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Local self-government, territorial integrity and protection of minorities

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a.. Minority rights: a remedy for international conflict - Opening statement by Mr Jean-Marc BOULGARIS

Ambassador, Bern

Ladies and gentlemen,

It is my pleasure and honour to welcome you here on behalf of the Swiss authorities on the occasion of the opening of this symposium.

The theme of the seminar is a highly topical one. I would like first of all to thank the Venice Commission. I am particularly pleased to be able to welcome the President of the Commission, Professor La Pergola. It is thanks to him and Professor Giorgio Malinverni, the Vice-President of the Commission, that it has been possible to organise this colloquy.

I would also like to thank the Swiss Institute of Comparative Law in Lausanne for agreeing to host the seminar. The Director of the Institute, Mr Pierre Widmer, and his deputy, Mr Bertil Cottier, have shown a great deal of commitment in the way they have devoted themselves to this task. I believe that the Swiss Institute of Comparative Law is a venue which is particularly suited to discussing this specific aspect of protecting minorities in complete objectivity.

In recent years, we have frequently been reminded how tricky the subject of minorities can be. After the end of the Cold War, there emerged in various parts of the world a feverish form of nationalism which was devoid of common sense, blind to all understanding, and which frequently had terrifying repercussions.

The 31 wars which the Peace Research Institute in Stockholm identified in its latest statistics were all civil wars. More than half of them (17 to be precise) stemmed from ethnic problems. The number of conflicts of this type has increased significantly in recent years, particularly in Europe.

The Stockholm statistics only cover wars in which more than 1 000 people have died. Below this threshold there are other conflicts involving minorities. You will all be aware of Ted Gurr's detailed study, conducted in 1990, in which he identified 233 minorities throughout the world which had become politically active in order to fight against proven or alleged discrimination.

There are thousands of minorities in the world and obviously not all of them can set up their own State. Twenty new States have been constituted in recent years in central and eastern Europe; yet there has been hardly any reduction in the number of minorities. More than half of these States contain minorities in proportions varying between 20 and 50%. The ethnic diversity of the peoples who make up these States is as great if not greater than that of Switzerland.

The repercussions of ethnic conflicts extend well beyond the frontiers of the States directly concerned. They threaten the security of whole regions. The floods of refugees and the humanitarian problems which result represent a major challenge to international solidarity. But the international community should not just be concerned with the symptoms; it should also be helping to remedy the causes of the problem.

International protection of minorities has a long tradition which, in Europe, goes back to the time of the Reformation. Over the last centuries it has even influenced the development of human rights. In spite of this, no miracle solution has been found so far.

After numerous attempts to reach bilateral agreements on religious freedom and, much later, on the protection of languages, a large-scale multilateral system for the protection of minorities was finally devised under the auspices of the League of Nations. That system, however, was only concluded with the new central and eastern European States in mind and did not remain in force for long. In practice it was unable to withstand the upsurge of nationalism or an excessive attachment to the sovereignty of the State.

It was for this reason that, after the second world war, the United Nations sought to guarantee the protection of minorities through the universal recognition of human rights. However, it was soon realised that it would be difficult to achieve this goal by such means alone. It is worth noting in this connection that it was primarily the socialist States emerging from the former Communist bloc who repeatedly drew attention to the need to secure special rights for minorities.

There can be no doubt that respect for human rights is a prerequisite for the protection of minorities. International standards in this respect have undergone encouraging changes in recent years. It is true that there are still major shortcomings as far as monitoring their implementation is concerned. One of the most effective means of tackling this problem is to set up machinery enabling individuals to bring their cases before international courts. This is particularly important for those members of national minorities who no longer trust the judicial authorities in their own country.

However, not even the proper observance of human rights can resolve all minority problems. To enable minorities to preserve their identity, special steps need to be taken in areas such as education, the media and culture. It is much more difficult and arduous to devise international standards in these areas. The CSCE had its first success in this area in 1990 with the document adopted at the Copenhagen meeting. It took the United Nations nearly twenty years of effort to get a declaration on minorities approved, in December 1992. The Council of Europe needed even more time: not until 1994 did it manage to get a framework convention on the rights of persons belonging to minorities signed.

However, the obligations arising from these documents are only very general in scope. None of them, for example, specifies the number of school-age children needed in order to open a school for a minority, or what conditions have to be met for the members of a minority to use their own language in dealing with the authorities. Incorporating these commitments into domestic law is a very tricky business and a third party has often proved useful as an intermediary. In recent years the OSCE High Commissioner for minorities has done some outstanding work in this area.

If we succeed in securing effective protection for the rights of minorities as well as promoting their cultural well-being, then we will have already achieved an important goal.

Naturally there will be still further goals to be attained, because some minorities want much more than this. Many of them have precise demands regarding rights and guarantees of greater independence in running their own affairs. We must show understanding for such demands, especially when they come from numerically strong minorities which are long-established in a particular region. Generally speaking, most of the States concerned and the international community are relieved if the demands go no further than this.

Today's symposium is devoted to this aspect of the protection of minorities. I should not need to stress that this is a delicate matter, albeit one of major importance.

It is indeed a complex issue, because it impinges on a sensitive area of national sovereignty. It is revealing that, in spite of several attempts, there has still been no success in devising international standards for the territorial autonomy of minorities.

Although proposals along these lines were put forward at the CSCE Conference in Copenhagen in 1990, none were adopted. As Professors La Pergola and Malinverni well know, the Venice Commission also incorporated the concept of territorial autonomy into the draft convention on

minorities which it drew up for the Council of Europe, but no trace of this remains in the version adopted by the member States. Even the idea of getting some willing States to sign framework agreements so that their example might encourage other States to sign later has not met with much of a favourable response. The fact is that this type of project does not satisfy the urgent need for action in various crisis regions.

Even within the context of the OSCE itself there is a whole range of conflicts for which peaceful long-term solutions can only be found if new, ambitious plans for local self-government are implemented soon. The High Commissioner for minorities and various long-term OSCE missions are constantly faced with this problem.

Obviously our task would be made considerably easier if we could rely on clear OSCE principles. We must not give up in this matter, but neither can we simply leave latent or open conflicts to fester until we have found more common ground. All that we can do, therefore, is to broker solutions based on examples which have worked elsewhere.

This theme is the subject of your seminar, ladies and gentlemen, and over the next two days you will be studying a number of cases of States which have solved their ethnic problems by setting up local systems of self-government. Though the list of examples which you are going to discuss is by no means exhaustive, it is surprising to see the wide range of different methods which have been used to resolve these conflicts. No less striking is the fact that those States which have decided to opt for the path of compromise have generally not been weakened by the process but, on the contrary, strengthened.

So this seminar is of great practical importance. Moreover, this is the reason why Switzerland has given the project its backing. The organisers have succeeded in persuading internationally renowned specialists to take part in this forum, and the discussions over the next days will certainly be of a high very standard. I would like to think therefore that they will contribute towards resolving some of the outstanding problems.

One of the priority issues for the current presidency of the OSCE is the protection of human rights and minorities. We are particularly aware of this issue and attach major importance to it. We have no intention of playing the part of enlightened missionaries, for our own experience has shown us that multicultural co-existence requires constant effort. However, it is worth the effort. The fact that several different cultural groups live together in harmony in Switzerland has been a source of enrichment for us, and not just from a material point of view.

We are aware of the particular features of our own historical development. As a result, we understand all the better that many minority problems require specific solutions. However, we are convinced that there are certain constant factors. I would like to mention two of these which seem to me to be especially important. The first is the principle of subsidiarity, and the second is positive discrimination for minorities.

As to the principle of subsidiarity, I do not need to remind you that great store is now set by it in the construction of the European Union. However, it should not be forgotten that it has always been a very effective approach at all social and political levels. It is an excellent tonic to boost the health of public institutions and has proved particularly useful in multi-ethnic States.

As regards positive discrimination, I refer to the numerical over-representation of minorities in public bodies. This over-representation is a widespread practice in Switzerland. It is a vital instrument, and perhaps the only one, by means of which minorities can be protected in Switzerland. The majority has never had reason to regret this liberal approach, because this

generosity has been largely rewarded by the active and loyal co-operation of minorities in the ideal of the State and its social well-being.

Switzerland does not have a monopoly on this approach: it has also been applied elsewhere. The European Court of Human Rights also argued in favour of it in its judgment of 7 December 1976, in the Handyside case, when it declared that democracy does not come down to the permanent supremacy of the opinion of a majority: it demands a balance which ensures that minorities are treated fairly and avoids all abuse of a dominant position.

It is with this impartial statement by the Strasbourg judges that I would like to conclude my introductory remarks. I hope that your discussions will be productive and that they will help us to find solutions to the problems we face. In this spirit, I would like to wish you a pleasant stay in Lausanne and thank you on behalf of the federal authorities for taking part in this symposium.

b..Welcoming message by Mr Pierre WIDMER
Swiss Institute of Comparative Law

Mr Chairman, Excellencies,
Dear Friends from the Council of Europe and the Venice Commission,
Dear Colleagues, Ladies and Gentlemen

It is a privilege and an honour for me to welcome you to Lausanne on behalf - so to say - of the "local self organiser" of this seminar: the Swiss Institute of Comparative Law, which is - by the way - a strange and certainly minoritarian legal entity, administratively linked to the Federal Department of Justice but geographically distant enough from the central administration to enjoy its status as an autonomous institution.

I would indeed have preferred to receive you on the premises and "on the territory" of the Institute, down on the lakeside and on the beautifully situated campus of the University of Lausanne. But, on the other hand, our building is still too small to hold you all comfortably (we hope to have one more floor on the occasion of your next visit); and, on the other hand, we thought that the temptation to enjoy springtime and the marvellous landscape would have been too strong down there, and that it was perhaps easier to keep you working here in the middle of the town with no possibility to escape.

As compensation, we have planned two excursions and we hope that we will succeed in the meteorological respect as well as in our effort to contribute to your permanent and continuing gastronomic and oenological education.

We have also considered the possibility of arranging a visit of the Institute at some time before or after the sessions; but it will not be easy to find the necessary free moment in our very closely packed programme. Let me therefore explain very briefly what the Swiss Institute of Comparative Law is and what we actually do. In your folder you will also find a leaflet entitled "General Information" which may provide you with further indications concerning the organisation and the functions of the SICL.

The Institute was founded in 1978 by an Act of the Federal Parliament. The first initiative to create an Institute dedicated to documentation and research in foreign, international and comparative law was taken in the early sixties by a small group of law professors of different Swiss law faculties who were convinced that it was no longer possible to teach law in a purely national context and that students and practitioners should have the possibility to widen their

legal horizon, peering over the national juridical garden-fence. They were at the same time conscious of the fact that no one of the eight law faculties or of the respective cantons (education being still one of the reserved and very jealously defended competences of the Swiss federal states), even pooling their forces, would have been able to afford such an institution.

In the meantime, the Confederation had itself become aware of the necessity - especially in preparing new legislation - to study foreign juridical systems and to compare its own legislative projects with solutions proposed elsewhere to solve similar problems. So the Minister of Justice of that time, Mr. Kurt Furgler, and his right and left hand, Professor Joseph Voyame, who is also with us today, and who was then the head of the Federal Office of Justice and subsequently the president of the Institute - these two personalities engaged themselves with great enthusiasm in the battle for this new confederal enterprise, the governing statute of which was finally adopted by the two Chambers of the Parliament after some tribulations.

Eighteen years later, our library contains some 170,000 volumes from all over the world and almost 1,900 legal journals from the four corners of the globe - that is if the globe can have corners. The library - the heart and lungs of the Institute - has some thirty collaborators including a dozen or so legal experts from each of the five continents. These and a similar number of librarians keep the wheels turning, producing each year a hundred or so reports and opinions: studies dealing with every type of legal problem imaginable and also a wide variety of national legal systems. In addition to the opinions proper we also deal with several hundred bibliographical enquiries and individual consultations.

These services are not just for the federal and cantonal authorities (who are given preferential rates) - primarily courts of all levels of jurisdiction - but also for barristers and lawyers and private individuals and companies. Foreign nationals and institutions also call upon our services. Increasingly we are working to a greater extent with international organisations such as the Council of Europe which in recent years has become one of our best customers. We have carried out three major studies for the Council: the first on discrimination against people who are HIV-positive and suffering from AIDS; the second - which has just been published - on racial discrimination; and the third, in 1995, which contained an overview of comparative legislation on medically-assisted procreation and embryo protection. For the rest, our activities extend to all areas of law, with nevertheless particular emphasis on family law and the law of succession.

In addition to this main consultative role, each year we organise two or three scientific meetings - like the present one. These colloquies generally deal with a topic of current interest from the point of view of comparative law; for example, our last two gatherings looked at constitutional reform in Europe[1] and harmonisation of European law on civil liability. On both these fronts, there are also proposed changes to Swiss domestic legislation. Since 1990, at least one of our annual events has looked at problems of particular interest to the countries of central and eastern Europe, problems which assume greater significance viewed against the background of these countries' efforts to reconstruct a democratic society and free economy. This seminar therefore fits quite naturally into that series of colloquies whose aim has always been to encourage those forces working for a world governed by the rule of law.

Still in the field of legal assistance offered in particular to researchers from the former socialist world and the developing countries, we have the privilege - thanks to private funds and special

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[1] *Roland Bieber - Pierre Widmer (Ed.) L'espace constitutionnel européen - Der Europäischer Verfassungsraum - The European constitutional area, Publications de l'Institut suisse de droit comparé, vol. 28, Zurich 1995.*

appropriations from the Confederation - of playing host to a dozen or so researchers on study grants staying with us for up to six months; they are given a post in our library and we can offer them an apartment we have rented especially for them. On the back of the information sheet in your folders you will find the "Rules for grants". I would encourage you to publicise this information in your own countries. These contacts are of mutual interest: we make new friendships and recruit new correspondents to strengthen our network, and our guests benefit from our library resources and also have the opportunity of establishing personal and professional relations with other users and visitors to the Institute. Clearly, I cannot describe the Institute to you in any great detail in the short space of this welcome address. I therefore encourage you to come individually and see our little "Juridic Park" for yourselves.

I will not take up any more of your valuable time for the moment. I sincerely hope you have a stimulating and productive meeting both from the legal/political point of view and on the level of personal relations.

However, I would not like to close without expressing my gratitude and appreciation to all those who have given their time, expertise, imagination and a generous helping of improvisation in preparing this colloquy to ensure it is as successful and enjoyable as possible: not through any lack of modesty but rather as a neat link to the next speaker I shall begin with my own collaborators and would like to extend particular thanks to Ms Martine Spitteler, our Deputy Director, Mr Bertil Cottier, and our administrative assistant Mr Olivier Frossard. From the Council of Europe, my thanks go to Ms Aubry and Mr Garrone. Finally, it is my pleasure, with your permission Mr Chairman, to hand over to my good old friend Mr Gianni Buquicchio.

c. Opening speech by Mr Gianni BUQUICCHIO, Secretary, European Commission for democracy through Law, Council of Europe, Strasbourg

The idea of setting up a European Commission for Democracy through Law first arose in 1989. The initiative was inspired by a premonition of the major changes in store. The moment was well chosen. As the 40th anniversary of the Council of Europe approached, the walls that had divided the continent collapsed. History provided us with a unique opportunity to set up a new instrument within the Council of Europe to pursue common objectives.

Democracy, human rights and the rule of law were no longer to be a western prerogative.

The Venice Commission was therefore created with three main goals in mind:

Firstly it was to be a specialised body whose role was to discuss matters of constitutional reform, both within the Council of Europe and for the benefit of central and east European states who might need its assistance in order to join the family of democratic nations.

Secondly, the Commission was to provide a forum for specialised and detailed knowledge regarding constitutional law as it is practised in the member States, focusing on a comparative assessment of decisions made by constitutional courts and other similar bodies. Democracy is a set of rules which is constantly evolving and is shaped not only by constitutions and statute law but also by the work of judges who act as mediators between broad principles and specific problems. In the words of Paul Freund, the never-to-be-forgotten authority on constitutional law, "the courts are transformers which convert the high voltage of the words of philosophers into a lower voltage which can be used in day-to-day life". Nothing could be more appropriate than this comment in the current European context: our domestic and European institutions would not be what they are today were it not for the courts, which have done democracy an outstanding service by investing treaties and constitutions with the certainty and dignity of the rule of law.

Last but not least, it has been acknowledged that the Venice Commission acts as an open tribune providing an opportunity for further knowledge of the constitutional law and political culture of the west.

The results we have achieved speak for themselves. The expanding membership of the Commission, which now has nearly fifty States taking part in its work, reflects the increasing role that the Council of Europe plays a uniting force among European States, thus enabling them to reap the benefits of our common political and legal heritage.

The Commission is therefore making progress towards achieving its third objective. Constitutional democracy, based on the rule of law, the balance between authority and freedom, and responsible government, requires a fully developed cultural environment. We have to ensure that the "constituent" process and the creative spirit it generates is not exhausted in the initial stages of transition from dictatorship to political pluralism and economic liberalism. Once the constitution has been drawn up there remains the formidable task of implementing it. The governing classes should be able to see to it that the assistance given to these countries by the Council of Europe and the Commission has a lasting impact on society.

This concern prompted the Commission to launch its programme on Universities for Democracy, otherwise known as "Unidem". The aim of this scheme is to promote the development of a certain legal awareness and maturity and a well educated political class by means of specialised seminars, university exchanges and conferences on matters relating to democracy and law, held whenever possible in the capitals of central and eastern Europe or, failing this, in the major western centres of knowledge. This programme will bring together major political figures currently occupying positions of responsibility as well as leading academics to discuss the science and technique of democracy and in particular that key component of democracy, the rule of law.

The Zeitgeist, or the prevailing spirit of this our age, is the freedom of movement or "circulation" which, as we know, is also the circulation of freedom. Unidem is an excellent means by which to disseminate the wealth of democratic experience we have accumulated. This also corresponds to the Commission's main purpose.

It is the Council of Europe's role to give a voice and meaning to the great values which make our continent what it aspires to be: not just one huge market, but a family of closely linked nations which, whatever their differences, share certain ideals and cherish their common roots. However, integration is never easy. A Pan-European system has to be set up so that the economic community can begin to take on the features of a genuine political union. This is likely to be a difficult process. We should not forget that we are witnessing a virulent resurgence of nationalism which threatens to take us back in many respects to the divided and troubled Europe of 1919. The "spirit of Geneva" of those distant days kindled hopes of a peaceful, civilised world built around the League of Nations and centred in turn on Europe. This period was also infused with the belief that conflicts should not be resolved by force but by reason and the law.

The "spirit of Geneva" was short-lived but our "spirit of Strasbourg or Venice" has a greater chance of prevailing. Europe has found the central place it deserves in a legal and political culture which appears now to enjoy a prospect of continuing without rupture. The days are gone when the Council of Europe could do nothing but denounce countries which had turned their back on democracy and violated human rights. The Council has become and will remain a driving force for Europe, a home of reason and justice, in which we can live and prosper together. The European Commission for Democracy through Law is committed to promoting

this spirit of Strasbourg as best it can. The work it has carried out is that of a laboratory of constitutional law. However this does not mean that it is forced to concentrate only on technical details. The subject it deals with covers the entire make-up of society, since all living constitutions are designed for the people and their government.

If I may, I would like to make a few more general comments about the theme of this seminar. Firstly, the very high number of participants shows the importance which is attached to the subject chosen for the seminar. Domestic conflicts and in particular inter-ethnic conflicts are, alas, all too common at the present time. They are often linked to a desire to create new States, to the wish to secede on the one hand or to a refusal to accept differences and a demand for uniformity on the other. In other words, people are asked to make a simple - and, in fact, simplistic - choice: either the State maintains its territorial integrity -and minorities have no say - or territorial integrity is destroyed by the secession of the region where the national minority is in a majority. The protection of minorities and territorial integrity are presented as a conflicting choice.

To present the situation in terms of such an alternative is of course entirely wrong. It is precisely the aim of this seminar to show that territorial integrity and the protection of minorities and territorial integrity and local self-government are not incompatible and can in fact be regarded as going hand in hand.

