delphi".[1]

If this was as far as the Amphictyony could go in introducing inter-Hellenic political co-ordination, other forms of suprastate structures went further than that in creating more firmly binding political structures that could be considered as Greek anticipations of

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1 **Demosthenes**, Περί ειρήνης, **paragraphe 25.**

confederal and federal structures. Ancient Greece never quite managed to create a unitary state, despite a widely shared consciousness of cultural and ethnic kinship. But over time more cohesive forms of political coordination and unity made their appearance, especially in the regional leagues of autonomous cities and tribes known as the κοινά, literally "communities", which often, like the amphictionies, were bound to a shrine or other place of common worship. These leagues of states were distinguished from the Delphic Amphictyony by the existence of central political and military authorities. On this basis the Greek κοινά possessed a degree of political unity that made them approximations of confederal structures. The best known of these primitive confederations were the κοινά of the Thessalians, of the Molossians in Epirus and of the Arcadians. Less well known is the κοινόν of the Cretans. In their early history the κοινά retained both the independence of the constitutent units and a common citizenship combined with a central authority which tended to be a monarchy of limited rights.

With the passage of time the κοινά gave way to more tightly organised leagues, in which the confederal association was replaced by federal structures that imposed greater political unity and secured greater political power for the new, territorially more extensive states. Thus arose the two Greek examples of federal states, the Aetolian and Achaean Leagues. These were the only great powers in Hellenistic Greece and their development as federal states with centralised political and military authorities was largely dictated by the need to face up to the threat to Greek freedom posed by the growth of Roman power in the West. The tendency in the development of the two great leagues, the συμπολιτε_αι, was to keep the power of member states weak and to strengthen the power of the League. In contrast to earlier κοινά, in the συμπολιτείαι central authority remained republican and the effective exercise of power depended on the emergence of a strong leader, like Aratus, who extended the Achaean League over almost all of the Peloponnese and made it

the strongest Greek state in the second half of the third century B.C. Such developments, however, closely connected with the logic of power politics, cancelled both the amphictionic beginnings of the Leagues and their confederal character and justified Polybius's perception of a single state in the case of the Achaean League and a unitary Aetolian constitution. These developments brought to an end the tradition of classical Greek politics which had focused on the freedom of the polis *and opened the way to the centralised and imperial political entities of the Hellenistic and Roman eras.*

It must be noted that the deeper political logic that dictated the emergence and consolidation of the federal leagues of Greek states, resistance to the menacing power of Rome, was served to the end by the Archaen League. It was this federal state under its last great leader, Philopoemen, that continued to resist Roman incursions on Greek freedom. It was only after Philopoemen's death in 183 B.C. and the decline of the power of the Achaean League that Rome could conquer Greece, following the death of Corinth in 146 B.C. Putting up this form of resistance to Rome was something that the more loosely organised confederacies of the κοινά *could never have done. The broader movement in the history of Greek state structures from inter-state amphictionies to confederal communities to federated leagues provides, from a theoretical point of view, a good indication of the impact of the international environment, especially the consequences of cleavages created by the policies of hegemonic great powers, upon domestic state structures.*

Let me conclude with two more general observations concerning the place in Greek culture and thought of the three forms of suprastate integration we have discussed above. My first point has to do with the paucity of theoretical reflection in Greek political philosophy about these forms of political organisation which extended beyond the polis. *Plato remains persistently silent on this variety of political project, which apparently failed to stir his political imagination. Aristotle is no more interested than Plato and where he does refer to*

confederal structures, the Cretan πολιτεία*, he is rather dismissive about it (Politics 1272 a-b). The marginalisation of political integration and of federalism in Greek political thought reflects the overriding belief of the ancient Greeks that only the small-scale* polis *could be the focus of civilised political life and sustain the good regime of autonomy, personal fulfilment and justice. It was their primary preoccupation with these values that left Greek political philosophers indifferent to political structures larger than the* polis*, which alone, they felt, could provide the appropriate context for their realisation.*

My second and final observation is the following. Despite the paucity of Greek theoretical reflection on formal inter-state political organisation, Greek practice in this field does possess considerable interest in itself as a precocious instance of the deeply felt human quest for extended boundaries and memberships. What could be considered as the most salient trait of Greek experimentation with such forms of political transcendance is the quite realistic sense that a cultural background of common values and beliefs and a framework of shared principles can provide the necessary preconditions for ventures beyond the city- or the nation-state. In respect of the actual institutional organisation or inter-state communities in ancient Greece, the combination of four basic principles, more or less generally observable in such contexts, can also form an object of fruitful reflection in conceptualising the idea of confederation. These four principles were the principle of autonomy, the principle of equality, the principle of common purpose and the principle of the identity of the regimes of the member-states. On this level the lessons of the Greek amphictionies, communities and leagues possess considerable relevance for the contemporary world and the Greek experience is worth pondering over, despite its distance in time and our fragmentary knowledge about it.

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b. The historical development of confederations - Report by Prof. Jean-François AUBERT, Professor at the University of Neuchâtel (Switzerland)

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Short bibliography.

I. Definition of the subject

1. The French word "confédération" (confederation), or to be more exact the French term "confédération d'Etats" (confederation of States), does not seem to present dictionary writers with any great difficulties. All dictionaries of everyday French, with a few variations, give a definition which at least has the advantage of focusing one's thoughts: they describe it as an association or union of States which have delegated certain powers to joint authorities. The concept poses greater problems for lawyers, who must undertake the difficult task of distinguishing confederations of States from all sorts of "international organisations" to which the everyday language definition might very well also be applied. Or, to put it another way, when lawyers note that "confederations of States" are only one species within the much wider genus of international organisations, they must endeavour to define their specific distinguishing features.

2. However, in attempting to do so lawyers must also be careful not to stray from the facts. They must not create a purely abstract concept of a confederation and painstakingly define something which has never existed. They must refer to structures which have actually been or are actually being used, including organisations whose members wanted to belong to a special category and actually felt that they did. Obviously, the reference can only be approximate: in the political field there have never been two identical forms. Yet there are analogies. In order to define a confederation of States, therefore, we must examine groupings of States which have really existed and whose contemporaries, particularly in the member States of these groupings, considered that they were not a unique combination but a pattern which had had precedents and parallels. This boils down to saying that the first confederation in history could not have been conceived in terms of a confederation.

3. However, a time came when certain similarities in the ends and means of these groupings led to the construction of a type. When this type came to have a sufficiently precise substance, politicians and lawyers gave it a name; a name which they borrowed from Latin and which had in fact already been, or was to be, used for many other purposes: they called it a "confederation". It will be agreed that the word is rather colourless, since it only indicates the grouping's contractual basis and therefore sheds no light on the specific features of the type it describes, in purely etymological terms. It was the careful study of the groupings bearing this name in the 18th and 19th centuries which finally gave substance to the word "confederation".

4. By studying the groupings of States designated as confederations, students noticed that they had a number of common features. Not only were they based on an international treaty, which obviously would not have sufficed to identify them, but also they were intended to last and therefore were accompanied by permanent bodies. They even acquired an international status, differentiating them from mere alliances and they pursued the fairly general aim of assisting against external attacks and subversion within the member States, so that 20th century observers cannot confuse them with all the international organisations which have since developed.

5. The common features we have mentioned enable us at least roughly to define what used to be called confederations. There are further traits which rather serve to explain why certain States formed confederations. The first is probably the proximity, or even geographical continuity, of the States entering into the association. The second is the presence of one or more social factors for integration such as a common language or religion, or at least historical tradition. The third, which no doubt derives from the first two, is some degree of homogeneity in the political institutions of all the group members. This is why it would have been unlikely for a confederation to have emerged in the 18th

or 19th centuries between France, Spain and Great Britain, though it was natural for one to spring up between the States of America newly liberated from British domination or between the German principalities.

6. This paper concerns the historical development of confederations. It will leave aside certain contemporary structures which offer similarities with "conventional" confederations; they will be dealt with in other papers. Nor will we be seeking any prototypes in the Ancient World; this subject has been addressed by Professor Kitromilides. Among the more recent forms, we shall overlook the Holy Roman Empire and the old Swiss Confederation, which were too diffuse and changeable for any precise conclusion to be drawn; nor shall we examine the United Provinces since to my knowledge only very sketchy information is available on that particular formation.

7. This leaves us with three conventional confederations which expressly laid claim to this title and whose emergence, development and demise can fairly easily be followed. They are: the United States of America from 1776-1777 to 1788-1789, the German Confederation between 1815 and 1866-1867, and the Swiss Confederation from 1815 to 1848. There is an immense mass of documentation, first-hand evidence from contemporaries and analyses by historians and lawyers on these three confederations. Obviously, I am only acquainted with a small fraction of this material, but the little I have seen still encourages me to present you with three separate sketches.

II. The United States of America (1776-1777 - 1788-1789)

8. In the middle of the 18th century Great Britain had thirteen colonies in America which enjoyed a certain degree of self-government. We shall not go into the circumstances under which these colonies, whose representatives had formed a congress, proclaimed their independence in July 1776. Nor shall we recount the

war which ensued and ended in 1783 in the defeat of the mother country. Our subject will be the mutual relations established by the colonies, and the States which they later became.

9. The colonies began to move together well before independence. In fact it was this rapprochement which, after a number of setbacks, enabled the break to be made. We might mention the first Congress in Albany (1754), the second in New York (1765) and then the establishment of a "Continental Congress" in Philadelphia, which met for the first time in 1774 and the second in 1775, producing, precisely, the famous Declaration of 4 July 1776. Thereafter the thirteen States, having gained independence, had to attempt to build up something durable. Being overly jealous of their new-found freedom, they did not wish to merge into a great American State and so they stopped at a basically contractual arrangement.

10. The treaty they concluded was entitled "Articles of Confederation". It was drafted by a committee which the Second Continental Congress had appointed on 11 June 1776, therefore even before the Declaration. The final text was adopted by the Congress itself on 15 November 1777. Then the "Articles" were opened for ratification by the States. All thirteen ratified them between 1778-1781.

11. The Articles, which expressly establish a "Perpetual Union", begin by stating that the official name of the Confederation is to be the "United States of America" (Article I). They go on to specify that the States shall preserve their independence and sovereignty and all the powers which are not expressly delegated to the United States (Article II). The aim of the association is the common defence of its members and the protection of their freedom and mutual prosperity (Article III). Freedom of movement is secured for the citizens of each State (Article IV). The capacity of States to conclude treaties is limited (Article VI). On the other hand, that of the United States is widely acknowledged and the Union is granted wide powers in matters of war and peace (the country was at war at the time) and in arbitrating any

disputes arising between members (Article IX). The powers of the United States are exercised by a Congress in which each State has one vote and which meets every November (Article V). Ordinary decisions are taken by a simple majority of all votes, i.e. seven; the more important decisions are taken by a qualified two-thirds majority, i.e. nine (Articles IX and X; the texts are not very clear, but this is how they have been interpreted and applied). The Articles can only be revised with the consent of the Parliaments of all the States (Article XIII).

12. American politicians and lawyers have always stressed that the Congress had no direct legislative power over individuals: its decisions were binding only upon States, not their inhabitants. The confederal authority, therefore, could not make actual laws; it could raise neither taxes nor armies; it only had such money and troops as the States undertook to place at its disposal. If the States did not fulfil their obligations, the Congress was soon penniless, and since it had no credit it could not even borrow. For their part the Parliaments of the States, which had full legislative powers, could use such powers as they wished, because they had to respect neither confederal law nor any fundamental rights.

13. Despite its weakness the confederal authority still managed to secure a number of notable successes. Firstly, and most importantly, it won the War of Independence - with the support of some staunch allies, it is true. Secondly, it purchased States' claims to the territories separating them from the Mississippi and kept for itself, i.e. for the Union, the Great Lakes region which Great Britain had ceded to it in 1783. However, in the long run this system could hardly be viable. In some States, laws designed to accommodate particular groups created a great gulf between the various social classes. Other States were torn by armed rebellion. The Congress, paralysed by conflicts of interest, was long powerless to help. It was only at the insistence of a number of determined individuals that it finally resolved to call a Convention to reform the 1777 Articles (1 February 1787).

14. The Convention opened in Philadelphia on 25 May 1787 with some thirty participants. Other delegates joined them later on from all the States except Rhode Island, which opposed the whole procedure. The assembly had a total of fifty-five members, although they possibly never all met together at the same time. The strange thing is that the size of the delegations clearly did not correspond to that of the States' populations: eight delegates for Pennsylvania and seven for Virginia was quite appropriate; but five for Delaware and four for Massachussetts was rather odd. It was as if the proximity of the Convention venue played a role in this apportionment of seats. What is even more remarkable is that most of the delegates, who had been elected by the State Parliaments, seemed more like deputies speaking in accordance with their consciences or interests than representatives acting on instructions: two colleagues from the same place often voiced opposing opinions. Decisions were still taken by individual States, but the State's vote was the sum of its representatives' individual votes.

15. The Congress had mandated the Convention to propose a number of alterations to the Articles of Confederation. However, most of the delegates had arrived in Philadelphia with different ideas, much more ambitious intentions, and the determination to revolutionise the structure of the Union and to make it a genuine State with its own sovereign powers and direct legislative authority. These were "Federalists", and they immediately set the tone. The work took a turn which neither the Congress nor the State Parliaments had bargained for: instead of a straightforward revision of a treaty, the only matter under discussion was the formulation of a Federal Constitution.

16. Those in favour of the status quo*, those who wanted to preserve the confederal form, the "Anti-Federalists", were constantly beaten in the voting and grew tired, several of them packing their bags and leaving the Convention. On 17 September, when the new Constitution was completed, the Federalists were*

masters of the field. Of the forty-two delegates present that day, thirty-nine signed the document, with only three refusing. Assuming that the members who had already left had also expressed their opposition, we might conclude that the Philadelphia Convention adopted the Constitution by 39 votes to 16. Yet the most interesting point in my view was the distribution of votes within each State's delegation: eight votes for in Pennsylvania, but four against and three votes for in Virginia; five votes for in Delaware, but two votes against and two votes for in Massachussetts; four votes for in South Carolina, three votes for and two against for North Carolina, one vote for and one against in New York, and so on.

17. The rest of the story is of the utmost importance. Basically, the 17 September document as yet had no binding force (except for the 39 signatories). If it was to replace the Articles of Confederation it would have to be ratified by the parties to these Articles, i.e. the States themselves. The Articles included a rule on their own revision: the Congress had to take a decision approved by the Parliaments of all the States (Article XIII). It was fortunate for the United States that this rule was not observed for the new Constitution. On the contrary, it was ignored on three counts.

18. Firstly, the Congress had the wisdom not to attempt to amend the text as submitted; it merely communicated it to the States, recommending that they follow the procedure proposed by the Convention (resolution of 28 September 1787).

Secondly, the Convention itself had decided that the Constitution would replace the Articles in those States which had ratified it, as soon as nine of them had done so (Article VII).

Lastly, in order to sidestep the natural opposition of the State Parliaments (which forfeited many powers under the Constitution), the Convention had also laid down that conventions specially elected by the citizens would

decide whether or not the States would ratify (still Article VII).
However, the most felicitous aspect of the whole affair was that the State Parliaments did not protest against these innovations and, with most of them allowing themselves to be pushed aside in this way, unflinchingly proceeded to organise the elections for these special conventions.

19. The elections took place almost immediately in some States and a little later in others; the conventions deliberated - and some of these deliberations managed to turn a hostile majority into a majority in favour of the Constitution. On 21 June 1788 in Concord, the New Hampshire convention gave the go-ahead for the ratification of the ninth State (after Pennsylvania, Delaware, New Jersey, Georgia, Connecticut, Massachussetts, Maryland and South Carolina). The Constitution was therefore ready to come into force in all nine States. The problem of relations between the nine States and the four remaining ones was greatly alleviated by two additional ratifications in the ensuing weeks, in Virginia and New York. Only North Carolina and Rhode Island remained outside, the former until November 1789 and the latter until May 1790.

20. The Congress promulgated the Constitution under a resolution of 13 September 1788 and chose 7 January 1789 as the date for the first federal elections, including the election of presidential electors, in those States which had ratified the Constitution: 4 February was to be the date of the election of the President of the United States, and 4 March the inauguration of the new federal authorities. So on 4 March 1789 the Constitution fully replaced the Articles of Confederation in eleven States. We shall not attempt to analyse here what the legal situation was in North Carolina up to November 1789 and in Rhode Island up to May of the following year.

III. <u>The German Confederation (1815 - 1866-1867)</u>

21. Unlike the American States, most of the German States had a long history behind them when they joined

in a confederation after the Napoleonic Wars. They had even already engaged in a pre-confederal type of union during their centuries as part of the Holy Roman Empire. However, this Empire, the "First Reich", had only been a rather unsubstantial association. In 1815, after the ordeals suffered at the hands of the French armies, the German populations aspired to a stronger type of union. The idea of unification, however, was still faced with two obstacles that could not be overcome: firstly, the virtually absolute monarchic regime in force in most of the States (except a number of Free Cities), which gave the rulers powers which they were reluctant to renounce; and secondly, the opposition of Austria, which had grounds to fear that the German national spirit might break up its empire.

*22. The German States therefore agreed on a confederal formula. On 8 June 1815, when the Vienna Congress was nearing its end, they concluded a treaty which was given the official title of "German Federal Act" (*Deutsche Bundesakte*). The treaty was complemented five years later, on 15 May 1820, after an intergovernmental conference also held in Vienna, with a second treaty known as the "Vienna Final Act" (*Wiener Schlußakte*). These two treaties of 1815 and 1820 formed the basis of the German Confederation (*Deutscher Bund*).*

23. The treaties established a genuine "confederation of States", which experts were in the habit of referring to at the time as a Staatenbund. Staatenbund *and* Bundesstaat *(ie "Federal State") are two concepts which German scholars developed at the beginning of the 19th century by studying the history of the United States in particular. The* Staatenbund *is based on an international treaty, whereas the* Bundesstaat*, although it might historically be based on a treaty, is legally based on a national constitution. The organisation set up by the 1815 and 1820 treaties obviously belongs to the former category; certain clauses even seem to have been directly borrowed from a public law handbook (see, for example, Articles 1 and 2 of the 1820 Act).*

24. The German Confederation comprised forty-one members. I should point out here that many smaller principalities which had had a separate existence at the time of the First Reich had been incorporated into bigger States under French influence (1803).

The forty-one States which had emerged from the Napoleonic Era still varied widely in size. There were two large ones which dominated the others, the Austrian Empire and the Kingdom of Prussia, which were in fact only included in the Confederation in respect of their German possessions. Then came the kingdoms of Bavaria, Saxony, Württemberg and Hanover, the Grand Duchies of Baden and Hessen, a number of principalities and duchies, some of which were really very small, and also four cities, Lübeck, Frankfurt, Bremen and Hamburg.

*25. The Confederation, which was very largely the work of Metternich, was intended to maintain Germany's internal and external security and the independence and inviolability of its constituent States (Article 2 of the 1815 Act and Article 1 of the 1820 Act). Each State had to have, but also preserve and defend, an authoritarian constitution based on the mediatisation of the people by the nobility, the clerical orders and the merchants of the cities (*Stände*), which was then known as a* Landständische Verfassung *(Article 13 of the 1815 Act). The Confederation and each State were required to prevent constitutional changes and the development of freedom of the press, democracy and German nationalism. On the other hand, the treaties secured the right of ownership, freedom of movement and access to justice in all the States for all Germans, something which was quite remarkable for the time (Article 18 of the 1815 Act).*

The Confederation was declared perpetual and indissoluble, and its members were denied the right of secession (Article 1 of the 1815 Act and Article 5 of the 1820 Act).

*26. The organs of the Confederation were the Confederal Diet (*Bundesversammlung *or* Bundestag*), in which the States had from one to four votes according to their size, with some seventy votes in all, and a Select Council (*Engerer Rat*), on which the eleven biggest States had one vote each and the thirty others six in all. Austria held the presidency of the Diet and Council, and the confederal authorities sat in Frankfurt.*

The plenary Diet met only on very few occasions, some fifteen in fifty years. The Council was the permanent body. Decisions were taken by a simple majority; decisions on some matters such as war and peace required a two-thirds majority (which gave the small States a right of veto); decisions on matters of the utmost importance, eg the admission of new members and especially the revision of the treaties themselves, required unanimity (Article 7 of the 1815 Act and Articles 12 and 13 of the 1820 Act).

*27. The Confederation had some legislative powers (although this point is disputed). However, the few laws it adopted were based on agreements concluded between the States. Furthermore, if these laws were to be applicable in the States, they had to be published by the local authorities. Although refusal to publish them could give rise to "confederal enforcement" (*Bundesexekution*), which is the power to force recalcitrant States to comply with confederal law, this procedure was only used two or three times, and then never in respect of a legislative matter, nor, obviously, against a powerful State.*

28. The German Confederation lasted over fifty years (from 1815 to 1866). This fairly long life owed more to the difficulty of finding a solution to the problem of German unification than to its intrinsic merits. In fact, the confederal structure did not work very well. Firstly, it was not what the people wanted: they would have preferred a more solid Germany; the liberal and nationalist bourgeoisie saw the Vienna treaties merely as something contrived by Metternich to block progress. Moreover, a confederation hoping to associate some

forty small and medium-sized states with two genuine European powers, Austria and Prussia, was bound to be under permanent pressure. The two aforementioned powers were opposed on essential points, one being protestant and mainly German and the other catholic and multi-national. Above all, there were two of them, i.e. one too many. The destiny of the Confederation was dominated by the history of this rivalry.

29. A first, unsuccessful, attempt was made in 1848-1849 to unify Germany, or to be more precise to transform the German Confederation into a German Federal State; a second, successful, attempt was made in 1866-1867. The inspiration for the 1848 attempt was liberal and democratic; the successful unification of 1867 was based on a much more authoritarian model.

30. As we know, the revolution which took place in Paris on 24 February 1848 was a European revolution, and Germany did not escape the influence of this powerful movement. As soon as news emerged of the collapse of the French monarchy, it was the turn of the German monarchies to shake. We shall not go into the changes made (sometimes very temporarily) to the States' internal constitutions. But the national liberals deemed that the time was ripe also to set about reforming the confederal bond. Naturally, there was no point in expecting the Bundestag *or the Princes, who were in a state of utter confusion at the time, to do anything. So the liberals followed the democratic and revolutionary path taken by France half a century earlier (in 1792): electing a constituent assembly to draw up a constitution. In fact, things went very quickly. A few politicians met first of all in Heidelberg on 5 March. They immediately sent liberal members of the States' corporatist assemblies and a number of prominent intellectuals an invitation to form a "pre-parliament" mandated to prepare the constitutional reform. The invitation was accepted and the "pre-parliament", comprising some five hundred members, met in Frankfurt from 31 March to 3 April. This body laid down the principle of a national assembly elected by universal suffrage in each confederate State, on the*

basis of one member per fifty thousand inhabitants. It is fairly indicative of the situation prevailing at the time in Germany that even though the Heidelberg colloquy and the Frankfurt "pre-parliament" had no juridical legitimacy, the Bundestag *put up no resistance to them and the election took place at the beginning of May throughout the country, in accordance with the rules laid down by both the aforementioned bodies. The Constituent National Assembly, which comprised some six hundred members, finally met on 18 May 1848, also in Frankfurt.*

31. Within ten months the Frankfurt Constituent Assembly had drawn up a Constitution, the first German Constitution. Far from simply revising the confederal texts, the Assembly was in the process of setting up a Federal State. This Federal State, which was referred to as the "Reich", was to comprise all the States Parties to the 1815 and 1820 Treaties. The Constitution set out the division of powers between the new Reich and its members in terms which have generally been deemed clear and reasonable. However, the difficult part was to define the future organs of the federation. Two virtually incompatible principles had to be reconciled: the democratic principle, which was the new idea from which the Constituent Assembly in fact derived its legitimacy, and the traditional monarchic principle, which was not seriously contested.

32. The solution was found in the following arrangement:

There would be a Federal Parliament made up of two chambers: for the first time, a Chamber of Deputies consisting entirely of elected members (like the Constituent Assembly itself), known as the Reichstag*; and a Chamber of States,* Staatenhaus*, to which each State would delegate from 1 to 4 representatives, half of whom would be appointed by the State's Government and half by the Parliament (with special rules for delegations with odd numbers); it was further specified that the members of the Chamber of States, like those of the* Reichstag*, would vote without instructions.*

The Government would be made up of a hereditary Head of State and ministers. The first Head of State would be a reigning Prince and would bear the title of Emperor of the Germans. The ministers would be appointed by the Emperor and would be answerable to him and Parliament.

33. This was where the crucial questions emerged: who was to be Emperor? And, an essential point, would Austria be part of the new State? Was the New Germany to be a "Great Germany" (with the German part of Austria and Prussia) or a "Little Germany" (with Prussia but not Austria)? Austria did not wish to join, fearing for its own integrity. This left a Little Germany, and all the Constituent Assembly had to do now was to offer the Imperial Crown to the King of Prussia (28 March 1849). As we know, the King refused it for two reasons: because in his view crowns came from God, not men, and he did not wish to receive his power from an Assembly vote; but also because he considered that the new Constitution, which had been adopted without the Princes' assent, was the outcome of an unlawful procedure. And it must be admitted that the procedure followed by the Constituent Assembly had been, if not actually illegitimate (it had the advantage of respecting democratic principles), then at least completely contrary to the rules on the revision of the treaties.

34. After the King of Prussia's refusal, the revisionist movement quickly collapsed. The Assembly split up, the reactionaries regained the upper hand, and the work done in Frankfurt on the constitution was soon a mere memory.

35. Unification did come about eighteen years later, though the circumstances had changed completely. This time, the opportunity was provided by the increasing hostility between Austria and Prussia. The conflict took a critical turn with the affair of the Duchies of Schleswig and Holstein, captured from Denmark by both powers in 1864, then administered as a condominium, and finally disputed by the joint rulers in 1866. Prussia saw this

dispute as a bilateral matter, but Austria wanted to refer it to the Bundestag*, where it had allies. Prussia took this as grounds for seceding (14 June 1866), and Austria attempted to bring it back into the Confederation by an enforcement procedure. In this particular case enforcement obviously meant war, and Prussia, which had been carefully preparing for hostilities, won a swift victory (at Sadowa/Königgrätz on 3 July 1866).*

A great many of the northern States had also left the Confederation with Prussia, out of solidarity, interest or fear.

36. After the battle the Confederation was left with only Austria and a few of its unfortunate allies: Bavaria, Württemberg, Saxony and Hanover. Prussia demanded its formal abolition, and the peace treaties concluded in August all contained a clause recognising its dissolution. The Bundestag *sat for the last time in Augsburg on 24 August, with nine delegations attending.*

37. The architect of victory, Bismarck, who was Prime Minister of Prussia, was then free to undertake the unification of Germany in his own way. It would be a Germany without Austria, but also without the southern States (Bavaria, Württemberg, Baden and Hessen), which would be excluded to avoid offending France; it was therefore a united Northern Germany. After a number of additional annexations by Prussia (including Hanover and Frankfurt), this union had a mere twenty-two members. Prussia was by far the predominant member, having an overwhelming hegemony with four fifths of the total population (24 million out of some 30 million inhabitants); the second largest State was Saxony with a population only one tenth the size.

38. In his efforts to devise a constitution, Bismarck had to bear in mind the same two principles as had the Frankfurt Assembly, viz democracy and the monarchy. However, this time it was the monarchic principle which directed operations. In August the representatives of the twenty-two States (nineteen monarchies and three cities) agreed on a sort of transitional federation and established the procedure which was to lead to the

adoption of a definitive constitution. It was stipulated that a conference of ambassadors would prepare a draft, which would then be forwarded to an assembly elected by universal suffrage (the Reichstag*). It would thereafter be reviewed by the conference and finally presented to the States for approval. To make it clear that the assembly emanated from the States, not the German people, the twenty-two Governments undertook to have identical electoral laws adopted in their respective States for the election of the members of the* Reichstag.

39. The conference of ambassadors met in Berlin from 15 December onwards. The Reichstag was elected on 12 February 1867, with 235 Prussian and 23 Saxon members out of a total 297, and with a majority of 180 votes in favour of Bismarck's ideas. On 4 March the conference presented its draft to the Reichstag, *which made a number of amendments. The amended draft was sent back before the ambassadors, who, rather than risking a showdown, accepted most of the changes. The* Reichstag *eventually adopted the Constitution on 16 April 1867 by 230 votes to 53, and the conference ratified it the next day. The Constitution was then submitted to the Parliaments of the States. The twenty-two Parliaments approved it in the ensuing weeks, the twenty-two Governments published it between 21 and 27 June and it came into force on 1 July 1867.*

40. The new State was officially called the North German Confederation, Norddeutscher Bund. *However, contrary to what this name would suggest, the Northern German Confederation was a Federal State. It was not the continuation of the German Confederation (*Deutscher Bund*) in a smaller geographical area. It was a completely different structure. Instead of treaties there was now a Constitution. Instead of the* Bundestag *there was now a real Parliament with an elective chamber, the* Reichstag, *and a Chamber of States, the* Bundesrat, *and this Parliament passed laws directly applicable to the population of the twenty-two States. Nevertheless, it will be noted that unlike the* Staatenhaus *provided for in the aborted 1849 Constitution (see paragraph 32 above) the* Bundesrat *was an assembly of representatives of the*

various States' Governments who voted under instructions. The Bundesrat*, which was a kind of Diet grafted on to a federal system and which subsisted right up to the Basic Law of the current Republic (1949), was a brainchild of Bismarck's.*

41. Where the executive function was concerned, the Constitution expressly attributed the presidency to the Prussian Crown. Thus the King of Prussia exercised the function of Head of State both in his kingdom and in the Federal State, although there were different rules for each function. The initial idea had been to entrust the Government to the Bundesrat *under the leadership of a Federal Chancellor appointed by the President (meaning under the leadership of a Prussian minister appointed by the King of Prussia). However, the* Bundesrat-*Government idea did not materialise, and the more usual pattern of a (Prussian) Chancellor surrounded by Federal Ministers (who were also generally Prussian) subsequently emerged.*

It goes without saying that the authorities of the new Federal State sat in Berlin, the Prussian capital.

42. From the legal viewpoint, therefore, the unification of Germany, i.e. the association of several States in one new State, dated from 1 July 1867. It is true that this united Germany amounted to Prussia and a few of its smaller neighbours. It would be another four years before unification was extended to the southern States.

43. Pending the integration of the south, it would be worth mentioning the interesting "customs federalism" mechanism which associated Bavaria, Württemberg, Baden and Hessen with the Confederation of Northern Germany in the years 1868 to 1870. In order to decide on customs matters and economic issues in general, the southern States sent deputies to Berlin to join with the Reichstag *in forming a* Zollparlament*. They concurrently sent ministers to join with the* Bundesrat *in a* Zollbundesrat*. These authorities had a legal status comparable to that of certain supra-national organisations which emerged a century later.*

44. The Franco-Prussian War provided the opportunity for a decisive rapprochement. Under a series of treaties concluded in Versailles in autumn 1870 between the Confederation and each of the four southern States (the "November Treaties") it was agreed that the latter, which had successfully fought alongside the German army, would accede to the Federal Constitution in return for a number of modifications and various concessions to them. These constituent treaties were ratified in December by all the parties (except Bavaria, which delayed somewhat) and came into force on 1 January 1871. They served as the basis for establishing the concept of a German Empire, the title of Emperor conferred upon the King of Prussia, and also the election of a new Reichstag. *It was these new authorities which on 17 April 1871 adopted the Constitution of the Second Reich. This Constitution, however, was nothing more than the 1867 Constitution extended to the whole of Germany and transformed into an Imperial Constitution.*

IV. <u>The Swiss Confederation (1815-1848)</u>

45. Like the German States, after the Napoleonic Wars the Swiss Cantons set up a confederal structure. To be more precise, they reverted to the confederal structure which they had had before 1798 and which the French military invasion had suddenly interrupted. However, as in Germany, the old structure was too loose and complex to provide any useful basis for study here.

46. Switzerland owes two unique innovations to the period of French rule.

Firstly, the legal inequality which had prevailed among the parties to the old Confederation was replaced by strict equality: the new Switzerland only had cantons, all of which were equal (with the exception, which we shall not go into here, of the "half-cantons").

Secondly, whereas the old Confederation had been mainly German-speaking, the new Switzerland was

multilingual: the Alemannic cantons were joined by a number of French-speaking cantons and one Italian-speaking canton.

47. On 7 August 1815, the twenty-two Swiss cantons (twenty cantons and four "half-cantons") concluded a "Confederate Pact" ("Pacte fédéral" or Bundesvertrag*) with a view to defending their freedom and independence against any attack from abroad and maintaining order and peace at home (Article 1).*

48. The joint authority was a Diet, or Tagsatzung*, which was a periodical (generally annual) conference in which each canton, whatever its size, had one vote (Article 8). In principle, decisions were taken by a simple majority, those regarding war and peace by a three-quarters majority, and those on other important matters by a two-thirds majority (Articles 8 and 9). Between sessions, business was conducted by the Government of one of the three "steering" cantons, Zurich, Bern and Lucerne, which took on this duty on a two-year rota basis (Article 10).*

49. The Confederation had few powers and no specific financial resources. It had no direct legislative powers and confined itself to adopting recommendations. In the military field, however, the Diet created a supervisory authority whose regulations were directly applicable to the army. Yet the cantons were in general highly jealous of their own sovereignty. They organised and legislated as they pleased, considered themselves, in their mutual relations, almost like foreign States, and did not even grant freedom of movement to the nationals of the confederate cantons.

50. The history of the Confederate Pact breaks down into two periods virtually equal in length: the Restoration era from 1815 to 1830, and the Regeneration era from 1830 to 1848.

During the first period most of the cantons had reverted to the oligarchical, inegalitarian practices which had been interrupted by the French Revolution.

The second period began just after the Paris Revolution of July 1830, which led to the fall of the Bourbons.

51. The Regeneration period was primarily characterised by the liberal/radical and democratic reform of the cantons' internal institutions: separation of powers, extension of the vote, development of the first instruments of direct democracy, and guaranteed freedom of the press. Most of the industrial and protestant cantons thus drew up new Constitutions.

However, the "regenerate" cantons very soon turned their attention to the 1815 Pact.

52. They had two main quarrels with the Pact. It ignored the Swiss national concept and it gave the "unregenerate" cantons the right to govern themselves as they wished, without imposing a minimum standard of democracy and respect for fundamental rights. So a first attempt was made in 1832 to subject the Pact to a "complete" revision, which would have turned it into a constitution. To this end the Diet even set up a special commission, which produced a draft. However, this venture was premature: the draft met with resistance from several cantons, even from some "regenerate" ones (1833). For many years thereafter the Diet could not secure a majority for a renewed attempt.

*53. From 1840 onwards the opposition between "regenerate" and "unregenerate" cantons was coupled with a denominational conflict. The closure of certain convents, decreed by the Parliament of the canton of Aargau (radical), and the recall of the Jesuits by the Government of the Canton of Lucerne (conservative) added fuel to the flames. The confederal bond itself was now under threat. Small bands of radical soldiers made armed forays into Lucerne. In response, seven catholic cantons formed a special military alliance (*Sonderbund*) with the tacit approval of a few other conservative cantons. This alliance was obviously incompatible with the obligations arising out of the 1815 Pact (see Article 6).*

54. In order to counter the Sonderbund*, the "regenerate" cantons had to seek a majority in the Diet, i.e. twelve votes. In 1845, after a certain fall-off in votes, they were left with only nine. However, the Jesuit affair and the separate alliance had stirred feelings. Two radical revolutions in the cantons of Vaud and Geneva gave them two extra votes. By 1847 they therefore had eleven votes. That spring, interest centred on the elections to be held in the canton of St Gall. The outgoing Parliament, with seventy-five conservatives and seventy-five liberals and radicals, had reached deadlock; it was therefore unable to give instructions to the canton's representative in the Diet. The May elections produced seventy-seven liberals and radicals against seventy-three conservatives: the political deadlock was broken and the "regenerate" party in the Diet gained its twelfth vote.*

55. The session opened in July and the Diet, with its twelve guaranteed votes, quickly took three decisions: the expulsion of the Jesuits, the dissolution of the Sonderbund *and the setting up of a new commission responsible for preparing a new draft revision of the 1815 Contract.*

The Jesuits left Switzerland in autumn, and the decision on the Sonderbund *was militarily enforced in November, in a short civil war which was easily won by the troops of the "regenerate" cantons.*

56. The revision commission began its work on 16 February 1848. Curiously enough, several conservative cantons agreed to be represented on the commission. The 24 February Revolution in Paris soon inspired the reformists with additional courage. On 8 April the commission had completed its task and presented the Diet with a draft Constitution for a genuine Federal State.

The draft introduced a Federal Parliament (Federal Assembly) on the model of the United States Congress, with a people's chamber in which the cantons had a

share of the seats proportional to their population (National Council) and a chamber of the cantons, modelled on the Senate, in which each canton had two representatives (Council of States). The members of both chambers would vote without instructions. The Federal Assembly would elect a Collegial Government whose members would be equal in rank and have no overall head (Federal Council). The federal legislature could pass laws directly binding on the population in the fields attributed to it by the Constitution.

57. The Diet began considering the draft on the following 15 May, after the cantons had read it and instructed their representatives on the positions they should adopt. However, the discussions proved very brief, producing very few amendments to the commission's text. The Diet adopted the new Federal Constitution on 27 June 1848 by thirteen votes to three, with four abstentions and the cancellation of four "half-votes" of four "half-cantons" because of discrepancies.

58. The ensuing events are vital for an appraisal of the inherent legitimacy of the Constitution.

The transitional provisions of the Constitution provided that the cantons would pronounce on the acceptance of the text according to the forms prescribed in their own Constitutions or, in the absence of constitutional rules, in the manner prescribed by the canton's supreme authority; the Diet would decide from the outcome of this procedure whether or not the new Federal Constitution had been accepted.

59. All the cantons but one decided by referendum or (in the smaller ones) by Landsgemeinde. *One canton reached its decision by a parliamentary vote. Fifteen and a half cantons accepted the Constitution and six and a half rejected it.*

60. The Diet held its historic last meeting in Bern on 4 September. Theoretically, the situation was rather uncomfortable. The 1815 Pact contained no rules regarding its own revision, but the general principles of

law indicated fairly plainly that a treaty like the 1815 one could only be modified with the agreement of all the parties. The writers of the Constitution had not even taken the American precaution (see paragraph 18 above) of stipulating that this Constitution would only replace the Pact in respect of cantons which accepted it.

The Diet decided to press on regardless. It deemed that the Constitution had met with a satisfactory degree of acceptance and stressed in particular that six sevenths of the total Swiss population lived in the cantons which had approved it; the minority cantons would simply have to fall into line.
This decision was taken by seventeen votes, with five abstentions. Thus the Constitution was promulgated, and came into force, on 12 September 1848.

61. All the cantons were immediately invited to elect their deputies to the two chambers of the new Parliament. The decisive factor in my view was that all the cantons, including those which had rejected the new Constitution, actually organised elections; and all the deputies met in Bern on 6 November 1848 for the constituent session. It is therefore fair to say that all the cantons finally agreed to the transformation of the Confederation of States into a Federal State, even if some only did so tacitly, by their subsequent behaviour.

When the Federal Assembly had elected the Federal Council on 16 November 1848, the Pact of 7 August 1815 was deemed to be repealed, in accordance with the last transitional provision of the Constitution.

62. Terminological note: the Swiss Federal State set up in 1848 bears the official French title of Confédération suisse. *This should not be considered ambiguous - though it often is (in fact the same could be said of Germany in 1867, see paragraph 40 above). In this case the French word* confédération *is a translation of the German word* Eidgenossenschaft, *not* Staatenbund. *In other words, the apparent ambiguity*

exists only in French and Italian[2]*, not in German. It is due to a certain "weakness" in the two Romance languages, which use the same word to designate a specific legal structure, the* Staatenbund*, and also the purely political concept of* Eidgenossenschaft*, which is intimately linked to the history of German-speaking Switzerland.*

V. Conclusion

63. The three historical phenomena which we have outlined have something in common. In all three cases a confederation of States was transformed, by a process of concentration, into a federal State. I mean a federal, not a unitarian, State, because the members of the extinct confederation did not lose all the characteristics of the States they had previously been, but in fact maintained a fairly strong legal position.

64. This common feature of the transformation is explainable (alongside economic reasons, which would probably have been insufficient on their own) by the existence of a national idea. In all three cases this national idea acted as a centripetal force. In the cases of the United States and Germany it can be explained by the fact of a common language; where German nationalism was concerned, the reason why Austria did not wish to join but, on the contrary, strove to oppose it was that it was itself a heterogeneous entity. The national idea is less natural in the case of Switzerland; it is, in a manner of speaking, more "voluntaristic", originating from the historical experiences which the cantons had gone through, particularly at the time of the French Revolution and the Napoleonic Wars.

65. However, beyond this common feature, the mode of transformation was profoundly different in the three countries. It was in the United States that the change occurred most lawfully and peacefully; and even then we have seen that the rules for the revision of the 1777

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2 And in English (Translator's note).

Articles were not strictly complied with (see paragraph 18 above). In Germany in 1848-1849 the transformation could also have occurred, if not lawfully then at least peacefully, if the liberal and democratic spirit had been more widespread among the people and the authorities. In the end, unification occurred through violence ("through iron and blood", as Bismarck had announced in 1862), i.e. through intimidation, warfare and annexations, the whole situation eventually being regularised by conventions and the unanimous acceptance of the Constitutions of 1867 and 1871. Switzerland comes somewhere between the other two: as it had no hegemonic military power it did not experience as much brutality as its northern neighbour; however, since it was politically absolutely impossible to achieve unanimity, a majority had to impose its will on the minority.

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SECOND WORKING SESSION

Chaired by Mr Michael TRIANTAFYLLIDES

Conceptual Aspects

a. The classical notions of a confederation and of a federal State
Report by Professor Giorgio MALINVERNI

b. The modern concept of confederation
Report by Senator Gérald-A. BEAUDOIN

c. Towards a new concept of confederation
Report by Professor Murray FORSYTH

d. A new concept of confederation
Intervention by Mr Maarten Theo JANS

a. The classical notions of a confederation and of a federal state - Report by Professor Giorgio MALINVERNI

University of Geneva

The problem of the legal nature of the new forms of interstate co-operation, which are the subject of this seminar and which have provisionally been given a very general and convenient name-tag, viz "modern confederations" (CIS, Bosnia-Herzegovina/Croatia, European Union) boils down to a choice between two alternatives: Are these new types of international co-operation conventional or, on the contrary, do they comprise characteristics which set them apart from the traditional types of union between states encountered up to now?

If this issue is settled by opting for the first alternative, there remains the open question of what traditional type of union of states should be taken to cover these new forms of co-operation (confederation or federal state). On the other hand, if the second alternative is selected, it is necessary to show what new features are characteristic of these new forms of co-operation.

Opinions are obviously divided on this question. Indeed, they seem to be divided on the most important points, particularly with regard to the legal nature of the European Union. Disputes among legal writers have been particularly frequent in Germany in recent times, following the adoption on 21 December 1992 of the new Article 23 of the Basic Law, and in France following the adoption of Constitutional Law No. 92-554 of 25 June 1992, which paved the way for two important decisions by the Constitutional Council (Maastricht 1 and Maastricht 2).

It is therefore essential to undertake a brief review of the classical and traditional forms of co-operation between states. With this in mind, it would be worthwhile to define the two conventional concepts of confederation and federal state, as I have been asked to do by the organisers of this seminar, for two reasons in particular.

The first reason is that, as was said above, especially in connection with the European Union, legal theory is currently dominated by two main tendencies, one of which places the Union in the category of confederations of states (or conventional international organisations), while the other assigns to it a federal character. For a proper grasp of the problem, therefore, it is essential to have as clear a picture as possible of these two notions.

The need for clarification becomes all the more acute when it is observed that legal commentators use vague and sometimes even equivocal or ambiguous terms, such as relative sovereignty, partial federation, organisation with a federal-type structure, etc, terms whose real legal scope is ultimately beyond our comprehension.

Secondly, the definition of these conventional notions appears to be necessary in order to bring out more clearly, by means of comparison, the specific characteristics of what we have provisionally called the new types of confederation.

In the second part of this seminar, my colleagues will analyse the institutional structure of the CIS, the European Union and other contemporary forms of interstate co-operation. Once the basic concepts have been defined and consideration has been given to the structural aspects of these new forms of co-operation, we shall perhaps be in a position to explain their legal nature.

Let us start, therefore, with an examination of the essential characteristics of the two best known forms of federalism, namely the confederation of states and the federal state.

1. Definition

Before it is ventured to give definitions of the expressions "confederation of states" and "federal state", it should be noted that such definitions are restricted by the force of circumstances to the

highlighting of common features, analogies and similarities between these two types of groupings. Indeed, never in history have there been two identical confederations, just as in modern times no two federal states are identical. The definitions are therefore necessarily general and approximative, since each political structure has individual characteristics distinguishing it from other structures, although they belong to the same family.

a. A confederation may be defined as a lasting union, based on a public international law agreement, between two or more states which retain their sovereignty and their legal equality and which propose to achieve common internal and external goals by means of their union. The newly established entity does not therefore supersede the states in question, but has its own permanent organs distinct from those of the latter. For this reason, a confederation possesses international legal personality.
On the other hand, a federal state is a complex entity which incorporates existing states, known as federated states, in a new state-type structure, based on a constitution. The federated states retain the characteristics of states (territory, population, political organisation), but forfeit the essential attribute of statehood, namely sovereignty.

b. One of the most important characteristics of a confederation, therefore, is the fact that its constituent units are genuine states within the meaning of international law. This characteristic emerges quite clearly from the most recent example of a confederation, the proposed union between the federation of Bosnia-Herzegovina and the Republic of Croatia, provided for in the agreement of 18 March 1994. Article 2 of that agreement provides that "the establishment of the Confederation shall not change the <u>international identity</u> or <u>legal personality</u> of Croatia or of the Federation (of Bosnia and Herzegovina)". Article II of the Articles of Confederation of the United States had already provided that the states should retain their independence and their

sovereignty as well as all powers which were not expressly delegated to the confederation.

In contrast, a federal state is not a mere union of states, since the constituent communities are not sovereign states from the standpoint of international law. Only the federal state itself, that is to say the global entity, takes the form of a state. The federated entities are not states, as their powers are derived from the federal constitution rather than from international law. This situation gives rise to a process in which the member states lose their identity as states and the federation acquires statehood. This crucial distinction is found in the terminology of the German literature, which contrasts the ideas of Staatenbund *and* Bundesstaat.

c. A confederation is therefore a system of co-ordinated sovereign powers, while a federation is a system of integrated sovereign powers. The structure of the federal state comprises two distinct but interlocking societies. The federal constitutional order is therefore not one of mere aggregation, as in the case of the confederal order. It is not just a question of superimposing the federal state on the federated states; there has to be co-penetration and participation.

d. Unlike a federal state, which may be the result of an association of states (associative federalism) or of the decentralisation of an existing unitary state (dissociative federalism), a confederation can only be the upshot of associative tendencies. Indeed, at the outset, the constituent states must necessarily be independent and sovereign entities, and they will moreover remain so after the entry into force of the treaty setting up the confederation. A confederation in which the component entities have been given their powers by a higher authority is hardly conceivable. This point is illustrated by the recent example of the Commonwealth of Independent States (CIS) - assuming that this organisation qualifies as a confederation, given the extremely weak and tenuous links between its members. At the time when the USSR was dismantled, each of its component federated states became a fully sovereign

state recognised as having international legal personality. It was only subsequently that most of them agreed to be united in a confederal relationship.

2. International legal personality

While the confederation itself is not a state, it forms a distinct political aggregate within the international community and its personality is different from that of its component states. However, the latter retain their international legal personality. The international personality enjoyed by confederations makes it possible inter alia *to distinguish them from mere alliances, although this personality is not as comprehensive as that of states. As in the case of international organisations, it is a functional personality, meaning that its purpose is to enable confederations to perform the international tasks entrusted to them under the terms of the treaty establishing them.*

In the case of a federal state, its international personality is of course implicitly indivisible. Only the central government enjoys such personality. It is forfeited by the federated states in the interest of the new federal structure. As a consequence of the loss of international personality by the federated states, unlawful acts committed by the individual member states can only be imputed to the federal state. It alone can be held to bear international liability.

3. Legal foundation

a. A confederation is based on an international treaty, albeit a particular kind of treaty different from the traditional treaties which serve to bolster international relations between states. Indeed, apart from creating rights and obligations for the contracting parties, it establishes a new political entity, the confederation. This treaty is therefore assigned quasi-constitutional functions. From this point of view, a confederation hardly differs from an international organisation. The distinction between them lies solely in

the scope of the powers they are allotted, those of a confederation being broader as a rule.

b. Relations between the member states of a confederation are governed by the rules specific to the founding treaty. On the other hand relations between a member state of a confederation and states outside the confederation are governed by general international law. The same is true of relations between the confederation itself and outside states.

c. The treaty-based legal nature of a confederation means that the confederated states may in theory break away by denouncing the treaty. In the confederation of the southern states (1861-1865), secession even replaced the unanimity rule. The pact could be revised by a special majority of two-thirds but it could also be denounced by the minority states.

In practice, however, treaties establishing a confederation are not so easily amenable to unilateral denunciation as are ordinary international treaties. In the eyes of its founders, a confederation is usually an enduring political institution. For instance, Article 7 of the agreement of 18 March 1994 between Croatia and Bosnia-Herzegovina rules out unilateral denunciation, in as much as it provides that it should remain in force "until otherwise agreed by the Parties". The text establishing the German Confederation stated that it was perpetual and indissoluble and denied its members the right of secession (Article 1 of the Act of 1815).

d. In a federal state, on the other hand, reliance is placed on a constitution, and the relations between the central government and the federated communities are no longer international relations but relations based on internal public law. From the standpoint of international law, the federal state is regarded as a state and is indistinguishable from a unitary state.

The question which then arises is that of the distinction between the member communities of federal states and the administrative subdivisions of unitary states. That is

a subject, however, which lies outside the purview of this contribution.

While the establishment of a federal state is in every instance the result of a unilateral act, namely the adoption of a federal constitution, a confederation is established on the basis of a simple agreement.

4. Status of component communities

A fairly simple way of distinguishing between confederations of states and federal states is to compare the status of their component communities.

Sovereignty was taken as the distinguishing criterion in traditional theory. The member states of a confederation remain sovereign, while in a federal state only the central government is sovereign, not the federated states.

Nowadays the theory of sovereignty has been replaced by that of international immediacy. Unlike the member states of a confederation, the communities which form a federal state are not directly governed by the rules of international law. Only the federal state itself is so governed. This theory serves to explain why federated states sometimes have international responsibilities assigned to them by the federal constitution, although they are not genuine states. Indeed, federated states do not derive their powers directly from the rules of international law, even in the rare cases where they have responsibilities in the international arena.

5. Organs

A confederation differs from a mere alliance, being more akin to an international organisation on account of its permanent bodies with their varying degrees of responsibility.

a. The organs proper to a confederation are nevertheless kept to a bare minimum: the core institution is invariably a deliberative assembly, in the form of a

sort of diplomatic conference with members appointed by the governments of states who normally follow the instructions of the latter.

This assembly frequently goes by the name of a Parliament or Diet (Confederation of the Rhine, German Confederation, Swiss Confederation). Other names are sometimes used: Congress, States General (United Provinces).

For example, the agreement establishing a confederation between Bosnia-Herzegovina and the Republic of Croatia, dated 18 March 1994, sets up as its only organ "a confederative Council in order to co-ordinate their policies and activities within the Confederation" (Article 3).

b. The Diet, which is usually composed of the plenipotentiaries of governments, conforms to the rule of equal voting rights (one vote for each member State), regardless of the size or importance of the individual states represented. The agreement establishing a confederation between Croatia and Bosnia-Herzegovina is illustrative in this connection, since it provides that "each Party shall have an equal number of members on the Council. Decisions of the Council shall require the approval of a majority of the members from each Party". Article V of the Articles of Confederation of the United States provided that the powers of the confederation should be exercised by the Congress, in which each state had one vote. Similarly, in the Diet of the Swiss Confederation, each canton, large or small, had one vote (Article 8 of the Pact of 1815).

The equality rule is only rarely waived. In the body known as the plenary Diet of the German Confederation (1815-1866), small principalities had one vote, but the large states had several (four for Austria, Bavaria, Hanover, Prussia, Saxony and Württemberg; three for Baden, Hesse, Holstein and Luxembourg; two for Brunswick, Mecklenburg and Nassau. In the body known as the Engerer Rat *(Inner Council), the large states each had one vote while the small states had to*

join forces in order to cast a single vote (six votes in all for 30 states).

c. As it is not a state, a confederation has no capital. Diets function under the rotating presidency of the different member states in some cases (eg United Provinces), under the presidency of some of them in other cases (Swiss Confederation, where the three "leading" cantons of Zurich, Bern and Lucerne succeeded one another every two years; Article 10 of the 1815 Pact), or again under the permanent presidency of one of the states (Austria in the German Confederation, although the confederal authorities had their seat in Frankfurt).

d. The organs responsible for exercising the powers of a federal state are more numerous than in the case of a confederation and less dependent on the communities which form the state. Indeed, every federal state, as in the case of unitary states, is found to have central institutions which exercise three sets of powers, those of the legislature, the executive and the judiciary. The federal state therefore possesses a superior organisational system, with its own organs, which reflects the rule of superimposition to the benefit of the federal authorities.

6. Powers

6.1 Scope

a. In a confederation, each of the confederated states retains its sovereignty in both internal and external affairs, subject to the restrictions inherent in the pact itself. In other words, the members of the confederation possess all the powers normally associated with a state, which are not taken away from them by the treaty establishing the confederation.

If confederation is defined as an expression of federalism and of the two fundamental principles of federalism, namely superimposition and autonomy, it can be said that, as a rule, the confederal system places

emphasis on autonomy rather than superimposition. Indeed, confederations allow their member states a considerable margin of autonomy.

Such autonomy is exercised in the constitutional field in particular, although general guidelines may be laid down in some cases. For example, Article 13 of the Act of 8 June 1815 provided for the constitution of assemblies of states in all the states of the German Confederation; in the United Provinces, the maintenance of Protestantism as the state religion came within the purview of the confederation itself.

b. In the case of a federal state, the federated entities also possess the right to organise themselves freely, within the limits laid down by federal law. This is moreover the characteristic which distinguishes them from the administrative districts of a unitary state, even if the latter is decentralised. Without such autonomy, the federated entities would not enjoy statehood and there would be no difference between a federal state and a unitary state.

Federal decentralisation is not only applicable to legislation, but also extends to the constitutional field. Unlike the situation in a confederation, however, the constitutional regulations of a federal state may impose restrictions on the self-organising powers of the federated states in such important areas as the form of the state, the number and composition of state organs, conditions of suffrage etc.

c. In the case of confederations, the apportionment of responsibilities usually operates to the benefit of the member states in the field of domestic affairs, but to the benefit of the confederation as a whole in the field of international affairs. This is because the confederation is seen as a political unit with regard to external affairs. For example, Article III of the Articles of Confederation of the United States provided that the purpose of the association was the joint defence of its members and Article VI considerably limited the capacity of the states to conclude treaties. Article 2 of the Act of 1815

provided that the purpose of the German Confederation was to maintain the internal and external security of Germany and the independence and inviolability of its component states. Under the terms of Article 1 of the Federal Pact of 1815, the purpose of the Swiss Confederation was to maintain the freedom and independence of the cantons against any attack that might come from abroad and to preserve domestic order and tranquillity.

Historically, treaties establishing confederations have thus always limited the right of member states to declare war. This right disappeared in the relations between the same states. In the German Confederation, for example, this right was limited to the possessions of the member states outside the confederation. In the case of Switzerland, Article 6 of the Federal Pact forbade any special military alliance between the cantons.