In fact there is an infinite number of intermediate structures between the unitarian State which rules out any protection of minorities and pure and simple independence. The word autonomy has a whole series of meanings in that it can apply to forms of organisation ranging from simple decentralisation to the most advanced form of federalism. Besides this, autonomy can cover all local authorities of a certain size, such as cantons or Länder in a federal State, or it can apply only to a specific part of the territory with unusual features; I am thinking for example of the Åland or Faeroe Islands. Autonomy can be the same for all cantons, as in Switzerland, or vary according to regions, as in Italy. It can apply to areas which in turn form part of a much larger autonomous authority; an example of this is the national districts in Russia which form part of another constituent entity of the Federation; in Switzerland I would refer to the districts and municipalities of Grisons which are an integral part of the canton, "on a much smaller scale of course", as Gilles said when comparing the Venoge with the Colorado river.

Far from the simplistic approach which I referred to a moment ago and which evokes disturbing memories of the sound of marching boots, complexity and diversity are the watchwords which should be guiding us in our work. However, it should be stressed that this complexity and diversity should always be placed in the context of the basic principles of the Council of Europe, namely democracy, human rights and the rule of law.

In conclusion, I would like to thank once again the Department of Foreign Affairs and Mr Bulgaris, whom we are honoured to have with us today, Mr Koller who, as a member of the Governing Board of UniDem, had the idea of proposing Lausanne as a venue for the seminar, and Mr Pierre Wiedmer and Mr Bertil Cottier for the invaluable co-operation of the Swiss Institute of Comparative Law.

First working session - The situation in certain Western countries - Chaired by Mr Giorgio MALINVERNI

a. The Åland islands in Finland
by Mr Markku SUKSI

b. The situation in Italy
by Mr Sergio BARTOLE

c. The situation in Spain
by Mr Miquel ROCA JUNYENT

d. The situation in Belgium
by Mr Jean-Claude SCHOLSEM

e. The situation in Switzerland
by Mr Joseph VOYAME

f. The situation in Canada
by Mr Gérald A. BEAUDOIN

g. A note on the Faroe Islands - Home Rule case
by Mr Arni OLAFSSON

a. The Åland Islands in Finland[1] by Mr Markku SUKSI
Professor, Åbo

1. Introduction

When discussing territorial autonomy and minority protection, the model of the Åland Islands is often brought to the fore, and not without good reason. The Åland Islands may be presented as a case in which autonomy helped to solve a conflict situation. However, before analysing the Åland arrangement, some initial parameters should be set within which the situation before 1920 is recapitulated. The purpose of this is to indicate that solutions of this kind may not be universally relevant and applicable, but are tied to the particular circumstances surrounding the case in question. Therefore, instead of speaking about a model of autonomy one should probably mention the Åland Islands as a laboratory of autonomy.

Firstly, Finland and Sweden formed a single kingdom until 1809, when Finland was conquered by Russia and taken into the Russian Empire as an autonomous Grand Duchy, leaving a substantial Swedish-speaking population in Finland in the coastal areas of Southern, South-Western (including the Åland Islands), and Western Finland. Some Swedish-speakers may have retained a longing for a reunification with Sweden until the 20th century.

Secondly, the Åland Islands are geographically near to Stockholm, the Swedish capital. The Islands' strategic importance derived from this close proximity. Moreover, from the Åland Islands, it was possible to control large areas of the Baltic Sea.

Thirdly, a treaty under international law was concluded in 1856 between Russia, Great Britain and France on the demilitarisation of the Åland Islands leading to a distinct status of this territory in respect of military installations[1].

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[1] *This report was written in February-March 1996. I wish to thank Dr. Lauri Hannikainen, Professor of Law at the University of Turku, and Mr. Lars Ingmar Johansson, Councellor to the Legislative Assembly of the Åland Islands.*

Fourthly, it deserves to be repeated that Finland was an autonomous Grand Duchy of the Russian Empire. This arrangement was created in 1809 and codified in Article 2 of the 1906 Constitution of Russia, which concluded that "(t)he Grand Duchy of Finland, while it constitutes an indivisible part of the Russian State, is governed in its domestic affairs by special institutions on the basis of a special legislation".[2] Apart from the plausible attempt to anticipate the 1921 decision of the League of Nations (see below) and the possible "model-effect" of the creation in 1919 of the Free City of Danzig under the Treaty of Versailles, the then recent Finnish experience as an entity with (relative) autonomy may be cited as an important factor conducive to the recognition of Ålandic autonomy in 1920 and in 1922.

Fifthly, Finnish independence at the end of 1917 resulted in the separation of Finland from the multiethnic Russian Empire and in the creation of Finland as an independent State with one dominant linguistic group, parts of which aimed at the creation of a nation state (in the Form of Government (Constitution) Act of 1919, however, a nation with two equal languages, Finnish and Swedish). This development was probably perceived quite negatively on the Åland Islands.

Sixthly, during the First World War, Russia deployed troops on the Islands and built military installations. Moreover, the Finnish Civil War at the beginning of 1918 resulted in the presence of military forces of the Whites, as well as units of the German and Swedish Army. The demilitarisation of the Åland Islands was in danger.

Seventhly, before the creation of Ålandic autonomy, the population of the Åland Islands was hardly viewed as a separate linguistic minority, but constituted a part of the Swedish-language population of Finland. Nevertheless, because of its geographically separate position (the area was quite difficult to reach before 20th century methods of communication were in place) the population of the Åland Islands developed the characteristics of a community and displayed distinct political aspirations (see below), but whether the Islanders constitute a minority is debatable.[3] Currently the inhabitants of the Åland Islands display a strong "Ålandic" national

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[1] *The 1856 Convention on the Demilitarisation of the Åland Islands was annexed to the 1856 Peace Treaty of Paris after the Crimean war. See Björkholm - Rosas 1990, p. 19 f.; Modeen 1973, p. 14. See also the 1921 Convention concerning the Non-fortification and Neutralisation of the Åland Islands (FTS 1/22), the 1940 Treaty between Finland and Soviet Union concerning the Åland Islands (FTS 24/49), under which Finland was to demilitarise the Islands, and the 1947 Peace Treaty of Paris (FTS 19-20/47), and the agreement between Finland and Soviet Union on reinstating the treaty of 1940 (FTS 9/48). Björkholm - Rosas 1990, p. 22 ff.*

[2] *Szeftel, 1976, p. 84.*

[3] *See, e.g., Hannikainen 1993a, p. ff. and Hannikainen 1993b, p. 20, in which it is concluded that the Swedish-speaking population of the Åland Islands forms a distinct national community which should be considered as qualifying in international law as a national minority or equivalent to a national minority, although not all of the most common criteria for minority status are fulfilled by the population of the Åland Islands. The criteria used by Hannikainen are 1) numerical inferiority to the rest of the population; 2) non-dominant position; 3) possession by the members of the minority of ethnic, religious or linguistic characteristics differing from those of the rest of the population; and 4) the display by the members of the group, even if only implicitly, of solidarity directed towards preserving their culture, traditions, religion or language. While the last criterion is of a subjective character, the other ones are of a more objective character. While the population of the Åland Islands would not seem to fulfil the third criterion, it could be argued that the decision of the League of Nations in 1921 recognised the*

identity in comparison with the Swedish-speaking population in Finland, which in general strongly identifies itself with Finland. Of a total population of 5.1 million inhabitants in Finland, some 300,000 (5.8 per cent) speak Swedish. The population of the Åland Islands amounts to more than 26,000 inhabitants, of which 25,158 are Swedish-speaking and 1,179 Finnish-speaking.[1]

Eighthly, when the Form of Government (Constitution) Act was enacted in 1919, provisions providing language rights and facilitating even general systems of self-government of a higher order were incorporated into the Constitution. The former were realised in the form of linguistic guarantees on an equal footing for both language groups, but the latter never led to anything concrete (with the exception of a committee and its subsequent "emergency drafting" of the Ålandic autonomy legislation, see below).[2] It should be noted that the Swedish-language population in Finland is not considered as a minority in Finnish law, but as a population which has the same linguistic rights as the Finnish-speaking population.[3] The Language Act (SOF 148/22) that implements Section 14 of the Form of Government (Constitution) Act combines the personal principle (the right to use one's own language in his or her case) with the territorial principle, which determines the linguistic character municipalities and administrative subdivisions as unilingually Finnish-speaking, unilingually Swedish-speaking or bilingual (with either Finnish or Swedish as the dominant language)[4].

On the basis of these background elements, it is possible to conclude that the Ålandic autonomy arrangement is very much tied both to international and to national politics and international and national law.

But why is the Ålandic model so attractive? In the contemporary world, its appeal seems to depend on its close relationship with the international law concept of self-determination. This concept, again, has various interrelated dimensions, some of which are relevant for areas which form parts of a State. In this respect, people's right to self-determination can be understood, inter alia, as a right of (a certain part of) the population to choose the State under whose authority they want to live. This was a common concept with respect to territorial changes after the First World War and concerned almost exclusively areas inhabited by a minority population.[5] This quite narrow version of the concept of self-determination, in comparison with the situation after the

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Ålandic population as one possessing the necessary qualities.

[1] *See also Myntti 1996, p. 1.*

[2] *See also Government Bill 73/1919 concerning the Act on the Self-Government of the Åland Islands.*

[3] *See Section 14 of the Form of Government (Constitution) Act.*

[4] *The representation of the Swedish-speaking population is taken care of, inter alia, through a semi-official and indirectly elected Swedish Popular Assembly. In all, the legislative framework in respect of the Swedish-speaking population in Finland could be characterised as establishing effective cultural autonomy. Moreover, there is an explicit provision in Section 51a of the Form of Government (Constitution) Act on a guarantee of cultural autonomy for the indigenous Sámi population in Finland in respect of their language and culture within the northernmost part of Finland. The Sámi have, in accordance with Section 52a of the Parliament (Consititution) Act, a right to be heard before Parliament, See Myntti 1996, pp. 15ff.*

[5] *Suksi, 1993a, p. 236.*

Second World War, had a tremendous appeal on the Åland Islands at the end of the 1910s and the beginning of the 1920s and resulted, inter alia, in the organisation of two petition campaigns on the Islands advocating secession from Finland and accession to Sweden. However, after a consolidation of the position of the Åland Islands as an autonomous part of Finland, this issue has, with certain smaller exceptions of a mainly internal character, ceased to be contentious.

Because the case of the Åland Islands is quite well documented, for instance, in legal writings,[1] the purpose of this report is only to recapitulate some of the most salient features of the autonomy arrangement concerning the Åland Islands and to update the information so as to include events that have occurred during the 1990s.

2. The Creation of Autonomy

Already in August 1917, an unofficial assembly of the inhabitants of the Åland Islands had proposed that the area would secede from Finland and join Sweden. Moreover, the Åland Islands question involves two instances which are often termed unofficial referendums or opinion polls.[2] Soon after the Finnish Declaration of Independence, at the end of December 1917, a petition campaign was undertaken on the Åland Islands to establish and support the wishes of the inhabitants to secede from Finland and to join Sweden. Of the approximately 21,000 inhabitants of the Islands, approximately 12,500 persons had the right to vote, and about 8,000 of these were presented with a petition on the issue. 7,135 persons signed the petition addressed to "the king and people of Sweden" asking for measures to be undertaken leading to annexation by Sweden.[3] A majority of persons with the right to vote can thus be said to have been in favour of union with Sweden.[4]

Soon thereafter, a dispute about the Islands arose between Finland and Sweden. Although Sweden was not a party to the 1856 treaty establishing the Åland Islands as a demilitarised area, the matter was laid before the Paris Peace Conference in 1919 in order to make it possible to follow a similar path as Denmark had followed with regard to Schleswig. This plan did not succeed, although it was supported by another petition campaign, which was completed on 29 June 1919. This second petition was signed by 9,735 persons who supported union with Sweden, while 461 persons refused to sign the petition.[5]

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[1] *See, e.g., Modeen 1973, passim; Hannikainen 1993a, passim; Hannikainen 1993b, passim; Björkholm - Rosas 1990, passim; Fagerlund 1993, passim; Jyränki 1995, passim.*

[2] *Austen - Butler - Ranney 1987, p. 145, call the petition an unofficial referendum.*

[3] *Högman 1981, p. 41, points out that the petition was formulated as a proxy in blanco, which authorised persons to be elected later on to deliver the wishes of the inhabitants of the Åland Islands to the king of Sweden, which happened on 3 February 1918. The final text of the petition was published on 20 March 1918.*

[4] *De Geer-Hancock 1986, p. 32 ff.; Modeen 1973, p. 14 ff.. The collection of signatures proceeded from house to house and was completed in less than a week. See Lindh 1984, p. 38 f.; Högman 1981, p. 43.*

[5] *Lindh 1984, p. 44 f.. Högman 1981, pp. 119, 124 f., points out that every signature was confirmed by two witnesses and that the petition again was a proxy in blanco for union with Sweden. According to Austen - Butler - Ranney 1987, p. 145, the "turnout" rose to 95.5 per cent and the share of people expressing support for a union with Sweden was 96.4 per cent.. According to De Greer-Hancock 1986, p. 40 ff., in 1919, representatives of an "illegally" elected and constituted regional assembly presented the case for union with Sweden to the Paris Peace*

In 1920, the League of Nations took the matter up on a proposal by Great Britain, which was a party to the 1856 Treaty. At this point, an Act on the Self-Government of the Åland Islands (SOF 124/20) was enacted by the Parliament of Finland, probably as a preemptive measure, the preparations for which had begun already in 1919.[1] With this Act, the province of Åland gained its own Legislative Assembly with a general competence in fields that were not included in the enumeration of exclusive legislative powers of the Finnish Parliament. However, because the inhabitants of the Åland Islands felt that the self-government legislation had been imposed upon them, the Assembly did not convene until 1922.

The position of the Provincial Governor as the representative of the President of Finland caused distrust and dissatisfaction with the arrangement. According to this Act on Self-Government, the President had, upon receiving an opinion from the Supreme Court, an absolute veto over the legislative enactments of the Legislative Assembly if the Ålandic Act violated the exclusive legislative powers of the State, or if the Act was in conflict with the good of the Republic. Courts of law of the State were in charge of interpreting the provincial Acts, too. At this point, the Åland Islands also received the right to use the proceeds of certain taxes and to levy some additional taxes and charges connected to these general State taxes. Many of these taxation powers were subsequently diminished and faded away altogether by the 1950s, because the State abolished the relevant categories of taxes when restructuring its general taxation. However, at the same time the Province was entitled to a certain economic adjustment by the State, determined by a delegation, if the taxes for the self-government functions rose above the average for corresponding functions elsewhere in Finland.[2]

The Act on Self-Government included no specific right of domicile. Nevertheless, the inhabitants of the Åland Islands, that is, persons who were registered as residents of the Ålandic municipalities under a regulation that covered all Finland, were exempted from military service, a provision which has an obvious connection to the demilitarised status of the Islands. The Act contained provisions concerning the language of State officials in the Åland Islands, which was to be Swedish. The Supreme Court of Finland was given the competence to rule on disputes that may arise concerning the powers of the Governor, the Legislative Assembly, and the Provincial Government under the Act on Self-Government.

The Act on Self-Government was enacted on the basis of Section 60 of the 1906 Diet (Constitution) Act as an Act of Exception, following the amendment formula for the Constitution. This method of enactment constituted the Ålandic autonomy arrangement as an exception to the constitutional structure of administration, but, however, without as such making the Act on Self-Government a part of the formal Constitution of Finland or without declaring the

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Conference. Moreover, in September 1919, Clemenceau spoke in the French Chamber of Deputies and indicated that the matter would be solved so as to protect Sweden's interests in the Åland case in the same way as Denmark's interests in the Schleswig case were being protected. See also Lindh 1984, p. 44 f.; Björkholm - Rosas 1990, passim.

[1] *See Government Bill 73/1919 concerning the Act on the Self-Government of the Åland Islands.*

[2] *Now the basic amount of adjustment is determined on the basis of Sections 46 and 47 of the Autonomy Act to be 0.45 per cent of the State income during one year. This arrangement follows from the fact that the State of Finland collects income and property taxes under the ordinary national tax schemes.*

Act a constitutional law. The special features of this legislative measure were included in Section 36 of the Act, according to which the Act on Self-Government could be amended only in the way established for the amendment of the Constitution and with the consent of the Legislative Assembly of the Åland Islands.

When the matter was dealt with by the League of Nations, Sweden requested in her submission to the Council of the League that the matter be decided by the inhabitants of the Åland Islands in a plebiscite.[1] Although plebiscites were fashionable in such questions after the First World War, no popular vote was ever organised, but the investigation of the matter was carried out by two commissions. The first one, the so-called Commission of Jurists, concluded that the Åland Islands issue fell within the jurisdiction of the League of Nations, and the second one, the so-called Commission of Rapporteurs, maintained that the Åland Islands should remain under the sovereignty of Finland. On 24 June 1921, the League of Nations decided the territorial dispute in favour of Finland on condition that guarantees aiming, inter alia, at the Islanders' prosperity and happiness would be established and that measures would be taken to demilitarise and neutralise the Islands. The guarantees relating to the inhabitants were to be included in the Act on Self-Government and would deal with the maintenance of the Swedish language as the language of school instruction, the maintenance of real estate in the possession of the inhabitants, the establishment under reasonable terms of the acquisition of the right to vote of persons who move to the Islands, and the appointment of a person as Governor who enjoys the confidence of the inhabitants.

The final solution agreed upon by Finland and Sweden and adopted by the League of Nations confirmed the existing autonomy of the Åland Islands and supplemented it with some additional features mentioned above[2] (for the text of the Agreement in the French language, see the appendix).

Although this so-called Åland Agreement was not a treaty under public international law, in Finland it led to the enactment of the Act containing Certain Provisions concerning the Inhabitants of the Province of Åland (SOF 189/22) or the so-called Guaranty Act in 1922. This Act was an amendment of and an addition to the Self-Government Act of 1920, enacted in the order prescribed for constitutional amendments. It regulated the appointment of the Governor by the President with the agreement of the Chairman of the Legislative Assembly (Section 1) and stipulated that the Legislative Assembly and the Ålandic municipalities are not obliged to maintain or support other schools than those in which Swedish is the language of instruction (Section 2). Moreover, in State schools located in the Åland Islands, the Swedish language would be the language of instruction. Finally, the Finnish language was not to be taught in primary schools maintained or supported by the State or a municipality unless the municipality in question consented to this.

According to Section 3 of the Guaranty Act, a citizen of Finland who moves to the Province of the Åland Islands acquires there the municipal and provincial right to vote only after he or she has been legally resident in the Province for five years. Finally, under Section 5, a restrictive regulation concerning property was introduced: if a piece of real property had been sold to

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[1] *Modeen 1973, pp. 14, 16, 26. See also Högman 1981, p. 4, and Gayim 1990, p. 15 ff., who give an account of the Åland question and connect it with to the right of self-determination.*

[2] *Modeen 1973, pp. 25-40; Hamburger 1925, pp. 6-89; Palmstierna 1951, p. 13 ff.; Lindh 1984, pp. 44-49; Decision by the Council of the League of Nations, June 24, 1921, 7 League of Nations O.J. 697-702 (1921).*

somebody whose legal residence was not in the Province of Åland, the Province, the municipality within which the property was situated, or a private person legally resident in the Åland Islands had the right to redeem the piece of property at a certain fair price.

None of these laws created any right of domicile limited to the inhabitants of the Åland Islands, but the regulations concerning the right to vote contained the basis for such a concept.