More generally speaking, the powers of confederated states in the field of international relations were limited. Their authority to enter into international treaties was restricted, especially with regard to armistices and peace treaties (see, for instance, Article XI of the Articles of Confederation of the United States).

In the field of diplomatic relations, the confederation and its member states sometimes exercised concurrent jurisdiction, inasmuch as the latter retained the right to send and receive diplomatic missions, and the confederation also possessed this right. However, under the legislation of the Confederation of the United States, the right to send and receive legations was assigned to the confederation itself and could be exercised by member states only with the special authorisation of Congress. The German Confederation and the Swiss Confederation controlled their own international trade arrangements.

d. To sum up, therefore, it can be said that both confederations and federal states apply the two well-known principles of autonomy and participation, but

that the implications of both these principles are stretched in opposite directions.

6.2 Method of attribution

The most clear-cut difference between confederations and federal states lies not so much in the scope of their powers and their respective areas of jurisdiction as in the method of assigning powers.

a. In a confederation, new powers may be assigned to the confederal authorities only by means of a revision of the founding treaty, which as a rule calls for the agreement of all the contracting parties. New responsibilities may be assigned to the confederation only on the basis of a decision adopted unanimously, or in some cases by a special majority, as was the case in the Confederation of the United States, where amendments to the provisions of the Pact were adopted by a special majority of nine votes out of thirteen.

In a federal state, on the other hand, the central government enjoys what is conventionally known as authority to decide questions of jurisdiction, i.e. the right to extend the sphere of its own powers at the expense of the federated states, either by amendments to its own constitution or by the adoption of federal laws. Separately, therefore, the federated states cannot oppose the extension of the sphere of jurisdiction of the central government. The constitution may be revised by a simple or special majority vote, against the wishes of certain federated states.

This is a major difference since, as we have seen, the confederation cannot determine the scope of its own powers independently of the wishes of all its members.

b. In other words, the member states of a confederation reject the possibility of any change in their internal system of government without the approval of their own constituent organs. In a federal state, on the other hand, the same member states accept their lack of individual ability to prevent or escape compliance with such changes. Accordingly, it may be said that a

federated state takes a step into uncharted territory by accepting the risk that changes to its legal system may be introduced against its better judgment, pursuant to a simple majority rule. The federal system is therefore characterised by the possibility of a unilateral revision of its statutes.

7. Decision-making process

In a confederation, the principle of equality between member states usually entails the rule that decisions should be taken unanimously. In some cases, moreover, the deliberations of parliament do not produce executive decisions but mere projects which become final only after ratification by member states.

However, unanimity is not required in all cases but only, as a rule, in respect of important decisions, particularly such as concern revision of the founding treaty or the accession of new members. Decisions in other fields are usually taken by a majority vote, since otherwise the work of the confederal organs would be in too much danger of paralysis. For example, the Articles of Confederation of the United States provided that ordinary decisions should be taken by a simple majority and more important ones by a special majority of two-thirds, while the articles themselves could be revised only with the approval of the parliaments of all the states (Articles IX, X and XIII). The decisions of the Council of the German Confederation were taken by a simple majority, those concerning war and peace by a majority of two-thirds, while those relating to the admission of new members and the revision of treaties required a unanimous vote (Article 7 of the Act of 1815 and Articles 12 and 13 of the 1820 Act). Articles 8 and 9 of the Swiss Federal Pact of 1815 provided that decisions should in principle be taken by simple majority, but that a majority of three-quarters was required in matters of war and peace.

On the other hand, the decisions of federal states may be taken without the agreement of the federated entities, although the latter have some sort of say in the shaping

of federal will, for example through one of the Houses of Parliament or in the context of constitutional reviews. It is in the latter field in particular that the so-called participation principle is given expression.

In the United States for instance, proposals for a revision of the constitution may be initiated either by Congress or by a majority of two-thirds of the member states, and the amendments adopted may enter into force only after approval by the parliaments of three-quarters of the member states. In Switzerland, any revision of the constitution requires two majority votes, by the electorate and by the cantons.

The participation principle is essential to the workings of a federal state. There can be no genuine federalism unless the associated communities have a hand, through their representatives, in the establishment of federal organs and the elaboration of their decisions.

8. Law-making power

a. Confederations possess no real law-making power. The Diet or parliament may only take the measures provided for in the founding treaty and confederal legislation is not directly applicable to individuals as a rule. By way of example, the Congress of the Confederation of the United States had no direct law-making powers in respect of individuals. Its decisions were binding only on the states, not their inhabitants. The German Confederation adopted some laws, but this was done on the basis of agreements between the states. The Swiss Confederation had no direct law-making powers either. The confederal system is further characterised by a lack of sovereign authority: no restraining influence can be exerted on the sovereign powers of the member states.

Unlike conventional international organisations, confederations were nevertheless entitled to adopt rules binding on their member states, rather than mere recommendations. In some fields specified in the founding treaty, they had the power to conclude

international treaties which were binding on their member states.

b. Federal states, on the other hand, like ordinary states, have genuine law-making powers. As a consequence of the superiority of the central state authority over the federated entities, federal law takes precedence over the law of the federated states: Bundesrecht bricht Landesrecht.

c. In federal states, unlike confederations, conflicts of jurisdiction between the central government and the federated entities are settled by a federal judicial body, and the federal authorities are empowered to secure compliance with the rules which they prescribe.

9. Territory and population

Confederations have no territory of their own and their subjects are their component states, excluding the individuals who reside in those states. There is no common confederal nationality even though, in some cases in the past, the nationals of member states were able to enjoy certain advantages within the confederation. For example, Article IV of the Articles of Confederation of the United States guaranteed freedom of movement for the citizens of each state. In principle, citizens come under the authority and jurisdiction of a single state. No legislation or judicial authority extends to the entire population of the confederation. The governments of the confederated states are thus necessary intermediaries for confederal action.

In the case of a federal state, by way of contrast, the territory and population of the federated entities are defined as federal territory and federal population within the spheres of responsibility assigned to the central government. Accordingly, the central government is entitled to exercise direct control over the territory and citizens of the federated states. The territory and subjects of a federal state thus come under dual state authority. This means that the federal state deals directly with individuals, whereas a confederation

normally does not. While some federal states provide for only one nationality, others also recognise the nationality of individual federated states. In any event, there is uniformity of nationality in both cases.

10. Finance

The weakness of confederations is reflected in their budgets. Rarely do they have direct access to resources of their own. In a federal state, on the other hand, federal taxes supplement the taxes of the federated states.

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b. The modern concept of confederation - Report by Gérald-A. BEAUDOIN

Senator and Professor (Canada)

As the twentieth century draws to a close, there is a great deal of talk of "federation" and "confederation", terms that have been around for centuries. Some people think they are interchangeable, while others appear to want to muddle them deliberately and many do not know what really distinguishes one from the other.

According to K. C. Wheare in Federal Government[3]*, a federal State is a country where powers or legislative functions are shared between two levels of government, whose action is co-ordinated though each is sovereign in its respective sphere. A confederation, on the other hand, is an association of independent countries united by a treaty or a pact for specific purposes.*

Some hold that a decentralised federation, a loose federation, is a confederation. This is not a sound way of looking at things.

There is more than a question of degree between "federation" and "confederation". A substantive distinction is to be drawn.

Marcel Prélot gives the following definition of confederation:

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3 K.C. WHEARE, Federal Government, 4th ed., Oxford University Press, New York, 1963, p. 10.

> *The confederation, in the strict sense of the term, is, then, a durable aggregate of States whose members, having common general and even vital objectives, such as security and peace, are bound by permanent undertakings and possess inter-state executive and representative bodies*[4].

Professor Jacques Brossard writes that "member States of confederations retain their full external and domestic sovereignty, but delegate the performance of certain functions to a central body"[5].
In the words of Professor Maurice Duverger:

> *"The traditional distinction between 'federation' and 'confederation' is axiomatic in this respect. The authorities installed at the head of a federation have real power of government over member States; the federation itself forms a super-State* vis-à-vis *the member States. Conversely, co-ordination bodies alone exist at the head of a confederation, with no real powers of decision; authority remains with the confederated States. Consequently unanimity is required for confederal body decisions, whereas a simple majority suffices for those of federal bodies."*[6]

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4 M. PRÉLOT and J. BOULOUIS, Institutions Politiques et droits constitutionnels, 6th edition, Dalloz, Paris, 1975, p. 274.

5 J. BROSSARD, L'immigration: les droits et pouvoirs du Canada et du Québec, PUM., MONTREAL, 1967, p. 39, NOTE K.

6 M. DUVERGER, Institutions politiques et droit constitutionnel, 11th Edition, PUF, Paris 1970, p. 40.

In its second report, entitled Coming to terms[7]*, published on 4 February 1979, the Task Force on Canadian Unity brought out the distinctive traits of a confederation and those of a federation, not hesitating to class Canada among the federations.*

The report contains a list of seven elements which are characteristic of a federation:

a. *Two orders of government existing in their own right under the Constitution and each acting directly upon the same citizens;*

b. *A central government directly elected by the electorate of the whole federation and exercising its authority directly by legislation and taxation upon the country as a whole;*

c. *Regional governments elected by the region and acting directly through laws and taxes;*

d. *A distribution of legislative and executive authority and of sources of revenue between the two orders of government;*

e. *A written constitution that cannot be unilaterally amended;*

f. *An arbiter regulating disputes over the division of power;*

g. *Mechanisms for interaction between the governments*[8].

The report illustrates the main features of a confederation:

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7 TASK FORCE ON CANADIAN UNITY, Coming to terms: The Words of the Debate, Supply and Services Canada, 1979, 111 p.

8 Ibid, p. 24.

"Generalizing from these examples, a confederation may be described as an association in which sovereign States are joined together by a pact or treaty of international law, or a constitution, in which they delegate specific limited authority, especially in matters of foreign affairs (defence and diplomacy), to a central agency. It may be called a 'diet', 'assembly', 'council' or 'congress' and its members are usually mandated delegates appointed by the member States (a delegate has less independent authority than an elected representative as the delegate must carry out the instructions of the government that appoints him).

Membership in the central organisation is normally on the basis of equality for the constituent states; decisions usually require unanimity, at least in important matters, and are generally implemented by the member states themselves.

The central agency having no direct authority over citizens and acting upon citizens through the constituent state governments, is usually supported financially by 'contributions' and militarily by 'contingents' from the member states.

Usually there is also in the treaty or constitution creating the confederation a formal agreement on the part of the member states renouncing the right to go to war against each other, assuming the obligations of collective security with respect to each other, and agreeing to the arbitration of their conflicts[9]*."*

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9 Ibid, p. 25-26.

In the light of the above principles, Canada is clearly a fully fledged federation and not a confederation. In 1864, of course, it was termed a confederation and the term has stuck. Dorion, the leader of the opposition in Canada in 1864, would have preferred a real confederation, but John A. Macdonald and Georges-Étienne Cartier established what was without a doubt a federation. But it was a compromise. At the outset, Macdonald was clearly a centraliser, speaking of provinces as solemn municipalities, while Cartier was markedly more autonomist. The judicial committee of the Privy Council from 1882 to 1949 foiled Macdonald's plans and produced balanced federalism[10].

Although the word "confederation" is to be found in the title of the Swiss Constitution, Switzerland is nevertheless a federation in the technical sense of the term. It has been a real federation since 1848.

Following the war of independence, the United States was a real confederation for a short period (1776-1787) but with little success. Since 1787, it has been a federation. James Madison and Alexander Hamilton were extremely influential in drafting the constitution. The federation has been tending towards centralisation for several decades, but the United States still constitute a federation which functions well.

Federalism is spread over the five continents. There are currently a good number of federations in the Americas: the United States, Canada and Mexico in the north, Brazil, Argentina and Venezuela in the south. As far as the Americas are concerned, Canada is currently the most decentralised federation. In Europe, Switzerland and Germany are federations, but they have already been confederations. Belgium has just introduced a federal system. The USSR and Yugoslavia have ceased to exist as being federations, although the Russian Republic remains a federal State. Austria has a federal

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10 G-A BEAUDOIN, La Constitution du Canada, Wilson-Lafleur, Montreal, 1990, p. 19.

system. India and Malaysia in Asia, and Australia in Oceania, are federal States. Federalism is rarer in Africa, with the exception of South Africa.

Many a time, the courts have declared that Canada is a federation. The preamble to the Canadian Constitution and the wording of Sections 91 to 95 leave not the slightest doubt[11]*. The courts and the judicial committee of the Privy Council have decentralised the Canadian Constitution*[12]*.*
Switzerland was a real confederation for centuries, notably from 1815 to 1848. Since 1848, it has been a true federation. The Constitution of 1848 was completely revised in 1874. The title of the Constitution - "Federal Constitution of the Swiss Confederation" - may be ambiguous, but it was the former Swiss Confederation which adopted a federal Constitution.

Viewed from the outside, the Common Market appears to be a confederal unit. Even if it seems to want to take on certain characteristics of a federal State, it can certainly not be said at this point that it constitutes a federation. In the view of Jacques Santer, president-in-office of the European Council in 1991, "The European Community is ... neither a federal State nor a confederation of States. It is a unique grouping which bears the hallmarks of both"[13]*.*

Does a modern concept of confederation exist? What is new today is that powers such as France and Germany and later the United Kingdom managed to create a "Community government" which approaches a confederation! It would be an innovation if the USSR, which disintegrated, could one day reappear in the form

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11 Ibid, p 19.

12 Id.

13 J. SANTER, "Quelques réflexions sur les principes de subsidiarité" in Subsidiarité: défi du changement (Record of the Jacques Delors colloquy, European Institute of Public Administration, 1991).

of a confederation. History has seen confederations, like Switzerland and the United States, become federations.

The difference in substance between the federation and confederation remains. It has not changed. Yet we talk more of "confederation" than "federation" at the moment, doubtless because of the Common Market and the 15 republics of the former USSR. Will we see federations break up and be revived in the form of "confederations"?

The European Community has devised a Community government. There is no doubt that this government has several features of a confederation, if not some (though not many yet, of course) of the federal system. Everything is in place, in embryo, for a confederation to be formed. The modern concept of confederation will probably emerge from Europe.

I can see no signs of it elsewhere for the time being. In the Americas, almost all federations have fairly centralised governments. Canada is a very special case; it is the most decentralised federation in the Americas. Will Canadian federalism manage to keep Quebec in the federation? There are currently many signs that it will.

Will there soon be a major debate in Canada on "federation" and "confederation"? It is not impossible. Indeed this is what supporters of Quebec's independence would like. At this stage, I would not say that a confederation is likely in Canada. If there is a referendum in Quebec in the next year or two, the subject will take centre stage again. You would need a crystal ball to say what will happen! The campaign for full sovereignty for Quebec is currently losing momentum among the people.

In the United States, the "Articles of Confederation" were proposed by Congress on 15 November 1777, ratified and brought into force on 1 March 1781. The present Federal Constitution was proposed by the Convention on 17 September 1787 and entered into force on 4 March 1789. The Confederation was short-

lived, the federation has lasted. It is now markedly centralised, which was not the case at the beginning.

There are instances of confederations that have lasted: Switzerland and Austria-Hungary (1867-1916). There is no reason why there should not be others in future.

K.C. Wheare wrote in Federal Government *that the modern concept of federalism comes from the United States. Where does the modern concept of confederation come from? From the Common Market? It is just about the only modern case that comes close to the confederal system. Thanks to the subsidiarity theory, this Common Market might well culminate in a confederative system. Who knows? The impact of multiculturalism in the world might well go hand in hand with the emergence of new confederations.*

We are in a era of major economic blocs - Europe, North America, and very soon Asia and other regions of the globe no doubt! These large blocs favour treaties, exchanges and trade, and perhaps, one day, in Europe for example, these large blocs will become more political. Confederations have come into being over the centuries, and many of them have been fleeting. But that does not mean to say that others will not emerge in the future, and will survive for longer.

There are more and more countries on the planet, with a multitude of languages and cultures. There is a trend towards emancipation, but there are also moves towards mergers. Many federal states have succeeded over the last two hundred years. Others have collapsed. Is the confederation more suited to today's needs than the federation? It is too early to say.
It seems to me that different types of confederation and federation are here to stay. Recourse will be made to one or the other depending on what is needed. No state is eternal. Civilisations are mortal, as Valéry said. The same is true of countries. None is eternal. It is a safe bet that the concepts of federation and confederation will last for centuries. They meet too many needs to disappear completely.

One thing is certain: federalism is always fluctuating between centralisation and decentralisation. The division of powers is less and less watertight. It varies from one federation to another, and even within a federal state depending on the historical era. Federalism is becoming increasingly complex and sophisticated. It is a living system which is constantly evolving.

Are confederations preferable? There is no ready-made answer. It all depends on the circumstances.

c. Towards a new concept of confederation - Report by Professor Murray FORSYTH

University of Leicester

The concept of confederation has enjoyed a certain revival in political debate in Europe - and elsewhere - in recent years. Confederation has been canvassed as the appropriate solution for a wide range of contemporary political problems, for example in the Middle East, in Cyprus, in the lands of the former Soviet Union, and in the Balkans. Voices have been raised in favour of confederation in South Africa, and some have argued that Canada will have to transform itself in a confederal direction. Confederation has also been proposed as the appropriate political form for a united Europe, and indeed it has been argued (by the present author, amongst others) that the European Union in its present form is, to all intents and purposes, a confederation.

This revival is all the more remarkable as confederations have traditionally been treated, in legal and political textbooks, as weak, ineffectual and transient or transitional forms of organisation, indeed as historical curiosities of little relevance to the modern world. What then is the source of the renewed appeal of confederation? Does this form of political organisation have a firm and coherent core - when all the historical

idiosyncrasies and the rhetoric have been stripped away - that is relevant to the modern world? What can confederations be expected to perform in the modern world? What are the preconditions of their effectiveness? What, finally, are their limitations? These are some of the questions which this paper will seek to address.

What is the appeal of confederation?

Like all political concepts confederation is a polemical term that has to be understood first in the context of the political struggle or contest in which it emerges. In the modern world the term tends to make its appearance in the political arena in alliance with two kinds of demand, one negative and one positive. First, the demand for confederation often represents the assertion by one or more politically organised units - states or provinces as potential states - that they no longer want to be linked with certain other political units in the form of a unitary state. It is a cry for a measure of real political independence or autonomy, and for an independent voice in the framing of any future political structures encompassing them. Indeed it is sometimes little more in practice than a veiled demand for complete independent statehood by previously non-independent political units. "We want henceforth to be treated by you as possessing all the rights of statehood!" That - expressed in extreme form - is one of the prominent political "arrière-pensées" of the demand for "confederation" in the modern world.

The second motive, which is usually less well articulated, is the demand by one or more political units, for a closer form of association with other units than that merely of "international relations". The units in this instance are not satisfied with a relationship of mere co-existence, they feel they have certain deep-rooted common interests vis-à-vis *the rest of the world which require institutional embodiment. They want a linkage that is more intimate, comprehensive, and lasting, than that created by specific,* ad hoc *or functional international treaties, or by membership of the same "international organisations". They want to constitute*

some form of union. This is the more positive political motive behind the demand for confederation in the modern world.

These two springs or motives for confederation do not of course exist in complete isolation from one another in the real world. As we shall see, the positive demand for confederation is often made precisely to counter or contain the negative demand for outright separation. The two demands are indeed incompatible only at the boundary or margin: confederation as complete independence is clearly incompatible with confederation as union.

This brief sketch of contemporary motives for confederation serves to illustrate an important general point, namely that confederations always point in two directions simultaneously: they imply a "yes" to some form of lasting union, and a "no" to the complete loss of the statehood of their members. Confederations do not, and cannot, emerge from an unreserved desire for independence, any more than from an unreserved desire for union. They represent an attempt to placate these two demands simultaneously. They are a "half-way house". This is their merit and their problem.

Let me now try and put some flesh and blood on the motives for confederation as a positive thing, as union. With some simplification, it is possible to distinguish two kinds of contemporary situation in which confederal union is advocated. The first one in which the attempt is made to try and effect a recombination, on a fresh and more acceptable, because looser, basis, of political units that have separated from one another, or are in danger of splitting apart from one another, because of mutually incompatible claims.

Here I am referring to situations in which there is deep distrust between the units based on their previous unhappy experiences of being joined together in a close - unitary or federal - political incorporation. Usually the root of the distrust is ethnic in the broad sense of the word. There are memories of ethnic discrimination, if

not of outright ethnic persecution under the old system. At the same time the units themselves, for all their mutual suspicions, are so intimately connected with one another, through history and geography, and perhaps even by some "ethnic" factors, and are sometimes so small and unviable, that outright, mutually agreed independence from one another is widely sensed to be an irrational final resolution of their differences. For these reasons the units - or at least some of the representatives and spokesmen - consider that they are obliged to work out some kind of modus vivendi *in which there is not simply a "peace treaty" embodying mutually recognised independence or secession, but something more - a peace treaty that establishes some form of loose political union based on equality of status. Hence the resort to the idea of confederation as a positive concept. It signifies in this instance an arrangement to re-establish some form of loose political union between partners highly sensitive of their rights and status, and profoundly wary of one another.*

Confederation in this guise can be seen as a side-product of contemporary movements for national self-determination, an attempt to temper and moderate and reconcile these movements in the name of rationality. The classic confederations of former times were <u>not</u> created for these reasons. The contemporary revival of confederation has been caused, in part at any rate, by a new historical challenge, namely the political disintegration caused by the pervasive appeal of the idea of national self-determination.

The second kind of situation is typified by the process of European integration, which has had such a reverberating impact on the rest of the world. Here one is not talking (or not talking primarily) of efforts to recombine a number of units which have had unhappy previous experiences of being yoked together in a tightly structured political unity, but of the effort by long independent states to enhance their welfare and security by combining together in the making and execution of certain key policies, without surrendering their statehood.

The contrast with earlier forms of confederation is marked in this instance by the relative strength of the economic motive and content of confederation, in keeping with the vast expansion of the economic factor in the world since the early nineteenth century. Confederations are today expected to act in highly complex areas of economic regulation unknown before the industrial revolution and the more recent technological revolution.

Why do long independent states engage in this kind of confederative enterprise? Stripped to the core, the motive is political - even if the content may appear primarily "economic". The drive to become powerful - economically and militarily - vis-à-vis *other states is as old as history. Large states, great powers, superpowers, whatever they are called, have always been the determinants of the overall structure and pattern of international politics and economics at a given time; small and medium-sized states have to adjust themselves to a framework and pattern which they can influence but not ultimately determine. By "framework" one means the deliberately defined rules of the game, and by "pattern" the more or less spontaneous configuration of leadership and dependency that shapes any international system. Great powers, as determinants of framework and pattern, are "freer" than other states, and it is primarily to secure the greater freedom of action characteristic of great powers, or at least to approach closer to that freedom, that other states strive to expand.*

In earlier times war, conquest and annexation were the classic modes of expansion. In the twentieth century the impact of two devastating world wars, the development of nuclear weapons, and the growth and tenacity of the idea of national self-determination, have made war, conquest and annexation far less practicable, acceptable and desirable as modes of expansion. Imperialism has long been on the retreat. Expansion through peaceful voluntary pacts and agreements, in a word by federal arrangements, has conversely increased its appeal, and

moved more towards the centre of world politics, as imperialism has retreated.

This second explanation of the current appeal of confederation has necessarily been very abstract. There may well be supplementary motives at work in the particular instance. For example, the aim of resolving the German problem has been present from the start in the drive to integrate Europe. But the broader political end is worth emphasising nonetheless. Too often it is papered over in the European context, and it is made to seem as if integration were merely a technical means to attain certain universal norms, for example a higher standard of living for individuals, or greater productivity. However, judged by this kind of yardstick, small states usually outshine large states. One does not have to be big to have a high per capita standard of living. It is not to achieve norms such as this, but rather to secure the size and strength to ensure that one can exercise a greater role in determining the framework and pattern of world trade and payments and security, and hence to be less dependent on the will of others - something that small states by definition cannot achieve, except through neutrality or the accident of geographical isolation - that confederation is primarily pursued.

Does confederation have a coherent core?

Having tried to describe and explain the contemporary appeal of the concept of confederation, it is time to turn to the more difficult task of examining its validity or coherence as a mode of achieving the ends it is currently intended to achieve. This I shall attempt to do by distinguishing and putting together what seem to me the permanent principles inherent in confederation and seeing how far they can be expected to resolve the kind of problems the advocates of confederation seek to overcome. The analysis will necessarily overlap with that of some of the other papers presented at the seminar. It will also again be rather abstract; the historical and empirical complexities can emerge in the seminar discussion.

One must begin, as Calhoun would have said, with the foundations. It seems better to try and reconstruct confederation step by step from first principles, rather than merely to list certain formal characteristics that have been pinned to confederation over the years in textbooks. A confederation is formed by a treaty or pact between partners who recognise one another as being equal in status, the status being that of "statehood". if there is no recognition of equal status the basis for a confederation is missing.

It may be asked: could not a confederation be created "from the top down", by a progressive "autonomisation" of regions by a central body representing the whole? Clearly such a process could lead significantly towards confederation, but I would argue that unless and until the autonomous regions are recognised not simply as the recipients of rights conferred by the centre, but as forming together the "constituent power" at the base of the central authorities, a confederation has not come into existence. It will be interesting to see, incidentally, if this final step is taken in the autonomisation process currently taking place in Belgium.

A confederal treaty, however, is not a normal international treaty, it goes beyond a normal international treaty. It is, as already suggested a "constituent treaty". it constitutes a new body politic of which the partners to the treaty are henceforth "members" or, more precisely, "constituent units". The partners, in other words, change their own constituted status in the making of the confederal treaty; they become parts of a new whole. This transformation marks off a confederation from all the structures and organisations that form part of "international relations". If a state wants to continue to conduct its external relations in accordance with the conventions of international relations then it should not advocate confederation, and still less become a member of one.
A constituted political entity is by definition intended to be a permanent thing. Constitution implies permanence. To set up a political body and simultaneously to make

express provision for the members to leave at their own discretion i.e. to secede, is not to set up a political body at all. To borrow Locke's analogy, it "would be only like Cato's coming into the theatre, only to go out again". For this reason secession, in the sense defined above, cannot logically be a provision of a confederal pact. It cannot, that is to say, be something that the members tolerate as being a normal part of the system they have established. Secession, in the sense defined, can only be deemed to be an act of terminating or destroying the union, for which the seceder must take the risk and responsibility, and which the other members have the right to resist and oppose.

The only sense in which a confederation can be said to embody or contain within itself the "right to secede" is that its constitution takes the form, as we have seen, of a treaty, and therefore the members retain the right to judge when the whole body has been altered or overturned and is therefore no longer a binding entity encompassing them. They retain a right in extremis *and only* in extremis. *Moreover this right does not negate the right of those members who judge - in the critical situation - that the union is still in existence, to act to maintain what has been constituted.*

It must be stressed that secession here has been defined throughout as a unilateral act of withdrawal; a mutual agreement by all the partners to the original pact that a particular member should be permitted to leave the union is not, according to this definition, an act of secession. It is simply an amendment of the confederal constitution.

The treaty establishing a confederation may well be ratified, not merely by the governments or parliaments, but by the peoples of the various partner states. This is indeed an indicator that it is more than a "mere" treaty, as The Federalist Papers *underlined. The important thing is that the constitution of a confederation is not, by definition, the unilateral act of <u>one</u> people, that is to say, the people of the confederation as a whole, considered as a homogenous unity, and acting by a strict majority*

vote. A confederation is formed precisely because a nation or people in this sense is deemed not to exist, because the sense of identity and thus of trust between the citizens of each member state does not run to that depth. Here we raise the question of the relation between confederation and democracy, which will be discussed further below.

Having said that the identity of nationhood is not there, it must be immediately added that there has to be some sense of kinship, or similarity, between the partners, particularly in relation to their political ethos and values, for a confederation to succeed. In a confederation one is committing a certain power over oneself to one's neighbours; it is crucial that one can assume that their basic attitude to critical issues such as human rights, legal procedures, the rights of parliaments, the political status of religion, and so on, are not just formally but really similar to one's own. A confederation requires trust and trust springs from a genuine sense of likeness. A confederation with purely formal and automatic rules of admission is doomed.