The League of Nations settlement gave the rights granted under this autonomy arrangement a collective character. Section 6 of the Guaranty Act of 1922, supplementing the first Autonomy Act of 1920, contained provisions for a situation where the Legislative Assembly of the Åland Islands might present complaints or notes about the implementation of the Self-Government Act and Guaranty Act. In such a situation, the Government of Finland would add its own observations to the complaint or note and pass on the issue to the Council of the League of Nations so that the Council could supervise the implementation of the provisions and, in cases where the matter was judicial, obtain an opinion from the Permanent Court of International Justice. This procedure became a desuetudo when the League of Nations system collapsed, but it was eliminated from Finnish legislation only in 1951, when the new Autonomy Act repealed the Acts of 1922 and 1920.[1] However, despite the disappearance of the mechanism of supervision, the autonomy arrangement itself has recently been regarded as one of customary law,[2] while at least the demilitarisation and neutralisation may perhaps be regarded as a so-called objective regime under international law.[3]

The 1951 Autonomy Act (SOF 670/51) confirmed the basic elements of the arrangement of the 1920s, but created at the same time a "specific right of domicile", which defined the group of persons who were to be considered beneficiaries of the special features of autonomy, that is, the right to vote and stand as candidate in municipal and provincial elections, acquisition and possession of real estate,[4] the right to carry out so-called regulated branches of trade,[5] and exemption from military service. The definition of the right of domicile created at this point a distinction between the inhabitants of the Åland Islands and those of mainland Finland that was more protective of the former than under the previous legislation, and the definition may have

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[1] *There were plans, recorded in committee proceedings and in a Government Proposal to the Parliament in 1946, to establish a similar procedure under the United Nations. On this, see Modeen 1973, p. 61-76; Hannikainen 1993a, pp. 41-48. A somewhat similar arrangement, which was also used in practice, existed on the basis of the Versailles and Paris Treaties for the Free City of Danzig. See Hannum 1990, p. 377 ff.*

[2] *Hannikainen 1993a, pp. 79-102.*

[3] *Hannikainen 1993a, pp. 103-130.*

[4] *A special Act on the Purchase of Real Estate (SOF 3/75) was enacted for the first time in 1938 (SOF 140/38) and amended in 1951 (SOF 671/51). The important change that took place in 1975 was that under the previous law, anybody could buy real estate on the Åland Islands, but faced, in the absence of the right of domicile, the risk of the property being redeemed by the mentioned categories of persons. However, under the 1975 Act, an advance permit by the Provincial Government is required of persons who are not in the possession of the right of domicile before they can purchase the property.*

[5] *However, the right of trade was not exclusively reserved for those who had the right of domicile, but regulated trades could also be carried out by persons who had had uninterrupted legal residence in the Åland Islands for five years.*

had a discouraging effect on persons from the mainland as concerns their intention to move to the Åland Islands. This Autonomy Act made the contours of autonomy more specific and provided more detailed regulations concerning the powers and functioning of autonomy. At this point, an enumerated list replaced the more general clause in defining the competences of the Legislative Assembly. As concerns the administrative tasks and possible conflicts between the administrative authorities of the State and the Province in respect of these, the Supreme Court was given the competence to rule on them upon an opinion of the Åland Delegation. Within the framework of legislative power, the boundaries of the law-making capacity of the Legislative Assembly could be efficiently supervised by the President of the Republic, who could veto an Ålandic Act upon receiving an opinion from the Supreme Court.[1] However, the authorities of the Åland Islands received no corresponding remedy for situations in which the legislature of the Republic of Finland interfered with the legislative powers of the Legislative Assembly.[2] This asymmetry is one element distinguishing the Ålandic arrangement in Finland from a federative arrangement.

The current Autonomy Act was enacted in 1991. The 1991 Autonomy Act strengthened the self-government of the Åland Islands and restricted the State's supervision. This was carried out especially by expanding the legislative competences of the Province (e.g., regulations concerning use of the flag of the Province, leasing, historical sites, social care, sub-soil resources (in respect of which there is a divided competence with the State), the sale of alcoholic beverages, archives, postal affairs, radio and telecommunications) as well as giving the Province more administrative powers.[3] A more detailed regulation concerning the language of instruction was included in the Act to provide more protection for the cultural identity of the inhabitants of the Åland Islands. Moreover, the acquisition of a certain proficiency in the Swedish language as a condition for the right of domicile was added to the Act. The special rights tied to the possession of the right of domicile were kept more or less in the same form as in the 1951 Autonomy Act, with the exception that the right of a person without the right of domicile to exercise a trade or profession in Åland for personal gain may be limited by a Provincial Act.[4]

The monopoly of the Swedish language on the Åland Islands may, however, create a so-called 'minority within a minority' problem in respect of Finnish-speaking persons (about 1100 or 4.5 per cent of the population) residing in the Province. Although Finnish-speakers could, if they wanted, create a private school on the Åland Islands, the language provisions may contain conflicts with the provisions of the 1960 UNESCO Convention Against Discrimination in

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[1] *When an Ålandic Act is presented for the President, it is always accompanied by an opinion of the Åland Delegation.*

[2] *On this, see Jyränki 1995, pp. 13-15. It should be noted that there is no judicial review in Finland in respect of Acts of Parliament or Acts of the Legislative Assembly of the Åland Islands, because the interpretation of Section 92, Subsection 2, of the Finnish Form of Government (Constitution) Act is that courts are prohibited from reviewing the constitutionality of legislation.*

[3] *For the legislative powers of the Province of Åland and the State of Finland, see Appendix.*

[4] *However, under Section 11 of the 1991 Autonomy Act, such a Provincial Act may not be used to limit the right of trade of a person residing in Åland, if no person other than a spouse and minor children are employed in the trade and if the trade is not practised in business premises, an office or any other special place of business. Hence a non-Ålander has the right to trade, but limitations to that right may be enacted in a Provincial Act.*

Education.[1] The Belgian Linguistics Case of the European Court of Human Rights would, in turn, seem to indicate that there is no such discrimination against Finnish-speaking pupils in the Åland Islands that would be prohibited under the European Convention on Human Rights: there would seem to exist "legitimate and objective grounds to keep the schools of the Åland Islands monolingually Swedish". At the same time, the present system would not seem to "involve disproportionality between the means employed and the aim sought".[2]

There has been a certain discussion concerning the relationship between the Ålandic arrangement and the various human rights conventions binding on Finland. It has been suggested that the 1921 decision of the League of Nations could be considered a lex specialis, but it would seem as if most legal experts gave precedence to Finland's obligations under human rights conventions according to the principle of lex posterior.[3]

3. The Constitutional Position of Ålandic Autonomy

The position of the Åland Islands was and is special at the level of the formal Constitution. In the multi-documentary Constitution of Finland consisting of the Form of Government (Constitution) Act, the Parliament (Constitution) Act, and two constitutional Acts pertaining to the form and procedure of the Court of the Realm, which all have been enacted in accordance with the qualified procedure prescribed for legislation at the constitutional level and which all define themselves as constitutional laws, the Åland Islands used to be referred to only in Section 33 of the Parliament (Constitution) Act. Before 1 March 1994, this article stated that "(s)eparate provisions shall apply on the right of the Åland Legislative Assembly to submit initiatives" to the Parliament of Finland.[4]

According to an amendment to the Form of Government (Constitution) Act, creating Section 52a which entered into force on 1 March 1994, the Province of Åland has self-government in accordance with separate enactments. At the same time, Section 33 of the Parliament (Constitution) Act was amended so as to include a provision according to which the procedure of enactment concerning the Autonomy Act of Åland Islands and the Act on Acquisition of Land on the Åland Islands is the one established in these laws. Moreover, Section 33 contains a provision according to which the Legislative Assembly of Åland has the right to present legislative initiatives to the Finnish Parliament according to separately enacted provisions.[5]

Does the above characterisation mean that the Åland Islands enjoyed a very weak constitutional status before 1994? On the contrary, despite the fact that the Åland Autonomy Act and the Act on Acquisition of Land on the Åland Islands do not declare themselves to be constitutional laws, it could even be possible to conclude that their hierarchical status may, in fact, be higher than that of the other four constitutional laws: both the Autonomy Act and the Land Acquisition Act

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[1] *Hannikainen 1993b, pp. 22 f., 41-49.*

[2] *Hannikainen 1993b, p. 38 f.*

[3] *Hannikainen 1993b, p. 53 f.*

[4] *According to Art. 1 of the Act on Election of Members of Parliament (391/69), which might be included in the Finnish Constitution in a broader material sense, the Åland Islands shall constitute one constituency and shall have one seat in the national Parliament.*

[5] *See Government Bill no. 138/1993 on the incorporation of provisions concerning the Åland Islands in the Constitution Act and the Parliament Act.*

stipulate (Section 69 and Section 17, respectively) that amendments to these laws are made only in the manner established for the amendment of the Constitution in Section 67 of the Parliament (Constitution) Act[1] and with the consent of the Legislative Assembly of Åland. However, the Finnish Constitution does not regard these two Acts relating to the Ålandic autonomy arrangements as Acts of a formally higher order than the other Constitutional Acts, but rather as Acts of Exception to the Constitution.

As concerns Ålandic consent to amendments to the Autonomy Act, Section 69 of this Act requires materially identical decisions of the Finnish Parliament and the Legislative Assembly of Åland, so that the Ålandic decision is made by a two-thirds qualified majority. The Land Acquisition Act does not, in the first place, according to Section 17, require any super-majority in the Legislative Assembly of Åland, but leaves this particular entrenchment and the raising of the decision-making threshold to the two-thirds level to be determined in an Ålandic Act (which itself must be enacted in that manner).[2]

Already before 1994, the position of the Åland Islands was therefore clearly entrenched: the Finnish legislature could not rid itself of the Åland Islands or alter Åland's formal or material status by using only those legislative means which are at its own disposal. With the amendments to the Finnish Constitution of 1994, the position and self-government of Åland have been properly anchored in the Constitution of Finland and thereby further entrenched.

Hence the Åland Islands seem to enjoy a strong position: we may describe the constitutional setting of the Islands before 1994 in terms of a special and regional entrenchment, "special" meaning here the requirement of constitutional amendment by a two-thirds majority in Parliament for alterations of the Autonomy Act, and "regional" meaning here the requirement of Ålandic consent for any modifications to the Autonomy Act. Moreover, after amendments to the Finnish Constitution on 1 March 1994, it now also includes a clear general entrenchment of the Åland Islands arrangement. In this way, the constitutional setting of the Åland Islands has become even more fixed than it was before.

Referring to the material Constitution, Section 1 of the Act on the Election of Members of Parliament (SOF 391/69) creates the Province of Åland as one constituency from which one MP shall be elected to the Finnish Parliament. This is a special arrangement that undoubtedly contains a strain of federalism, but it must at the same time be noted that the Ålandic constituency is more or less the same size as the other constituencies in Finland.[3]

4. The Åland Islands in the European Union

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[1] *A simple majority in favour of the amendment in one Parliament and a two-thirds majority in the new Parliament convened after elections, or a decision on urgency of the amendment with a five-sixths majority and adoption by two-thirds by the same Parliament.*

[2] *Such an entrenchment is not envisioned in the proposal of the Provincial Government (nr 15/1995-96) to the Legislative Assembly of Åland to be dealt with during the spring of 1996.*

[3] *The federative element is somewhat strengthened by Section 52, Subsection 3, of the Parliament (Constitution) Act, according to which the Ålandic MP shall always have the right to be present in the meetings of the Grand Committee of Parliament, which is the central body in Parliament dealing with integration matters.*

When the accession of Finland to the European Union was prepared and negotiated, Finland recalled that the autonomy of the Åland Islands is constitutionally guaranteed on the basis of the internationally recognised status of the Islands and requested that special measures be taken so that the autonomy arrangement would not be adversely affected. Consequently, Finland proposed that derogations be inserted into the Treaties on which the European Union is founded by way of special provisions in Articles 227 EC, 79 ECSC, and 198 EAEC and a special Protocol. Without such an arrangement, the assent of the Legislative Assembly of Åland Islands could not be taken for granted, with the risk of the Åland Islands remaining outside the European Union altogether.

Firstly, the Åland Islands would have to be allowed to maintain its legislative power over the conditions regulating the rights to vote and to stand as a candidate in elections to the Legislative Assembly and to municipal councils, a legislative power that was, under the Autonomy Act of 1991, limited to those enjoying the right of domicile in the islands. According to the Finnish Government, the conditions for obtaining voting rights would not discriminate between Finnish citizens of mainland Finland and citizens of other Member States. Secondly, the right to acquire and hold property, the right of establishment, and the right to provide services would be restricted to natural or legal persons enjoying the right of domicile in the Åland Islands or to those authorised by the competent authorities of the Islands. Thirdly, the Government of Finland requested a permanent exemption from Community tax harmonisation legislation for the Islands and the ferry traffic passing through them. Fourthly, a Protocol should include provisions that protect the rights of the inhabitants of the Åland Islands in Finland and that require the authorities of the Åland Islands to treat citizens from all Member States equally.

Of these requests, Protocol No. 2 on the Åland Islands, attached to the Treaty of Accession of, inter alia, Finland to the European Union, excluded the first[1] and the first part of the fourth demands, while it contains the second and third requests (the third request was accepted with a view to maintaining a viable local economy in the Islands) and the latter part of the fourth, thus creating an option for a more or less permanent exception on the part of the Åland Islands to the Treaties on which the European Union is founded.[2] In granting these exceptions, the European Union took into account the special status which the Åland Islands enjoy under international law,[3] but only as of 1 January 1994.[4]

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[1] *However, in Declaration No. 32 on the Åland Islands of the Final Act on the Accession by the current Member States, the Union recalls in respect of the municipal suffrage and eligibility that Article 8b TEU makes it possible to agree with the requests presented by Finland. According to the Declaration, if Finland declares, according to Article 227(5) ECT, that the Treaty will be applied in the Åland Islands, the Council will, within six months and according to procedures laid down in Article 8b TEU, establish the conditions on which this Article shall be applied to the special circumstances of the Åland Islands.*

[2] *In the fields of harmonisation of the law of the Member States on turnover taxes and on excise duties and other forms of indirect taxation, the exemption may be less permanent, depending on the exemptions not having any negative effects on the interests of the Union nor on its common policies. Protocol No. 2 on the Åland Islands, Article 2(b).*

[3] *Conference on Accession to the European Union/Finland. Subject: Chapter 29: Other - Union common position on Finland's request concerning the status of the Åland Islands. Agreed by the Council at its meeting on 21 February 1994 (CONF-SF 20/94).*

[4] *This so-called stand-still clause means that in the area of Community law, no new exceptions may be introduced after 1 April 1994.*

Hence the final arrangement in respect of the European Union contains an addition to Article 227 EC (and the corresponding Articles 79 ECSC and 198 EAEC) as littera d), according to which the Treaty shall not apply to the Åland Islands, unless the Government of Finland gives notice by a declaration when ratifying the Treaty that the Treaty shall apply to the Åland Islands in accordance with provisions set out in Protocol No. 2 to the Treaty concerning the accession of new Member States. This declaration was deposited with the Government of Italy on 9 December 1994, whereupon the Åland Islands' entry into the European Union became effective together with that of Finland on 1 January 1995, albeit with the special conditions referred to above. The effect of the special arrangement in respect of the Åland Islands is the special tax regime in relation to mainland Finland and the European Union, making the Islands comparable to a third country concerning the taxes included in the arrangement and drawing a certain tax boundary between the Åland Islands and mainland Finland.

With the accession of Finland to the European Union and with the emerging principle of integration by referendum, it was asked whether the Åland Islands should hold an advisory referendum on the EU issue before the Legislative Assembly of the Åland Islands gave its formal consent to the Islands' membership of the EU, which actually involves a special EU status on the basis of the separate protocol on the Åland Islands.[1] Lacking specific referendum provisions, one issue that arose on the basis of the Autonomy Act in this respect was whether the Åland Islands is at all permitted to organise popular votes of any kind. A positive solution could be based on the right to self-determination: since EU regulations supersede and supplant Ålandic norms and interfere with Ålandic jurisdiction especially within the area of trade, it can be argued that EU membership will have the effect of diminishing the self-government and also the self-determination of the Åland Islands.[2] Therefore, an advisory referendum could be held,[3] especially as the conditions of accession were not a theme during the elections to the Legislative Assembly on 20 October 1991.

In an Opinion to the President of the Republic, the Supreme Court of Finland emphasised the fact that the referendum is only advisory, and that it does not constitute any infringement of the decision-making procedures and thus does not deprive the Legislative Assembly of its right to represent the Åland Islands. Therefore, the Court found that regulations concerning an advisory referendum do not violate the Autonomy Act. The Court concluded that provisions concerning advisory referendums are not of a constitutional character in the sense that they would, under Section 27, Subsection 1, deviate from the competence of the Republic to enact laws at the constitutional level. On the contrary, the Supreme Court ruled that in this case, Ålandic legislation concerning an advisory referendum could be enacted under Section 18, Subsection 27,[4] because the matter fell under the competence of the Åland Islands.[1] Hence the President of Finland did not disapprove of the Ålandic law on the advisory EU referendum.

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[1] *The Act concerning the conditions of accession and the adjustments to the Treaties on which the Union is founded, Protocol No 2 on the Åland Islands, OJ 94/C 241/08.*

[2] *In the same vein, one could also argue for an Ålandic mandate in the European Parliament. Considering the fact that the European Parliament is not the legislative body of the EU, the argument based on self-determination does not have the same force.*

[3] *A decisive referendum would clearly require an amendment of the Autonomy Act.*

[4] *"The Province shall have legislative authority in matters pertaining to (...) 27) the other matters that are to be deemed under the legislative authority of the Province according to the*

The Ålandic advisory referendum on membership of the EU was organised on 20 November 1994. Only those with the right of domicile had the right to vote in this regional referendum. This EU referendum, the first referendum ever on the Åland Islands, produced a low turnout of only 49.1 per cent. Of those voting, 73.6 per cent voted for the EU, while 26.4 per cent opposed joining the Union together with Finland.[2] The Legislative Assembly of the Åland Islands accordingly made its final decision on 2 December 1994, applying the required two-thirds qualified majority, because Finland's accession to the European Union was made according to the procedure prescribed in Section 69, Subsection 1, of the Parliament (Constitution) Act and hence forms an Act of Exception in relation to the Constitution and, as it happens, also to the Autonomy Act in accordance with Sections 59 and 69 of this Act.[3] Had EU membership been rejected, the Ålandic government would probably have resigned and the Islands would not have become a part of the European Union by 1 January 1995, but would have assumed a status comparable to that of the Faroe Islands.

At the end of 1994, the Autonomy Act was amended (SOF 1556/94) so as to include a new chapter on issues that concern the European Union. According to Section 59a, the Provincial Government shall be informed about issues that belong to the exclusive competence of the Åland Islands that are being prepared within the Union[4] and shall be provided the opportunity to participate in the sessions of the Finnish Council of State when such issues are dealt with. Moreover, according to Section 59b, in issues falling under the competence of the Åland Islands, the Provincial Government shall formulate the Finnish position in respect of the application of the common EU policies on the Åland Islands.[5] Finally, on the basis of Section 59c, a candidate selected by the Provincial Government shall be proposed as one of the Finnish representatives to the Committee of Regions.

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principles on which this Act is based."