A confederal pact also implies necessarily a willingness on the part of the contractors to submit any dispute that henceforth arises in relation to the matters delegated to the union to peaceful settlement by arbitration rather than by unilateral force. The arbitration mechanisms may be judicial or political, or a combination of the two.

Let us now turn to the superstructure of confederation. The constituent treaty establishes institutions representing the union as such alongside the constituent units. These institutions are, once again, more than international agencies or organisations. They are authorised to act within a broad sphere of competence. That is, they must have more than the power to make recommendations and proposals to the members, they must be able to make decisions on their own responsibility which directly bind or obligate the member units and their citizens. Within the union this means a right to make and to execute laws. If the implementation of union laws is left to the members (as

it is largely in the European Union) then it implies a supervisory right by the centre over such implementation. It also implies the right of the union to act unilaterally to counteract threats to the working of the union, in other words, the right of self-protection. Externally it means that the institutions of the union can make agreements or decisions relating to foreign states or international organisations which are directly binding on the members.

The institutional structure of confederations can and does vary greatly. However, one or two generalisations can be made. First, in a confederation a key role in the structure is always played by a council or congress bringing together the representatives of the members states - whether these "representatives" be officials of the governments of the member states, or persons elected by constituencies coinciding with the member states. Instructions from governments to their deputies sitting in such bodies, during the preparation of union decisions, are not incompatible with confederalism. It is the directly binding nature of the decisions one made that is crucial. Because the union is intended to act, majority decisions by the members must be permitted in at least some areas. However I would argue that, logically, unanimity must apply for decisions amending the original constitutional pact, and for the admission of new members. In simple terms: unanimity at the base, majority voting in the superstructure.

Parliamentary bodies will inevitably be inserted in the institutional structure of a confederation made up of parliamentary democracies. However it is to my mind wrong and misleading to think that the parliament of a confederation can or should have the same powers, or play the same role, as a parliament in a unitary nation state. Those who demand that the European Union, for example, should be made fully democratic, in the sense that its "government" should be made as accountable to the "people" of the Union as the separate member governments are to their peoples, presuppose the existence of a sense of European nationhood as close as that in the unitary - or tightly federal - states that

compose the bulk of its members. A confederation is not a unitary democratic state; its aims are different from that of a unitary democratic state; its system of control and accountability must also be different from that of a unitary democratic state, and need not for this reason be dismissed as worthless or non-existent. One must keep firmly in sight the aims and benefits of this particular form of polity, and not apply to it, blanket fashion, the criteria of other polities.

A confederation implies that only certain, albeit significant, powers are granted to the union. There is necessarily a remainder or residuum of power not granted, and these reserved powers, in a confederation, belong of necessity to the members units. In earlier confederations it was often not felt necessary to specify the reserved powers of the members. It was deemed enough to make some reference to the "sovereign" nature of the members, and to assume that "domestic" matters did not fall within the purview of the union. Even in the European Union there is no express definition of the powers reserved to the members, though of course it is tacitly implied that they exist.

In the modern world, where, as I have attempted to argue, confederation is advocated primarily as a means of recombining ethnically divergent units who have had unsatisfactory experience of close incorporation, or as a means of uniting states with a long history of independence, with particular stress on economic matters, the need to specify and expressly to entrench the reserved powers of the members becomes more rather than less important. In particular it becomes important to specify and entrench the powers of the members in relation to language, to education, to culture, to the preservation of national heritage, to immigration possibly to the ownership of certain forms of property, to the conferment of national citizenship, and to policing. This does not necessarily mean that the members should be granted exclusive powers in all these areas, nor of course that the union should be completely debarred from aiding, for example, national, cultural or educational schemes. The reserved powers may often be

concurrent. The important thing is that they are set out expressly and given a guarantee.

The specification and entrenchment of reserved powers such as these should help to mitigate the parity syndrome, or the wish of members to be represented proportionately on all confederal institutions. The reserved "static" rights will of course cut across the "mobile" economic rights of firms and individuals that are given such prominence in modern confederations - but that is precisely their point. Experience shows that liberal economic rights - free movement, non-discrimination, fair competition, and so on - can be expanded into every nook and cranny of life. There is no limit to them. The experience of the past two hundred years has also shown that what can be characterised broadly as "ethnic" attachments, attachments to one's land, language, community, and "way of life", do not fade away with the progress and expansion of liberal market systems, and can flare up fiercely if ignored or repressed in their name. Modern confederations or aspirant confederations, which are based on the ethnic heterogeneity of their members, rather than, as in the past, on their ethnic homogeneity, will not survive or succeed if they do not deliberately adjust to this primordial tension, and specify as clearly as possible the guaranteed rights not merely of the union but also of the parts. It need hardly be added that machinery for conciliating differences resulting from the conflict of the rights of the union and parts will need also be concomitantly more developed. One is not advocating deadlock, but mutual respect.

The basis of a parliamentary system in a unitary state is the trust of the citizens, based on their kinship or similarity, that extremes will not be pursued by victorious majority parties. Rules guaranteeing rights to the "opposition" help to underpin the system. Confederations too are built on trust, the trust of each member state that the others will not pursue policies via the union that will ride roughshod over its fundamental interests or values. Here, also, express stipulations can help to underpin the trust and allow the positive work of

the union to proceed without perpetual anxiety. In modern confederations, advocated and established in markedly different circumstances from the older ones of the textbooks, the underpinning of trust becomes of vital importance.

d. A new concept of confederation - Intervention by Mr Maarten Theo JANS

Researcher, European University Institute, Florence

Professor Forsyth's clear and thought-provoking contribution analyses the main features of the confederal idea. While subscribing to most of the presented confederal characteristics, one could disagree with Profesor Forsyth's dismissal of "the right to secede" for the confederal member states. It could be argued that secession rights are actually a crucial defining feature of confederations.

Confederations are the result of sovereign political units transferring some of their powers to an overarching political institution: the confederal body. Despite the transfer of powers the member states remain sovereign. Therefore the primary and ultimate sources of sovereignty in a confederation are the member states. The union exists because of a voluntary act of its sovereign members to sustain it. Since the member States are sovereign these powers can be withdrawn. If the sovereignty of the member states and the derivative nature of the confederal body are accepted the "right to secede" seems to be a logical consequence of the confederal principle.

Professor Forsyth accepts secession only if the confederal treaty explicitly allows for it. One could argue that in view of their sovereignty, secession is an implicit right of the confederal member states, only to be refused if the constituent members agreed in the treaty to prohibit it.

THIRD WORKING SESSION

Chaired by Mr Constantin ECONOMIDES

Examples of present and possible applications

a. *International and constitutional law aspects of the preliminary agreement concerning the establishment of a confederation between the Republic of Bosnia-Herzegovina and the Republic of Croatia*
Report by Mr Stanko NICK

b. *Comments on the preliminary agreement concerning the establishment of a confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia (Washington Agreements)*
Report by Mr Sergio BARTOLE

c. *Washington Agreements*
Intervention by Mr Mariofil LJUBIC

d. Washington Agreements
Intervention by Mr Avdo CAMPARA

e. The Russian Federation and the Commonwealth of Independent States (CIS): legal nature, current situation and development prospects
Report by Mr Nikolai V. VITRUK

f. Some features of confederation between the Baltic States
Report by Mr Kestutis LAPINSKAS

g. The idea of confederation in Central Asia: searches, problems and ways of decision-taking
Report by Mr Serikul KOSAKOV

h. The CIS and the idea of federaling Ukraine
Report by Mr Leonid YUZKOV

a. International and constitutional law aspects of the preliminary agreement concerning the establishment of a confederation between the Republic of Bosnia-Herzegovina and the Republic of Croatia - Report by Mr Stanko NICK

On March 18, 1994 an agreement was reached in Washington and signed by the Presidents of Croatia and Bosnia-Herzegovina (Drs Franjo Tudman and Alija Izetbegovi_), establishing a series of progressive steps in the economic cooperation of the Republic of Bosnia-Herzegovina and the Republic of Croatia, with the aim of establishing a Confederation. Attached to the Agreement were agreements granting

> Bosnia-Herzegovina unrestricted access to the Adriatic and Croatia unrestricted access through Neum. The two Presidents committed themselves to making their best efforts to pursue the entry into force of the Preliminary Agreement, in the context of an overall settlement in the region. The text was also endorsed by Dr. Haris Silajd_ió and Mr Krešimir Zubak, who have since - between 7 and 11 May 1994 in Vienna - reached a series of additional agreements on the criteria for territorial division of cantons in the Republic Bosnia-Herzegovina, on principles of cantonal organisation, on the division of key functions in the Republic etc.

The Washington Agreement is a preliminary agreement because it provides for the conclusion of the principal (final) international agreement on the establishment of a Confederation[14] *between the Republic of Croatia and the Republic of Bosnia-Herzegovina.*

This Agreement, therefore, contains the main provisions of the expected final agreement (points 1, 2, 4 and 5). It defines the measures which the Parties are obliged to take in order to create appropriate conditions for the conclusion of the principal agreement and the establishment of the Confederation (point 3).

The objectives

The aim of the Preliminary Agreement is to resolve several serious geopolitical, historical and legal problems simultaneously by:

-putting an end to violent conflicts in this part of the world and eliminating inter-ethnic, religious, regionalist and other tensions;

-satisfying the feelings of the population in certain parts of Bosnia-Herzegovina (primarily Croats and Muslims, but taking into account the Serb population in Bosnia-Herzegovina) by maintaining those territories whose division is not possible,

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14 A confederation is defined by international law and constitutional law theories as an alliance between sovereign states on the basis of an international agreement through which they intend to achieve certain goals jointly, each of the states maintaining its international and legal personality (in a subjective sense).

within an overall integral state structure (Republic of Bosnia-Herzegovina);

-recognising the desire for closer ties between Croats in Bosnia-Herzegovina and the newly-created state of the Republic of Croatia);

-providing access for the Republic of Bosnia-Herzegovina to the Adriatic Sea through the Port of Plo_e;

-resolving the problem of territorial discontinuity of the Republic of Croatia in the Neum area (both of these last two historical problems appeared with the dissolution of the former SFR Yugoslavia);

-creating conditions for peaceful co-existence, for the maintenance of peace and for diversified co-operation among the populations of Bosnia-Herzegovina and between the two neighbouring states.

Every one of these goals seems to be difficult to achieve, even separately. Some of them almost exclude each other. Therefore, the Preliminary Agreement is an agreement in principle and a compromise and framework agreement. Many of its elements are yet to be worked out in the principal agreement. So far, only the initial steps for the establishment of the Republic of Bosnia-Herzegovina have been made.

Short-term and long-term measures of implementation

1. The Preliminary Agreement provides for the establishment of a Confederation between the Republic of Bosnia-Herzegovina and the Republic of Croatia. The Parties have therein expressed their will to establish a Confederation when appropriate conditions are met.
2. The establishment of the Confederation shall not change the international identity and legal personality of the two Parties. They will remain independent and sovereign states after the establishment of the confederation, and will, each of them individually, maintain their international and legal subjectivity. Subsequently, citizens of each confederative member state will have only the citizenship of that state. Non-existence of common citizenship is one of the main characteristics of a confederation.

3. The Preliminary Agreement provides for a number of measures, to which the Republic of Croatia and the Republic of Bosnia-Herzegovina commit themselves in order to create appropriate conditions for the establishment of a Confederation. The two Parties commit themselves to enact internal regulations and conclude agreements providing for progressive measures (some of them to be taken immediately and some later, at a yet to be established point in time) for economic co-operation with the aim of establishing a common market and monetary union.

a. according to the Preliminary Agreement, the two Parties shall immediately begin with the co-operation and development of common policies in the following areas: transport, energy, environmental protection, economic policy, the reconstruction of the economy, health care, culture, science, education, industrial standardisation and consumer protection, migration, immigration and asylum, law enforcement, particularly with regard to terrorism, smuggling, drug abuse etc.

b. The two Parties shall co-operate with a view to establishing, within a certain period, the following:

a. a free trade area providing for the free movement of goods of democratic origin;

b. a customs union;

c. a common market, in which goods, services, capital and labour shall move freely; and

d. a monetary union.

c. The two Parties shall agree as soon as possible on defence arrangements, including the co-ordination of defence policies and the establishment of joint command staffs in the event of war or imminent peril to either Party.

4. From the above, the common goals, which are at the same time the purpose of the expected establishment of the Confederation between the Parties, are evident. Of the utmost importance are the following goals: joint defence of any of the Parties, a free trade zone, a common market and a customs and monetary union.

Confederative Council

5. The Preliminary Agreement provides for the establishment of the ***Confederative Council*** *as a joint body of the Parties to co-ordinate the policies and activities of the Parties within the Confederation. According to the provisions of Article 3(1) of the Preliminary Agreement, the Confederative Council shall be constituted after the establishment of the Confederation, since its objective is to co-ordinate the policies and activities of the Parties within the Confederation.*

By establishing the Confederative Council, the Preliminary Agreement also provides for another important element of the future Confederation by envisaging a joint confederative body. The very existence of such a body as a "confederative assembly" is what makes a confederation different from an ordinary union. Since it is composed of representatives of its member states, the Confederative Council is not a government body but, by its nature, is similar to international conferences. It can be seen from Article 3(1) of the Preliminary Agreement that the jurisdiction of the Confederative Council is limited by the very objective for which the international confederative treaty is being concluded.

Each party shall have an equal number of members in the Confederative Council. Decisions require approval by the majority of other members from each Party. The President of the Council is elected for the period of one year, alternately from the members of both Parties.

Since the links between sovereign countries united in an alliance of states (called a confederation or otherwise, but having the major characteristics of the contents of the term "confederation") can be of different kinds and intensity, and be guided by different objectives - ranging, for example, from the Swiss Confederation (until 1789 and 1815-1848) to the European Union - it is of utmost importance to define the relations between the members of the confederation and the joint confederative bodies when determining the nature of the Preliminary Agreement of the future confederation. By observing its functions and powers, future relations between the members of the Confederation become obvious.

Each member of the Confederation shall independely pursue its policies and activities, while the Confederative Council shall co-

ordinate them. Since the decisions require a majority vote of all the members from each confederative member state, there is no possibility for outvoting, i.e. imposing the will of one member of the Confederation over the other.

Another characteristic of a confederation, generally accepted in theory and practice of both international law and constitutional law (except if explicitly agreed otherwise by means of an international treaty), is the fact that decisions by the confederative council adopted by approval (Confederative Assembly) are not automatically obligatory for citizens of confederative member states, but become law and therefore obligatory only when the individual member states of the confederation adopt them, i.e. when enacted into law in accordance with regular procedures. Hence, confederative bodies do not have immediate jurisdiction over the citizens of confederative member states: a procedure adopting and enacting a confederative decision into the internal law of the individual member state is required.

Transfer of jurisdiction from confederative member states to the Conferation is possible if both confederative member states agree. This shall have to be separately regulated by an international treaty between the confederative member states, so that such "confederative authority" shall derive directly from the authority of the confederative member states. Usually, a confederation does not have a uniform taxation system nor a uniform budget.

On the basis of the above, since the Confederative Council shall only be a co-ordinator between two independent policies and activities of the confederative member states, in order to achieve other mutual objectives of the Parties - i.e. a common market, a customs and monetary union - it will be necessary to conclude new international agreements between the member states of the confederation as provided for in Article 4(1) of the Preliminary Agreement.

<u>Annexes</u>

In order to further regulate their regulations, the Parties have concluded two agreements on the basis of Article 6 of the Preliminary Agreement, the texts of which are attached to the Preliminary Agreement as Annexes I and II. These are:

I.the Agreement on the basis of which the Republic of Bosnia-Herzegovina is granted access to the Adriatic Sea through the territory of the Republic of Croatia,

and

II.the Agreement on the basis of which the Republic of Croatia is granted transit through the Republic of Bosnia-Herzegovina.

ad I. The Agreement grants the Republic of Bosnia-Herzegovina an unrestricted access to the Adriatic Sea in accordance with the 1982 UN Convention on the Law of the Sea and the 1965 Convention on the Transit of Land-Locked States, in such a way that the Republic of Croatia shall lease a part of the Port of Plo_e, which will have the status of a free zone, for 99 years. The Agreement provides for the manner of access to this free zone as well for the manner of using it. The Agreement also provides for a Joint Commission that will assist in implementing the Agreement and in the settlement of possible disputes (by arbitration).

ad II. The Agreement grants the Republic of Croatia unrestricted transit - to and from the Republic of Croatia - between the eastern and western borders of the municipality of Neum with the Republic of Croatia, for a period of 99 years. The Agreement provides for the manner of using this right, thereby assisting the implemention of the Agreement, as well as for the manner of settling any possible disputes.

<u>Follow-up</u>

A more detailed arrangement of the relations between the confederative member states shall be made on the basis of the above mentioned principles and provisions of the Preliminary Agreement, and this shall be determined by the final international agreement establishing the confederation.It may be necessary to make some amendments to the Constitution of the Republic of Croatia in order to meet the specification of the Washington Agreement.

After creating the above mentioned favourable conditions for establishing the Confederation, and especially after finding the final political and legal solution to the status of the Republic of Bosnia-Herzegovina as one of the Parties, and having respected each Party's

constitutional provisions on alliances with other states, the conditions shall be created for concluding the principal (final) international treaty on the establishment of the Confederation between the Republic of Croatia and the Republic of Bosnia-Herzegovina.

With time, the possibilities for implementing these new, rather complex, arrangements may increase.

b. Comments on the preliminary agreement concerning the establishment of a confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia (Washington Agreements) - Report by Professor Sergio BARTOLE

University of Trieste

The preliminary agreement signed by the Republic of Croatia and the (proposed) Federation of Bosnia and Herzegovina provides for the establishment of a Confederation between the two Parties. It is expressly stated that "the establishment of the Confederation shall not change the international identity or legal personality of Croatia or of the Federation" (article 2). But the Parties agreed to undertake "progressive steps in their economic collaboration", with the aim of establishing a common market and monetary union when conditions are appropriate (article 4). The adoption of this common purpose restricts the scope of the activity of the Confederation to the economic field especially. Therefore there is no provision in the preliminary agreement dealing with the adoption of a general policy of the Confederation in the field of foreign affairs of common interest to both Parties. However, according to article 5, the Republic of Croatia and the Federation of Bosnia and Herzegovina undertake "to agree as soon as possible on defence arrangements".

Does the Republic of Croatia have to adopt amendments to the constitutional law of the Republic of Croatia "as a consequence" of the mentioned agreement? Article 2 of the Constitution of Croatia expressly allows the conclusion of alliances with other States which keep untouched "the sovereign right" of the Republic "to decide by itself on the powers to be transferred". The construction of the preliminary agreement does not, apparently, imply that the establishment of the confederation has immediate and direct effects on the internal system or the sources of law of the Republic of Croatia. The acts or decisions of the proposed Confederative

Council shall not have direct internal normative effects on the Croatian legal system. Their purpose is the co-ordination of the policies and activities of the concerned Parties within the Confederation. Article 4 of the agreement suggests that this purpose will be obtained through the enactment of internal regulations and the conclusion of agreements by the Parties. Therefore both the Parties undertake to give an internal implementation to the decisions of the Confederation according to their constitutional provisions. The pursuing of their co-operation and the development of common policies shall imply - with regard to the Croatian constitutional system:
1. the adoption of statutes by the Croatian Sabor or decrees by the government (Cabinet), and

2. the ratification - when necessary - of the agreements reached by the Parties within the scope of the Confederation (articles 80, 110 and 133 of the Croatian Constitution).

As far as the mentioned provisions of the Washington Agreement are concerned, we are outside the scope of the second part of article 133 of the Croatian Constitution. Powers derived from the Constitution of the Republic of Croatia are not apparently granted to the Confederation. Strangely, the Confederation was not entrusted even with the power of dealing with international relations, which is a usual attribution of confederations.

Entering into the new agreement does not imply for the Republic of Croatia that it has to surrender sovereign rights to the Confederative Council nor that it has to allow this body to interfere with Croatian internal affairs. The situation to which the Republic of Croatia is subject is completely different from that whereby, for example, member States of the European Community have accepted that regulations adopted by European Community bodies have direct and immediate effects in their internal orders and take the place of prior domestic norms.

The previous Croatian rules in force before the adoption of the decisions of the Confederative Council and of the agreements between the Parties are not abrogated by those decisions directly, to the extent that they differ from them, but shall have to be repealed by the Croatian internal bodies in implementing the confederative decisions.

If this interpretation is correct, the Washington Agreement does not require a revision of the Croatian Constitution. According to the opinion of Professor Smiljko Sokol, the principles of Croatian Constitutional law do not allow for an internal process of federalisation in the Republic of Croatia: the same principles certainly forbid the entry of the Republic of Croatia into a federal State without any revision of that Constitution. But the adhesion to the proposed confederation does not imply participation in a federalisation process with other States, at least for the time being. Therefore it falls within the scope of the provisions of the Croatian Constitution.
Moreover, because the implementation of the Washington Agreement does not provide for a grant of powers derived from the Croatian Constitution to the Confederative Council, its ratification does not have to be adopted with the special majority required by the second part of article 133 of the Croatian Constitution.

But the establishment of a Confederation implies the creation of a special supranational order, separate from the general international order. The Parties to the Confederation agree to enter into a special, mutual and distinct relationship. This relationship derives from the common decision-making process in respect of decisions in areas covered by the rules of the Confederative Agreement providing for co-operation between the Parties of the Confederation and for the development of common policies. According to the purposes of the Agreement, the Confederation has a permanent character and the Parties commit themselves to deal in common with the areas mentioned in article 4.1 of the agreement on a permanent basis. These common decisions shall not be the result of an ad hoc policy, adopted on a day to day basis, but shall flow from a continuous and institutionalised practice of co-operation. We can say that, according to the Agreement, the Parties are committed to giving priority to the common decision-making process not only over separate and distinct international relations with other States (even if the Confederation has the power of dealing with international relations), but also over individual internal decisions of the Republic of Croatia.

But if there is such a priority, the powers "derived from the Constitution of the Republic of Croatia" are certainly limited even though they are not directly granted to the Confederative Council. That is to say, the establishment of the Confederation implies an institutionalisation of a decision-making process which restricts, on a

permanent basis, the freedom of decision of the Croatian governing bodies.

It might be objected that the limitation of the powers of the Croatian constitutional organs is a natural consequence of the Washington Agreement, which is not dissimilar from the normal consequences of any other international treaty obligations. This objection could be correct, but it misses the point that with the creation of the Confederation, the Republic of Croatia is undertaking a permanent joint enterprise with the Federation of Bosnia and Herzegovina in the prescribed fields, and that this permanent joint enterprise affects also the relations of the Republic of Croatia with other States which, in turn, are confronted on an occasional basis with a new international organisation. This interpretation is certainly consistent with the provisions of Article 7 of the preliminary agreement, according to which the agreement shall "remain in force until otherwise agreed by the Parties". But Professors Malinverni and Economides have extensively dealt with the question of the construction of this provision and I can refrain from talking about it here.

1. Rebus sic stantibus*, it would be advisable to revise the Constitution of Croatia mentioning Croatian membership of the Confederation explicitly. Such a provision would allow - if the constitutional bodies of the Republic of Croatia judge it convenient - for other constitutional reforms. The permanent basis of the confederative co-operation could require the establishment of a simplified procedure for the internal ratification and implementation of the decisions of the Confederative Councils and the bypassing of the general provisions of article 133 of the Croatian Constitution without exempting the Croatian Cabinet from parliamentary inspection. The Italian experience of membership of the European Community, as well as that of other member States of the European Community, has shown that relations between the executive and legislative bodies are a very delicate constitutional matter in the presence of institutionalised forms of international co-operation. Moreover, the appointment or the election of Croatian representatives on the Confederative Council could be provided for by specific new constitutional "rules". Alternatively, the Constitution could confirm that such representative powers are exercised by the ordinary diplomatic structures of the Republic.*

2. Two additional agreements grant: a. the Federation of Bosnia and Herzegovina access to the Adriatic Sea through the territory of the Republic of Croatia, and b. the Republic of Croatia transit through the Federation of Bosnia and Herzegovina. Neither of these agreements directly establishes specific rights on behalf of the people interested in the transit through the territory of the Federation of Bosnia and Herzegovina and or in the access to the Adriatic Sea through the Republic of Croatia. Therefore, these people do not have rights deriving from the legal order of the Confederation. The two agreements affect only the relationship between the two Parties to the Confederation and establish mutual rights and duties on behalf of them without any regard to the people concerned whose rights shall be established in the internal legal systems of the Parties on the basis of the internal acts which the Parties adopt to implement the two additional agreements.

Such an approach to the problem of the personal rights flowing from the two additional agreements is consistent with the choice of adopting for the co-operation between the Republic of Croatia and the Federation of Bosnia and Herzegovina what Professor Antonio La Pergola calls the old fashioned model of confederation, which does not give direct relevance to the problems of the guarantee of the personal rights within the legal order of the Confederation.

Actually, according to the documents I received from the Secretary of the Venice Commission and which I have been able to consult, the Washington Agreement for the establishment of the Confederation between the Republic of Croatia and Federation of Bosnia and Herzegovina does not make any reference to Council of Europe instruments or other international instruments concerning human rights. Therefore it differs from the proposed constitution of the Federation of Bosnia and Herzegovina, whose annexe explicitly refers to human rights instruments.

But there is not, obviously, any bar to the adoption of some specific constitutional rules by the constitutional bodies of the Republic of Croatia so as to give a special, internal constitutional guarantee to the personal rights flowing from the Washington Agreements.

The problem is that the proposed constitution of the Federation of Bosnia and Herzegovina takes a line different from the line I have suggested in this paper. It does not make any reference at all to the agreement for the proposed Confederation. But the fact that the Commission of Venice was requested by the Croatian side to give an opinion on possible amendments to the Constitution of Croatia as a consequence of the Washington Agreements suggests that the Republic of Croatia does not judge that draft constitution to be a binding precedent.

c. Washington agreements - Intervention by Mr Mariofil LJUBIC

Vice-President of the Parliament of the Republic, President of the constitutional Parliament of the Federation of Bosnia-Herzegovina

The Constitution of the Federation of Bosnia-Herzegovina creates an acceptable model of a federal state in the first phase, especially convenient for multinational communities such as Bosnia-Herzegovina. That is a decentralisation of the State, creating cantons as federal units not only as the exclusive national territories, but also by establishing a high degree of autonomy within those territories, at the lower level, to municipalities, that is by establishing local authorities. This plan extends equality to all citizens. The Federation will be in charge of foreign affairs, defence, monetary policy and so on, and all other competences will vest in the lower levels, to the cantons. Through the institutions of these authorities, minorities will be protected. Since the issue of minorities has been present everywhere, and because national issues are to be decided by consensus, there are more institutions which will be ensuring equality of the people. First of all, there is the Chamber of Nations, which will have an equal number of Bosnians and Croats and an equal number of the others. Also, the Federal Government has the mechanisms to protect one nation from being outvoted by the other. This situation is also found in the Supreme and Constitutional Courts, which are actually composed in a manner opposite to the ideas of ethnic division. The Washington Agreement is taking as the basic presumption the possibility of joint life, creating a State on the principles of modern society based upon a combination of federal

and confederal institutions and on the experiences of multi-ethnic, multi-cultural States such as the USA, Switzerland, Australia, Canada and Belgium. That does not mean that the national component is being negated here. On the contrary, the right significance is given to the nation, but it is set in provisions concerning identity, tradition, religion, customs, language and education which reflect upon the fact that the Washington Agreement is starting from a position which threatens the substance of life and which has resulted in closing the territory off from economic relations. This means that the Washington Agreement has accepted federation as the way and as the first phase of resolving the total Bosnian crisis. It has as its main aim to preserve the territorial integrity and international subjectivity of Bosnia-Herzegovina. The Washington Agreement is evaluated by Bosnia-Herzegovina and by the Republic of Croatia as a plan without an alternative, and there were many meetings on this, especially the meeting on 13 September where the two delegations have met and agreed on certain details which I will be elaborating upon later. As I have said, the cantons are national cantons but are conceived as a means of establishing a high degree of autonomy and independence in territories where Bosnians and Croats and all the other nationalities live equally.