[1] *Opinion of the Supreme Court, 9 September 1994, Nr 3169 (Dnr OH 94/104).*

[2] *The Åland Islanders, including those without the right of domicile, of course also participated in the nation-wide advisory EU referendum, which was arranged before the Ålandic referendum. The turnout on the Åland Islands in this national referendum was 61.2 per cent, and of those voting, 51.9 per cent supported EU membership. The reason for the greater support for EU membership in the Ålandic referendum was probably that by the time of the regional referendum, it was known that both Finland and Sweden would become members of the Union. Folkomröstningarna om ..., 1994, p. 12.*

[3] *According to Section 58 of the Autonomy Act, the Provincial Government has the possiblity to participate in negotiations concerning international treaties. However, the Åland Islands are not a subject of public international law but have a very limited international legal capacity. See Hannikainen 1993a, p. 172.*

[4] *The Ministry of Foreign Affairs should ensure that all proposals by the European Commission concerning new legislative acts are forwarded to the Provincial Government at the same time as the specialised ministries shall, within their field of competence, inform the Provincial Government about matters that they are dealing with. See Government Bill 307/1994 concerning the Position of the Åland Islands in case of a Finnish Membership in the European Union, p. 10.*

[5] *See Government Bill 307/1994 concerning the Position of the Åland Islands in case of Finnish Membership in the European Union, p. 11. In such cases, the position of the Åland Islands would be appended to the position of Finland.*

5. The Recognition of a "Regional Citizenship"[1]

The Act on the Autonomy of Åland (SOF 1144/91) spells out the details of Ålandic autonomy and creates, in line with its predecessor of 1951, an exclusive characteristic in respect of citizenship: only citizens of Finland may have the right of domicile in Åland. The arrangement amounts to a special regional citizenship, which is possessed, by virtue of the Autonomy Act under Section 6 of the same, by a person who at the time of the entry into force of this Act had the right of domicile according to the Autonomy Act for Åland of 28 December 1951 (SOF 670/51) and by a child who is under 18 years of age, is a citizen of Finland and is resident in the Province, provided that the father or the mother of the child has the right of domicile. Hence the regional citizenship follows the principle of jus sanguinis. However, according to Section 7 of the Autonomy Act, the right of domicile is, in general, granted upon application to a citizen of Finland who has moved to the Province, and who has, without interruption, been habitually resident in the Province for at least five years,[2] and who is satisfactorily proficient in Swedish.[3]

The term "regional citizenship" is, since 1 January 1995, equivalent to the right of domicile (in the Swedish language hembygdsrätt and in the Finnish language kotiseutuoikeus) in Article 1 of Protocol 2 on the Åland Islands, in the Act concerning the Conditions of Accession and the Adjustment to the Treaties on which the Union is Founded, attached to the 1994 Treaty of Accession, inter alia, of Finland to the European Union.[4]

The rules concerning the acquisition of the right of domicile in the Åland Islands may thus be viewed as exclusive in relation to citizens of other countries[5] and restrictive as concerns the mainland citizens of Finland. However, the right of domicile entitles the possessor of this right under Sections 9 to 12 of the Autonomy Act to some material rights that present themselves as exclusive compared with the persons who are not in possession of the right of domicile. These material rights are the right to participation in Provincial and municipal elections, including

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[1] *Based on Rosas - Suksi, 'Finland', in Bruno Nascimbene (ed.), Nationality Laws in the European Union (forthcoming, 1996).*

[2] *See KHO 1991-II-3, in which the Supreme Administrative Court concluded that the fact that the person applying for the right of domicile had moved from the Province while his application was pending was not a reason which could be used to deny his application.*

[3] *On the situation in respect of the language requirement on the basis of the 1951 Autonomy Act, which did not contain such a requirement, see the Oinas case, KHO 1979-I-4.*

[4] *OJ 94/C241/08.*

[5] *See KHO 2788/1/94 of 2 June 1995 (Docket Nr 2386), in which the Supreme Administrative Court declared, upon concluding that the request by the applicant of a preliminary ruling from the EFTA Court was unfounded, that the requirement of equal treatment in Article 126.2.c of the EEA Treaty had not been violated by the Provincial Government when it declined an application for the right of domicile from a German citizen because of the lack of Finnish citizenship. On the part of the Åland Islands, the EEA Treaty contains exceptions with respect to the possession of real estate and trade, concerning which non-domiciled persons may acquire rights on the basis of administrative permits granted by the Provincial Government, which procedure must not be discriminatory, while the Treaty does not affect, inter alia, the political rights flowing from the right of domicile.*

eligibility for office,[1] the right to acquire real estate in the manner provided for under the Land Acquisition Act (SOF 3/75),[2] and the right of trade,[3] as well as some exemptions from the general duty to perform military service.

Under Section 8 of the Autonomy Act, the forfeiture of Finnish citizenship shall also mean the forfeiture of the right of domicile, while the forfeiture of the right of domicile of a person who moves permanently away from the Province shall be regulated in a Provincial Act.

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[1] *According to Section 67 of the Autonomy Act, as amended on 31 December 1994 (SOF 1556/94), a Provincial Act enacted by a two-thirds majority in the Provincial Parliament may stipulate that a citizen of Finland without the right of domicile and citizens of Iceland, Norway, Sweden and Denmark shall be granted suffrage and be eligible for office in municipal elections on the prerequisites provided for in a Provincial Act and that the same rights may be given to citizens of other States. The latter part of the Section is a reaction to the exception that remained unrealised in the Accession Treaty and to Article 8b of the Treaty on European Union, which grants these rights to citizens of Member States in respect of municipal elections in any Member State, albeit on the basis of a Council Directive, which may contain derogations that follow from "problems specific to a Member State". See Council Directive 94/80/EC of 19 December 1994. In an Explanatory Memorandum to a Proposal for a Council Directive (COM(95) 499 Final/11.01.1996) amending the above mentioned Council Directive on municipal elections, the EC Commission points out that "(s)ince a period of residence, irrespective of nationality, is required of all those that do not have the right of domicile it can be concluded that there is no discriminatory treatment incompatible with article 8B (1) of the EC Treaty between Finnish citizens and other EU nationals as regards to the right to vote and to stand in municipal elections. No specific conditions are therefore necessary to apply article 8B (1) to the Åland islands". However, by the beginning of 1996, there was no such Provincial Act which would grant citizens of other countries an equal status in respect of municipal elections. An amendment is nonetheless being prepared which would grant citizens of the European Union the right to vote in municipal elections after three years residence. Please note that the elections to the Legislative Assembly are not covered by Article 8b TEU.*

[2] *See KHO 3941/1/94 of 2 June 1995 (Docket Nr 2385), in which the Supreme Administrative Court concluded that a decision by the Provincial Government, with which it had denied the application of a company resident in Sweden to possess real estate in the Province, was not discriminatory in respect of companies in other EEA countries. The ruling dealt with the application of Article 126 of the EEA Treaty and Section 2 of the Land Acquisition Act. A similar regulation is found in Article 1 of Protocol No 2 on the Åland Islands of the Act concerning the Conditions of Accession and the Adjustments to the Treaties on which the Union is Founded (OJ 94/C241/08), attached to the 1994 Treaty of Accession, inter alia, of Finland to the European Union.*

[3] *Under Section 11 of the Autonomy Act, the right of trade is not exclusively tied to the right of domicile, but dependent on a Provincial Act, which, however, shall not limit the right of trade of a person residing in the Province if no staff except his spouse and minor children is used in the trade and if the trade is not practised in business premises, an office or another special place of business. A similar regulation is found in Article 1 of Protocol No 2 on the Åland Islands of the Act concerning the Conditions of Accession and the Adjustments to the Treaties on which the Union is Founded (OJ 94/C241/08), attached to the 1994 Treaty of Accession of, inter alia, Finland to the European Union.*

6. Concluding remarks

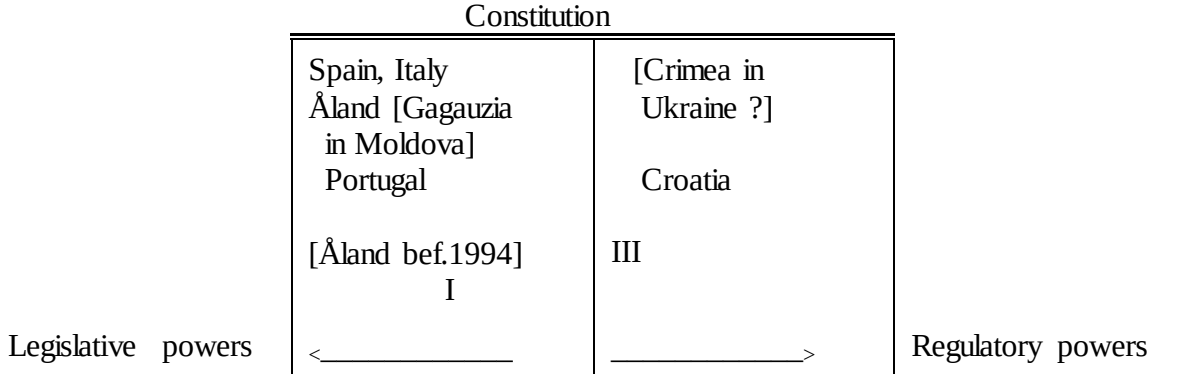
With the territorial demarcation as a starting point, the autonomy of the Åland Islands has become ever stronger: a specially guaranteed self-government of a higher order created in 1920 was supplemented, on the basis of the League of Nations conflict solving decisions of 1921, by a set of special features in the so-called Guaranty Act of 1922. Here the position of Ålandic culture based on the Swedish language was entrenched. At the same time, specific provisions concerning the right to vote and stand as a candidate in elections and the acquisition and possession of real estate were created.

Later amendments to this autonomy arrangement in 1951 and 1991 deepened the autonomy and the position of the Islanders by establishing a distinct regional citizenship to which a number of features were connected: the right to vote and stand as a candidate in provincial and municipal elections, the acquisition and possession of real estate, the right of trade (which was not an element of the original Agreement), and exemption from military service (which already was an element of the self-government of 1920). Although this arrangement, which also could be called a "sandwich" of exclusive rights, contains elements of minority protection, one could, nevertheless, conclude that the protection of the territory is the central concern. It is, at the same time, recalled that the right of domicile and, as one of its elements, the right of trade, are not covered by the 1921 decision by the League of Nations but depend on Finnish legislation.

Legislative and administrative powers, as well as the possibility for the Åland Islands' to involve itself in international affairs, have increased. Hence, materially speaking, the Ålandic autonomy arrangement has grown beyond its original parameters as they were laid down at the beginning of the 1920s.

Formally speaking the Åland Islands arrangement is now regarded as a kind of customary law, and any threat of diluting this arrangement would probably propel the Government of Finland to invoke such an argument. This took place, for instance, during the negotiations leading to the Finnish accession to the European Union: the Finnish accession affected the right to vote and stand as a candidate, the right to acquire real estate, and the right to trade (involving the freedoms of establishment and services). It could indeed be concluded that the special accession arrangements with the Åland Islands in this respect display a recognition of the territorial aspect. One could also argue that Ålandic autonomy is protected by the concept of self-determination. More importantly, however, the constitutional position of the Åland Islands has been very strong and has lately become even stronger, at least from a very formal point of view, with explicit stipulations in the Finnish Constitution (see figure 1, below, which indicates the position of the Åland Islands in relation to other autonomy arrangements)

[FIGURE 1]



II	IV
Greenland Faroe Islands	Corsica

Ordinary Legislation

At the same time as the legislative powers of the Åland Islands have become broader, we may conclude that the entrenchment of the position of the Åland Islands in the Constitution of Finland has given rise to the development of new dimensions. It is not anymore solely a matter of a special and regional entrenchment, but there is also a general entrenchment in the Finnish Constitution of the Islands' position.

ABBREVIATIONS

SOF = Statutes of Finland
OJ = Official Journal of the European Communities
KHO = Korkein Hallinto-oikeus (the Supreme Administrative Court)
EU = the European Union
FTS = Finnish Treaty Series

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APPENDIX I:

Procès-verbal de la dix-septième séance du conseil, 27 juin.

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Présents: Tous les représentants des Membres du Conseil et le Secrétaire général.

L'Espagne est représentée par M. De Reynoso, et le Brésil par M. Blanco.

Les représentants de la Finlande et de la Suède prennent place à la table du Conseil.

M. Hymans rappelle que le Conseil a reconnu que la meilleure manière d'arriver à une solution, en ce qui concerne les garanties, serait de la rechercher par un accord entre les représentants de la Finlande et ceux de la Suède, avec le concours d'un Membre du Conseil. Il déclare que les conversations prévues ont eu lieu sous sa présidence et qu'il en apporte le résultat sous la forme d'un texte précis qui sera, si le Conseil l'adopte, joint à sa résolution du 24 juin.

Il donne lecture du texte suivant, qui contient l'accord auquel sont arrivées les deux parties:

«1. La Finlande, résolue à assurer et à garantir à la population des Iles d'Aland la préservation de sa langue, de sa culture et de ses traditions locales suédoises, s'engage à introduire à bref délai dans la loi d'autonomie des Iles d'Aland du 7 mai 1920 les garanties ci-dessous:

«{2.} Le Landsting et les Communes d'Aland ne sont, dans aucun cas, obligés d'entretenir ou de subventionner d'autres écoles que celles où la langue d'enseignement est le suédois. Dans les établissements scolaires de l'Etat, l'enseignement se fera également dans la langue suédoise. Sans le consentement de la commune intéressée, la langue finnoise ne peut être enseignée dans les écoles primaires entretenues ou subventionnées par l'Etat ou par la commune.

«3. Lorsqu'un immeuble situé à Aland est vendu à une personne qui n'a pas son domicile légal dans la province, toute personne y domiciliée légalement, ou le Conseil de province, ou bien la commune dans laquelle l'immeuble est situé, a le droit de racheter l'immeuble à un prix qui, faute d'accord, sera fixé par le tribunal de première instance (Häradsrätt) en tenant compte du prix courant.

«Des prescriptions détaillées seront fixées par une loi spéciale concernant la procédure du rachat et la priorité entre plusieurs offres.

«Cette loi ne peut être modifiée, interprétée ou abrogée que dans les mêmes conditions que la loi d'autonomie.

«4. Les immigrants dans l'archipel d'Aland jouissant des droits de citoyen en Finlande n'acquerront le droit de suffrage communal et provincial dans les Iles qu'après cinq ans de domicile légal. Ne seront pas considérées comme immigrantes, les personnes qui ont eu précédemment cinq ans de domicile légal dans les Iles d'Aland.

«5. Le gouverneur des Iles d'Aland sera nommé par le Président de la République finlandaise, d'accord avec le Président du Landsting des Iles d'Aland. Au cas où cet accord ne pourrait se réaliser, le Président de la République choisira le gouverneur sur une liste de cinq candidats, désignés par le Landsting et présentant les garanties requises pour la bonne administration des Iles et la sécurité de l'Etat.

«6. La province d'Aland aura le droit d'employer pour ses besoins 50 % des revenues de l'impôt foncier, outre les revenus prévus par l'article 21 de la loi d'autonomie.

«7. Le Conseil de la Société des Nations veillera à l'application des garanties prévues. La Finlande transmettra au Conseil de la Société des Nations, avec ses observations, toutes plaintes ou réclamations du Landsting d'Aland au sujet de l'application des garanties susdites, et le Conseil pourra, au cas où la question serait de nature juridique, consulter la Cour permanente de Justice internationale."

Le Conseil approuve unanimement les termes de cet accord et décide de l'annexer à sa résolution du 24 juin; il adresse ses remerciements à M. Hymans pour l'heureuse réussite des négociations.

Les représentants de la Finlande et de la Suède se retirent.

[Quoted from Modeen 1973, pp. 190-191.]

APPENDIX II:

Legislative powers of Åland and the State/Sections 18 and 27 of the Autonomy Act.

Section 18
Legislative authority of Åland

Åland shall have legislative powers in respect of

1. the organisation and duties of the Legislative Assembly and the election of its members, the Government of Åland and the officials and services subordinate to it;

2. the officials of Åland, the collective agreements on the salaries of the employees of Åland and the sentencing of the officials of Åland to disciplinary punishment;

3. the flag and coat of arms of Åland and the use thereof in Åland, the use of the Åland flag on vessels of Åland and on merchant vessels, fishing vessels, pleasure boats and other comparable vessels whose home port is in Åland, without limiting the right of State offices and services or of private persons to use the flag of the State;

4. the municipal boundaries, municipal elections, municipal administration and the officials of the municipalities, the collective agreements on the salaries of the officials of the municipalities and the sentencing of the officials of the municipalities to disciplinary punishment;

5. the additional tax on income for Åland and the provisional extra income tax, as well as the trade and amusement taxes, the bases of the dues levied for Åland and the municipal tax;

6. public order and security, with the exceptions as provided by section 27, subparagraphs 27, 34 and 35; the firefighting and rescue service;

7. building and planning, adjoining properties, housing;

8. the appropriation of real property and of special rights required for public use in exchange for full compensation, with the exceptions as provided by section 61;

9. tenancy and rent regulation, lease of land;

10. the protection of nature and the environment, the recreational use of nature, water law;

11. prehistoric relics and the protection of buildings and artifacts with cultural and historical value;

12. health care and medical treatment, with the exceptions as provided by section 27, subparagraphs 24, 29 and 30; burial by cremation;

13. social welfare; licences to serve alcoholic beverages;

14. education, culture, sport and youth work; the archive, library and museum service, with the exceptions as provided by section 27, subparagraph 39;

15. farming and forestry, the regulation of agricultural production; provided that the State officials concerned are consulted prior to the enactment of legislation on the regulation of agricultural production;

16. hunting and fishing, the registration of fishing vessels and the regulation of the fishing industry;

17. the prevention of cruelty to animals and veterinary care, with the exceptions as provided by section 27, subparagraphs 31-33;

18. the maintenance of the productive capacity of the farmlands, forests and fishing waters; the duty to transfer, in exchange for full compensation, unutilised or partially utilised farmland or fishing water into the possession of another person to be used for these purposes, for a fixed period;

19. the right to prospect for, lay claim to and utilise mineral finds;

20. the postal service and the right to broadcast by radio or cable in Åland, with the limitations consequential on section 27, subparagraph 4;

21. roads and canals, road traffic, railway traffic, boat traffic, the local shipping lanes;

22. trade, subject to the provisions of section 11, section 27, subparagraphs 2, 4, 9, 12-15, 17-19, 26, 27, 29-34, 37 and 40, and section 29, paragraph 1, subparagraphs 3-5, with the exception that also the Legislative Assembly has the power to impose measures to foster the trade referred to in the said paragraphs;

23. promotion of employment;

24. statistics on conditions in Åland;

25. the creation of an offence and the extent of the penalty for such an offence in respect of a matter falling within the legislative competence of Åland;

26. the imposition of a threat of a fine and the implementation thereof, as well as the use of other means of coercion in respect of a matter falling within the legislative competence of Åland;

27. other matters deemed to be within the legislative power of Åland in accordance with the principles underlying this Act.

Section 27
Legislative authority of the State

The State shall have legislative power in matters relating to

1. the enactment, amendment, explanation and repeal of a Constitutional Act and an exception to a Constitutional Act;

2. the right to reside in a country, to choose a place of residence and to move from one place to another, the use of freedom of speech, freedom of association and freedom of assembly, the confidentiality of post and telecommunications;

3. the organisation and activities of State officials;

4. foreign relations, subject to the provisions of chapter 9;

5. the flag and coat of arms of the State and the use thereof, with the exceptions provided by section 18, subparagraph 3;

6. surname and forename, guardianship, the declaration of the legal death of a person;

7. marriage and family reasons, the juridical status of children, adoption and inheritance, with the exceptions provided by section 10;

8. associations and foundations, companies and other private corporations, the keeping of accounts;

9. the nationwide general preconditions on the right of foreigners and foreign corporations to own and possess real property and shares of stock and to practice a trade;

10. copyright, patent, copyright of design and trademark, unfair business practices, promotion of competition, consumer protection;

11. insurance contracts;

12. foreign trade;

13. merchant shipping and shipping lanes;

14. aviation;

15. the prices of agricultural and fishing industry products and the promotion of the export of agricultural products;

16. the formation and registration of pieces of real property and connected duties;

17. mineral finds and mining, with the exceptions as provided by section 18, subparagraph 19;

18. nuclear energy; however, the consent of the Government of Åland is required for the construction, possession and operation of a nuclear power plant and the handling and stockpiling of materials therefor in Åland;

19. units, guages and methods of measurement, standardisation;

20. the production and stamping of precious metals and trade in items containing precious metals;

21. labour law, with the exception of the collective agreements on the salaries of the Åland and municipal officials, and subject to the provisions of section 29, paragraph 1, subparagraph 6, and section 29, paragraph 2;

22. criminal law, with the exceptions provided by section 18, subparagraph 25;

23. judicial proceedings, subject to the provisions of sections 25 and 26; preliminary investigations, the enforcement of convictions and sentences and the extradition of offenders;

24. the administrative deprivation of personal liberty;

25. the Church Code and other legislation relating to religious communities, the right to hold a public office regardless of creed;

26. citizenship, legislation on aliens, passports;

27. firearms and ammunition;

28. civil defence; however, the decision to evacuate residents of Åland to a place outside Åland may only be made with the consent of the Government of Åland;

29. human contagious diseases, castration and sterilisation, abortion, artificial insemination, forensic medical investigations;

30. the qualifications of persons involved in health care and nursing, the pharmacy service, medicines and pharmaceutical products, drugs and the production of poisons and the determination of the uses thereof;

31. contagious diseases in pets and livestock;

32. the prohibition of the import of animals and animal products;

33. the prevention of substances destructive to plants from entering the country;

34. the armed forces and the border guards, subject to the provisions of section 12, the actions of the authorities to ensure the security of the State, state of defence, readiness for a state of emergency;

35. explosive substances, as to the part relating to State security;

36. taxes and dues, with the exceptions provided by section 18, subparagraph 5;

37. the issuance of paper money, foreign currencies;

38. statistics necessary for the State;

39. archive material derived from State officials, subject to the provisions of section 30, subparagraph 17;

40. telecommunications; however, a State official may only grant permission to engage in general telecommunications in Åland with the consent of the Government of Åland;

41. the other matters under private law not specifically mentioned in this section, unless the matters relate directly to an area of legislation within the competence of Åland according to this Act;

42. other matters that are deemed to be within the legislative power of the State according to the principles underlying this Act.

b. The situation in Italy by Mr Sergio BARTOLE
Professor, Trieste

1. Italy as a regional state

Italy is not supposed to be a federal State. It has been defined as a regional State, which is the result of a decision of her Constituent Assembly which adopted the new republican Constitution in 1947. The majority of the Assembly blamed the success of the fascist regime on the centralisation of the State organisation preferred by the liberal elite when the process of the unification of the country had been completed in the nineteenth century. They saw in that centralistic choice the starting point of the authoritarian developments which had characterised fascism: the desire for a completely new organisation of the State underpinned the idea of regional reform.