Because of all this, we consider the Washington Agreement to be extremely important not only in respect of its implementation but also in its conception, and we believe that the conception of modern society is one where the guarantees of human and individual and collective rights will be guaranteed. That is the first phase of how to resolve the Bosnian crisis. In the Constitution of the Federation of Bosnia-Herzegovina it is stated to be of the most important priority that there is a possibility for the territories where the majority of the Serbian population is found to be organised in the manner foreseen within the Confederation and in the Washington Agreement. We believe that only in this way can we resolve the problems in former Yugoslavia. All the countries in the territories of the former Yugoslavia have still to recognise each other. This would be more important, more significant, than placing international monitors along the border with Serbia and Montenegro because recognising each other mutually does not have any legal obstacles, which means that the Washington Agreement and the proposals of the contact group for the resolution of the Bosnian problem should much more press Serbia to resolve national problems in the same way as the problems of Bosniacs in Sandjak, of the Hungarians and Croats in Vojvodine and the Albanians in Kosovo. In this way we will create

conditions which will facilitate many aspects of co-operation with Serbia in the future, but this does not mean the reconstruction of Yugoslavia. We have to remind ourselves here that Serbia has not recognised either the Republic of Croatia nor the Republic of Bosnia-Herzegovina. Therefore, we cannot draw parallels between Bosnia-Herzegovina and relations between Bosnia-Herzegovina and Croatia, Croatia having been one of the first countries to recognise Bosnia-Herzegovina and to sign a confederation with it.

The interest of all countries which were created from the former Yugoslavia is to join in with the integration processes in the European Union and in the peace programme partnership. Now I will give you some basic ideas regarding the Washington Agreement and the preliminary agreement on the confederation.

The Washington Agreement has established a framework for the preliminary agreement on the principles and bases for the creation of confederation between the Federation of Bosnia-Herzegovina and the Republic of Croatia. After that, the preliminary and confederal agreement will follow. The Confederation as the unity of two countries will have international character since the international law regulations will be applied but it will not change the international personality and the legal status of the federal units. Besides the usual political aims, the Confederation is being created with the aim of establishing certain activities of mutual interest. Concretely, these are to establish a joint mutual common market with the free flow of goods, services and capital, to ensure co-operation and development of policy in the field of transport, energy, protection of human rights, economic policy, finances, customs, a reconstruction of the economy, health services, culture, science and education, standardisation of the products and protection of consumers, migration, terrorism, illegal drug trafficking, and organised crime. Earlier agreements were concluded between the two parties to ensure access to the Adriatic Sea through the Croatian Port of Plo_e and to ensure the right of the Republic of Croatia to a corridor through the territory of Bosnia-Herzegovina.

The confederal States, by applying international laws, will conclude agreements on customs and monetary union and on defence arrangements in case of war and in case of a threat of war for either State. Now I will go back to the agreement which was signed on 13 September this year. It was signed in Zagreb, and it stated that the agreement on customs co-operation is ready. A high degree of accord has also been obtained with respect to the treaty on railway transport, with a provision that the settlement of reciprocal arrangements regarding immovable property associated with railway transport shall be regulated by separate treaty. It was agreed on the level of two representative delegations that the already-signed agreement on the port of Plo_e and on transit through Bosnian territory will be put into effect. As my colleague from Croatia, Mr Nick, has said, significant agreements regarding diplomatic relations have also been established. Both countries will be representing each other in the parts of the world where there is no diplomatic representation of the other country. On the level of the national television, it was agreed to create the joint programme or broadcasts through which, once a week, the Republic of Bosnia-Herzegovina and the Republic of Croatia will be informed about developments in mutual relations and co-operation. Certain issues associated with federation, which are closely related to the transport of goods and the regime of customs duties on the border with the Federation, were also agreed. To be able to co-ordinate joint policy and activities the confederal States will create a Confederal Council which will then elect a President for a period of one year consecutively. The Confederal Council will be composed of an equal number of delegates from both sides and will enable each State to express its own will through this Council. These decisions will be obligatory for the citizens of confederative States provided first that this be regulated according to their Constitutions, which means that confederal States will have sovereignty in confederative territories. A confederation does not have authority over citizens since there is no central legislative body. It will not have executive bodies; it will receive diplomatic representatives and will sign international treaties.

I have just tried within very brief lines to put forward the main ways this model will be implemented. There are practical considerations for this arrangement, deriving from the interests of the citizens of the two future participating States and from the history and culture of these two nations, which have been intermingled. During the last 73 years we have been first within the Kingdom of Yugoslavia and after the Second World War within the Socialist Republic of Yugoslavia. Both of these have been economically using the national potential of federative states in favour of other federative states. Independence gave the opportunity for relations between the States of ex-Yugoslavia being ruled by clear bills, clear relations which might be established through the establishment of the Confederation. Instead, Serbia - with the help of Montenegro - has decided on the war option,

capturing by force the territory of the neighbouring countries of Croatia and Bosnia-Herzegovina.

Therefore we cannot understand the attitude of some European countries who, acting contrary to the decisions of the CSCE for protection and respect of internationally recognised borders and to decisions of the London Conference, are directly and indirectly supporting the aggressor and his policy of killing and ethnic cleansing. In any case I want to point out that this Confederation might have a future because the basic precondition for the creation of a Confederation is the stabilisation of the political situation and the implementation of the Constitution of the Confederation, and especially the establishing of peace in the areas where the majority of the Serbian population lives. This population - the Serbian population - is given an open approach to the Federation on the principles of national equality, democratic relations and the ensuring of the high standards of respect of human rights in Bosnia-Herzegovina. The concept established by the Constitution of the Confederation shows its effectiveness in the territories where the Bosniacs and Croats live because within a very short period of time the war activities have stopped and the establishing of long-lasting and stable peace has been created. We do not consider the Federation as a war coalition of two nations against a third one, but as a model which leaves the possibility to all the peoples, all the citizens, an equal position within the framework of the Bosnia-Herzegovinan Federation as an internationally recognised state and the implementation of this will very much create the future confederation. It is obvious that it is not enough that we are ready to accept compromises, it is not enough for peace, because the aggressor still believes that with the war option the aggressor will impose the final solution. Therefore, they are opposing all peace plans and initiatives. Unfortunately the aggressor is being encouraged by hesitation and by the absence of a common approach by very important international actors, who are avoiding making their peace initiatives more effective. Without that, the peace process will not go forward. On the contrary the aggressor will acquire new initiatives for the forceful realisation of its goals. We can see this where certain concrete sanctions were meant to force the aggressor to give in. Still the contact group hesitated and was not very principled. By establishing the Federation of Bosnia-Herzegovina and creating a confederation between the Federation of Bosnia-Herzegovina and the Republic of Croatia, we are showing that joint action - economic, cultural scientific and cooperative - is possible in this part of Europe and the Balkans. We expect that this integrational process will find your understanding and support. Thank you.

d. Washington agreements - Intervention by Mr Avdo CAMPARA

Secretary-General of the Parliament of the Republic of Bosnia-Herzegovina

Mr Chairman, my colleagues from Bosnia-Herzegovina and Croatia have mainly spoken on the Washington Agreement and the creation of the Confederation between the Republic of Croatia and the Federation of Bosnia-Herzegovina.

I would like to inform this esteemed group of scientists - although I believe you all know - that it is now three years since we have aggression from Serbia and Montenegro with the former Yugoslav national army and with the extremist Serbs from Bosnia-Herzegovina. The aggressor is actually on the sovereign and independent territory of the Republic of Bosnia-Herzegovina. There are crimes being committed, crimes which are not remembered in recent history - killing, expelling, raping - crimes which are unimaginable going on within the heart of Europe and the Balkans in an internationally recognised sovereign independent state such as Bosnia-Herzegovina. I have to inform you that within several days it will be one thousand days since the city of Sarajevo, my city, the capital of Bosnia-Herzegovina, has become the biggest concentration camp, where nobody can leave or go in. You can only leave the city if you are taken by the military plane with the United Nations military force. It is not only Sarajevo that has been under blockade. Many other major cities have been blockaded such as the eastern enclave comprising Goura_de, Srebrenica and Jajce, where there is unseen genocide being committed against the Bosniac and Croat population. I just wanted to give these few remarks to paint a picture for you of the circumstances under which the government of Bosnia-Herzegovina and its leadership is trying, making efforts, to find all possible solutions to reach a peaceful solution to this conflict. A conflict which has been created by aggression. Therefore my government has accepted all international agreements and treaties that were going towards the establishment of peace. However, all those agreements and treaties have not been accepted by the aggressor, who has continued the policy of destruction of everything that has been mutually built, including forceful expulsion, rape, and destruction of everything which has to do with contemporary civilisation. Our aim is to resolve this conflict in a peaceful manner. Therefore the Washington Agreements and the Constitution of the Federation which has been accepted by the Assembly of the Federation of Bosnia-Herzegovina as a transitional solution (until the new elections) is actually the internal solution for the relations within the Republic of Bosnia-Herzegovina. We are leaving the door open for the Serbs to join this Federation, that is for Serbs where they are in the majority, and I want to point out that now Serbs under the occupation have 70% of the territory of the Republic of Bosnia-Herzegovina. In Bosnia-Herzegovina there are more than 45% Muslims, 33% Serbs and 18% Croats - those were the figures before the war. Bosnia-Herzegovina is so intermingled that it is impossible to divide it. You only have three municipalities where 90% of the population is one ethnic group and that is in western Herzegovina where all the Croats live. All the other areas are intermingled in such a way that you cannot separate or divide Bosnia-Herzegovina as my

colleague, Mr Nick, has spoken about. To be able to reach the Federation and later the Confederation between the Republic of Croatia and the Republic of Bosnia-Herzegovina it is necessary first of all to create a Federation, which we have created through the Constitution of the Federation of the Republic of Bosnia-Herzegovina. The Constitution is a democratic one. It is envisaging the highest democratic rights which are being respected today in Europe and in the world but we are at the very beginning of creating a Federation of Bosnia-Herzegovina: we have chosen the President and Vice-President of the Federation, as well as the Constitutional Assembly of Bosnia-Herzegovina which is composed of members of Parliament whose mandate is valid, thereby creating a legislative body. We have also created a government of the Federation of Bosnia-Herzegovina and we are now working on establishing the authorities on the lower levels, in the municipalities, which are under the control of the army of Bosnia-Herzegovina and of the Croat Army. We are working on the creation of Cantons, and I can tell you it is not going without problems, but still we consider that we will, after the agreement on the highest level between the representatives of the Republic of Croatia and Bosnia-Herzegovina, be able to create the authorities in the municipalities and in cantons and on the level of the Federation. It is also well-known that the city of Mostar is under the management of the European Union. This is envisaged also for the city of Sarajevo within the next two years. This has all been done to establish peace as soon as possible in Bosnia-Herzegovina. The authorities, such as the President, the Parliament and the Government of Bosnia-Herzegovina, will remain as the bodies of the Republic until peace has been signed with the Serbs.

The legal authorities are doing everything to be able to reach a just and long-lasting peace. However, to be able to reach this we expect stronger support from the international community. Unfortunately, I have very frankly to say that that support so far has not been to the degree which we expected, and some European countries do not even have a full understanding of the situation and are not influencing the aggressor in a way that everybody is expecting. The civil war is a typical case of aggression by one Republic, one State - Serbia and Montenegro - over the independent and internationally recognised state of Bosnia-Herzegovina. You still have a great number of Serbs who are living on the free territories - territories under the control of the army of Bosnia-Herzegovina and territories controlled by the Croat Army. I can tell you that in the highest body of the Presidency of the Republic of Bosnia-Herzegovina, which has ten members, there are three Serbs. I can also inform you that the President of Parliament of the Republic of Bosnia-Herzegovina is a Serb. I am telling you this to be able to see that we want Bosnia-Herzegovina to remain independent, one single state, internationally recognised with inviolable borders and we will arrange our internal relations in the best possible way for all three nationalities - Serbs, Croats and Bosniacs.

e. The RussianFederation and the Commonwealth of Independent States (CIS): legal nature, current situation and development prospects - Report by Mr Nikolai V. VITRUK

Doctor of Law, Professor, Acting President of the Constitutional Court of the Russian Federation, representative of Russia on the European Commission for Democracy through Law

The Russian Federation: legal nature, current situation and development prospects

As part of the former USSR, Russia enjoyed sovereignty (with the right to secede from the Union) to the same extent as other federate Republics under the USSR Constitution under their respective Constitutions, and was also itself a federation (the RSFSR).

At the time, the RSFSR was made up of autonomous republics in the form of states, autonomous regions, autonomous national districts, territories and regions. In reality, however, the RSFSR differed little from a unitary state, despite having the external legal appearance of a federation. The same also applied to the USSR as a whole.

The transition from totalitarianism to the new democracy has posed the problem of establishing genuinely federal structures in Russia, this being a problem which became particularly acute following the break-up of the USSR in December 1991.

The adoption by the first Congress of People's Deputies of the RSFSR of the Declaration of State Sovereignty of the RSFSR was the starting point in the process of the genuine federalisation of Russia[15].

In August 1990, the autonomous republics of Komi and Tatarstan adopted their own Declarations of State Sovereignty. The other autonomous republics followed suit, except for the Mordovian SSR which, without formally declaring sovereignty, considerably extended its powers by adopting on 7 December 1990 the Declaration on the State and Legal Status of the Republic.

In 1991 the Adygei, Gorno-Altai, Karachaevo-Cherkess and Khakass autonomous regions became republics in the Russian Federation of their own accord.

At the time, the territories and regions were defined only as administrative territorial units in constitutional terms and were not referred to as "subjects"

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15 Gazette (Vedomosti) of the Congress of People's Deputies of the RSFSR and of the Supreme Soviet of the RSFSR, 1990, No. 2, Art. 22.

(component units) of the Russian Federation. That is why the territories and regions began to seek recognition as component units of the Russian Federation and to have their legal/constitutional status brought into line with that of the republics in the Russian Federation.

At the same time, some republics (Tatarstan, Bashkortostan, Komi, Yakutia and Tuva) have taken the defence of their sovereignty as far as obtaining recognition as subjects of international law, and their legal instruments give them the right to restrict the effects of the Constitution and laws of the Russian Federation on their territories. The Constitution of Tuva includes a provision allowing the republic to withdraw from the Russian Federation. The Chechen Republic has effectively placed itself outside the Russian Federation.

In its decisions, the Constitutional Court of the Russian Federation has opposed trends of this kind in the development of the Russian Federation. In this connection, the Constitutional Court of the Russian Federation examined, on 13 March 1992, the constitutionality of the Declaration of Sovereignty of the Republic of Tatarstan of 30 August 1990, of the Act of the Republic of Tatarstan of 18 April 1991 on Amendments and Supplements to the Constitution (Basic Law) of the Republic of Tatarstan, of the Act of the Republic of Tatarstan of 20 November 1991 on the referendum in the Republic of Tatarstan and of the Decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 on the organisation of the referendum in the Republic of Tatarstan concerning the status of the Republic of Tatarstan.

The Constitutional Court ruled that the provisions of Article 5(2) and of Article 6 of the Declaration of Sovereignty of the Republic of Tatarstan of 30 August 1990 restricting the effect of the laws of the Russian Federation on the territory of the Republic of Tatarstan were not consistent with the Constitution of the Russian Federation.

It also ruled that the provision in Article 4 of the Act of the Republic of Tatarstan on Amendments and Supplements to the Constitution of the Republic of Tatarstan of 18 April 1991, which states that the relations of the Republic of Tatarstan are based on the treaty with the Russian Federation, was not consistent with the Constitution of the Russian Federation either, as the said provision meant that the Republic of Tatarstan was not part of the Russian Federation.

For the same reasons, the Court ruled that the Decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 on the organisation of the referendum in the Republic of Tatarstan on the question of the legal status of the Republic of Tatarstan was not consistent with the Constitution of the Russian Federation in so far as there was a question asking whether the Republic of

Tatarstan should be a subject of international law and base its relations with the Russian Federation and with the other republics on treaties of equal legal force[16].

Reacting two weeks later to the ruling of the Constitutional Court of the Russian Federation, the Supreme Soviet of the Republic of Bashkortostan ruled that the Russian Federation Act on the Constitutional Court of the Russian Federation was not enforceable on the territory of the Republic of Bashkortostan[17].

The authorities of the Republic of Tatarstan have ignored the ruling of the Constitutional Court of the Russian Federation, and the Decree of the Supreme Soviet of the Republic of Bashkortostan has not been repealed to date.

It should be stressed that the above-mentioned ruling of the Constitutional Court of the Russian Federation has retained its legal force and will also serve as a deterrent in future.

The tendency of the republics within the Russian Federation to acquire sovereignty is also reflected to some extent in the on-going discussion about the legal nature of the Russian Federation, which is focusing on the question of whether the Federation is contractual, constitutional or constitutional-contractual (contractual-constitutional).

The position of some republics boils down to regarding the Russian Federation as contractual in nature. This could require, in practice, creating the Federation anew through the conclusion of a Federal Treaty or at least through the recognition of the precedence of such a treaty over the Constitution of the Russian Federation.

The Constitutional Committee of the Congress of People's Deputies of the RSFSR, which drafted the new Constitution of the Russian Federation, worked on the basis that the Federation was constitutional.

On 31 March 1992, the representatives of the Russian Federation and of its component units signed the Federal Treaty comprising three separate treaties on the apportionment of powers and responsibilities between the federal authorities of the Russian Federation and the authorities of the sovereign republics in the Russian Federation, and of the territories and regions, the cities of Moscow and

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16 Gazette of the Constitutional Court of the Russian Federation, 1993, No. 1, pp. 40-52.

17 Gazette (Vedomosti) of the Supreme Soviet and the Government of the Republic of Bashkortostan, 1992, No. 3, Art. 86.

St Petersburg, and the autonomous regions and districts in the Russian Federation.

On 10 April 1992, the Federal Treaty (comprising the three treaties) was approved by the Congress of People's Deputies of the Russian Federation[18].

The question of the legal nature and the meaning of the 1992 Federal Treaty is the subject of much controversy.

There can be no doubt that the Treaty, which proclaimed the territories, regions and the two cities of federal importance to be component units of the Russian Federation, has helped to create parity in the legal/constitutional status of all the component units of the Russian Federation (although complete equality has not been achieved).

However, the above-mentioned Federal Treaty cannot be regarded as a treaty on the formation (or transformation) of the Russian Federation. As rightly stated by G. A. Gadzhiev, judge at the Constitutional Court of the Russian Federation, it represents a democratic process (involving representatives of all the component units of the Russian Federation) establishing constitutional norms on the apportionment of powers among the various authorities in the Russian Federation[19].

The problem of the legal/constitutional status of the territories and regions has become more and more acute. In 1993, there was increasing discussion of the problem of transforming the territories and regions into republics. The region of Sverdlovsk took the first step by proclaiming the Ural Republic. However, this decision of the legislature of Sverdlovsk region was repealed in a decree issued by B. N. Yeltsin, President of the Russian Federation, and the Governor of Sverdlovsk region was dismissed[20].

The problems involved in establishing a genuine federation in Russia were the subject of heated discussion at the constitutional conference convened by the President of the Russian Federation for the purpose of drafting the final version of

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18 Gazette (Vedomosti) of the Congress of People's Deputies of the Russian Federation and of the Supreme Soviet of the Russian Federation, 1992, No. 17, Art. 898.

19 See: Gadzhiev G.: The Federal Treaty and the new role of the Constitutional Court. "Ethnopolicy". The Russian Ethnopolitical Gazette, 1992, No. 2, pp. 18-26.

20 Compendium of the decisions of the President and the Government of the Russian Federation, 1993, No. 46, Art. 4447.

the new draft constitution of the Russian Federation, submitted at the initiative of B. N. Yeltsin.

Particular support was expressed for the idea of organising the federation along exclusively territorial lines by establishing gubernias *(provinces) in place of the republics, territories and regions (such provinces would have combined several component units of the federation and been smaller in number). Although this idea did not reflect the reality of the situation and was not accepted, it did contain an element of rationality. It played a significant part in preventing any mention being made in the Constitution of the Russian Federation of the sovereign nature of the republics in the Russian Federation, of the right of the republics to withdraw from the Russian Federation or of the Federal Treaty and the constitutions and laws of the republics taking precedence over the Constitution of the Russian Federation and federal legislation.*

In its final version, the federal system in Russia is based on the provisions set out in Article 5(1) of Chapter 1, "The Basics of the Constitutional System", of the Constitution of the Russian Federation, which was adopted by referendum on 12 December 1993:

"1. The Russian Federation shall consist of Republics, Territories, Regions, Cities of Federal importance, Autonomous Regions and Autonomous Areas, subjects of the Russian Federation enjoying equal rights.

2. A Republic (State) shall have its own Constitution and legislation. Territories, Regions, Autonomous Regions, Autonomous Areas and Cities of Federal Importance shall have their own Statutes and legislation.

3. Federative relations within the Russian Federation shall be built on the basis of state unity, unity of the state power system, separation of the terms of reference and authorities between the bodies of state power of the Russian Federation and the bodies of state power of the subjects of the Russian Federation, and equality of rights and self-determination of peoples within the Russian Federation.

4. In their relations with federal bodies all the subjects of the Russian Federation have equal rights."

An approach of this kind to federalism in Russia is consistent with the current phase of the transition process, involving the establishment of a civil society, a market economy, the democratic institutions of a constitutional state and efforts to provide the best possible federal structures for the country.

Following the adoption of the new Constitution of the Russian Federation, discussion has continued as to the legal nature of the federation: is it constitutional or constitutional-contractual? This is not a merely a theoretical issue. It also has practical implications.

Under the terms of the Constitution, Russia is a constitutional federation. This is not invalidated by Article 11(3) of the Constitution of the Russian Federation, which stipulates that the delimitation of powers and responsibilities of the authorities of the Russian Federation and the authorities of the component units of the Russian Federation is realised on the basis of the Constitution and the Federative and other treaties on the delimitation of powers and responsibilities.

The Russian Federation has not copied the conventional models of federations found throughout the world. On the whole, it is more centralised than decentralised.

For instance, within the jurisdiction of the Russian Federation and in respect of the powers of the Russian Federation in areas in which responsibility is shared by the Russian Federation and its component units, the federal executive authorities and the executive authorities of the component units of the Russian Federation form a single system of executive authority in the Russian Federation (cf. Article 77(2) of the Constitution of the Russian Federation).

As far as judicial powers are concerned, the decisive role lies with the central authorities (Article 128 of the Constitution of the Russian Federation).

The powers of the Constitutional Court with regard to relations within the federation have been extended. It rules on the compatibility with the Constitution of the constitutions of the republics, the statutes, laws and other regulations of the component units of the Russian Federation concerning matters under the jurisdiction of the authorities of the Russian Federation and under the joint jurisdiction of the authorities of the Russian Federation and those of the component units of the Russian Federation, as well as on the constitutionality of treaties between the authorities of the Russian Federation and those of the component units of the Russian Federation and of treaties between the authorities of individual component units of the federation (Article 125 of the Constitution of the Russian Federation).

A further trend in the development of the Russian Federation has emerged in recent times. On 15 February 1994, the Russian Federation and the Republic of Tatarstan signed a treaty on the delimitation of jurisdiction and the mutual

delegation of powers between the authorities of the Russian Federation and the authorities of the Republic of Tatarstan[21].

The treaty signed by the Russian Federation and the Republic of Bashkortostan on 3 August 1994 is identical in nature[22].

On 21 July 1994, the Russian Federation and the Republic of Kabardino-Balkaria signed a treaty on the delimitation of jurisdiction and the mutual delegation of powers between the authorities of the Russian Federation and the authorities of state power of the Republic of Kabardino-Balkaria[23].

It seems likely that similar treaties will also be signed with other republics[24].

As indicated by the title, the above-mentioned treaty concerns not only the delimitation of responsibilities, but also the mutual delegation of powers, there being a strict definition of the powers of the Republic of Tatarstan and of those which it delegates to the federal authorities.
In the context of the relations developing between the Russian Federation and the Republic of Tatarstan, press reports have indicated that Tatarstan has concluded a treaty with Abkhazia[25]. *The latter's autonomy is not recognised by Georgia, which regards it as an integral part of its territory. Abkhazia has not been recognised as a sovereign state by the Russian Federation either.*

Many experts believe that a series of provisions in the treaty between the Russian Federation and the Republic of Tatarstan are not compatible with the Constitution of the Russian Federation and also that the conclusion of a treaty between the Republic of Tatarstan and a state not recognised by the Russian Federation is unacceptable.

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21 Rossijskaya Gazeta of 17 February 1994.

22 Soviet Bashkiria of 6 August 1994.

23 Kabardino-Balkaria Pravda of 8 July 1994.

24 See the Decree of the President of the Russian Federation on the appointment in the President's Office of the committee responsible for preparing treaties on the delimitation of jurisdiction and the apportionment of powers between the federal authorities and the authorities of the component units of the Russian Federation (Compendium of legislation of the Russian Federation, 1994, No. 13, Art. 1475).

25 Izvestia of 25 August 1994.

The preamble to the treaty states that the Republic of Tatarstan is united with the Russian Federation. Article 6 of the treaty provides that the treaty itself and not the Constitution of the Russian Federation takes precedence in relations between the Russian Federation and the Republic of Tatarstan, stating that the authorities of the Republic of Tatarstan and the federal authorities may appeal against the application of the laws of the Russian Federation in the Republic of Tatarstan if the latter are inconsistent with the treaty.

The experts concerned believe that such treaties should not be allowed to amend the constitutional provisions regarding the jurisdiction of the authorities of the Russian Federation and those of its component units (Articles 71-73 of the Constitution of the Russian Federation).

Under Article 78(2) and (3), of the Constitution of the Russian Federation, the federal executive authorities and the executive authorities of the component units of the Russian Federation may agree reciprocally to transfer some of their powers, providing this is not inconsistent with the Constitution of the Russian Federation or federal legislation.

Another group of experts regard such practices favourably, believing that a so-called "asymmetrical federation" is developing in Russia on a contractual basis. Unfortunately, they do not indicate the content of the concept of an "asymmetrical federation", let alone the limits within which such asymmetry could exist.
The conclusion of treaties between the Russian Federation and the republics on the delimitation of jurisdiction and the reciprocal delegation of powers between the authorities of the Russian Federation and the corresponding authorities in the republics indicates that the Russian Federation is not developing in strict conformity with the provisions of the Constitution of the Russian Federation concerning the federal system in Russia.

This can, of course, be explained by the complexity and contradictory nature of the processes occurring during the transition period in Russia, given the conflict of interests between various state and political elites both in the centre and in peripheral regions.

Practical experience will prove the viability of one or other form of federal union.

The role of the Constitutional Court in the reform of the Russian Federation

In 1992-1993, just over one-third of the decisions of the Constitutional Court of the Russian Federation in the 27 decided cases directly concerned problems involving relations between the component units of the federation. The legal

stance adopted by the court was essentially aimed at preserving the integrity of the Russian Federation and strengthening the status of its component units.

The Constitutional Court's decisions helped bring about the conclusion of the Federal Treaty between the federal authorities and the component units of the Russian Federation and also helped to harmonise the interests of the federal authorities and of the authorities of the component units of the federation. They were aimed at defending the equality of rights and freedoms of citizens of all nationalities, as well as the rights of national minorities and other small ethnic groups in Russia.

The first group of decisions of the Federal Constitutional Court concerned the sovereignty of the Russian Federation as a whole. In the cases in question, component units of the Russian Federation had exceeded their jurisdiction and infringed the rights of the federal authorities.

As already stated, in the case concerning various legislative texts adopted by the Republic of Tatarstan, the Constitutional Court ruled that the Constitution of the Russian Federation took precedence over restrictions on the effect of federal legislation on the territory of the Republic of Tatarstan, as the latter republic was part of the Russian Federation. At the same time, the Constitutional Court confirmed the lawfulness of legal/constitutional efforts to achieve a proper balance between general state interests and regional, national and ethnic interests (decision of 13 March 1992)[26].