But the adoption of regional reform did not imply a return to the federal hopes that some political and ideological movements supported during the Risorgimento. The Constituent Assembly shared the idea that a federal solution would have endangered State unity, undermining the very result of the Risorgimento and its restoration after the splitting of Italy between the Kingdom in the south and the Fascist Republic in the north during the last years of the second world war. Moreover, according to the majority of the political parties, when the Constituent Assembly was meeting the necessary conditions for a federal arrangement did not exist in Italy. The framers of the Constitution still shared the traditional theory of federalism which required that the federal State had to be based on a compact between preexisting States which were to surrender some of their functions to a new common State organisation. Italy could not become an association of Regions because the Regions were not in the position to take

part in the establishment of the Italian State. They had to be created by the State through a devolution of functions to newly established regional authorities.

Like the other institutions of local government (Comuni and Province), the Regions had to be autonomous territorial entities entrusted with normative and administrative functions. As a matter of fact, these functions were not sovereign. They did not belong to the Regions as original powers or features of them, but the State itself had to provide for the devolution of these functions to the Regions in implementing the Constitution. Therefore the constitutional position of the Regions is founded on and guaranteed by the Constitution, and not only by the parliamentary statutes as is the case of the Comuni and the Province. There could be a similarity between the Italian regional State and federal States, but we have to keep in mind that the constitutional rules outline only the chief elements of regional organisation and functions, leaving to the State Parliament some discretion as to their implementation. In some way we can say that the constitutional position of the Regions depends on the central State: the Regions are not allowed to participate in the State decision-making process, even if it concerns their own powers. It follows that the central State and the regions do not enjoy an equal constitutional position or equal guarantees.

When the Constituent Assembly adopted the regional order in 1947, the reform was not directly aimed at the protection of linguistic minorities. Linguistic minorities are not a main problem for Italian society. They are established only in some border regions of Italy: a German speaking group mainly in the province of Bolzano; a French speaking group in the Valle d'Aosta; a Slovenian speaking group in the eastern part of Friuli-Venezia Giulia (especially in the provinces of Trieste and Gorizia) and the small Ladinian group living in the provinces of Bolzano and Trento. Notwithstanding the limited dimensions of the phenomenon, the Constituent Assembly immediately realised that regional institutions could be helpful in dealing with the protection of minorities. Besides, the internal implementation of the De Gasperi-Gruber Agreement required Italy to adopt this path of the extent that it implied the entrusting of the exercise of legislative and executive powers to the German speaking inhabitants of the province of Bolzano and of the neighbouring bilingual comuni of the province of Trento, where there was a substantial number of German speaking people. Moreover, internal political obligations bound Italian authorities to a similar arrangement in Valle d'Aosta. Therefore the presence of the German speaking group and of the French speaking group in the territories of Trentino-Alto Adige and Valle d'Aosta provided support for giving these two Regions a special constitutional status and for taking into account the protection of linguistic minorities within the organisation of these Regions. As a matter of fact the provisions concerning both these Regions were adopted by special constitutional statutes in 1948, and the space left to the national Parliament's discretion for their implementation is much more limited than it is in respect of other Regions: the relevant decisions have to be adopted by the Cabinet on the basis of an agreement with the representatives of the two Regions. The statute concerning Trentino-Alto Adige was modified in 1971 after long and difficult negotiations, because the previous text did not satisfy the German speaking minority. Again, in 1993, the statute concerning Valle d'Aosta was amended, with the addition of some rules providing for the protection of the linguistic and cultural traditions of the German speaking inhabitants of the Lys Valley.

When it began its work, the Constituent Assembly was of the view that it should extend the same type of protection to the Slovenian speaking group. After the adoption of the Peace Treaty, however, only a limited number of persons belonging to that group remained in Italy. In consequence, the Assembly changed its mind on the grounds that its limited dimension did not justify the entrusting of a special autonomy to the Friuli-Venezia Giulia area, where the

Slovenian speaking minority lives. However, such autonomy was in any case provided for, on the grounds of the economic and social problems of that Region, which is a border Region. Accordingly, because the presence of the Slovenian minority was not really determinant for that decision, in the constitutional statute concerning Friuli-Venezia Giulia we don't find provisions which are similar to those concerning the German and French minorities contained in the Trentino-Alto Adige and in the Valle d'Aosta statutes. In any case the special status of Friuli-Venezia Giulia certainly allows for the recognition of special functions to be exercised by regional authorities in the field of the protection of minorities. The Constitutional Court now shares this opinion following its modification of its previous jurisprudence, which had restricted regional powers in the field of the protection of minorities to those functions explicitly provided for by the constitutional statutes.

In conclusion it can be said that in the Italian legal system there is a link between the protection of minorities and the institution of regional self-government. But only the statutes concerning Trentino-Alto Adige and Valle d'Aosta take care to protect minorities directly in shaping the organisation of the regional government and in listing its functions. In the other special Region we mentioned, that of Friuli-Venezia Giulia, it is the implementation of the protection of minorities. For instance, in the province of Trieste, which is a part of Friuli-Venezia Giulia, the Italian authorities are internationally bound not to change the borders of the minor basic administrative units (the Comuni) with the aim of prejudicing their linguistic composition: when it is the majority in a local body, the minority can exercise the functions of self-government to protect its own interests without endangering the rights of the inhabitants who do not belong to the minority itself. In the province of Trento, in Trentino-Alto Adige, the protection of the Ladinian speaking group is also implemented at a sub-provincial level.

2. The autonomy of Trentino-Alto Adige and of the province of Bolzano

The Trentino-Alto Adige Region is divided into two Provinces, Trento and Bolzano, which are given a special constitutional status and a peculiar autonomy that is very similar to the autonomy of the Regions, and particularly of the special Regions. Therefore the two Provinces of Trento and Bolzano have an organisation and functions which are completely different from those of the other Italian Provinces, and they can, in addition, negotiate with the State on the implementation of the relevant constitutional provisions. This solution as well as the splitting up into two separate bodies of the Region, is aimed at ensuring that the German speaking minority (which mainly lives in the territory of the Province of Bolzano) enjoys the degree of territorial self-government established by the De Gasperi-Gruber Agreement in the required regional framework of Trentino-Alto Adige, while giving - at the same time - special self-government powers to the inhabitants of the Province of Trento. The arrangement might appear very complicated, but the legislator was called upon to serve different purposes in establishing provincial autonomies within the framework of overall regional unity. After the adoption of the constitutional revision of the statute of the Region the provincial authorities have more powers than the regional ones, and are dependent on regional decisions only in respect of the organisation of certain institutions of local self-government.

The Region as well as the two Provinces have a representative government. As a matter of fact we can say that they are self-governing institutions because the people living in the territories under their rule can participate in the government of their own affairs through the election of their representatives to the provincial legislative councils for four continuous years. The provincial counsellors are - at the same time - members of the regional legislative council according to an arrangement which establishes an organic regional unity. The regional and

provincial executive bodies and Presidents are instead distinct and separated. On the basis of special provisions, the membership of the provincial executive board and of the presidency of the provincial legislative council in the Province of Bolzano has to guarantee the presence of representatives of the Italian and German linguistic groups on a proportional basis to the size of those groups in the provincial assembly: special rules provide for their rotation in the main offices of both bodies. Similar arrangements are adopted for the minor local self-government authorities in the Province of Bolzano, which take account also of the presence of the Ladinian speaking group.

While the distribution of offices in the provincial political bodies is made according to the membership of the legislative assembly, the administrative offices as well as the offices of the State Administration in the Province of Bolzano must have German and Italian speaking employees in proportion to the size of the respective linguistic groups, which is ascertained on the basis of personal statements contained in the last census. To some degree, it can be said that the principle of the protection of linguistic groups has pervaded the structures of all the administrative authorities in the Province. The solution necessarily implies some rigidity, particularly when a turn-over of the labour force is required or skilled trades are at stake. Its explanation and justification are referable to two different orders of reason. On the one hand, the distribution of offices and jobs between members of the linguistic groups according to their size should ensure the stability of this size itself and, therefore, the actual balance of the groups and of their social and political power. On the other hand the adequate and proportional presence of people of different linguistic groups in the management of public life should give equal opportunities of development and manifestation to the linguistic and cultural characteristics of the groups. It is evident that a conservative philosophy of social relations underpins the preference for this manner of protecting linguistic groups. This was particularly fitted to the closed alpine milieu of the Alto Adige area in the past, but could raise some difficulties as civil society becomes progressively open to the process of modernisation. But there is also at stake the idea that the institutions for protecting the linguistic groups have to cover all aspects of social life, for the reason that the linguistic differences can occasion discrimination and inequalities in every corner of social relations. The guarantee of the use of different languages as well as the according of constitutional status to the German language could be insufficient - according to this philosophy - if the protection of the languages is not strengthened by a legal machinery of distribution of power between the members of the linguistic groups.

3. Distribution of functions in Trentino-Alto Adige and general evaluation

The same philosophy is evident in the distribution of the functions between the State, the Region and the two Provinces.

Both the Trentino-Alto Adige Region and the two Provinces, and - therefore - the Province of Bolzano also, have legislative powers (namely a "primary function", a "concurrent function" and a "supplementary function") and administrative powers. No Italian Region has judicial powers which are completely reserved to the State bodies, even in this part of Italy where - nevertheless - the holders of judicial office are also to be chosen between the members of the linguistic groups according to the size of these groups themselves.

The distinction between the three legislative functions is based on the different limits placed on regional autonomy in the exercise of each of those functions. The peculiar limits or the "primary function" are the general principles of the Italian system of law, the international obligations of the Italian State, the guidelines of economic and social policy, and national interests (including

the interests of linguistic minorities). With regard to the "concurrent function", there exist not only the above-mentioned limits, but also the limit of the principles laid down in addition by special national statutes (framework legislation). Finally, the "supplementary function" is bounded by the limits of national statutes for the implementation of which it has to provide.

The legislative and the administrative functions must be exercised exclusively with regard to the regional or provincial territory and to the fields (or matters) assigned to the Region and to the Provinces by the constitutional statutes on which their autonomy is based. The choice of these fields (or matters) was made on the basis of the special concern for the efficiency of regional and provincial autonomy, but also with special attention to requirements of linguistic protection. Therefore, while the Region is competent to establish and maintain local institutions in administrative, health and economic matters, the Provinces saw their competences largely strengthened after the constitutional reform of 1971. The developments were quite peculiar: the reform aimed to answer the demands of the German speaking group for better protection of its interests, culture and language and provided for an enlargement of the functions of the Province of Bolzano, in whose territory that linguistic group mainly lives. However, the Province of Trento profited from the reform, and also obtained a similar enlargement of its competences. The growth of the autonomous powers of the two Provinces followed a parallel path, even though in the Province of Trento there were no great problems of protection of linguistic groups, with the exception of those concerning the small Ladinian group in the Fassa Valley, as mentioned before.

The fields given over to the competence of the Provinces cover - inter alia - protection of the historical and cultural heritage, local cultural institutions, handcrafts, local commercial exhibitions and markets, urban planning, civil protection, mines, hunting and fishing, natural parks and protection of the environment, road building and public works of local interest, local public transport, tourism, agriculture, public assistance, health and hospital services, schoolchildren public assistance, workers training and development of trade and industrial activities. The list is therefore evidently very extensive: the legislator aimed to give the provincial self-governing bodies a large scope of intervention with regard not only to the protection and development of the traditional features of the linguistic communities but also to the control of the main aspects of social and economic life.

The underlying idea was that linguistic groups had to recover from a long history of unjustified abuses and to be saved from the present dangers of discrimination and inequality, restoring and keeping their historical identities and institutions while obtaining control of the economic and social factors which underpinned their cultural development. Attention was given to the problems of the German speaking group, which had been in the majority in the province of Bolzano and a minority in Italy since the end of the first World War, but also to the position of the Italian speaking group which is a minority in the Province and - therefore - needs special protection at the local level. The described sharing of the membership of the provincial and local government bodies between the linguistic groups was designed to ensure an exercise of the provincial and local self-government functions attentive to the interests of all the linguistic groups concerned. Moreover, only the province of Bolzano has a concurrent legislative function in the field of public education. There are schools for the Italian speaking and German speaking students, in which the teaching language is their own language respectively. While the teaching staff has an employee status depending on the decisions of the State legislator, the administrative staff of these schools is completely under the direction of the Province. Both the Province and the State concur in the appointment of the heads of the administrative and teaching staff.

The legislative and administrative autonomy of the Provinces and of the Region is supported by the constitutional guarantee of financial resources which come from the sharing of State fiscal revenues on the one hand, and from the income of local taxes completely assigned to the provinces or directly adopted by the Region on the other. The opinion is generally shared that the Region and the two Provinces are given a degree of economic autonomy which is stronger than that of the Italian Regions, which do not have a peculiar constitutional position comparable with the constitutional position of the three special Regions (Trentino-Alto Adige with the two Provinces, Valle d'Aosta and Friuli-Venezia Giulia; Sicilia; and Sardegna). A discussion is now under way about the necessity for coordinating the finances of all public authorities in Italy with the purpose of balancing the economic autonomy of the special Regions and their underlying rights with those of the central State, on the one hand, and, on the other hand, the financial solidarity of all public powers, which would imply the adoption of solutions similar to those implied by the system of "fiscal federalism".

The picture may be completed by mentioning the provisions concerning the protection of the Ladinian speaking group: the rules governing representation of the linguistic groups in the bodies of the Bolzano Province and in the minor institutions of local self-government, and those governing the staff of the State authorities and teaching staff in nursery and primary schools, are also applied to the Ladinian group and language in the territories where the Ladinian group is settled. The protection of the Ladinian group in the Province of Trento is comparatively minor, and primarily concerns the protection of the traditional and cultural heritage of the group itself.

Both the powers of the Trentino-Alto Adige Region and of the two Provinces, on the one hand, and the minority rights of their inhabitants, on the other, can be enforced by the Constitutional Court.

4. The Valle d'Aosta

The Valle d'Aosta is also a Region with special autonomy. The provisions concerning its functions and organisation were adopted by a constitutional statute and are connected with the presence in the valley of a French speaking group whose protection was given special attention by the Constituent Assembly to balance the lack of attention of the previous fascist regime.

The Region has ("primary" and "supplementary") legislative and administrative functions in many fields of local relevance: their list is in some way similar (but more restricted) to the list of the matters assigned to the competence of the Trentino-Alto Adige and of the two Provinces. In particular it covers agriculture, local and rural police, public works of local interest, local transport, hunting and fishing, local typical products, handcrafts, tourism, technical education, libraries and museums of local interest, local trade exhibitions and markets, trade and industry, local banks, public primary and secondary education, social assistance, public health, antiquities and fine arts.

In the statute there are no rules providing for the distribution and rotation of offices between persons belonging to the Italian and French speaking groups. However, the French language bears in the region the same constitutional status as the Italian language. State employees have to be born in the valley or to know the French language. In the schools of the Region the same time is devoted to the teaching of the French language as to the teaching of the Italian language, and the French language is also used as a teaching language.

Notwithstanding that the philosophy of the list of the fields covered by the regional functions looks very similar to the philosophy underpinning the list of the functions of the Trentino-Alto Adige and of the provinces of Bolzano and Trento, evaluating the solution adopted in Valle d'Aosta we have to remark that there is an interesting difference between this arrangement and the solution adopted in Trentino-Alto Adige. Perhaps it depends on the bilingual attitude of the people there, but the rules concerning the two linguistic groups in Valle d'Aosta, that is the French speaking group and the Italian group, are apparently aimed at ensuring a peaceful integration between the two groups in more productive terms than the provisions dealing with relations between the German and the Italian speaking groups in Trentino-Alto Adige, where the rules concerning the separation of the schools for the pupils of the two communities, those providing for the proportional distribution of political offices and administrative jobs and the solutions about the use of the languages, might appear to be designed to keep the two groups separated, avoiding any possible form of tightly close integration. In Valle d'Aosta the idea of the protection of the features of the two groups is balanced with the purposes of a coexistence which should be able to favour and increase flexible relations between all the persons belonging to the regional population. By contrast, commentators have sometimes remarked that in Trentino-Alto Adige the main end of the normative provisions adopted by the legislator in agreement with the representatives of the two groups is the defence of the traditional peculiarities of the groups concerned, without always taking into consideration the exigencies of their active and productive coexistence.

5. The Friuli-Venezia Giulia and the Slovenian speaking group

We have seen that the principles of the Italian system of law imply an implementation of the principle of the constitutional protection of linguistic minorities which may vary in accordance with the different situations of the linguistic minorities and according to the peculiarities of the areas where they live. Therefore the link between the institutions of regional self-government and the protection of minorities is not always similar, even if the local authority is frequently charged with important tasks in the field.

Notwithstanding that the creation of the Friuli-Venezia Giulia Region was not directly aimed at the protection of the Slovenian speaking minority and did not therefore imply the more common shift of competence in linguistic matters to the local level, the Friuli-Venezia Giulia Region as well as the local authorities are given powers to implement the protection of that minority, especially through financial aids to the preservation and the development of the ethnic and cultural identity of the Slovenian speaking group. It is true that the schools for Slovenian speaking children are managed by the State and that the State-owned radio and television company has special local programs for the Slovenian minority (as for the other minorities), but the fields covered by the regional functions are so large and important that the policy of protecting the Slovenian minority becomes a significant aspect of the activities of the Region. For instance, the Constitutional Court recently argued that the Region should be allowed to allocate funds to the State's judicial bodies to pay for interpretation and translation services for the Slovenian speaking persons in the province of Trieste.

6. A tentative conclusion

A final evaluation of the Italian way of connecting the protection of minorities with regional autonomy is now possible. Certainly it favours the self-government of the linguistic groups, giving them the chance of directly providing for the preservation and the development of their own ethnic and cultural identity. On the other hand, it emphasises the link between the autochthonous minorities and the territory covered by the autonomous institutions. Certainly the territorial integrity of the State is not thereby put in danger, but notwithstanding the traditional Italian concept of the Nation, a concept very similar to the French one - a strictly ethnic concept of linguistic minorities is adopted, underlining the natural links for cohesion rather than providing for the basis of a unity founded on the will of the people concerned.

The author cannot help asking whether such a solution is suited to post-industrial societies where the connection of economic and social interests is very close and the mobility of the people is very high. What might be useful for a rural society may not be useful in other environments. Moreover, guarantees of economic and financial autonomy which can be ensured in times of prosperity may be difficult to fulfil when a country has to deal with economic ills, and needs the active solidarity of all its components. In this last hypothesis, one could think that a more restricted degree of autonomy, limited to the cultural and educational fields, would be more convenient. However, territorial autonomy can allow for an adequate economic State policy in time of crisis if it is integrated into an institutional framework which gives the national government the necessary and sufficient powers to deal with economic ills. In contemporary society territorial autonomy cannot survive outside the framework of cooperative regionalism or federalism, even it implies some downgrading of the powers of the autonomous powers and some centralisation of the main economic and social decisions.

c. The situation in Spain by Mr Miquel ROCA JUNYENT

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Following the death of General Franco, a process of democratisation began in Spain which led to the general elections of 15 June 1977. These elections, conducted in accordance with the rules followed by all European democracies, gave rise to the constitution of an assembly (the "Cortes Generales") elected by universal suffrage in a free, secret and direct ballot by the sovereign will of the people.

These first "Cortes Generales" were a constituent assembly, which means that their main purpose was to draw up a constitution clearly marking the break with the former totalitarian regime and echoing the aspirations expressed by all Spanish citizens for the re-establishment of individual and collective freedoms. That constitution, adopted almost unanimously by both houses of parliament, was ratified in a referendum by the huge majority of the Spanish people.

But I wish to come directly to the subject which is more particularly of concern to this seminar, that is the State and its autonomous communities established by the Spanish Constitution of 1978. By structuring the State's political authority in this way, the authors of the Constitution were seeking to solve two major problems. For a long time Catalonia and the Basque country had been demanding that their distinct character as nations be recognised. This demand runs through the whole history of Spanish "constitutionalism" since 1812 and is a constant element in the political history of twentieth-century Spain.

The Second Republic (1931-39) took account of this in its 1931 Constitution, providing for a special system of political autonomy to which Catalonia resorted, followed by the Basque

country and, after the start of the civil war (1936-39), Galicia. That constitution was then taken as a model for the post-war Italian Constitution, which adopted the Spanish model but applied the system of regional autonomy to the whole of the country. It was therefore logical, in post-Franco Spain, that the re-establishment of freedoms should also be seen by the Catalans and the Basques as an opportunity to recover - and broaden - the autonomy enjoyed under the Republic and annulled under the dictatorship. It was also normal that this demand was accepted in the 1978 Constitution, which grants Catalonia, the Basque country and Galicia - all three considered as "historic nationalities" - a high degree of self-government.

With the return of democracy, this desire for decentralisation was, this time, felt by all the Spanish regions. Francoism, which had relied on a strong, centralised State apparatus, awoke a desire in citizens to feel closer to power, closer to the places where decisions affecting them are made. Consequently, the Constitution structures the State around the generalised process of access to autonomy for all regions.

In short, the 1978 Constitution recognises the right to autonomy of the historic nationalities and regions, and establishes the political framework in which it can be implemented. In this way what we call the "process of constructing a State of autonomous communities" was launched, involving seventeen autonomous communities with their own independent institutions and a level of powers very similar - at least potentially - to the federal structure in Germany, from which the authors of the Spanish Constitution took much of their inspiration.

The differences between historical nationalities and regions in terms of autonomy lie more on a procedural level than on the level of the contents and scope of their rights. The Constitution accords the so-called historical nationalities (Catalonia, the Basque country and Galicia, followed by Andalusia) the maximum level of powers from the beginning of their institutionalisation. However, for the other regions the Constitution provides for a procedure which postpones the acquisition of the same maximum level of powers to a later date.

It can therefore be asserted that, once the time limits set in the Constitution have expired, there will be no difference between the autonomous communities as concerns their level of powers. Moreover, Article 150.2 of the Constitution stipulates that, if certain regions do not provide for the assumption of certain powers in their statute of autonomy, the State may transfer these powers to one or more autonomous communities. As a result, the upper limit of powers will be the same for all.

Nevertheless, two important exceptions can be noted. Firstly, there are certain powers which cannot be relevant to all regions as they involve matters which only affect some of them. This is true, for example, of linguistic powers, which can only interest those communities which have their own language as distinct from Spanish; both languages are then considered as official and it is for the autonomous community concerned to take legislative and administrative measures giving practical effect to the official status of the two languages. Secondly, the situation is the same for those communities which had in the past their own system of law, different from the ordinary Spanish law. It is, logically, up to these communities to re-establish and update that system of law so that it may be applied in the territory concerned.

Language, law, culture, and spatial organisation on a regional and local level are among the specific characteristics of the historical nationalities integrated into the Spanish State. Thus the State consists of a mix of nationalities or, as is sometimes said, of a "nation of nations". These are particularities which justify the different modes of exercise of power. However, it should be

remembered that the upper limit of those powers is the same for all the autonomous communities.

Some communities also have an important tradition of "fueros" (legal codes): their autonomy has always been more or less recognised under different political regimes through the preservation of ancient historical rights, particularly in fiscal matters. These historical rights were also fundamentally respected by the 1978 Constitution for the Basque country and Navarre, which have thus enjoyed their own fiscal system.

It is these particularities with regard to powers which have allowed the theory of unity and diversity to be developed in the Spanish concept of autonomy. Thus there is acceptance of a diversity (recognition of plurality) which does not detract from the structural unity of the State. This recognition is not however free from the political polemics and re-emergent Jacobinism which has often upset the smooth development of the process of autonomy in Spain.

Yet who can deny that the progress made in this area since 1978 has been extraordinary? We have seen a very substantial decentralisation of State power, and the autonomous communities - at least those which are "historical" - have attained a high level of self-government. And, no less important, they have attained it with much less conflict than might have been expected. The autonomous communities have taken root in the legal and institutional reality of Spain, and society as a whole shows that it is adapting perfectly to this new pluralist reality.

Needless to say, this rapid summary does not deal with the subject comprehensively and does not seek to hide the fact that there are still important questions to be solved. Nonetheless, it is right to emphasise that there are institutional formulae today designed to solve these problems and that the political climate has imposed serious consideration of the claims of certain historical nationalities.

We should doubtless consider in some detail what approach to take to certain national problems which are sometimes seen, by some sectors of Spanish society, as factors likely to destabilise the State or lead to its disintegration. I am referring to Catalonia and the Basque country. Where the latter is concerned, the problem lies in the terrorist actions of ETA, which create an extremely tense climate in that region and are an obstacle to the calm atmosphere that is needed if a system of self-government is to be developed.

In the case of Catalonia, the development of autonomy demands that obstacles due to certain central government policies, impeding its capacity for self-government, be overcome. Its main demand concerns the need to define a system of financing to achieve a better balance, in respect of State resources, between central government and the autonomous community.

This is not a problem specific to Catalonia, but it is true that it is more acute in Catalonia than elsewhere. Its increased powers have meant it has had to run poorly financed services generating large deficits. As a result of the requirement of greater budgetary control and an obsession with limiting the public deficit, the transfer of services often entails a transfer of the State deficit to the autonomous communities. Even more worrying, the result is less efficient services.

This first approach allows us to define, apart from the question of financing, the greatest problems obstructing the process of autonomy in Spain. Firstly, the system of financing the autonomous communities must be reviewed. The fact that Catalonia (or its government) is

voicing this problem most vehemently does not mean that it is not a problem common to all Spain's autonomous communities. They all need greater fiscal co-responsibility, taking the ratio of their overall revenue to their fiscal income into account.

This review will not be easy, as it raises a question of interregional balance. However, there must be a move towards an objective, non-discriminatory system whereby the effort of solidarity between the various communities falls to the general budget. Of course it will not be easy to find a system which satisfies everyone, but it must be done. Because some communities have very limited possibilities, their inhabitants sometimes ascribe the poor quality of services to a general dysfunction of the system of self-government itself.

Secondly, since the text of the Constitution was approved, one issue has remained outstanding: the genuine modernisation of public administration, such as to adapt it to the new reality of Spain and its autonomous communities. In practice, the development of self-governing administrations has not led to a corresponding reduction in central government. The effect of this is to create two parallel administrations, to slow down procedures, to disorientate citizens and, of course, to raise costs in the public sector. Timorous attempts to solve this situation have not as yet produced any positive results, or at least not sufficiently positive ones.

It would however seem that, following the last general elections in Spain (3 March), the different political parties have reached agreement to move forward along the path to what may be termed a single administration. This means that, within the territory of each autonomous community, the autonomous administration should also act as the administrator of the services which come under State jurisdiction. The State would legislate and set the criteria for basic action but, within this framework and the conditions imposed by the State, the administration and management of the service in question would be the responsibility of the autonomous communities.

Apart from the economic reasons justifying this decision (an end to the costs incurred by the existence of two parallel administrations and useless services), it would yield a simplification of the system for which citizens would be grateful. Moreover, the autonomous communities would be seen by their citizens as more involved in governing their own territory and less as a second tier of central government, dealing purely with questions of minor interest to the community.

In this connection, it should be particularly stressed that, through their respective Statutes, the Basque country and Catalonia have developed their own systems of security by creating independent police forces which are gradually replacing State forces and bodies across the national territory, except in those matters which come under the exclusive jurisdiction of the State (borders, drugs, etc).

The third major problem concerns the new role to be accorded to the Senate, which is destined to become a veritable federal-type chamber of nationalities and regions. Up to now the Senate has not played this role and has functioned as a second legislative body without any specific political influence.

Of course, this requires amendments to the 1978 Constitution. The legislators at that time did in fact agree on the provisional nature of some of the articles, but the majority did not dare introduce an institution of a federal nature into the Spanish legal system before knowing how the process set in motion would unfold, preferring to wait for the results of the provisions of the Constitution which, although legitimate and justified in everyone's eyes, needed the

confirmation of sufficient success in practice. It should be remembered that, under the Second Republic, the autonomous status of Catalonia was only in force on a normal, continuous basis, without a war situation, for 18 months.

There now seems to be a more complete consensus on the reform of the Senate. There are, however, conflicting views on how to proceed. All the same, it would be absurd to consider as incongruous the desire to bring together the representatives of each government or parliament of the different autonomous communities to debate common problems and not, of course, issues specific to, or within the exclusive jurisdiction of, one or other of them. It is along these lines that the legislative period which has just begun in Spain should proceed.

Nevertheless, and despite the foregoing, the most important problem is the genuine, sincere acceptance of all that goes to make up Spain's multinational, multilingual and multicultural reality. This "nation of nations" must be more than a doctrinal construct emanating from the 1978 Constitution: it must become more deeply embedded in the whole of Spanish society. Accepting and recognising the existence of diverse cultures; respecting the different languages spoken in Spain; not seeking to impose some people's priorities on others in defining the Spanish collective heritage: these are the most important questions to be solved.

Spain has seen a spectacular transformation over the last twenty years. One of the elements most characteristic of this process is the development of the State comprising autonomous communities. However, despite everything, this process has gone forward more in the legal system than in social comprehension, except in the communities which, belonging as they do to a historical nationality, already possessed a sufficiently developed collective awareness of their identity. The process of autonomy has had positive aspects, of course, but it has also served as a pretext for holding up the demands made by Catalonia and the Basque country or for imposing certain attempts at standardisation which have been resisted by these two communities.

To overstate these problems would however be absurd: they can and must be settled within the constitutional framework. But it must not be forgotten that attitudes and behaviour are, at the end of the day, always more important than the decisions taken. For this reason we have argued repeatedly that the difficulties over the process of autonomy in Spain lie neither in the Constitution nor in the Statutes, but in the political will with which the legislative texts are applied and interpreted.

Acceptance of diversity also means making that diversity possible and viable. Diversity must not be fossilised, it must not stagnate. Groups and communities are living elements which develop and adapt to the realities of each moment in history. The plurality which must underpin the construction of Europe is comparable to the rich pattern of Spain's reality, perhaps representing its contribution to the process of European construction.

A Europe of tolerance can only be built if there is recognition of the plurality of ideas, religions, cultures and languages, and also of peoples possessing a national consciousness within pluralistic, complex States like Spain.

d. The situation in Belgium by Mr Jean-Claude SCHOLSEM
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1. The situation in Belgium appears to be worth noting as far as the theme of this seminar is concerned. Over the last decades, Belgium has indeed become a prime example of a composite structure which tries to promote the protection of its minorities by forging a great degree of

autonomy among its components. The topic of territorial integrity is also omnipresent in the political life and the legal system of the country.

This was not always so, far from it. A brief look at the country's history is necessary to understand its current situation and to assess its future development.

2. At the time of its declaration of independence from the Netherlands in 1830, Belgium was an exclusively French-speaking state. The Constitution certainly proclaimed freedom in the use of languages except as far as prescribed by law "only for acts of the public authorities and for judicial matters" (Art. 30 Const.). In fact, all political, administrative and legal matters took place in French. From time immemorial, various Germanic dialects were spoken in the north of the country and Romanic dialects (Walloon, Picard, Lorraine) in the south. However, in 1830, the ruling classes as a whole spoke French and thereby ensured the cultural homogeneity of the country. The geographical language frontier which had always existed was eclipsed by a class-based language frontier because the ordinary people spoke the dialects (be they Germanic or Romanic) and the middle classes spoke only French.

This state of affairs was challenged by the leaders of what is called the "Flemish movement" as early as the middle of the 19th century. This movement was originally cultural and linguistic. It was not until much later that it took on a political flavour and led to federalist claims.

Step by step, Dutch gained a status of equality with French in the political and judicial life of the country. In 1898 the "Equality Law" was enacted which required all laws to be adopted in the two national languages. Similarly, at the end of the 19th century, secondary education gradually became Dutch. It was however not until 1930 that the University of Ghent also became Dutch-speaking. This historical context explains why the Belgian Dutch-speakers, although having the majority in terms of numbers, considered themselves to be an oppressed minority for a long time as far as language and culture were concerned.

3. The stronger position of French-speakers in Belgium, already weakened by the end of the 19th century, had to finally give way with the introduction of universal suffrage immediately after the First World War. It is not surprising that the inter-war years were marked by the adoption of the first laws governing the use of languages in administrative matters in 1932. Step by step, the idea of linguistic territoriality made its way. However, the 1932 legislation still had a very flexible concept of territoriality concerning the use of languages. A language census was carried out every ten years, as a result of which some local districts could become bilingual or have a special regime in favour of inhabitants who spoke the minority language (so-called "à facilités" districts).

The Flemish criticised this state of affairs. They generally disliked the inadequate implementation of the language legislation. They feared in particular the progressive gallicisation of Flemish Brabant around Brussels. In effect, the capital, a historically Flemish city, has gradually become gallicised and it had (and still continues to have) a considerable power of attraction on the whole of its Flemish hinterland.

4. It was not until 1962-1963 that the Flemings were able to get the legislature to definitively fix the language frontier. This matter is well-known abroad because of the judgment of the European Court of Human Rights on Belgian language legislation. Since then, the country has been divided into four language regions, three monolingual regions (of French, Dutch and German language) and one bilingual region (that of Brussels-Capital). Some local districts, a

few in number and exhaustively listed by law, have a special status for their language minority. These are the local districts in the German language region (where the French language minority is protected), the local districts referred to as the "language frontier" and the six peripheral local districts in the environs of Brussels (Dutch language local districts where the French-speaking "minority" - which sometimes is the majority in numerical - terms) is protected.

Similarly, in the 19th century, the problem of the use of languages in Belgium could be seen as one of a dispersed "minority". A numerical minority of dispersed French-speakers in Flanders in fact dominated the political, economic and social life there. It is against this cultural domination that the "Flemish movement" fought. In the 20th century, and especially since 1962, the problem is instead characterised in terms of concentrated minorities either on a country-wide scale (the French-speakers make up approximately 42% of the population; the German-speakers are about 66,000) or in some local districts which appear on an exhaustive list.

The concept of the language frontier is so important to the Flemings that it was enshrined in the Constitution in 1970, at the time of the first federalist-inspired reform. Since this date, Article 4 of the Constitution requires a constitutional type of special majority for the adoption a law resulting in any change in the language frontier. These so-called "special" laws can only be adopted with two-thirds of the vote in both chambers (Chamber and Senate), subject to a quorum of two language groups and a majority of each language group in each Chamber (Art. 4 Const.). The "language frontier" is consequently even more difficult to change than the borders of the State, the modification of which does not require a special majority.

5. The history of Belgium is not limited to the struggle of the Flemings to obtain the same status as French for their language and culture, and in this way to ensure the homogeneity of their language region. As a counterpoint, a Walloon struggle developed, especially after the Second World War. This struggle differs very much from that of Flemish movement in that it was not focused on cultural and language factors but rather on economic factors.

To understand its context, it is necessary to know that during the whole of the 19th century and the first half of the 20th century, Wallonia was by far the most prosperous region in the country. Based on early industrialisation (coal, steel, glass, cement), it was the economic powerhouse of the country; at the time its industrial capacity was by far greater than its size and population. Since the end of the Second World War, this situation has slowly changed. In the sixties, all economic factors turned around in favour of Flanders. The Walloons were shaken by two fears. As French-speakers, the traditional predominance of their language was put into question. As Walloons, they increasingly considered themselves to be a sort of "economic minority", victims of the large holdings in Brussels which preferred to invest in a less unionised Flanders where the salaries were lower. This is how the demands for economic autonomy in Wallonia were born, demands to be given adequate political instruments for its restructuring (in the seventies, these were conceived in terms of planning and public industrial policy). From the Walloon point of view, the emphasis was not placed on two large communities of language and culture (the German-speaking community rather having the status of a true protected language minority) but rather on the existence of three economic regions with very distinct differences. Brussels is not Wallonia, not economically, not socially. It is a "city-state" occupying just 0.5% of the territory but concentrating about 10% of the population, with their own needs and characteristics.

6. The coincidence of autonomist desires of different origins in the north and south of the country led to four major reforms of the Constitution (in 1970, 1980, 1988 and 1993) based on a very complex federalist kind of structure in which practically every population group enjoys the

status of a protected minority. This protection is, in most cases, designed and organised on a territorial basis but with some concessions as will be shown later.

At the level of the central State, the French-speakers' fear, which increased in the sixties, of being turned into a minority by the Flemings who had a numerical majority, was at the origin of a dualist state structure.

As a consequence, the cabinet must be made up of the same number of French-speaking and Dutch-speaking ministers (Art. 99 Const.).

For many laws, whose number increases with each constitutional reform, the Constitution requires a "special majority" which has already been described (see above, at the end of paragraph 4). This majority requires, in addition to an overall majority of two-thirds in each assembly, an absolute majority of the votes of each language group. This concept of language group is consequently a fundamental idea in the constitutional balance in Belgium. By requiring a majority of each language group, the Constitution enshrines the idea of joint management, on an equal footing, of the essential structural elements of the Belgian state, thus protecting the French-speaking minority. All the deputies and senators belong to one or the other language group.[1] A special feature must be mentioned in this context. Generally, it is the territoriality rule which governs the membership in a language group: whoever is elected in a French-speaking or Dutch-speaking electoral district is deemed to be a French-speaker or Dutch-speaker.[2] The important exception to this principle is the bilingual electoral district of Brussels, Halle-Vilvorde. The latter covers both the bilingual region of Brussels and the Dutch-language region of Halle-Vilvorde, a region where a large minority of French-speakers live (in local districts with "facilités linguistiques" or without any special regime). As an exception to the strict principle of territoriality, these "French-speakers of Flanders" (actually, of the greater environs of Brussels) may still vote for deputies and senators which will belong to the French language group. If the techniques used are different for the Chamber and the Senate, the central feature remains the same: it establishes an important political safeguard for the French-speakers of a well-defined part of the Flemish region (the electoral district of Halle-Vilvorde), even though some of them live in local districts without any particular language regime.

It is not difficult to foresee that this special status of the electoral district of Brussels-Halle Vilvorde will, doubtlessly in the next few years, lead to friction between the Flemings and the French-speakers. As always in the history of the country, the former will defend the territorial approach which protects a language and a culture which they consider as having a minority status and denounce the "imperialism of the French-speakers"; the latter will support the principle of individual freedom and the protection of minorities using whatever international texts they can to support this.

7. Besides the parity in the cabinet and the requirement of a special majority for certain laws, a great many other features of the Belgian state reflect its fundamental dualism.

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[1] *With the exception of the senator elected by the Council of the German-speaking Community.*

[2] *The voters of the German-speaking Community do not have their own electoral district for the Chamber or for the Senate. Their votes are in both cases combined with those of the French-speaking voters.*

In this way, every law (with the exception of special and budgetary laws) may be the subject of a special procedure referred to as the "alarm bell". Three-quarters of the members of a language group, either in the Chamber or the Senate, may pass a motion declaring that a bill or proposal threatens to cause serious damage to relations between the communities (Art. 54 Const.). In such a case, the procedure is suspended and the text is submitted to Cabinet (in which the languages are equally represented), which must exercise a kind of political arbitration. Even though this procedure has hardly ever been used since its introduction in 1970, its existence nevertheless constitutes a certain psychological reassurance for the country's French-speaking minority.

Similarly, the Senate is essentially community and not regionally oriented. Its structure reflects the existence of two large language communities. The 70 senators are divided into two language groups: 41 Dutch-speakers and 29 French-speakers, approximately in proportion to the respective populations. The full Senate is made up of, aside from these 70 senators, one or more senators sitting as birthright (the King's children) and a single Senator elected by the Council of the German-speaking community representing the German-speakers of Belgium. The German-speakers consequently appear to be, as already emphasised, more of a protected minority than a part having a say in determining the policies of the federal state.