In its decisions, the Constitutional Court found that there had been infringements of the rights of the federal authorities by component units of the federation in the case of the Supreme Soviet of the SSR of North Ossetia with regard to the question of the restriction of the rights and freedoms of citizens of the said republic of Ingush and Ossetian nationality (decision of 17 September 1993), and in the case of the Supreme Soviet of the Republic of Kabardino-Balkaria with regard to the organisation of the elections and the status of judges in Kabardino-Balkaria (decision of 30 September 1993).

The second group of decisions by the Constitutional Court of the Russian Federation concerned the protection of the rights of the component units of the federation against abuses of authority by the federal authorities and against abuses by other component units of the federation, not least in the light of the provisions of the Federal Treaty. In its decision of 11 May 1993, the Constitutional Court thus recognised the right of Chukchi Autonomous District to

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26 Gazette of the Constitutional Court of the Russian Federation, 1993, No. 1, pp. 40-52.

enter the Russian Federation directly as a component unit (except for the Magadan region). For this reason, the Constitutional Court referred the question of the procedures governing the exercise of joint authority and reciprocal action by the federal authorities and the authorities of the autonomous districts to the Supreme Soviet, the President and the Government of the Russian Federation for examination[27].

On 3 June 1993, the Constitutional Court of the Russian Federation upheld the right of the Mordovian SSR to deal as it saw fit with the matters falling under its jurisdiction (regarding the post of the President of the Mordovian SSR)[28]. *In addition, it has upheld the rights of Chelyabinsk Region as a component unit of the Russian Federation (decision of 7 June 1993)*[29] *and the rights of the city of Moscow as a component unit of the federation and its capital (decisions of 19 May 1992 and 2 April 1993)*[30].

In its decision of 10 September 1993 on the case concerning the constitutionality of the decree by the President of the Russian Federation on the organisation, upon privatisation, of the management of the electricity industry of the Russian Federation, the Constitutional Court upheld the rights of Irkutsk Region and Krasnoyarsk Territory as component units of the Russian Federation, thus providing momentum for the implementation of the section of the Federal Treaty concerning the use of conciliation procedures to settle ownership disputes.

The above-mentioned decisions and the statement by the Constitutional Court of the Russian Federation on 5 March 1993 concerning the state of constitutional legislation in the Russian Federation in relation to questions of federalism have helped to provide a clearer constitutional basis for federalism in Russia. They have also played a part in bringing about the adoption of a series of new constitutional provisions concerning relations between the component units of the federation (Articles 4, 5, 6 and 11 of the Constitution of the Russian Federation) and in extending the Constitutional Court's powers in this area.

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27 Gazette (Vedomosti) of the Congress of People's Deputies of the Russian Federation and of the Supreme Soviet of the Russian Federation, 1993, No. 28, Art. 1083.

28 Gazette (Vedomosti) of the Congress of People's Deputies of the Russian Federation and of the Supreme Soviet of the Russian Federation, 1993, No. 30, Art. 1183.

29 Gazette (Vedomosti) of the Congress of People's Deputies of the Russian Federation and of the Supreme Soviet of the Russian Federation, 1993, No. 27, Art. 1044.

30 Gazette (Vedomosti) of the Congress of People's Deputies of the Russian Federation and of the Supreme Soviet of the Russian Federation, 1992, No. 23, Art. 1247; 1993, No. 17, Art. 621.

The CIS: legal nature, current situation and development prospects

The constituent documents and other texts of the CIS do not provide a clear indication of the legal nature of the Commonwealth of Independent States, which was set up following the dissolution of the USSR under agreements signed in December 1991.

Article 1 of the Agreement on the CIS proclaims the establishment of "the Commonwealth", but neither the agreement itself nor the subsequent documents indicate the legal content of this concept. One obviously has to agree with those writers who have stated that "the Commonwealth" is merely a name with no legal force[31]. The constituent documents of the CIS indicate that it is neither a state nor a body holding supranational powers (Article 1 of the Statute of the CIS, Alma-Ata Declaration of 1991).
Most researchers believe that the CIS is neither a confederation nor an international organisation, as it does not possess sufficient features of either category. This situation is in line with the objectives and tasks which the CIS has set itself. The objective behind its creation was to perform the transition from a unitary federal state to a post-federal area made up of independent states and to establish new relations between the latter on the basis of their being equal and sovereign.

Under Article 2 of the Statute of the CIS, the objective of the CIS is to bring about co-operation in the political, economic, humanitarian and cultural fields, among others. The constituent documents are full of terms such as "support", "mutual assistance" and so on.

From a legal point of view, the Commonwealth of Independent States does not have the powers to achieve its proclaimed objectives. Article 4 of the Statute of the CIS refers not to powers but to joint activity by the states within the framework of the CIS. The same article also states that multilateral and bilateral agreements on various aspects of mutual relations between the member states - and not the Statute - form the main legal basis of the relations between states within the framework of the Commonwealth[32]. The process of establishing standards within

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31 Fissenko V. N., Fissenko L V.: The charter for co-operation within the framework of the Commonwealth of Independent States, Moscow Journal of International Law, 1993, No. 3, p. 39.

32 With rare exceptions, the international treaties on which international organisations are based do not allow reservations to be made in respect of their provisions. In contrast, the Statute of the CIS permits reservations in respect of a whole series of chapters and articles, this being an option of which the member states have availed themselves actively. The substance of certain reservations has been tantamount to the rewording of the provisions of the Statute, which is contrary to Article 21 of the Convention on the Law of Treaties.

the framework of the CIS is completely unregulated in many areas. Bilateral agreements are often concluded on matters of genuine interest to all members of the CIS.

The concept of membership of the CIS is anything but clearly defined. Comparison of various documents reveals not only that the terminology varies ("member state of the Commonwealth", "participant in the Commonwealth" and "High Contracting Party"), but also that no specific procedure has been laid down on how states become members.

Lastly, the CIS does not have a system of political bodies meeting at regular sessions rather than on a sporadic basis.
The people of the countries of the CIS (of the former USSR) are increasingly coming to expect some form of rapprochement and genuine integration within the territory of the former Soviet Union in the economic and cultural fields so that frontiers remain open, customs barriers are removed and individual rights and fundamental freedoms are guaranteed.

Discussion is under way in the countries of the CIS about the choice of long-term models for the integration of the territory of the former Soviet Union. There has been a proposal to unite Russia, Ukraine and Belarus in a Union of Slav States, and N. A. Nazarbaev, President of Kazakhstan, has proposed that a Euro-Asian Union be established (taking up the proposal by A. D. Sakharov, the famous human rights activist, that a Union of Independent European and Asian States be established in order to bring about a genuine transformation of the USSR). It is highly likely that we will see the emergence of a kind of core inter-state formation comprising Russia and certain other republics (Ukraine, Belarus and Kazakhstan) which are most suited to economic integration and close co-operation in other areas. However, these proposals and plans, for all the fine words and phrases, do not take account of the realities of the present situation. Moreover, the Commonwealth of Independent States still has much to offer. The most effective approach would be to strengthen the CIS and give it new impetus by providing mechanisms to enable it to operate efficiently. Such an approach (and a new phase in the development of the CIS) has now begun with the signature by the member states of the CIS of a Treaty on Economic Union aimed at re-establishing on a market basis a single economic area with free movement of goods, services, capital and labour. All countries of the CIS (including Ukraine as an associate member) have signed the treaty. Within the framework of the CIS Economic Union, a decision has been taken to set up an Inter-State Economic Committee with a range of supranational powers[33]. A customs union, a CIS defence union

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33 "Sodruzhestvo" (Commonwealth). Gazette of the Council of Heads of State and the Council of Heads of Government of the CIS, Minsk, 1993, No. 4 (12), p. 20.

and many other such arrangements could usefully be added to the economic union.

It was once rightly suggested that it is better to grind down the pieces of a broken vase and cast a completely new, durable vase in the same or another shape than to collect the pieces and glue them together in a vase of the original shape with cracks.
Unfortunately, inadequate attention has been paid within the framework of the CIS to guaranteeing and protecting individual rights and fundamental freedoms. The CIS has no effective mechanisms for guaranteeing international and European human and civil rights standards in the relations between the states of the CIS (despite a constitutional declaration that the universally recognised principles and standards of international law and international treaties apply directly and take precedence over other laws). This shortcoming is reflected in the many appeals made to the Constitutional Court of the Russian Federation by people seeking protection of universally recognised human rights and freedoms, who are unable to obtain such protection because of the lack of corresponding regulations within the framework of the CIS.

The Statute of the CIS provides for the establishment (among the bodies of the CIS) of a human rights commission. For the time being, however, no decisions have been taken on how this will be put into practice. Under the terms of the Statute of the CIS, the human rights commission is to be a consultative body with a supervisory role and not a control mechanism, still less a body with judicial functions.

At present, the establishment of a CIS human rights court would be in contravention of the Statute and the constituent documents of the CIS, under which the latter does not have supranational powers. In our view, the establishment of a human rights court within the CIS would clearly be beneficial. It is a proposal on which literature already exists[34].

One possible solution to this problem would be the adoption by the Council of Heads of State of an appropriate declaration, followed by the drafting of a CIS human rights convention providing for the establishment of such a court or a similar body. On 29 December 1992, the Interparliamentary Assembly of the Member States of the CIS adopted a decision on the need to draw up a draft convention on the protection of human rights and fundamental freedoms and the

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34 See: Lukasheva E: Human Rights - the time for difficult solutions, Svobodnaya Mysl (Free thought), 1992, No. 4, pp. 91-94.

rights of national minorities, which would be open for signature and subsequent ratification by the participants in the Assembly and other states. The Interparliamentary Assembly believes that the above-mentioned convention should make provision for appropriate mechanisms for monitoring compliance[35]*. However, these ideas have not yet been put into practice.*

f. Some features of confederation between the Baltic States - Report by Mr Kestutis LAPINSKAS

Judge at the Constitutional Court of the Republic of Lithuania

1. Formal relations of co-operation between the Baltic States (Estonia, Latvia and Lithuania) have sprung up already, in the years between World War I and World War II. These were legally established in the Treaty of Friendship and Co-operation between Estonia, Latvia and Lithuania that was concluded in Geneva on 12 September 1934. Though this Treaty exhibited no features of confederation and did not help the Baltic States to save their State independence in the dramatic events of 1940, it nevertheless has an important historical significance. That is why very soon after the restoration of the independence of these States, the good relations and co-operation between the Baltic countries were renewed. On 12 May 1990, in Tallinn, they proceeded to sign the Declaration of Friendship and Co-operation of the Republic of Estonia, the Republic of Latvia, and the Republic of Lithuania. Later many other legal and political documents of this kind were adopted.

2. A new level of interstate relations between the Baltic States was reached on 13 June 1994, when the Heads of Governments of the Baltic States (i.e., the Republic of Estonia, the Republic of Latvia, and the Republic of Lithuania) met in Tallinn and established the Baltic Council of Ministers. At the founding session of the Baltic Council of Ministers, the Terms of Reference for the Council were adopted and an Agreement on the Baltic Parliamentary and Governmental Co-operation between the Republic of Estonia, the Republic of Latvia, and the Republic of Lithuania was signed. In the statement of the Heads of Governments of the Baltic States, it was emphasised that the signing of this Agreement represents a historic step towards the integration of the Baltic States into the European Union.

3. The above-mentioned Agreement expressed the desire of the Baltic States to develop mutual co-operation in the various spheres of mutual interest and to

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35 **Information bulletin of the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States, 1993, No. 2, p. 22.**

create a framework for the co-ordination of co-operation. It was not a new idea, because this Agreement was based:

- *on the Treaty of Friendship and Co-operation between Estonia, Latvia and Lithuania that was concluded in Geneva on 12 September 1934;*
- *on the Declaration of Friendship and Co-operation of the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania signed in Tallinn on 12 May 1990;*

- *on the experience of the co-operation between the parliaments and between the governments of the Baltic States during the period of 1990-1994;*

- *on the joint declaration of the presidents of the Baltic States on 21 September 1993, and on the Baltic Assembly Resolutions of the Baltic Council on 31 October 1993 and 15 May 1994.*

Article 1 of the Agreement proclaims that the Baltic States shall endeavour to develop co-operation in the spheres of foreign policy, security, defence, legislation, social and economic affairs, energy, communication, environment, culture and other fields of mutual interest, and for this purpose, that they shall negotiate bilateral and multilateral agreements which regulate these spheres of co-operation.

The Agreement also provided that the main bodies of co-operation between the Baltic States should be the Baltic Assembly and the Baltic Council of Ministers. Moreover, the Baltic States may decide to establish special co-operation bodies within the framework of the said Agreement.

4. The Baltic Assembly could be described as a body for co-operation between the parliaments of the Baltic States. Its activity is based on the Regulations of the Baltic Assembly signed in Tallinn on 8 November 1991, and revised on 31 October 1993.

It is an advisory consultative institution which discusses questions and drafts which attract the common attention of the States. The Assembly expresses its own position in the form of declarations, proposals and recommendations. They have no obligatory force as yet.

Each Baltic State has delegated to the Assembly 20 of their parliamentary members. The sessions shall take place twice a year. In cases of necessity, extraordinary sessions shall be held. The Assembly has a Presidium which functions between plenary sessions. The Assembly has the following committees:
1. legal,

2. social and economic affairs,
3. environment and energy,
4. communications,
5. education, science and culture,
6. security and foreign relations.

The work of the Assembly shall be assisted by a secretariat.

The Baltic Assembly may make addresses, proposals and recommendations to the Baltic Council of Ministers.

In the Plenary Sessions of the Baltic Assembly, members may submit questions to the Baltic Council of Ministers on matters concerning Baltic co-operation.

Exchanges of current information between the Baltic Assembly and the Baltic Council of Ministers are conducted through their respective secretariats.

The Baltic Assembly also has the right to state its views on major questions of Baltic co-operation during its intersessional periods.

5. The executive body or the so-called body for co-operation between the governments of the Baltic States is the Baltic Council of Ministers, based on the Terms of Reference adopted in Tallinn on 13 June 1994.

The Baltic Council of Ministers is chaired by the Heads of Government of the Baltic States. The Heads of Government are responsible for overall co-ordination of matters pertaining to Baltic Co-operation and, in specific areas of co-operation, by one or more branch Ministers from each Baltic State.

The term "Ministers of Baltic Co-operation" shall mean the Ministers of Foreign Affairs of each Baltic State who normally perform the duties of a Minister for Baltic co-operation. Any Baltic State may however decide to designate another minister as its Minister for Baltic Co-operation.

The Baltic Council of Ministers is entrusted with the tasks of:

- *taking decisions with regard to the recommendations of the Baltic Assembly;*
- *carrying out assignments delegated to the Baltic Council of Ministers in accordance with agreements concluded between the Baltic States;*

- *addressing matters of relevance in the context of Baltic co-operation, whereby the Baltic Council of Ministers shall draft and direct the*

implementation of measures required to promote extensive and substantial Baltic co-operation.

The chairmanship of the Baltic Council of Ministers is rotated among the Baltic States on an annual basis in alphabetical order.

The chairmanship is charged with being actively engaged in directing the work carried out in the various fields of co-operation.

The State holding the chairmanship shall, if not otherwise decided by the Baltic Council of Ministers (Heads of Government or Ministers of Baltic Co-operation), represent the Baltic Council of Ministers in relations with other States and international organisations.

6. The Heads of Government, in the framework of the Baltic Council of Ministers, and the Ministers for Baltic Co-operation shall be assisted in their work by a Baltic Co-operation Committee.

The term "Baltic Co-operation Committee" shall mean the body co-ordinating the activity of the Baltic Council of Ministers during intervening periods between meetings of the Heads of Government and between meetings of the Ministers for Baltic Co-operation and composed of three members. Each of the three Baltic States appoints one senior official.

The meetings of the Heads of Government, being the supreme decision-making body of the Baltic Council of Ministers, shall take place at least twice annually.

The Ministers for Baltic Co-operation and the members of the Baltic Co-operation Committee shall be invited to participate in these meetings.

In the framework of the Baltic Council of Ministers, meetings of the Heads of Government shall normally be held on the initiative of the country holding the chairmanship of the Baltic Council of Ministers. Extraordinary meetings of the Baltic Council of Ministers shall be held on the request of any one of the Heads of Government.
The Baltic Council of Ministers shall have the power of decision when representatives from all of the Baltic States, with the necessary credentials, are present.

Decisions of the Baltic Council of Ministers shall be made on the basis of the principle of consensus.

Decisions of the Baltic Council of Ministers are binding for the Baltic States, provided such decisions are in full accordance with the internal laws of each Baltic State.

In case of necessity, and upon the decision of the Heads of Government, special legal acts in accordance with the internal laws of the Baltic States shall be issued in each of the Baltic States in order to implement decisions of the Baltic Council of Ministers.

If, in accordance with the internal laws of one or more of the Baltic States, a decision of the Baltic Council of Ministers requires parliamentary approval, the decision shall come into force only after approval of that or those parliament(s).

If such approval is necessary, the Baltic Council of Ministers shall be informed thereof by the state in question before making its decision.

7. An interesting common form of co-operation is provided between the highest bodies of the Baltic States. It is called the Baltic Council, which consists of the Baltic Assembly and the Baltic Council of Ministers, when they hold annual joint sessions. At each annual joint session the Baltic Council of Ministers shall submit a report on the Baltic States co-operation concerning the past year co-operation and plans for the further co-operation.

Other forms of co-operation are provided as well:

- ad hoc *meetings between the Heads of Government and the Presidium of the Baltic Assembly;*

- *on a working level - meetings between the Baltic Co-operation Committee and the Secretariat of the Baltic Assembly.*

A brief summary:

- *Among Eastern and Central European countries, and especially those in the Baltic States which lived long decades subject to occupation in a supposed union, a syndrome of distrust and suspicion has prevailed in respect of all kinds of alliance between States. Thus the path towards confederation or towards some other kind of alliance in Europe, for these countries, shall not be an easy and simple one.*

- *Although a very short time has elapsed since the Baltic States won their independence, they have formed quite an interesting mechanism for*

interstate relations and co-operation. However, the search for concrete forms of co-operation is not finalised entirely.

- *A characteristic feature of the contemporary development of relations between the Baltic States is orientation towards Europe. This point is stressed in the above-mentioned Agreement: "The Baltic Council of Ministers and the Baltic Assembly shall seek to develop mutually beneficial co-operation with the Nordic Council, the Council of Baltic Sea States and other interstate bodies, bearing in mind the importance of regional co-operation in European integration processes." That concerns not only the objects of co-operation but its organisational forms as well.*

g. The idea of confederation in central asia: searches, problems and ways of decision-taking - Report by Professor Serikul KOSAKOV

Vice-Minister of Justice, Chairman of the Higher Court of Arbitration of Kyrgyzstan

At the present time all countries of the CIS continue to suffer deep crises in all spheres of public life, economics, politics, ideology, international relations; social and economic tension increases. All this takes place in conditions whereby the development of the Commonwealth of Independent States is determined by two tendencies. On the one hand, the process of creating of national statehood is progressing, and on the other hand there is a tendency towards integration of the Commonwealth countries.

The CIS, being an international union, plays an important role in the creation of a legal framework for international relations among the countries which it includes. The potential for CIS activity has not been exhausted. However, there currently exist no adequate structure in the CIS bodies which might allow for the realisation of the full existing potential for integration. This is attractive not only for the leaders of CIS countries but also for the population of those countries at large, and the experience of the past years of functioning of the CIS proves the necessity to proceed to a new level of integration.

At the present time all CIS countries are in search of new forms of governmental structures which are adapted to their internal conditions. Practice shows that neither unitary nor federative CIS countries may be considered stable in the full sense. In such conditions in early 1994, President Nursultan Nazarbaev offered to create a Eurasian Union on the bases of the former USSR which may, by his words, already include 5-6 countries. The President of Kazakhstan thereby

proposed to replace the non-functioning structures of the CIS by new formations reminiscent of the European Union rather than the Soviet Union.

According to the author of this project, who duly presented it project to all heads of the CIS, the Eurasian Union is characterised as a Union of equal independent countries having as its aim the implementation of the national interests of each participant country and having a joint potential for integration. The project identifies three stages in the creation of a Eurasian Union. The first one is economic, the second humanitarian - related to the defence of human rights in the CIS countries and to cultural and scientific exchange - and the third provides for guarantees of state security and defence.
The following principles and mechanisms for the formation of the Eurasian Union are proposed:

Conducting national referenda or a decision by parliaments on the entry of countries to the Eurasian Union.

Signing an agreement by participating countries on the creation of the Eurasian Union on the basis of the principle of equality, non-interference in internal matters, respect for sovereignty, territorial integrity and immunity of national borders. The Agreement should lay down legal and organisational basis for deepening integration in the direction of the formation of economic, monetary and political union.

The Eurasian Union does not allow for associate membership. Decision-making in the CIS is carried out on the basis of a qualified majority of four-fifths of the total number of the participant countries.

Independent countries should enter the Eurasian Union if they fulfil preliminary conditions:

Compulsory execution of adopted intergovernmental agreements;

Mutual recognition of existing governmental and political institutions of participant countries of the Eurasian Union;

Recognition of territorial integrity and immunity of borders;

Refusal of economic, political and other forms of pressure in intergovernmental relations;

Termination of military actions among the countries.

Entry of new countries to the Eurasian Union is made after an expert opinion is made of their readiness to enter the Eurasian Union by a unanimous vote of all members of the Eurasian Union. An expert opinion is made by a body which is created on an equal footing by the countries which expressed their agreement to become members of the Eurasian Union.

Members of the Eurasian Union may participate in other integration associations including the CIS on the basis of associate or permanent membership or observer status.
Every participant may withdraw from the Eurasian Union having notified other countries at least six months prior to such decision.

The following supranational bodies are proposed:

Council of heads of states and heads of governments of the Eurasian Union - the highest political body of the Eurasian Union. Each participant country presides in the Eurasian Union for a periode of six months, rotating according to the Russian alphabet.

The highest consultative body is the Parliament of the EAU. The Parliament is formed by way of delegating deputies from the parliament of each participating country or by direct election. Decisions of the EAU Parliament become effective after their ratification by parliaments of EAU countries. The question of ratification should be considered within a month.

The main activity of the EAU Parliament is the co-ordination of legislation of participant countries with a view to the development of a uniform economic space and the implementation of measures for the protection of social rights and the interests of the individual, based upon mutual respect of State sovereignty and rights of citizens in the countries of the EAU.

A common legal base is created through the EAU Parliament to regulate relations among economic entities of participant countries.

The Council of Ministers of Foreign Affairs of the EAU has the task of coordinating external political activity;

The EAU Intergovernmental Executive Committee is a permanent executive and supervisor body. The head of the Executive body is appointed in turn from among representatives of participant countries by heads of the EAU countries for a fixed period.

The staff of the Executive Committee is made up from representatives of all participant countries.

The EAU in the person of its Executive Committee should obtain the status of observer in a large number of international organisations;
An Information Bureau of the EAU Executive Committee is also envisaged. In this connection, there will be a special duty on participant countries concerning the prohibition of unfriendly statements in the addresses of participant countries under the Agreement;

The Council on Education, Culture and Science will be charged with co-ordinating policy in these fields with promoting cultural and scientific co-operation and exchanges, and with joint activity in the creation of text books and teaching materials;

With a view to deeper co-ordination and effectiveness, within each of the EAU countries it would appear reasonable to create a Governmental Committee (Ministry) on EAU matters;

At the ministerial level, there will be regular meetings and consultations on matters of health, education, labour, employment, environment, culture, fighting crime and so on.

Promotion of activity of non-governmental organisations in accordance with the domestic legislation of participating countries of the EAU.

The official language in the EAU, in accordance with the operation of domestic laws on language, is the Russian language;

With regard to citizenship, free movement of citizens within the EAU boundaries demands co-ordination of external visa policy in relation to third countries. In the case of an individual changing his or her country of residence within the EAU, he/she will automatically acquire citizenship of that country if he/she so wishes.

The capital of the EAU has been proposed as one of the cities at the border between Europe and Asia, for example Kazan, or Samara.

Thus the creation of a Central Asian Union may be considered as a step towards Eurasian Union. On 8 July 1994, a meeting of the Presidents of Kyrgyzstan, Kazakhstan and Uzbekistan took place in Almaty. This meeting was considered by the participants as an actual movement towards the creation of not only economic but also a common political, defence and cultural space in the region. In Almaty it became possible to reach agreement on the mechanism and structures

aimed at co-ordinating and, what is more interesting, controlling and promoting the execution of the agreements entered into. Executive bodies emerged with the purpose of bringing the central Asian alliance closer to the type of integration model which was constantly discussed by the Kazahk leader at the CIS meetings.

Working groups have also been created at the intergovernmental level to harmonise domestic legislation and for the development of new co-ordinated laws.

Among the documents signed at the meeting, the most interesting are the Agreement on the establishment of a Central Asian Bank for Co-operation and Development (with a start up capital of 9 million US dollars) and the decision of the Heads of government on the creation of an Intergovernmental Council and its subsidiary bodies.

The Heads of government signed an agreement on military and technical co-operation and on distribution of information as well as agreements in the area of economic and social development. In addition, a joint declaration of presidents was signed and an agreement was also reached on an address to the citizens of partner states and a memorandum on co-operation in the sphere of migration. The latter concerns first of all migration processes in the Central Asian Region.

h. The CIS and the idea of federaling Ukraine - Report by Mr Leonid YUZKOV - chairman of the Constitutional Court of Ukraine

I share the views of my Russian colleague, Professor N. Vitruk, regarding the definition (or, rather, lack of definition) of the status of the CIS (Commonwealth of Independent States) in international law. The fact is that neither the Agreement on the CIS nor the documents establishing the CIS indicate the legal substance of this entity. Article 1 of the CIS's Charter merely stresses that the CIS is not a State or an entity with supranational powers.

The conclusion to be drawn both from this provision of the CIS's Statute and from the way the CIS functions[36] in practice is that the CIS does not have the traditional

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36 After ratifying the Agreement establishing the CIS on 10 December 1991, Ukraine made a declaration through its Supreme Council (Parliament) on 20 December 1991, i.e. even before the Alma-Ata Declaration. Ukraine's declaration, relating to its signing of the Agreement establishing the Commonwealth of Independent States, stated in particular:

- that Ukraine was opposed to the transformation of the CIS into a State entity with its own organs of power and administration;
- that Ukraine was opposed to granting the CIS the status of a subject of international law;

form (federation or confederation) whose characteristics were so carefully described by Professor M.G. Malinverni. The Commonwealth is not a new type of confederation, let alone a new type of federation. It is a loosely structured entity created for the purpose of marking the fact that the Soviet Union had ceased to exist as a subject of international law as well as ensuring the transition from a union of States to the establishment of a member of independent States in the post-Union area. Under Alma-Ata Declaration, co-operation between the new States should be founded "on the principle of equality of rights guaranteed by coordinating bodies established on a joint basis and acting according to a procedure laid down in agreements between the member States of the Commonwealth, which is neither a State nor a supranational entity" (my own underlining).

The statement that "the CIS is neither a State nor a supranational entity", which occurs repeatedly in many documents, reflects the wish of the independent States to reinforce their sovereignty as well as their opposition to, and even fear of, a return to the former Soviet Union in any guise whatever. The statement does not, of course, mean that the CIS countries will remain aloof from the integration processes under way in Europe and in the world as a whole. If the CIS continues to exist and all its members display good will and mutual understanding as well as comply properly with the requirements of multilateral and bilateral agreements within the CIS framework, then it is quite conceivable that the CIS may give rise to some new form of Euro-Asian confederation.

This will not be possible until, firstly, the constitutional structure of each of the sovereign States participating in the CIS is founded on political, economic and social principles that enable democratic pluralism, the pre-eminence and inviolability of human rights and freedoms and the liberalisation of the economy to be respected, unreservedly supported and observed. Secondly, it will be necessary to work out and give legal form to mechanisms guaranteeing genuine equality between the members of the CIS, without any one member being able to claim a paternalistic or "big brother" role.

The current functioning of the CIS, on which opinions are divided, suggests that the road to a new form of confederation will be arduous, long and fraught with contradictions. It is also quite possible that, once the CIS has completed the function of providing a post-union area within which its member States can assert their full sovereignty, it will cease to exist and be replaced by other forms of co-operation between the States concerned.