The same observation can be made with respect to the Belgian Constitutional Court, called the Cour d'Arbitrage. It was originally created to settle conflicts of competences between the State, the communities and the regions but since 1989 has taken on a greater importance because its jurisdiction was extended to include all questions relating to compliance with the principle of equality by the various legislatures. The Cour d'Arbitrage has 6 Dutch-speaking and 6 French-speaking judges. Two presidents, one Dutch-speaking and one French-speaking, preside over the Court on an alternate basis.

Once again, it is not the three regions which form the basis of the Cour d'Arbitrage, but the existence of two languages widely spoken by the population and of two "communities". The German-speaking community, whilst enjoying the same internal autonomy,[1] was not put on an equal footing with the French-speaking and Flemish communities when the rules were set up governing the composition and functioning of the central State bodies, such as in this case, the Cour d'Arbitrage.

8. The originality and at the same time complexity of Belgian federalism is to have two competing federated structures, the communities and the regions. The territories of these structures partially overlap, but not entirely. This two-tier federalism clearly reflects the different aspirations of the Flemings, who favour the concept of the community, and of the Walloons and the inhabitants of Brussels, who are more attached to the regions.

The regions are exclusively territorial. The Walloon region includes the French language and German language territory. The Flemish region corresponds to the Dutch-language region and the Brussels region to the bilingual region of Brussels-Capital. Consequently, the German language region is both a part of Wallonia (economically speaking) and an autonomous community (culturally speaking).

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[1] *With the exception of regulating the use of languages. The federal legislature is competent in this field so as to protect the French-speaking minority located in the German language region.*

While the regions are in charge of matters concerning the environment, transportation, the economy etc., the communities are competent for language, cultural, educational and some social matters (those referred to as "personalisable" in Belgium).

The French and Flemish communities have a very specific feature, rather unique in the field of federalism: their competence is not entirely territorial. The decrees (laws) of the two communities apply of course to their own respective language regions, but in some cases and to a certain extent also to Brussels. The legislatures of the French-speaking and Flemish communities both have concurrent competences in Brussels. Since Belgian law does not recognise sub-nationalities (legally, there are no Walloon, Brussels, French-speaking, German-speaking or Flemish citizens), the communities have competence in Brussels only over some institutions which because of their activities or organisation fall under the jurisdiction of the community in question. In this way, jurisdiction follows from the language used in theatres, libraries, schools or even hospitals. It is therefore true to say that Belgian federalism is not completely territorial because of this special competence of the communities in Brussels. Nor is it personal federalism in the strict sense of the term, in the sense that no sub-nationality is recognised. In Brussels, a community decree may not ever be aimed at persons. It can only be aimed at institutions which have a connection with the community adopting the legislation.

One can imagine the complexity of the situation in Brussels. Brussels is the true "crossroads" of Belgium. It is a fully-fledged region made up of 19 local districts complete with its elected bodies and its own competences in economic matters (regional competences). However, as far as the community competences are concerned, Brussels is subjected to the concurrent legislation of the French and Flemish communities, under the conditions just described.

This is a fundamental compromise between the French-speakers and the Flemings on the role of the central region of the country. The Flemings feared that Brussels, a fully-fledged region with a French-speaking majority, would not adequately protect the rights of the Flemish minority and would create a Belgium made up of three components (Flanders, Brussels and Wallonia). In such a structure, the Flemings, in spite of their (demographic and economic) predominance, would risk finding themselves in the position of a minority due to an alliance between two other regions (Wallonia and Brussels). By contrast, the Walloons, and to a lesser extent the people of Brussels, defend the tripartite structure of the country. The special character of economic and social problems in Wallonia and Brussels in their view justifies different treatment and consequently autonomous regional policies.

The compromise, which is not easily understood by foreigners and difficult to implement in practice, is to maintain regional and community institutions side by side. It is mainly in Brussels that this superimposition of competences shows all its effects and consequences. Thanks to the community competences, the Flemings have "their say" in Brussels and may promote their culture and social institutions there. They have even made Brussels their capital even though Brussels as a region does not belong to Flanders. In other respects, the inhabitants of Brussels, both French-speaking and Flemings, are "masters in their own home" in Brussels when regional matters are being dealt with. In this respect, they rely on neither Flanders nor Wallonia. However, in this area, the greater number of French-speakers risks becoming a problem. In the 1995 elections for the regional council of Brussels, only 10 of 75 councillors elected belonged to the Dutch-speaking language group, which gives a rough idea of the numbers of the two population groups (about 85% French-speakers).

Because of this, the regional institutions in Brussels are characterised by numerous mechanisms designed to protect the Flemish minority. Very generally, it could be said that Brussels is an inverted mirror image of Belgium. Where in Belgium the French-speaking minority is protected, the Flemish minority is protected in Brussels. The mechanisms of protection are quite similar. As an example, in a five member government of the Brussels Region, the Flemings must have two mandates and one of three positions of State Secretary. They are consequently over-represented in the Brussels executive as are the French-speakers at the federal level, thanks to parity in the Cabinet (see above, paragraph 6).

9. The Belgian complexity therefore largely arises from the desire to guarantee a double autonomy; on the one hand, in the cultural field (community concept), and on the other hand in the socio-economic field (region concept).

What is the connection between the structures born of this double desire and the theme of this seminar (which highlights not only the problem of self-government but also the issue of the territorial integrity and the protection of minorities)?

It could be stated that in general the principle of territoriality has prevailed in Belgium after a long period of development (see above, paragraphs 3 and 4). However, a closer look shows that the positions of the principles of the Flemings and the French-speakers are not always very coherent. Generally, the French-speakers plead for the principle of "personality". From their point of view, the maintaining of a single electoral district in the centre of the country, extending beyond the territory of Brussels-Capital, is essential (see above, paragraph 6). They also wish to maintain the "language facilities" in the local districts where they exist, whereas part of Flemish public opinion would like to abolish them. Nevertheless, the same French-speakers insist the most on the division of the country into three socio-economic regions, and the majority are opposed to a Belgium with two components.

For their part, the Flemings have for historical reasons a great concern for the principle of territoriality. Any activity which, however little, transgresses the boundaries (for example, a subsidy), is easily resented by Flemish public opinion as a kind of aggression. At the same time, the Flemings are the staunchest defenders of the concept of the community, because this institution enables them to directly exercise an influence in Brussels.

Stated in other words, the principles of territoriality and personality are sometimes used by one part of the country, sometimes by the other, depending on the interests in question. The French-speakers defend the territorial concept of the region, having large majorities in two of them (the Walloon and the Brussels regions). However, at the level of the federal State, it is not a tripartite but a dualist structure which has been enshrined, as already shown (see above, paragraphs 6 and 7). The Flemings, for their part, insist on the concept of language territoriality but are the staunchest defenders of the institution of the community (which hardly finds an echo on the other side of the language frontier).

10. The difficulty of federalism in Belgium does not lie solely in the small number of federated entities, but in the unending debate about the very nature of these entities themselves. The Flemings have little desire to establish regional institutions separate from community institutions. Besides, for them, the practical difference is not great; the Flemings in Brussels are but a small percentage of the total Flemish population. They have thus "merged" regional and community institutions, whose seat they have symbolically set up in Brussels. By contrast, about 20% of the French-speaking population in Belgium lives in Brussels. The Walloon region

(which moreover includes the German-speakers) therefore appears to be very distinct from the French community. Far from merging, the inhabitants of Wallonia and Brussels have since established a mechanism permitting the Walloon and Brussels regions to exercise some of the competences of a "community", which in the south of the country inspires hardly any interest or psychological echo.

Belgium, especially after the 1993 revision called "St. Michael's", consequently appears to be more and more asymmetrical. It embodies a mainly community-oriented federalism in the north and a mainly regionalistic one in the south. Brussels is at the epicentre of this complex system in which it is moreover the major challenge.

The heaviness and complicated - sometimes even byzantine-nature - of this compromise are very often criticised. But it is undeniable that Belgium - which bears little resemblance today to the Belgium which existed just 25 years ago - has shown remarkable inventiveness in the constant search for peaceful solutions reconciling peoples with conflicting aspirations. Its example might, it is hoped, be instructive elsewhere. If so, it would doubtlessly be as much in order to avoid its faults as to imitate its qualities.

e. The situation in Switzerland by Mr Joseph VOYAME
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"A society is judged on the way in
in which it treats its minorities."

Gandhi

I. General remarks

There are hardly any States - in Europe at least - whose population displays as little homogeneity as that of Switzerland. According to the latest census (1990), 73.4% of the Swiss population have German as their mother tongue, 20.5% French, 4.1% Italian and 0.7% Romansch, all four being recognised as official languages. This diversity is further enriched by the foreigners who make up 19% of the country's population, though it is true that most of them have one of the country's official languages as their mother tongue.

The religious picture is no less varied. 46% of the country's inhabitants are of Roman Catholic faith, 40% are Protestant and 7.4% declare that they do not belong to any faith. The rest, mostly foreigners, belong to different religions, ranging from Islam (2.2%) to the Orthodox Church (1%).

Switzerland, composed of political entities (cantons) which existed prior to its formation, could only be a federal State. In any case, the diversity which characterises the country was hardly suited to a highly centralised form of government. Switzerland is therefore made up of twenty-six cantons of very unequal size, as their populations range from 13 900 (Appenzell Inner Rhodes) to 1 179 000 inhabitants (Zurich). Even though there has been a marked trend towards centralisation since Switzerland abandoned its status as a Confederation of States in 1848 to become a federal State, the cantons still enjoy a large degree of autonomy, particularly in the spheres of public education, culture, justice, the police, health and religious affairs. This autonomy is guaranteed by Article 3 of the federal Constitution:

"The cantons are sovereign insofar as their sovereignty is not limited by the federal Constitution and, as such, exercise all rights which are not entrusted to the federal authorities."

Any new power of the federal authorities therefore requires a modification of the Constitution, which must be approved by the majority of the Swiss people and cantons. The cantons are free to organise themselves as they see fit: the federal Constitution (Art. 6) simply requires that their constitutions "ensure the exercise of political rights according to republican (representative or democratic) forms" and "have been accepted by the people ...".

The organisation of Switzerland is moreover made easier by the fact that the linguistic communities have remained relatively compact. In general terms, the German-speakers occupy the North, centre and East of the country, the French-speakers the West, the Italian-speakers the southern Alps and the Romansch-speakers certain valleys in the eastern Alps. The same applies to the country's different religions. While each of the two main religions predominates in some cantons, religious borders in no way coincide with linguistic borders and the differences are therefore not exacerbated by their addition.

The rest of my statement will essentially focus on linguistic differences, which are the cause of the most typical minority situations.

II. The institutions

1. Federal level

a. The federal Parliament is made up of two Chambers with equal powers. The National Council is the people's Chamber. Its members are elected according to a system of proportional representation, each canton forming a constituency. In the second Chamber, called the Council of States, each canton, regardless of its size, delegates two representatives, which it elects according to its own rules. This system therefore greatly favours the small cantons.

b. Executive power is exercised by the Federal Council, whose seven members constitute, as a body, the Head of State and are also part of the Government, sharing the departments (ministries) out among themselves. They must come from different cantons (Art.96 of the federal Constitution). Two other (unwritten) rules govern its composition: the four main political parties, ie over 80% of the electorate, must be represented; and the Latin minorities must have two or three representatives. At present, the Federal Council includes four German-speakers, two French-speakers and one Italian-speaker; the Latin minorities therefore constitute three-sevenths of the federal Government, although, broadly speaking, they only make up a quarter of the population of Switzerland.

c. Where the Federal Court (Supreme Court) is concerned, the federal Constitution (Art. 107) stipulates that, when electing its members, the Parliament must ensure that the three main languages of the country are represented. In fact, care is taken to ensure that all the regions, the four languages, the political parties and the main religions are represented equitably, ie in proportion to their size.

2. Cantonal level

The great majority of cantons have only one official language. Three are bilingual: Berne, Fribourg and Valais, and one is trilingual: Grisons. The problem of minority languages arises principally in these four cantons.

In general, it can be seen that each multilingual canton ensures that the minority(ies) is (are) represented equitably in its government and courts. This occurs automatically in cantonal parliaments through elections based on a system of proportional representation.

III. The main principles

1. Equality of languages

At federal level, the three main languages are equal. Romansch is a little less so. This is what emerges from paragraph 4 of the new Article 116 of the Constitution, adopted on 10 March 1996 by the Swiss people and the cantons:

> "The official languages of the Confederation shall be German, French and Italian. Romansch shall be the official language for the Confederation's relations with Romansch citizens. The details shall be regulated by law."

As we shall see, in principle the cantons are free to regulate the status of their language(s) as they see fit. In practice, the regulations of the multilingual cantons are the same as those of the federation: the official languages are equal.

2. Freedom of language

The federal Constitution makes no mention of freedom of language. However, in its capacity as a constituent body, the Federal Court considers this freedom, which derives from personal freedom, to be an "unwritten" constitutional right, adding that it is a precondition for the exercise of other freedoms such as freedom of the press, freedom of association, assembly, worship, etc.

So, everyone may freely use the language of their choice, both in public and in private life. Freedom of language is not restricted to a specific geographical area; it belongs to every individual, wherever he may be in Switzerland. It may be invoked by anyone, not only by Swiss citizens. It may be exercised orally or in writing; newspapers and other periodicals may therefore be published in any language whatsoever, with no restrictions. Finally, it is not restricted to private relations; it is in principle universal and so concerns the public sector too.

As with all constitutional rights, freedom of language is not absolute. However, according to the Federal Court, any restrictions must have a sound legal basis, be introduced in the public interest and comply with the principle of proportionality, ie they must be capable of achieving the aim pursued, be necessary for this purpose and not interfere with the freedom of individuals to an extent disproportionate to the aim pursued.

The main restriction to freedom of language - and almost the only one - is the principle of territoriality.

3. The principle of territoriality

The principle of territoriality is no more expressly provided for in the federal Constitution than is freedom of language. However, the Federal Court considers that it follows implicitly from Article 116 of this Constitution, the first paragraph now reading as follows:

> "(1) The national languages of Switzerland shall be German, French, Italian and Romansch."

It is considered that, with a few exceptions, a language cannot be preserved unless it is actually used by a more or less homogeneous population in a given area. The language must have a territory, which must be preserved for it, especially if it is a minority language. It is also believed that peace between languages is threatened if the borders between language zones are too unstable. Any change affects the personal interests of the populations directly concerned and creates tension. An effort must therefore be made to stabilise linguistic borders. Finally, it is recognised that peace between languages can be maintained more effectively if the speakers of the different idioms do not mix. Social contacts are then easier, points of friction are rarer and public administration is simplified. We should therefore strive for as much homogeneity as possible in the populations of the various linguistic zones.

It goes without saying that this principle of territoriality serves above all to protect the languages with the fewest speakers: the smaller the number of people speaking them, the more threatened they are.

This does not mean however that the territory of a multilingual State like Switzerland should necessarily be divided into monolingual zones. There are regions and communes which are traditionally bilingual - or even trilingual - and in which a modus vivendi has been found which preserves linguistic peace. What is more, monolingual zones may, in time, become bilingual, or even change their language. The principle of territoriality should not be imposed at any price; the preservation of a language depends to a great extent on the will and the behaviour of the population which speaks it. It should not stifle freedom of language. Moreover, it can come up against other freedoms, such as freedom of establishment and economic freedom. A fine balance should therefore be struck between the rules and interests involved.

Based as it is on these principles, the case-law of the Federal Court smacks of the same nebulous ambiguity. First, it says, the principle of territoriality, which is an exception to freedom of language, only allows such measures as are covered by the rule of proportionality: in particular, they must be necessary to maintain the size and the homogeneity of the area of the national language whose protection is sought and they must be in proportion to the infringement of the freedom of language and, more generally, personal freedom which they entail. Thus, the State - Confederation and cantons - may not take any measure aimed at shifting linguistic borders, eg decreeing that the majority language is the only teaching language, in such a way as to cause the minority language to disappear over a period of time. In the same way, the principle of territoriality should not tend to freeze the linguistic situation of a territory definitively, and still less restore an earlier situation.

However, obliging authorities to abstain from certain actions is not enough. Article 116 of the federal Constitution is based - says the Federal Court - on the idea that one of the essential elements of Switzerland's identity is the coexistence of four communities of different yet equal languages. It recommends the preservation of this situation and demands positive measures for this, especially if the existence of national languages is in danger. These measures, for the most part, are the responsibility of the cantons.

4. The obligations of the Cantons

Within the rather vague framework laid down in this way by federal law, the cantons must settle the problem of languages within their territory. Firstly, they must specify in concrete terms the aim pursued. In principle they are free to choose the means and methods for achieving the goals defined. For example, they may use rules of positive law, or they may make do with customary law if it suffices. They may also choose to regulate the matter completely themselves or to delegate it to their communes, as it is the territory of the latter which is in question.

The cantons have carried out this task in very different ways. As there can be no question of studying the different methods of each canton in this brief overview, I shall limit myself (in Part V) to the canton of Fribourg, which is particularly interesting as it is in the process of drafting its new law on languages.

IV. Application of the principles

a. For the federal authorities, as we have seen, the three main languages are equal.

In the Parliament, all three are used. However, Italian Deputies often speak in French or German, on the assumption that they will thus be better understood by their colleagues. Legislative Acts, once adopted, cannot enter into force until they have been published - simultaneously - in the three main languages; the three texts have the same legal force. As for Romansch, constitutional Acts and the other principal Acts are translated into this language.

The same principles hold for the Government. The administration, for its part, is organised to work in the four national languages. If an application is made to it in one of these languages, it must deal with the matter and reply in the person's language.

As for the Federal Court, which generally only hears cases on appeal, it issues its decisions in the same language as the lower court. If the latter heard the case in Romansch and the federal judges dealing with the case do not understand this language, the necessary translations must be supplied, and the costs of this are met by the Confederation.

b. While real protection for minorities is primarily the responsibility of the cantons, the Confederation has been concerned for several years with endangered languages, namely Italian and, particularly, Romansch. Aid given voluntarily until now has become an obligation since it was written into the new Article 116 of the federal Constitution:

> "(3) The Confederation shall support the measures adopted by the cantons of Grisons and Ticino to safeguard the Romansch and Italian languages."

This aid essentially consists of financial contributions.

c. As we have seen, public education is the responsibility of the cantons. They are in charge of education at all levels, up to university level. But the Confederation is responsible for the two higher technical institutions, the federal polytechnics, one German-speaking in Zurich, the other French-speaking in Lausanne. The German-speaking majority and the French-speaking minority (to remind you: approximately one-fifth of the population of Switzerland) are thus treated equally.

In the sphere of universities, which are the responsibility of the cantons but are subsidised by the Confederation, the same phenomenon may be noted: four are German-speaking, three are French-speaking and one is bilingual. An Italian-speaking university is also in the process of being created, beginning with the faculty of architecture.

d. As concerns the protection of minorities, it is also interesting to see how the income from the licence fees collected by the Swiss broadcasting company is allocated: 43% for programmes in German; 33% for those in French and 23% for Italian programmes; in addition, there are programmes broadcast in Romansch every day. If these percentages are compared to those of the linguistic communities, one has every reason to be satisfied with the lot of minorities.

e. We should also note that for a long time the Confederation and the cantons have been taking various measures to ensure good relations between the linguistic communities. This task is now also firmly anchored in the new article of the Constitution already mentioned:

> "(2) The Confederation and the cantons shall encourage understanding and exchanges between the linguistic communities."

This rule still needs to be put into practical effect through legal provisions and regulations, which are in preparation.

V. Minorities in the cantons

The case of the Canton of Fribourg

As has already been said, it is not possible to discuss the situation and the law in each of the twenty-six cantons here. We shall therefore look at one example: that of the canton of Fribourg.

The canton of Fribourg has 213 500 inhabitants of Swiss nationality. The majority (67.3%) are French-speaking, grouped in the centre, the West and the South of the canton. 32.5% are German-speaking and mostly live in the North and East of the canton. Between these two groups, there is a zone of mixed communes, including the capital, Fribourg (36 500 inhabitants).