- that co-ordinating bodies operating within the framework of the CIS could not take mandatory decisions; their decisions had the force of recommendations (see Bulletin of the Supreme Council of Ukraine, 1992, No. 6).

I shall now deal briefly with the question of the State structure of Ukraine in the context of the ongoing new constitutional process.

From the formal legal point of view, Ukraine is at present a unitary State which includes the Autonomous Republic of Crimea. This structure is far from satisfying all regions or all political figures. There are growing demands for federalisation so as to endow the regions with administrative autonomy. This idea was first put forward in 1990-1991 by politicians in Western Ukraine. Later, the threat of separatism led them to drop the idea and call instead for a "unitary Ukraine". However, the idea of a federal Ukraine did not disappear altogether. It was taken up again by politicians in Eastern Ukraine, where it received wide popular support. Thus, on 27 March 1994, following a decision by the Donetz and Lugansk regional councils and simultaneously with the elections to the Supreme Council of Ukraine, a consultative referendum on the question of a federal structure for Ukraine was held in these two major regions of the country. The result of this poll showed that some 90% of the voters who took part in it were in favour of a federal Ukraine.

I personally believe that the revival of Ukrainian statehood will probably culminate in the federalisation of Ukraine. At the same time it must be stressed that if the idea of a federal Ukraine is to be implemented, at least four factors need to be taken into consideration:

1. The federalisation of the Ukraine must take place in stages, without any haste, on the basis of a new constitution. Administrative autonomy should be granted initially to those regions that are best prepared to exercise it, particularly in the economic sphere.

2. The transition to a federal structure cannot be fully effected on the basis of the existing regional system. A radical but carefully considered territorial reform is needed, with the creation of large regions, having regard to economic, ethnic, cultural, natural, geographical and other characteristics.

3. Administrative (territorial) autonomy should be granted to regions in conformity with the Constitution and on the basis of a special law. In no circumstances should the regions conclude a treaty of union among themselves. In other words, the federation should be based on the Constitution, not on agreements.

4. To pave the way for the federalisation of the Ukraine, it will be necessary undertake a programme of action designed to raise the level of political and legal "culture" of the centre, as well as of the administration of regions and the organs of regional and local self-government. This will involve, in particular, making

every effort to ensure that the following principles are firmly established in political and legal practice:

a. in exercising its functions and specific powers, the central authority must not attempt to usurp the powers of the new regions;
b. the new regions, acting within the unitary legal area of Ukraine and within the framework of their powers, must not in any circumstances ignore the laws or other legal or normative texts of the central authority.

To ensure that these principles are applied, it will be necessary to create the appropriate system of checks and balances and give it the necessary legal form.

FOURTH WORKING SESSION

Chaired by Mr Constantin ECONOMIDES

Perspectives on the idea of confederation in Europe (here understood as based in particular on the European Union experience*)*

a. Contemporary concept of confederation in Europe - lessons drawn from the experience of the European Union
Report by Mr Yves LEJEUNE

b. New idea of confederation in Europe
Intervention by Mr Armando TOLEDANO LAREDO

c. New idea of confederation in Europe
Intervention by Mr Juan GONZALEZ ENCINAR

d. The European Union and federal and confederal analogies
Intervention by Professor Constantin STEPHANOU

a. Contemporary concept of confederation in europe - lessons drawn from the experience of the European Union - Report by Mr Yves LEJEUNE

Professor at Louvain Catholic University

The legal nature of the European Communities and, today, the European Union is one of the most complex and most debated issues in law[37]*. Ever since the E.C.S.C. was set up, every possible opinion on the subject has been expressed. The Communities have been described as federations; as partial or limited functional federations; as international organisations with a quasi-state or quasi-federal structure; as* sui generis *or supranational international organisations; and as one or more confederations. The adoption of the Maastricht Treaty has compounded the difficulty of describing such an entity. The components of the European edifice have multiplied and the European Communities have undergone a radical transformation, which began with the Single European Act in 1986.*

The structure constituted by the Union and by its Community foundations inspire fresh attempts at definition, which inevitably come up against the hybrid nature of such a structure[38]*. And yet the Union and Communities "form a unified whole on the international scene"*[39]*. Could it be that this concentric system defies classification under the legal theory of the state?*

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37 For previous attempts at definition, see P. HAY, Federalism and Supranational Organizations, Univ. of Illinois Press, 1966, pp. 29-76 and the bibliography referred to in pp. 77 and 78; K. von LINDEINER-WILDAU, La supranationalité en tant que principe de droit, Leyde, A.W. Sijthoff, 1970, pp. 153-159; L.J. CONSTANTINESCO, "La nature juridique des Communautés", Ann. Fac. Droit Liège, 1979, pp. 154-192; V. CONSTANTINESCO, Compétences et pouvoirs dans les Communautés européennes : contribution à l'étude de la nature juridique des Communautés, Paris, LGDJ, 1974. For more recent analyses, see C. LEBEN, "A propos de la nature juridique des Communautés européennes", in "L'Europe et le droit", *Droits*, n° 14, 1991, pp. 61-72 and the references mentioned in note 2.

38 See, e.g., S. CASSESE, "L'architecture constitutionnelle de la Communauté européenne après Maastricht et la place des pouvoirs locaux", in La décentralisation française et l'Europe (H. PORTELLI, ed.), Boulogne Billancourt, ed. Pouvoirs Locaux, 1993, pp. 215-223; A.D. PLIAKOS, in R.T.D.E., 1993, pp. 187-224.

39 S. CASSESE, op. cit., pp. 215-216 (translation of the French original).

Before setting out a number of elements reflecting various opinions, some clarification of the concepts of federalism, international organisation, confederation, supranationality and "intergovernmentalism" is necessary (section I). This will be followed by a brief description of the institutional architecture of the European Union (section II). Lastly, the legal nature of the European edifice will be analyzed on the basis of recent legal and political developments and in the light of the case-law of the European Communities Court of Justice and the member States' constitutional courts (section III).

I. BRIEF ANALYSIS OF CERTAIN CONCEPTS

A. Federalism

In the broad sense of the term, political federalism is an integration *movement giving rise to groups, associations, unions or confederations of states, or to federal states. In its strict sense, political federalism is a phenomenon of domestic law which structures and organises a single state by reconciling unity and diversity, equality and hierarchy, autonomy and interdependence.*

Anglo-Saxon legal doctrine has pragmatically identified four federal characteristics of some international organisations such that they may be described as "functionally federal": power-sharing between "central" bodies and "regional" bodies; relative independence of these bodies vis-à-vis *one another; direct action by these bodies on the people; and the principle of power-sharing, usually guaranteed by judicial review*[40]*. Obviously, these essentially descriptive characteristics can generally be found, to differing degrees, in all federal states as well as in a number of confederations and some integrated international organisations, such as the European Communities.*

B. Supranationality

The European Union member states have invented and implemented a method of "group government", often dubbed supranational, which has no precedent elsewhere in the world[41]*. The method chosen, namely the voluntary integration of democratic States, is a unique experiment in the history of mankind. In practical terms this finds expression in a set of "supranational" characteristics. This "supranationality" is no doubt a concept without specific legal meaning but which may have real descriptive value.*

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40 See, e.g., L. BERNIER, International Legal Aspects of Federalism, London, Longman, 1973, pp. 2-6 and 211-216.

41 According to J. LEPRETTE (Une clé pour l'Europe, Brussels, Bruylant, 1994).

A "supranational" organisation is an international organisation dedicated to integration on which its founders have conferred characteristics considered unusual for intergovernmental organisations (though not necessarily for confederations). The more an international organisation integrates its members, the more "supranational" it becomes. It combines various characteristics set out in the treaty establishing it. It has the power to take decisions in respect of member states that are directly binding not only on their public authorities but also on the individuals within their jurisdiction. Its own organs perform their functions quite independently of the member states and take their decisions in accordance with the majority principle; individuals may appeal against such decisions before a judicial body of the organisation. This is indeed the case for the three European Communities.

Supranationality is therefore not simply an assortment of methods for calculating the respective weight of states in joint decision-taking to counterbalance the de facto *inequality arising from the functional over-representation of small "powers". Nevertheless, the decision-making mechanism in "supranational" organisations, however autonomous they may be* vis-à-vis *their founding States, remains, by virtue of its origin, interstate and therefore intergovernmental in nature. The calculation of the respective weight of each member in "supranational" decision-making prevents "directorial" or hegemonic temptations as does, in general international law, the principle of the sovereign equality of states, which is not in any way a supranational principle.*

C. The difference between an international organisation and a confederation

Can we argue that an international organisation pursuing this kind of integration is closer to the confederation of States model?

It is customary to say that a confederation is a group of states whose purpose remains state-based whereas an international organisation is a body distinct from its founding members who have invested it with special powers to pursue collective interests. While the confederation is, in principle, simply an organised union of states without international personality[42]*, the organisation usually has such personality*[43]*.*

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42 On this question, see part D below.

43 However, this does not apply to either the Benelux or the European Union.

In both cases, it is public international law which governs relations between member States[44]*. In both cases, the central organs exercise only those powers provided for in the treaty establishing the entity concerned. In both cases, they consist of representatives of all the member states. In both cases, the collective body is the fruit of the states' common will to cooperate in specific fields, in view of their* de facto *interdependence. In both cases, the structure created is purely functional and instrumental: it is an association of states and not a national community with an intrinsic right of self-determination under public international law. In both cases, the entity has no real territory. The confederation has a territorial base which does not belong to it (since it is not recognised as having rights and obligations) but is the sum of the territories that its member states have acquired exclusively. The "territory" that can be deemed to delimit the spatial competence of an international organisation does not belong to it either since the organisation, made a subject of international law by its founders, is a non-territorial legal entity: the relevant territory does not determine a group of individuals' membership of a public community. An international organisation is no more "territorial" than a local social welfare centre*[45]*, whose spatial sphere of competence is defined by the municipal territory.*

What are the essential differences then?[46]

From a legal standpoint, the ***confederation*** *is a structure of permanent, institutionalised cooperation enabling its member states to present a coordinated point of view on the international scene and to establish harmonised, even uniform, legislation on certain internal issues. Although this may restrict the states' freedom of action, it is the result of their own volition and it is in "the very exercise of sovereignty" that they consented to it without losing either the power of having the last word (*Kompetenz-kompetenz*) or their "international immediacy" (*Vökerrechtsunmittelbarkeit*), even in part.*

The ***international organisation*** *is not a group of states but a body distinct from its member states on which the latter have conferred autonomy and, usually, separate legal personality, authorising the development of "internal law" proper to that organisation. The purpose is to assign the permanent task of multilateral cooperation to a specialised international administrative entity, whilst ensuring*

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44 It is international law which governs relations between the members of a Confederation (J.F. AUBERT, Traité de Droit constitutionnel suisse, Neuchâtel, Idles et Calendes, 1967, t. I, p. 198, in note i; L. WILDHABER, Treaty-making Power and Constitution, Basle and Stuttgart, Helbing and Lichtenhahn, 1971, p. 256 etc.).

45 Such as the "Centres publics d'aide sociale" (CPAS), local public establishments in Belgium.

46 See also P. HAY, op. cit., in particular pp. 18-29 and 80-89.

that there is no infringement of the sovereign equality of the States which have instituted it. The simplest framework is one which respects the strictest equality among states, thereby averting any commitment to interstate integration, although there is nothing to prevent states from adapting the rules of collective management governing their common entity according to the majority principle or from extending such management to broader fields, to achieve a form of sectorial integration. This is how what are now commonly called "supranational" organisations have emerged.

D. Considerations on the definition of a confederation

It is clear that both "supranational" organisations and confederations are ruled by international law, derived from an integrative (ie federal) approach by States instituting them through treaties. Although the pursuit of integration may require States to modify their constitutional law, this does not make them disappear from the international stage. According to our analysis so far, the two models seem to be distinguished by the personality acquired by a "supranational" organisation, in contrast to a confederation, and by the nature of the interstate method of integration, in particular the direct effect of legal rules set by the organisation.

In practice, legal commentators have never fully agreed on the two following aspects which continue to divide contemporary writers:

- *the international legal personality of the confederation;*

- *the indirect nature of the relationship between the "local" populations and the confederation, whose central body must rely on the member states to implement its decisions.*

Without having had the opportunity to re-read all the authors who have contributed to shaping the concept of confederation[47]*, we have gleaned the following variations on these two themes.*

1. Is the Confederation a subject of international law?

For L. LE FUR, the Confederation is "an association of sovereign states in which there is a central authority with legal personality and possessing permanent organs"[48]*; as far as J. de LOUTER is concerned, it is "a plurality of states which*

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47 See contributions by Professor G. MALINVERNI and Professor M. FORSYTH. Adde J.L. KUNZ, Die Staatenverbindungen, Stuttgart, W. Kohlhammer, 1929, pp. 442-456.

48 Etat fédéral et Confédération d'Etats, Paris, Marchal et Billard, 1896, p. 495 (quoted in French by M. FORSYTH, op. cit. p. 138).

is clearly an international legal entity while the 'state' character of its members remains intact and undeniable"[49]*. J.H.W. VERZIJL describes it as a "new legal entity" or a "compound international person"*[50]*. P. Hay maintains that the Swiss Confederation and the North-American Confederation have been recognised as subjects of international law but he does not conclude that the coexistence of the member states' personality and that of the Union is a criterion for distinguishing between the federal structure and the confederal structure*[51]*.*

For M. SIOTTO-PINTOR however the central body does not exercise its international powers as personal rights. "It merely represents one way which the members have chosen to exercise rights belonging to them individually. As the members remain subjects of public international law, the confederation can be the subject of specific rights only exceptionally when direct and exclusive power is assigned to it"[52]*. Similarly, P. LABAND writes that "the confederation of states is a 'legal relationship' between states and not a 'subject of law' [...] The will of the Confederation is merely the expression of the common will of its members [...] Even though, in international law relationships, the confederation of states is regarded as a collective power, even though it has a collective name, even though it can appoint common plenipotentiaries, etc., it nevertheless remains, in accordance with its legal nature, a society of states"*[53]*.*

This last analysis seems the most valid. Unless it is reduced to being a mere international organisation, the confederation can give rise to a new international personality only by encroaching on the very substance of its member states' sovereignty. Judicial doctrine and practice consider that confederate states retain full sovereignty and that treaties concluded by the central body confer on them direct and exclusive rights and obligations. Thus, on 4 July 1978, the Swiss Federal Court ruled that a treaty concluded by the Swiss Confederation before the Federal state was founded (1825-1826) bound and continues to bind the cantons on whose behalf it was concluded[54]*. Consequently, if the confederate members remain directly subject to the treaty law established by the confederal body in*

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49 Le droit international public positif, Oxford University Press, Vol. 1, 1920, pp. 205-206 (translation).

50 International Law in Historical Perspective, Leiden, A.W. Sijthoff, Vol. II, 1969, p. 159 and note 23.

51 Op. cit., pp. 22 and 87-88.

52 "Les sujets du droit international autres que les Etats", R.C.A.D.I., 1932, vol. 41, pp. 252-362, at p. 308 (translation).

53 Le droit public de l'Empire allemand, Paris, V. Giard and E. Brière, vol. I, 1900, pp. 100-101 and 104 (translation).

54 Elmar, Schwald & Cie, 4 July 1978, ATF 104 Ia 68, 69-70; A.S.D.I., 1979, p. 163.

conjunction with foreign states, it is difficult to see what rights and obligations the confederation could hold in its hypothetical capacity as a subject of international law.

2. Can the confederation exert direct jurisdiction over individuals?

The traditional definition of a confederation is that it constitutes a group whose members are states, not human beings, such that the central authority does not maintain direct relations with the nationals of those states.

L. LE FUR noted however, back in 1896, that "there is clearly nothing to prevent confederate states, when assigning a given function to the central authority, from conferring on it the right, in connection with that function, to bind their nationals; and, in fact, it will be observed that this is what happens to varying degrees in all confederations of states without exception[55]". Similarly, J.-F. AUBERT notes that there are a number of counter-arguments to the claim that there is an absence of direct relations between the confederation and the populations of confederate states[56]. M. FRENKEL observes that the treaty establishing a confederation can bind individuals directly, which is increasingly frequent in modern economic confederations[57]; and J.H.W. VERZIJL acknowledges that a form of political organisation, "half-way between confederation and federation", can be identified when central organs are invested with direct legislative or judicial authority over the individuals within the member states' jurisdiction[58].

The above considerations lead to the conclusion that the use of the legal model of a "supranational" organisation for federalist ends has the following advantages:

- *it is a simple means to confer the status of subject of international law on the structure which incorporating the member States;*

- *it makes it possible to achieve more extensive integration in a wider range of areas than in 19th Century confederations, while also fundamentally preserving the international independence and "immediacy" of States.*

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55 Op. cit., p.507 (quoted by M. FORSYTH, pp. 139-140).

56 Traité de droit constitutionnel suisse, Neuchâtel, Idles et Calandes, 1967, vol. I, No. 525, p. 200.

57 Federal Theory, Australian National University, 1986, No. 308, p. 77.

58 Op. cit., vol. II, p. 160.

II. EUROPEAN INSTITUTIONAL ARCHITECTURE

One hesitates to point out that the European Communities are, in law, three separate international organisations with joint organs. What has been labelled the European Union, which does not have international personality, is quite simply the formalisation of cooperation between the member States in fields falling outside the jurisdiction of the Communities, with the help of the Community organs; nonetheless, the Union may also be seen as a system of concentric circles encompassing both the European Communities and the machinery for intergovernmental cooperation in common foreign and security policy, justice and home affairs. This is how it will be understood in what follows.
The main instruments for the implementation of Community policy, primary law and secondary law, establish rules which, as the member states intend, must be applied directly or indirectly by all state bodies to all entities, private or public, addressed by those rules.

The Treaty of 7 February 1992 on European Union significantly extends the fields in which the Community can take action; among them, monetary policy can be regarded as one of the most important. Alongside this extension of its "exclusive" powers, the Community has been granted powers to be exercised "conjointly" with those of the member States[59] "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community" *(principle of subsidiarity, Article 3b of the Treaty establishing the European Community).*

The Union itself - and not the European Community - is gradually being granted certain state powers of "sovereignty" or "authority", sometimes referred to as "regalian"[60]*, namely defence, foreign affairs, justice and public order, to be managed through intergovernmental cooperation*[61]*, even though "gateways" to the European Community are provided*[62].

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59 It should not be forgotten that this distribution of powers between the Community and the member states is quite different from the distribution of legislative or administrative powers within a federal or regionalist state. Each state retains control over the transfer of power to the European Community; to recover exercise of that power, it "simply" has to withdraw. A federal state, however, has conferred on its federate bodies a substantive part of its powers, and constitutional reform is necessary to modify this purely internal distribution.

60 S. CASSESE, op. cit., p. 218.

61 Titles V and VI of the Treaty on European Union.

62 In the fields of justice and home affairs (Treaty on the European Union, Art. K.9; E.C. Treaty, Art. 100c, para. 6).

In this way, the Union-Community now handles a wide variety of state activities, albeit to a more or less limited degree.

The institutional structure of the European entity consists, without a doubt, of intergovernmental *components: the Council of Ministers and the European Council; the Monetary Committee (with advisory status) and the Economic and Financial Committee; the Political Committee for matters of common foreign and security policy; the Coordinating Committee for matters of justice and home affairs; COREPER and the General Secretariat of the Council*[63]*. Even the European Parliament, in the final analysis, fits at least into an interstate, if not intergovernmental, framework*[64]*.*

The Commission and, to a degree, the Court of Justice represent the "supranational" *components of the structure. The Commission consists of members offering every guarantee of independence* vis-à-vis *the member states and takes decisions by a majority voting procedure*[65]*. It may indeed have lost its exclusive power of initiative both in areas within the Community domain and in "extra-Community" sectors, but the Treaty on European Union has broadened its field of action by broadening that of the Community; moreover, it has left intact the organisation of the Commission, in particular its many committees through which it has managed to weave an extremely dense network of contacts with national administrative departments.*

Through the Court of First Instance, the Court of Justice pursues its task of reviewing the lawfulness of the acts of Community institutions but does not review the exercise of powers conferred on the Union (Treaty on European Union, article L). However, its functions may be extended to the fields of justice and home affairs if conventions adopted by the members states in these fields so provide (article K.3, paragraph 2, final sub-paragraph).

The Treaty of 7 February 1992 also establishes or consolidates entities similar to the "independent administrative authorities" that have emerged recently in several member states. Neither intergovernmental nor supranational, these institutions enjoy extensive autonomy vis-à-vis *states, the Commission and the European Parliament. They include the European Monetary Institute, the European System*

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63 Treaty on the European Union, Art. D, J.8, para. 5 and K.4, para. 1; E.C. Treaty, art. 146 and 109j, para. 2, art. 100d, 109c and 151.

64 See below, section II, A.

65 E.C. Treaty, Arts. 157 and 163.

of Central Banks (ESCB), the European Central Bank[66], the European Investment Bank[67], the Court of Auditors[68] and the Ombudsman[69].

In this complex, multifarious structure, the standard-setting function is shared chiefly between the Parliament and the Council, with a distinct emphasis on the latter despite the consolidation of the Parliament's powers. The Council's decisions frequently require unanimity[70] but may be taken by absolute or qualified majority in many cases[71].

The amalgamation of such diverse components, held together by a delicate balancing act between sometimes conflicting interests, has produced a somewhat hybrid, multiple structure that should now be identified in relation to the legal concepts described earlier.

III. THE LEGAL NATURE OF THE EUROPEAN EDIFICE

The European edifice is "federal" in the broad sense because it satisfies the conditions established in Anglo-Saxon legal doctrine[72], by integrating states which remain independent. It is not, or barely, federal in the strict sense because it often establishes uniformity without taking account of national diversity (cf. debate on subsidiarity) and because no big member state in the group would agree to forgo its international sovereignty in order to build a veritable European federal state. Only three definitions of the legal nature of the European Union and its components are therefore possible: a supranational organisation or organisations, an integrated confederation, or a sui generis *institution with a distinct system of law.*

A. Developments

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66 E.C. Treaty, art. 4a and 105 et seq.

67 E.C. Treaty, art. 4b, 198d and 198e.

68 E.C. Treaty, art. 188a et seq.

69 E.C. Treaty, art. 138e.

70 This is so in fields falling within the jurisdiction proper of the Union (Treaty on European Union, art. J.8, para. 2 and K.4, para. 3).

71 For the weighting of votes for the purpose of calculating a qualified majority, see art. 148 of the E.C. Treaty.

72 See above, section I.A.

1. Factual developments

As far as the factual situation is concerned, the interaction between the policy of Community institutions and that of its member states has taken on an "internal" dimension that has replaced traditional approaches to international cooperation. It is characterised by growing interdependence between the two levels of authority and by full dovetailing of their respective powers. In practice, therefore, the effectiveness of Community decisions depends on a delicate balance between seeking integration and taking account of national interests.

This "internal" dimension presupposes a European "environment" which, for want of a better word, will be described as "supranational". The free movement of goods, persons, services and capital in a geographical area without internal borders is the most obvious manifestation of such an environment.

Is the situation of the states within the Union affected by this development? The consolidation of the role of Community institutions and the removal of internal borders are indications that this may be so.

2. Legal developments

Another way of asking the same question is to examine what is vaguely termed "the two legitimacies", that of the states grouped together in the Community and that of the peoples - or people? - electing the European Parliament.

The Maastricht Treaty based European citizenship on citizenship of the Union. If citizenship is taken to mean "nationality" - which in the French tradition of public law is inaccurate - then European citizenship is a concept expressing an individual's allegiance to a political entity that is neither a state nor a recognised member of the international community in legal terms, but simply a group of states which retain individually the right to determine who are their nationals and accept all the consequences with respect to internal law and private international relations.

However, the Edinburgh European Council decided on 11-12 December 1992 that "the provisions [...] relating to citizenship of the Union [...] do not in any way take the place of national citizenship". The same European Council also took note of the unilateral declaration by Denmark that "Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-State". Citizenship of the Union therefore signifies, first and foremost, the recognition of a number of rights throughout the integrated area in which these citizens enjoy free movement. Such rights (and

obligations) are henceforth attached to the status of European citizen and are no longer the by-product of the (negative or positive) obligations on each state[73]*. It is a guarantee of equal treatment on the territory of other member states. The same phenomenon occurred when the first genuine federal states were formed.*

On a political level, citizenship of the Union means recognition of the right to vote and to stand as a candidate in elections to the European Parliament in the member state of residence, under the same conditions as nationals of that state[74]*. The Treaty provision guaranteeing this right*[75] *could be seen as the implicit embodiment of the existence of a "nation" of European citizens able to appoint their representatives in whichever member state and to express the political will of this "nation" at European level through political parties*[76]*. This forward-looking view, however, cannot prevail over the interstate logic underlying the European Parliament as an institution, insofar as it continues to consist of "representatives of the peoples of the States brought together in the Community"*[77]*.*

B. Tentative legal description

1. Internal viewpoints

One way to approach the question of description is to refer to the constitutions of the member states which, after all, remain the founders of the European Union and the Communities.

In the coordinated Belgian Constitution, article 34, originally incorporated in 1970 as article 25bis, states that the entities which may be granted the exercise of given powers emanating from the Belgian nation are "public international law institutions"[78]*. Title XIV of the French Constitution, introduced before the*

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73 S. CASSESE, op. cit. p. 217. It can be deduced that a direct legal relationship now exists between the European Community and the nationals of the different member states.

74 The right to vote and stand as a candidate in municipal elections, which has quite different implications, will not be discussed here.

75 E.C. Treaty, art. 8b, para. 2.

76 E.C. Treaty, art. 138a.

77 As observed by M. SEIDEL and A. PLIAKOS (R.T.D.E., 1993, p. 221). See E.C. Treaty, art. 137.

78 On the "validation" of founding treaties in Belgian constitutional law, see P. WIGNY, Propos constitutionnels, Brussels, Bruylant, 1963, chap. V; N. VALTICOS, "Expansion du droit international et Constitutions nationales", in Hommage à Paul De Visscher, Paris, Pedone, 1984, pp. 9 et seq.

ratification of the Maastricht Treaty, states in article 88-1 that the European Communities and the European Union, in which the French Republic participates, "consist of states which have chosen freely, under the terms of treaties, to exercise jointly some of their powers". The new Article 23, paragraph 1 of Germany's Basic Law authorises the Federal Republic to participate "with a view to establishing a united Europe, in the development of the European Union [to which] the Federal state may [...] transfer rights of sovereignty".

It will be observed that national Constitutions favour the theory of the interstate character of the European Union, on which its founders have conferred public authority prerogatives in an area of competence determined by them. The constitutional case-law of some member states confirms and reinforces this interpretation.

According to the French Constitutional Court decision 92-308 DC of 9 April 1992, France participates, without its national sovereignty being infringed, in "the establishment or development of a permanent international organisation having legal personality and decision-making authority obtained by the transfer of powers granted by the member states"[79].

On 12 October 1993[80]*, the German Federal Constitutional Court ruled that "the treaty is the foundation of a group (*Verbund*) of European states" (reasons, C) "destined to develop" (C, II.2, d 2), "with the aim of creating an ever closer union among the peoples of Europe" (C,II) but "originating in the member states and respecting their national identity" (Reasons, C). This "community of states may carry out acts of sovereignty and has been granted the exercise of sovereign autonomous powers" (C, 1.2, a); that exercise, however, "is based on authorization conferred by states which remain sovereign" (C, 1.2, c).*

The German Constitutional Court considers that the purpose of the treaty is not "membership of a European state" (Reasons, C). "In any event, the institution of a 'United States of Europe', comparable to the founding of the United States of America, is not currently being considered [...] Community power derives from the member states and may only have binding effect on German territory by virtue of a decision ordering its application in Germany. Germany is one of the "masters of the treaties" concluded with a view to permanent membership but from which it could withdraw by a decision to that effect. In this way, Germany retains its status

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79 J.O. (Official Gazette), 11 April 1992, p. 5354.

80 2 BvR 2134/92 and 2 BvR 2159/92. A partial French translation appears in R.U.D.H., pp. 286-292; see also the note by C. GREWE on pp. 226-231.

of sovereign state by virtue of its own law and the principle of sovereign equality with other states" (C, II.1, a).

The German Constitutional Court also considers that article F, paragraph 3 of the Treaty, according to which the Union shall provide itself with the means necessary to attain its objectives and carry through its policies "does not confer jurisdiction on the Union to decide questions of jurisdiction". It is a political "declaration of intent" (C, II.2, b6), a general policy provision relating to joint action by the member states and not to "an independent subject of law endowed with its own powers" (C, II.2, b1). Moreover, the states have always expressed their desire to confine the European institutions and organs to the exercise of functions and powers specifically delegated to them (C, II.2, b3, b6 and c). At the European Council in Edinburgh, the Heads of State and Government "confirmed the member states' general conception that the states themselves would remain "masters of the treaties" and subsequent developments thereof" (C, II.2, b6). Hence, the states alone retain jurisdiction to decide matters of jurisdiction.

2. The Community point of view

The matter takes on a very different complexion from the standpoint of the case-law of the European Court of Justice. Opinion 1/91 of 14 December 1991[81] *considers that "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. [...] the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals"*[82]*. This standpoint had, for the most part, already been expressed in the* Van Gend & Loos *judgment of 5 February*[83] *and, in another form, in the* Costa v. ENEL *judgment of 15 July 1964*[84]*. In other words, the umbilical cord linking the European Communities to the member states has been cut and the latter have lost a part of their sovereignty, i.e. a part of themselves. Such an*

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81 (1991-1992) 9 D.J.I. 537, p. 538.

82 It will be noted that this last detail corresponds to an old definition of the federal state, which consists of two categories of members: the nationals and the federate states (see R. CARRE de MALBERG, Contribution à la théorie générale de l'Etat, Paris, Sirey, 1920, vol. I, p. 119).

83 Case 26/62, Rec. p. 5, concl. K. ROEMER. This judgment however described the new legal system as being part of international law; it did not describe the treaties as a "constitutional charter of a Community based on the rule of law" and it referred to the limitation of the sovereign rights of states "in limited fields" only.

84 Case 6/64, 15 July 1964, Rec., p. 1143.

analysis, which has allowed the Court of Justice to transpose gradually the exigencies of the state based on the rule of law to this "Community based on the rule of law"[85]*, is tantamount to acknowledging the "irreducibly specific nature of the Community's legal structure"*[86]*, a non-state entity independent of the States which have established it and which accordingly generates law which is neither international nor national.*

*As in most aggregative federal systems, the Court of Justice (which is an organ of the "central authority") has pursued a centralist policy. It formulated the doctrine of the pre-eminence of Community law back in 1964 (*Costa v. ENEL *judgment) and, in the interests of consolidating the authority of Community law, it sought to introduce a series of legislative consequences of this pre-eminence into the member states' systems of national law*[87]*.*

Whatever the pertinence of these inductions, they are difficult to reconcile with E.E.C. case-law, and one cannot have it both ways. The first possibility *is that Community law and the different systems of national law form a single, integrated legal system which the states no longer control but rather to which they are subject. In this case, there is no need to proclaim the pre-eminence of one legal system over others; or, in the case of sub-systems linked by a federal structure, it is necessary to proclaim the equipollence of federal law and federate law: a hierarchy of legal rules within the unitary normative system or within the legal sub-orders coordinated by the "constitutional charter", would suffice.* The second possibility *is that Community law is a third system of rules, separate from the international system and from state legal systems. If this is so, it should not impose, outside its sphere of competence, obligations of conduct on its member states. Such obligations are only applicable insofar as the states act as subjects of the Community legal system. These states may of course impose on themselves the obligation to take measures in their domestic systems via agreements under*

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85 D. SIMON, "Y a-t-il des principes généraux du droit communautaire?", Droits, No. 14, 1991, pp. 73-86, at p. 82.

86 D. SIMON, op. cit., p. 76.

87 National judges and all public authorities were required not to apply any contrary provisions of national law (9 March 1978, Simmenthal, case 106/77); national judges were required to suspend provisionally the application of a national measure until its compatibility with Community law had been established, even in cases where these judges did not have such authority under national law (19 June 1990, Factortame, case C-213/89, Rec., p. 2433); member states were required to ensure effective judicial review so as to allow those concerned to monitor observance of Community rules (15 May 1986, Johnston, case 222/84, Rec. p. 1676); individuals were granted the right to obtain compensation for the harmful consequences of a violation of Community law attributable to a member state, even if no corresponding basis exists in national law (19 November 1991, Francovitch and Bonifaci, case C-6 and 9/90, Rec., p. 5357); member states were required to ensure observance of Community law by individuals and to provide "effective, deterrent, proportional penalties, comparable with those applied for national law violations of comparable nature and magnitude" (2 February 1977, Amsterdam Bulb, case 50/76, Rec. p. 137).

traditional international law; but by proclaiming itself independent of the will of the states which conceived it, Community law has set itself up as an original source, logically stripping it of the right to impose obligations on national systems, which are just as independent.

The fact is that the European Community legal system does not come under the member states' systems, but nor does it include them. It is the internal legal order of an international organisation to which the founding states have opted to transfer the power to take certain decisions concerning them (secondary law). It is a distinctive system of international law produced by bodies expressing the will of one or more legal entities distinct from the states.

Individuals continue to fall within the jurisdiction of national States. In theory, it is only indirectly that they are subject to European Union law. As the addressees in national law of directly applicable Community rules, at most they can be considered secondary subjects of Community law in so far as they have their own rights and obligations in this system. As felicitously expressed by J. VERHOEVEN, it is the respective autonomy of the national and international legal systems that gives direct applicability its special character[88]*: without the pluralism of legal systems, the question of direct effect would not arise.*

3. The interstate, hence international, nature of the European edifice

In reality, the German Constitutional Court's analysis[89] *seems completely valid. The founding of the European Union and European Communities by treaty normally implies that they are subordinate in legal terms to their founders. The states have neither relinquished their sovereignty nor conferred jurisdiction to decide matters of jurisdiction on the Union or its interstate components. There is no doubt that "legitimacy" or sovereignty - that is: the ultimate source of authority in Community Europe - lies with the states. In legal terms, they have not definitively renounced the sovereign rights they conferred on special international organs placed at the head of administrations with legal personality and organisational and technical autonomy. The personality of these groups is "secondary" or "derived" to use H. MOSLER's terminology*[90]*: such legal entities do not have a legal existence "by virtue of their own right" (*kraft eigenen Rechtes*) and their powers, even in respect of individuals, remain legally dependent on the joint good will of the member states.*

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88 "La notion d'"applicabilité directe" du droit international", R.B.D.I., 1980, pp. 243-264, at p. 244.

89 See II.B.1 above.

90 See, inter alia, "Die Erweiterung des Kreises der Völkerrechtssubjekte", *ZaöRV*, vol. 22, 1962, pp. 1-48.

The continued consolidation of the internal market, however, prompts public opinion in the states concerned to question the development of this political-administrative integration of states and demand the right to have a say, since Europe now affects individuals in their daily life. The European Parliament exists in theory to channel and express such opinion. It is the expression of Europe's human dimension whereas the Community edifice is that of the states, the Commission and technocracy.

The European Parliament takes the form of a congress[91] *to which are delegated representatives of each "state people". It was therefore undoubtedly overstepping its powers when it drew up drafts for a European Union Constitution.*
Indeed:

a. disregarding the flexibility of international terminology[92]*, in law a constitution is the founding instrument of a sovereign public community; the fact is that the European Parliament derives its powers from the Treaties which were concluded by the states; without a revolution, only the states have authority to conclude a merger treaty transferring power of the final word to a higher entity and establishing its constitution, which would give rise to a European state as soon as the organs of such a state had been set up, in application of the treaty, and had begun official activities*[93]*;*

b. usually, the exercise of an original, constituent power is barely hindered by legal limits but where Europe is concerned it should originate in an assembly that has received a mandate from each national electorate body[94]*; this is not the case, however.*

Hence, it is essential to make good the "democratic deficit" by introducing, both at national and Union level, permanent parliamentary scrutiny of the European executive organs, be they intergovernmental or otherwise.

4. The European Union is a confederation of states

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91 In history, this was the name given to the confederal body or the constituent assembly of a future federal state.

92 Does the ILO not, after all, have a "constitution"?

93 See R.CARRE de MALBERG, op. cit., vol. I, pp. 135-137.

94 Cf. the founding of the United States and Switzerland.

The most appropriate manner of describing the European edifice today seems to be as a confederation of states, clad at the outset in the "legal garb" of international organisations. The states remain fully sovereign but have created an integrated interstate area for which they have adopted new uniform rules and principles for the harmonisation of national legislations. Community law is the specific international law of a confederation, designed by the confederate states to govern their reciprocal relations in fields determined by the founding treaties. The reader will not be surprised by this description, if the following is considered:

a. historically, matters handled collectively by confederate states are not confined to joint security, defence and external relations, even though it is true to say that these are the prime concerns of such states; such matters frequently include internal issues (such as the armed forces, currency and finance);

b. only the most important decisions of the common organ of the confederate members require unanimity; a qualified majority is sufficient in other cases;

c. confederations may be integrated to differing degrees, provided that they continue to respect the international sovereignty of their members; they exercise the powers laid down in the treaties establishing them, which may grant the confederal organs direct control over the confederate states' territories and nationals, to avoid the instability that characterised the earlier forms of this type of group.

Despite the complexity of the European Union's architecture, it is not difficult to spot the distinctive features of a standard confederation. The restructuring of scattered elements into a single system, however asymmetrical it may be, undeniably simplifies the interpreter's task. The Union is founded on international treaties which, on account of their implications for the functioning of member states' institutions, frequently require modifications, to varying degrees, of national Constitutions. These treaties, concluded for an indefinite period[95], create bodies responsible for managing the member states' common foreign and security policy as well as organising an economic and monetary union while respecting the international sovereignty of those states. The European Council, the Council of Ministers and the COREPER bring together representatives of all the member states[96]; through these bodies collective and, in theory, egalitarian management of

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95 EC Treaty, Art. 240.

96 Such representation is effected respectively by heads of state or government, ministers, or delegates mandated by their governments. The European Parliament, for its part, represents more specifically the peoples of all the member states.

joint affairs is possible[97]*. The Court of Justice settles disputes among the member states and between the member states and the Community bodies within the scope of the treaties and the law deriving from them.*

As it forms a particularly integrated confederation, the Union/Community has been granted by its founders the authority to establish legal rules that are directly applicable in all the member states to the individuals concerned. It possesses a body, the Commission, consisting of members who perform their duties with complete independence - as desired by the confederate states themselves - and invested with powers of initiative and proposal. Lastly, it ensures the uniform interpretation and application of Union law through the Court of Justice.

Some characteristics of the Union are alien to the traditional physiognomy of confederations, but are not incompatible with it. These include the absence of centralisation with regard to general aspects of foreign policy[98]*; the extension of joint tasks to cover a great number of areas of state activity; the fragmentation and mutual autonomy of the bodies representing the states; the powers of joint decision and scrutiny granted to a parliament that is democratically elected by the peoples of the member states; lastly, the existence of monetary and financial authorities that are independent of the states and the Community institutions.*

* * *

In the final analysis, from the experience of the European Union it is possible to identify it with all necessary caution, as an example of "contemporary concepts of confederation". It would appear that within a confederal union, the protection of the member states' international sovereignty can be reconciled with renouncement of a purely egalitarian system of managing joint affairs. It is also compatible with "supranational" organs, procedures and powers. And especially, it is possible partially to make good the confederation's democratic shortfall by subjecting the intergovernmental and supranational organs to scrutiny by an interparliamentary assembly to which are delegated the representatives of each "state people", in addition to the national parliaments' scrutiny of the ministers participating in the confederal decision-making organs[99]*.*

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97 "The current pivotal role of the Committee of Permanent Representatives deserves particularly to be noted. Because of its permanency, its close links with the member states, and the "instructions" which pass to it from them, it is in some ways more analogous to the governing body of the customary confederation than any other body in the European Community" (M. FORSYTH, op. cit., p. 185).

98 The European Community is only competent in matters of common commercial policy - with the notorious difficulties of determination which that entails.

99 See D. NAGANT DE DEUXCHAISNES, "Le renforcement du caractère démocratique de la Communauté européenne", in La Belgique fédérale, Brussels, Bruylant 1994, pp. 440-458, esp. pp. 447 et seq.

b. New idea of confederation in Europe - Intervention by Mr Armando TOLEDANO LAREDO

Legal adviser of the European Commission

Mr President, I would like to make a few comments after the brilliant report by Mr Lejeune.

First of all, we are in a Seminar on the modern concept of confederation. Professor Lejeune spoke about the prospects of a new idea of confederation in Europe on the basis of the more specific experience of the European Union and he reached the conclusion, based upon various legal arguments, that the European Union is a Confederation.

In attempting to explain what the European Union is, I rather tend to explain what it is not. In effect, it is easier to state that it is neither a State nor an international organisation like any other than to describe it in the image of something close to a federation or confederation, particularly when one is addressing people who are not necessarily legal experts.

I very much appreciated the approach of Mr Lejeune, and I wish to congratulate him on the clarity of his treatment. But in considering the question of whether the Union might be regarded as a confederation or not, he did not speak of the place which is occupied by the citizen in this construction. I believe that this point should not be overlooked, and indeed that it deserves to be given some attention. In the list that Professor Malinverni established yesterday, what characterises a federation as opposed to a confederation is, particularly, the existence of a common federal citizenship, a federal territory, a Parliament elected by universal suffrage, a court of law at its centre, and the right to levy taxes.

It is well known that these elements are partially present in the European Union, but it is perhaps less known that the Union raises a certain number of taxes in the agricultural sector and that the the levy imposed on the turnover of companies in the coal and steel sector is a tax. When the steel industry was faced with a crisis some years ago when the steel industry was becoming bankrupt, the European Community was in difficulty because it had these debts. A Recommendation of the Coal and Steel Community, duly transposed into the domestic legal orders of member States, provided that the levy in question was in the nature of a privileged credit.
Can one then say that the European Union is a federation? That is not what I, for my part, am driving at. We are approaching the end of this Century, shall soon

enter into the 21st Century, and if all the experience and precedents are to be drawn upon as a source of wealth of which we should be aware, we should avoid entering into that future in a backward-looking manner.

This phenomen of integration which has been developing in Western Europe since the 1950s is a process which is turned towards the future. It is an open laboratory which has to find a formula which has not been devised as yet. Professor Forsyth spoke about this yesterday. If one considers the economic requirements which exist today - which practically did not exist in the 18th Century - the modern economy has a multiplicity of requirements, to which also must be added the social dimension as well as democracy, the concern of the Venice Commission and which was then little in evidence. Democracy is today the primary concern of all populations, whether in the economic, social or political sphere. It is to this concern that this open laboratory responds, through which Jean Monnet envisaged not a coalition between States, but a union of peoples, which is far from the idea of a confederation. What must be sought, it appears to me, is the will to integrate - the animus integrandi *- which compels people and their governments to build up something new, something that has not yet been fully sketched.*

That is why, Mr Chairman, I believe that when you speak of perspective, you have in mind those people who are looking to the European Union and who want to draw inspiration from this experience in different ways.

A few months ago I went to Asia, at the invitation of ASEAN. The members of this organisation want to know what this European integration is, not to copy it but to try to assess the extent to which the path of the Community, monetary union, and political cooperation, could serve as a source of inspiration for them.

There is also the other half of Europe which, since the cataclysm of 1989, has turned its attention towards us and has placed its hopes in a common future.

I really believe that the answer to this generalised attention is not to adopt a "confederal" or "federal" label for the process. It is the everyday steps towards integration, the successes of yesterday and the plans for tomorrow, stripped of the weight of the past, which make up the assets of the future.

Thank you very much.

c. New idea of confederation in Europe - Intervention by Prof. José Juan GONZALEZ ENCINAR

Director, Department of Public Law, University of Madrid/Alcalá de Henares

I should like to make two brief remarks, one about the concept of "State", the other about the relationship between legal theory and what Mr Vitruk and Mr Yuzkov referred to this morning as "practice" or "the actual situation".

First remark:

When we talk of Union, Association, League, Alliance, Confederation of States, federal State, federated States or member States, do the word "State" and the concept of "State" have the same or a similar meaning in all cases?

In my view, there is no doubt that the answer must be no.

Let us take, for example, the case of the member States of a federal State, die sogennanten Mitgliedstaaten. *They are not States but they keep this name* ad honorem *as a kind of compensation for the political and legal power they have clearly lost, a compensation for the real loss of their status of "State".*

*Obviously, for want of a better word, we talk of the "State", whether we are referring to the political organisation of Antiquity, the modern State, the contemporary State or even today's party-based State (*Parteienstaat*).*

However, the different historical forms of political organisation described as "States" represent quite different processes of the internal shaping of political and legal will.

The question is therefore whether it is useful to group together, for analytical purposes, historical realities which, although they all bear the same name, are in fact very heterogenous political realities.

Second remark:

My second remark concerns the relationship between the legal form and the "actual situation".
Antonio La Pergola brought out very clearly the two aspects of the modern concept of Confederation: the traditional aspect, that of a league of States, and the modern aspect, that of a democratic community of citizens.

A community such as the modern Confederation, which grants rights to individuals and which chooses a democratic regime as its form of government, is a quite different political community from the forms of pre-democratic organisation that preceded it, particularly from the point of view of the organisation of the State.

*In the party-based State (*Parteienstaat*), the balance between centralisation and real decentralisation depends not only on what the law actually says, but particularly on the specific characteristics of the party system and, more especially, the manner in which consensus is reached.*

Of course, in a supranational or international community, it will be necessary to take account not only of political parties but also of other parties such as the various States or nationalities. But the result is always the same: real decentralisation depends and will continue to depend on alliances between the parties. As has been said here, the legal powers conferred on southern countries will remain virtually useless for as long as the European Community's decisions are based on the majority interest of the northern countries.

Thank you for your attention.

d. TheEuropean Union and federal and confederal analogies
Intervention by Professor Constantin STEPHANOU

Panteion University of Athens (Jean Monnet Chair)

1. The Community method

The method of integration devised by the founders of the European Communities and developed subsequently exhibits the following characteristics:

- *step by step integration, excluding "high politics" at the outset;*

- *establishment of supranational bodies, relatively independent of States, which possess genuine law-making and jurisdictional powers;*

- *establishment of a legal system which is autonomous from the standpoint of international law and takes precedence over the rights of member States, a system comprising rules immediately enforceable in the domestic legal order and directly applicable to individuals and legal entities.*

The specific features of the European Community as compared with other international organisations and the appreciable restrictions on sovereignty entailed by the participation of member States in the Community make it possible for the latter to be described as a supranational organisation. Moreover, its supranational characteristics correspond on the whole to federal characteristics, hence a second description applied to the Community, that of a functional federation, that is to say a federation lacking territorial sovereignty.

It should be pointed out, however, that the Community method has not led (and is probably not likely to lead) to genuine abdications of sovereignty. On the one hand, the Community has not reached the final stage of economic integration, that of economic and monetary union, entailing inter alia *a single currency; what is more, it remains far removed from political union, which would entail the disappearance of member States as international legal entities. On the other hand, the privileged status accorded to the Council of Ministers in the decision-making process and the possibility for member States to influence, or indeed block, decisions taken by the Council, have led to the Community system being described as a system of shared sovereignty and the federal model pertaining thereto as one of co-operative federalism.*

2. The European Union

At Maastricht, the member States decided to pursue economic integration to its logical conclusion, that of economic and monetary union. The Union was to operate on the basis of the German federal model, which is also the model for the rules governing the exercise of Community powers and, in particular, the principle of subsidiarity. The idea of European citizenship, which was also introduced by the Maastricht Treaty, supplements the system of election to the European Parliament by means of direct universal suffrage, which was introduced in 1976, and constitutes the first tentative manifestation of a European people, attesting to a new political legitimacy, and of the quasi-governmental nature of the hybrid entity known as the European Union.

In the foreign policy field, far from entrusting powers to the Community, the member States have confined themselves to replacing European Political Co-operation with a mechanism meant to be more efficient, that of Common Foreign and Security Policy (CFSP). In order to ensure that the Community's external actions are compatible with action under the CFSP, the States have set up a single institutional framework, that of the European Union. However, not only do the decision-making procedures for each type of action differ considerably, but the international actor is also different, since the CFSP is conducted by the European Union and its member States.

While seeking to act in the field of "high politics", the European Union finds itself wanting in resources. This is true of military as well as legal and political resources. For example, the Union has no international legal personality. Consequently, it is not in a position to grant (or refuse) recognition to a State or to provide diplomatic protection for its citizens. Nevertheless, the provisions of Title V of the Maastricht Treaty make the Union an autonomous legal entity in relation to the three Communities and the member States, with its own opinions and interests, although the latter can be defended vis-à-vis *third States only by the*

member States acting jointly on the basis of various forms of representation (Presidency of the Council, troika, members of the Security Council, as the case may be).

The above observations appear to show that, unlike the Treaty instituting the European Community, the provisions of the CFSP reflect a confederal method of organisation. However, in as much as both the Community and the CFSP constitute pillars of the European Union, it appears possible to attribute the federal and confederal characteristics derived from the respective treaty provisions to the Union itself. It should be noted, though, that the federal characteristics are not derived exclusively from the Treaty instituting the European Community - they are also found in the general provisions of the Treaty instituting the European Union. Thus, citizenship of the Union is included among the objectives set out in Article B and the principle of subsidiarity is set up as a fundamental principle by the same provision.

The above remarks confirm the mixed nature (federal/confederal) of the European Union. This combination of federal and confederal elements makes the European Union unclassifiable, but must not for all that obscure the real question, which concerns the democratic supervision of political decision-making. Between a union of States and a union of peoples, there is a grey area in which there is a risk of decisions escaping democratic scrutiny.

CLOSING SESSION

Conclusions and closing statement by Mr Constantin ECONOMIDES, Professor at Pantios University, Director of the Legal Department, Ministry of Foreign Affairs

Conclusions and closing speech - by Mr ECONOMIDES

Mr President,
Ladies and Gentlemen,

At the close of this Unidem Seminar, I have the thankless and difficult task, having chaired the proceedings of the second day, of formulating the conclusions that have emerged.

With regard to the title of the seminar, I believe that the point made by Professor N. Alivizatos is well taken, and I therefore propose that the term "modern" be

replaced by "contemporary", a suggestion that has already been made in the Venice Commission by our San Marino colleague, G. Gualandi. After all, the aim of the seminar has been to examine closely the concept of confederation in its current form.

The historical part was of great interest for the purposes of our work. We had the privilege of hearing two excellent presentations, one by Professor P. Kitromilidès on the antecedents of the confederation as an institution in antiquity and the other by Professor J. F. Aubert on its evolution to the present day.

The three classic examples of confederation (American, German and Swiss), which in a sense are the most complete and faithful prototypes of the institution, undoubtedly constitute a valuable source of knowledge and inspiration for States wishing to embark upon that path or to pursue individual solutions suggested by the experience of these countries.

The conceptual part of the seminar enabled us to produce what we believe is an exact and precise definition of the concept. We are grateful to Professors G. Malinverni and M. Forsyth for their brilliant work on this aspect, the former having pursued a strict legal analysis and the latter having broadened the concept to include elements from the political science field. It is relatively simple to draw a distinction between a confederation and a federal state. The differences have also been discussed by Professor Aubert. The most important distinguishing feature lies in their legal basis: a confederation is created by a treaty and is an institution of international law, whereas a federal State is established by a constitution and is thus a matter of internal law. Another fundamental criterion is the notion of immediacy. A highly integrated federal State has the power to lay down binding legal rules that directly affect individuals, whereas a confederation is in principle devoid of such power and can only take action through the intermediary of its constituent states.

However, differences exist within each category, and some of them are considerable. Federal States vary appreciably from one to another. The same holds for confederations, which can clearly be classified in a number of categories. The science of law would do well to address this question, which has not yet been sufficiently examined. But the essential feature of a confederation that should be borne in mind is the adaptable, flexible way in which it is organised, given that each case, as we have seen, has its own form and characteristics.

It is more difficult to draw a distinction between a confederation and an international organisation. To date, there is no body of legal opinion comparing these two institutions, probably because they were not created at the same time.

Although there are several distinguishing criteria, most of which have already been cited, the most important, in our view, is that of the basic treaty establishing a confederation or an international organisation, which automatically enables such a distinction to be made. In most cases, this can readily be done by examining the text of the treaty: for example, there can be no doubt that the Council of Europe, by virtue of its statute, is an international organisation, whereas the association between Croatia and Bosnia-Herzegovina is, in accordance with its constituent treaty, a confederation in the making. In more difficult instances, the desire of the States parties must be taken into account in order to determine whether the basic treaty is meant to establish an international organisation or a confederation. The States parties always have the last word.

I now turn to the third part of the seminar, which concerns existing or potential confederations.

The seminar first considered the Washington Agreements of 18 March 1994 and the establishment of a confederation between the Federation of Bosnia-Herzegovina and the Republic of Croatia. Statements on this nascent confederation and on the Constitution of Bosnia-Herzegovina agreed between the Croats and the Muslims of that State were made by Mr S. Nick, Director of the Legal Department of the Ministry of Foreign Affairs of Croatia, and by the members of the delegation of Bosnia-Herzegovina: Ms M. Ljubic, Vice-President of the Parliament, and A. Campara, Secretary General of the Parliament. The speakers stressed that although these developments, and in particular the establishment of the confederation, are aimed first and foremost at supporting and strengthening Bosnia-Herzegovina, they do not constitute an alliance against the Serbs, but rather a quest for peace which the Serbs can join. Several questions were then put to the speakers, notably by Professor S. Bartole and members of the Venice Commission, G. Malinverni and G. Maas, and a very stimulating discussion took place on this new experience. It was concluded that the Venice Commission should follow developments in the confederation closely.

The seminar then focused on the question of the Russian Federation and the Commonwealth of Independent States (CIS) in the light of a statement by Mr N. Vitruk, President of the Constitutional Court.

As the speaker pointed out, although the CIS is not a confederation or international organisation, but simply a form of co-operation between independent States, nothing prevents it from progressively developing towards a confederal system; converging interests already argue in favour of this. Such a possibility was also referred to in the speech by Mr L. Yuzkov, President of the Constitutional Court of Ukraine.

Mr K. Lapinskas, Judge at the Constitutional Court of Lithuania, discussed the ideas and trends that militate for a confederation of the Baltic states, who are concerned about their defence. He stressed that it was still too soon to draw conclusions on such developments.

With reference to Central Asia, Mr S. Kosakov, Deputy Minister of Justice and President of the Supreme Court of Arbitration of Kyrgyzstan, stressed the need for States in that part of the world to co-operate and increasingly to envisage systems of joint action and, indeed, confederal arrangements.

This part of the seminar was chiefly, if not exclusively, informative. The ensuing discussion, which was fully in line with Mr La Pergola's understanding of the contemporary concept of confederation, led to the conclusion that today any such confederation can only be founded upon democracy, the rule of law, human rights and the market economy. Future confederations will be democratic in the strict sense of the term.

Lastly, this third part closed with the consideration of the concept of confederation as it relates to the European Union, a question that received remarkable treatment in a thought-provoking report by Professor Y. Lejeune. Statements were also made on this topic. The conclusion that emerged from the essentially theoretical examination of the question is that the European Union is a supranational organisation with a number of very significant features, both confederal and federal.

These features have assumed growing importance for the construction of the European Union, which since its creation has undergone a steady evolution towards confederal and federal forms. But any assessment of further progress in that direction will have to await the next stage, in 1996.

Before closing the seminar, I would like to express my deep gratitude to Mr M. Triantafyllides, who chaired the seminar on the first day, the rapporteurs, the speakers and all the participants, especially those who came to Santorini from distant countries, Mr G. Buquicchio and his colleagues, my colleagues from the Ministry of Foreign Affairs, the interpreters, the technical staff and, above all, Mr Petros Nomicos, who has kindly made available to us this splendid conference centre on this beautiful Aegean island.

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