In 1990, the people of Fribourg added a new provision to the constitution of the canton (Art. 21), reading as follows:

> "(1) French and German shall be the official languages. Their use shall be regulated according to the principle of territoriality.
>
> (2) The State shall promote understanding between these two linguistic communities."

A committee was given a remit to draft the principles of the legislation to implement these general rules. Its conclusions, which to a large extent merely take up existing legal rules or legalise existing situations, can be summarised as follows:

a. The two official languages are equal. The central authorities of the canton will be organised in such a way as to be able to work both in German and in French.

In the Parliament of the Canton, the Deputies will speak the language of their choice. Laws and decrees may only be brought into force after publication in both languages.

The Government and administration of the canton, in which the two linguistic communities will be represented equitably, will use the language of the communes and of individuals with which they are dealing.

The same will apply to the judiciary and all other institutions of the canton which have dealings with both linguistic communities, such as the university, the hospital of the canton and vocational schools.

b. Future legislation will place the communes into one of three categories: French-speaking, German-speaking, and bilingual. In principle, the language of the majority of the population of Swiss nationality will be the deciding factor. However, a commune will be recognised as bilingual if the linguistic minority represents, with a certain degree of stability, at least 30% of the Swiss population. Other criteria may be applied, such as geographical proximity (to avoid linguistic islands), history and the wishes of the population. The capital, by virtue of the fact that it is the capital, will have the status of a bilingual commune, even though the German-speaking minority made up only 28% of the population at the last census.

In monolingual communes, the authorities and public services may choose to use the official language of the commune. However, the two languages will be equal in bilingual communes. The authorities, government departments and public services will thus be able to work in both languages. Official publications, street names and signs will be bilingual. Children may attend the local school in the language of their parents' choice.

c. Of course, the application of such rules - which will have to be more detailed than those set out here - may well give rise to complications. The legislature will no doubt have to provide for certain exceptions and, in any case, the rules will have to be applied flexibly. It would be inconceivable, for example, for a civil servant of a French-speaking commune to refuse, if he can speak German, to reply to a citizen who does not speak any other language but German.

One last comment: the committee's proposals are set out here in the future tense, ie de lege ferenda. However, as we have seen, a large number of them have already been implemented.

VI. Foreigners

There are a large number of foreigners lawfully resident in Switzerland, as they constitute roughly 19% of the country's population. As regards fundamental rights, such as equality, protection of personality and private life, freedom of conscience and beliefs, freedom of opinions and information, assembly and association, foreigners have the same status as Swiss citizens. However, where political rights are concerned, only two cantons (Jura and Neuchâtel) confer the right to vote and the right to certain hold public offices on foreigners.

VII. Conclusion

Owing to its very structure, Switzerland can only exist in a spirit of tolerance and respect for minorities. The overlapping of cantonal, linguistic and religious borders means that a large part of the Swiss population belongs to at least one minority.

Over the centuries this has given rise to a conciliatory spirit which is deeply rooted in the population. This spirit has been embodied in the few legal rules which the Confederation and the cantons have laid down. It might be tempting to expand these into minutely detailed regulations. But that would be a mistake. However detailed it might be, such legislation would contain omissions. Moreover, highly detailed rules would probably be too rigid in many circumstances. Peace, in particular peace between languages, would gain nothing by this. Summum jus, summa injuria.

Harmonious and peaceful coexistence depends much more on understanding, moderation and a spirit of tolerance. These virtues should of course manifest themselves in the everyday life of institutions and individuals. It would seem that this is generally the case in Switzerland. With or without binding rules, we endeavour to allocate an equitable place and role to national minorities in all spheres. In fact, the majorities are often magnanimous and accord minorities more than they would receive if the law of proportions were adhered to. We have seen this at federal level as regards the composition of the Government, measures taken to safeguard endangered languages, further education establishments and the allocation of income from television licences. This does not mean, however, that there is never any tension between majorities and minorities. The latter must often call themselves to the attention of the majorities and proclaim their interests and rights. But for several decades there has been only one serious conflict, namely the problem of the separation of the French-speaking part of the canton of Berne (with a large majority of German-speakers) and its formation as an autonomous canton. This conflict has been partially settled and, what is more, is the subject of relatively peaceful discussions.

The situation is slightly less favourable as regards foreigners. Those who live lawfully in Switzerland do not complain about any intolerance. However, the - very numerous - asylum-seekers are sometimes the victims of violent attacks, though these have tended to decrease in the past three or four years. Caveant consules!

As a last remark, it can be recalled that in a number of countries it is feared that in protecting minorities by extending to them a large degree of autonomy, the State might endanger its own territorial integrity. The Swiss example demonstrates that this is not the case. On the contrary, it is precisely the autonomy enjoyed by Cantons which guarantees the territorial integrity of the country. In a Swiss State which wished to become strictly centralised, tensions would be such as to risk provoking its break-up. This was the case in 1789, when an attempt was made to establish a single and undivided Helvetic Republic. The attempt collapsed within five years, fortunately, never to be taken up again.

f. The situation in Canada by Mr Gérald A. BEAUDOIN
Senator, Professor, Ottawa

Introduction

Canada is a constitutional monarchy and a parliamentary democracy. It became a federal State in 1867. Its constitution is partially written and unwritten. The principle of the rule of law exists in Canada. The judiciary in Canada is powerful and independent.

The Constitution Act 1867, our fundamental law, includes some sections on the protection of minorities. In 1982 another piece of constitutional legislation completed this protection by inserting, inter alia, a Canadian Charter of Rights and Freedoms, in the Constitution. The classic rights (for example, fundamental freedoms, equality and security of the person), aboriginal

rights, language rights and the principle of multiculturalism were constitutionalised in 1982. Canada has signed several international conventions on rights and freedoms. In order for treaties to come into effect in Canada, each level of government has to legislate within its own sphere of competences.

Because Canada was a heterogeneous federation with more than one language and one culture, the thirty-three Fathers of Confederation decided to give the provinces exclusive powers over education under section 93 of the Constitution of 1867. Quebec may therefore choose its own system of education.

I-Territorial self-government

The ten provinces making up Canada have sovereign power over their spheres of legislative competences. Their boundaries are inviolable and may not be altered without their consent, as set out in section 43 of the Constitution Act 1982 and section 3 of the Constitution Act 1871. Under section 109 of the Constitution Act 1867, the lands, mines and minerals belong to the provinces.

In Canada, the self-government of the ten provinces is well developed. In Quebec, one of the federated states, the French-speakers are a majority (82%); outside of Quebec, the French-speakers are a national minority rather than simply a minority.

Since the enactment of the Constitutional Charter of 1982, Canada has devoted much more time and energy to the "aboriginal question". Some Supreme Court decisions in the 1970s, had already opened the debate: among others the Drybones[1] Lavell[2] decisions; the Sioui[3] and Sparrow[4] decisions followed after the adoption of the Charter.

Many aboriginal people live on reserves. Conventions and treaties have been signed. A recent example is that of the Nisga'a of British Columbia who have just concluded a tripartite agreement (Nisga'a, Canada and British Columbia) which confers a certain territorial autonomy on them and which may serve as a precedent for other aboriginal peoples of Canada.

Under this agreement, the federal and provincial governments recognise the possession of a 1900 sq. km. territory in British Columbia and provide for the creation of an autonomous Nisga'a government on this territory. This agreement contains provisions relating to fishing, lands and resources, access to lands, environmental assessment and protection, the Nisga'a government, taxes, financial transfers and artifacts. The Canadian Charter of Rights and Freedoms and the Criminal Code continue to apply to the Nisga'a but the Indian Act (a federal law) ceases to apply to them. The Nisga'a government may enact laws in the following areas: culture and language, employment, public works, traffic, transportation, land use and celebration of marriages, health services, child welfare and education. Subject to the consent of the

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[1] *R. v. Drybones, [1970] S.C.R. 282.*

[2] *Canada (A.G.) v. Lavell, [1974] S.C.R. 1349.*

[3] *R. v. Sioui, [1990] 1 S.C.R. 1025.*

[4] *R. v. Sparrow, [1990] 1 S.C.R. 1075.*

provincial government, the Nisga'a may, like a municipality, provide police services and set up a court responsible for the implementation of Nisga'a law in Nisga'a lands.

This agreement is subject to ratification by the Nisga'a, Canada and British Columbia.

II-The protection of minorities at the institutional level

At the level of the House of Commons in Ottawa, the system of "representation by population" which was in effect in Canada before confederation in 1867, prevails.

At the level of the Senate, the Fathers of Confederation opted for the system of regional representation. Quebec and Ontario both constitute a region with 24 senators each out of a total of 104. In 1867, the three maritime provinces constituted a region: 24 senators were allotted to this region. This is still
the case. Newfoundland joined the Canadian federation in 1949 and was allotted six senators. The Canadian West is made up of four provinces, each having six senators. The federal territories, Yukon and the Northwest, both have one senator.

In my opinion, the make-up of the Senate reflects a certain amount of protection for Quebec which, since 1915, represents almost one-quarter as does Ontario; in 1867, these two provinces each constituted one-third. Sir Georges-Étienne Cartier, the leader of Quebec and one of the Fathers of Confederation accepted the principle of representation according to population in the House of Commons on condition that Quebec receive one-third of the Senate seats and remain on par with Ontario which was more populous than Quebec.

This principle of regional representation is in part intended to protect Quebec. This protection is however relative. Under the Constitution, this protection could be withdrawn from Quebec. The agreement of the federal government and of seven provinces with 50% of the population would be sufficient. This is one of the lacunae in the constitutional amendment formula of 1982. The "right of dissent" provided for by section 38 (3) of the Constitution Act 1982 does not protect Quebec here; one cannot withdraw from the Senate.

On 17 April 1982, the Senate lost its veto over the amendment of the Constitution under section 47 of the Constitution Act 1982. The Senate veto no longer comes into play except in the cases under section 44 which provides the following:

> "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and the House of Commons."

This power has a limited scope. It replaces section 91 (1) of the Constitution Act 1867 which was repealed in 1982.

At the level of the Supreme Court which is composed of nine judges and sits as the court of last instance, Quebec has three of nine judges, that is, one third of the Supreme Court. This is a measure of special protection for Quebec, which is the only province which has a civil law regime.

III-Denominational rights

In the eyes of Chief Justice Duff, one of our greatest lawyers, section 93 of the Constitution Act 1867 was one of the pivotal points of the great compromise of 1867[1]. This legislative competence is accompanied by constitutional guarantees to protect the rights of Catholic and Protestant groups which in 1867 made up almost all of the population and also to protect the right to dissidence. In addition, the possibility for religious groups to seek a supplementary and conditional remedy before the federal political authorities was foreseen. This remedy proved to be of little use during the Manitoba schools question from 1890 to 1896, and has since become obsolete[2].

In Quebec, the denominational rights include the right to denominational schools in Montreal and Quebec City and, outside, the right to dissidence; they also include the rights to administer, to hire teachers, to choose textbooks, and to impose taxes. This list is not exhaustive[3].

Freedom of religion is guaranteed in Canada. There is no State religion. Each person is free to have a religion or not.

Since confederation and especially since the 1890s, starting with the Barrett[4] decision, the guarantees enshrined in section 93 are the subjects of well-known decisions. The Catholic and Protestant groups realised that these guarantees were relative, given that they left the path free for example for double-taxation in Manitoba. It took several decades for acceptable political compromises to be struck in this area in some provinces.

In 1917[5] the school minorities also discovered that section 93 did not protect the language of instruction. It was not until 1982 with the adoption of the Canadian Charter of Rights and Freedoms that this lacuna was filled, which in the interval caused great injury to French-speaking minorities outside Quebec and violently shook Canadian federation.

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[1] *In Re Adoption Act of Ontario, [1938] S.C.R. 398, p. 402.*

[2] *G.-A. BEAUDOIN, "La loi 22: à propos du désaveu du référé et de l'appel à l'exécutif fédéral", (1974) 5 R.G.D. 385. This protection still exists in law, but it became obsolete almost a century ago. One can hardly imagine a federal authority intervening in a similar case.*

[3] *Professor Pierre Carignan has devoted a whole book to the question of denominational guarantees; P. CARIGNAN, Les garanties confessionnelles à la lumière du Renvoi relatif aux écoles séparées de l'Ontario: Un cas de primauté d'un droit collectif sur le droit individuel à l'égalité, Montreal, Éditions Thémis, 1992, 268 pages.*

[4] *Ex parte Renaud, (1872-73) 14 N.B.R. 273; City of Winnipeg v. Barrett, [1892] A.C. 445; Brophy v. A.G. Manitoba, [1895] A.C. 202; Roman Catholic Separate School Trustees for Tiny v. The King, [1928] A.C. 363. The Court adopted a less legalistic approach in this decision than it did in the Barrett decision. See the study by F. CHEVRETTE, H. MARX, and A. TREMBLAY, Les problèmes constitutionnels posés par la restructuration scolaire de l'Ile de Montréal, Quebec, Éditeur officiel, 1971. See P. CARIGNAN, "De la notion de droit collectif et de son application en matière scolaire au Québec," (1984) 18 R.J.T. 1-103.*

[5] *Trustees of the Roman Catholic Separate Schools for Ottawa v. MacKell, [1917] A.C. 62.*

Under section 93, education remains under the exclusive competences of the provinces. Section 93 is subject to two constitutional guarantees: a denominational one since 1867, and since 1982, one concerning language rights.
In the Greater Hull School Board[1] decision, the Supreme Court of Canada struck down sections 339, 346, 353, 362, 366, 375, 382, 495, 498, 499 and 500 of a Quebec Law on municipal taxes (Act 57) on the grounds that they "omitted to provide for the proportional distribution of subsidies and because in the event of a referendum, the will of a school board may be submitted to that of voters other than its constituents..."[2].

In this decision, the Supreme Court did not set aside the decision in Hirsch,[3] which to the contrary remains a landmark decision because it sets out the scope of section 93. The former decision is based on the latter. The Court found that:

> In 1867, the right of Protestants and Roman Catholics to manage and control their own denominational schools was recognised by law. As to funding, the law empowered, inter alia, trustees and school boards to receive subsidies on a proportional basis and the right to tax their constituents within the limits of "their respective municipalities"[4].

The provincial legislatures must respect the denominational rights granted to the Catholic and Protestant groups in 1867 when they legislate on education. It however follows from the Hirsch decision that they may also establish a neutral, Jewish, Muslim or other sector.

Since 1982, religious education is protected by a special section in the Canadian Charter of Rights and Freedoms: section 29. The denominational guarantees under section 93 of the Constitution Act 1867 remain intact; in this area, the Charter does not make any changes.

In the Reference on Bill 30 of Ontario[5] case, relating to the funding of Catholic secondary schools in Ontario, the Supreme Court concluded that Bill 30 was valid, by virtue of the preliminary provisions of section 93 and section 93(3) of the Constitution Act 1867. The great political compromise of 1867 provided for the continued guarantee of the religious rights and privileges established in 1867 and the ability of legislatures to grant others according to the circumstances.

The protection granted by section 93(1) and section 93(3) is not the same because laws adopted under the latter may be amended or repealed. By contrast, the rights granted by section 93(1) cannot be touched. The Court stated that rights under section 93(1) are exempt from the Charter,

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[1] *Greater Hull School Board and Lavigne v. A.G. of Quebec [1981] C.S. 337; [1983] C.A. 370, [1984] 2 S.C.R. 575; 56 N.R. 93. With respect to the control exercised by the Catholic and Protestant groups over their schools, the decision of the Supreme Court of Canada in Caldwell v. Stuart, [1984] 2 S.C.R. 603 is worth reading.*

[2] *A.G. (Que.) v. Greater Hull School Board, [1984] 2 S.C.R. 575, p. 598.*

[3] *Hirsch v. P.B.S.C.M., [1928] A.C. 200.*

[4] *See above, footnote 11, p. 577.*

[5] *Re An Act to Amend the Education Act (Bill 30), [1987] 1 S.C.R. 1148.*

even without section 29 of the Charter. The rights conferred by section 93(3) are exempt from the Charter because of the provinces' absolute power to enact these laws. 'The federal compromise is found in section 93 as a whole and not in its individual components"[1].

According to Justices Estey and Beetz, the provincial legislature may legislate in the area of education subject to two conditions: no law may violate the minimal constitutional guarantees laid down by section 93(1), and the exercise of provincial competences may be met with a federal intervention under section 93(4).

In the Protestant School Board of Greater Montreal[2] case, the Supreme Court upheld two regulations of the Quebec Ministry of Education establishing a uniform curriculum for all non-religious subjects in all Quebec schools.

According to the Court, section 93(1) of the Constitution Act 1867 protects not only the religious aspects of the denominational schools, but also the non-denominational aspects which are necessary for the effectiveness of the denominational guarantees. The constitutional right granted to certain groups of persons to establish denominational schools, funded by the State according to fixed legal rules, must not be interpreted as a right or freedom guaranteed by section 29 of the Charter, but rather as one guaranteed by section 93. The Court declared that the regulations in question did not result in the laying down of the content of moral or religious instruction in the protestant schools. The power to regulate the curriculum in denominational schools granted to the Trustees and School Boards in 1867, is constitutionalised only in so far as this limited power of regulation is necessary to make the religious guarantees effective. The ancillary argument that section 93(2) does not give constitutional status to legally enshrined rights and privileges which existed in Ontario and Quebec in 1867 was rejected.

Chief Justice Dickson and Justice Wilson declared that even if section 93(2) intended to increase the constitutional protection of the dissentient schools of Quebec in order to put them on an equal footing with the separate schools of Ontario, the Quebec legislature would still be competent to regulate the powers of the dissentient school boards with regard to the curriculum, provided that this regulation did not harm the denominational character of the these schools.

Finally, Justice Beetz, writing for the majority, found that section 93 of the Constitution Act 1867 does not confer rights or freedoms such as those provided for in the Canadian Charter, but rather grants privileges, and must as such be treated as an exception:

> "While it may be rooted in notions of tolerance and diversity, the exception in section 93 is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory benchmark should not be construed as a Charter human right of freedom or, to use the expression of Professor Peter HOGG, a "small bill of rights for the protection of minority religious groups"[3]."

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[1] *Ibid., p. 1198.*

[2] *Protestant School Board of Greater Montreal v. A.G. Quebec, [1989] 1 S.C.R. 377.*

[3] *Ibid., p. 401.*

IV-Language rights

Section 23 of the Canadian Charter of Rights and Freedoms of 1982 added a constitutional guarantee concerning language rights in education[1].

Section 23 is profoundly in keeping with the history of Canada; it rectifies school systems found to be inadequate by the constituent in 1981. The lacuna is filled by a remedial measure which is uniform for the ten provinces.

The Canadian federation differs from the Belgian and the Swiss federations as far as the protection of language rights is concerned. In Canada, the principle of a personal regime rather than that of territoriality was adopted.

A federal law establishes the two official languages: French and English; this law applies throughout Canada, at the federal level. In schools, the French and English languages, when spoken by minorities, are protected by the Constitution. Wherever numbers warrant, the minorities may exercise the right to administer their own educational facilities.

In the French Language Charter[2] case of 1984, the Supreme Court in an unanimous judgment declared that sections 72 and 73 of the French Language Charter (Bill 101) adopted by Quebec were inconsistent with section 23 of the Canadian Charter and to the extent of this inconsistency had no force or effect under section 52 of the Constitution Act 1982. The Court added that the restrictions under section 73 were not lawful restrictions within the meaning of section 1 of the Charter.

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[1] *Section 23 reads:*

23.1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[2] *Q.A.P.S.B. v. A.G. Quebec, [1984] 2 S.C.R. 66.*

Section 73 of the French Language Charter is clear, precise and specific. It clearly departs from section 23 of the Canadian Charter and has as its true effect its amendment. The limitation clause in section 1 of the Charter does not amount to an exception (as provided by section 33 of the Charter for some areas) nor an amendment of the Charter, the mechanism for which is provided for under sections 38 and following of the Constitution Act 1982.

The Supreme Court stated that section 23 of the Charter grants rights to some categories of persons; this classification is laid down specifically. A provincial legislature cannot redraw and modify these categories. It is bound by the Charter and cannot break away from it.

In the opinion of the Supreme Court, section 23 is so precise, the right guaranteed is so specific and the categories so well described that the restriction under section 73 can only be seen as a pure and simple departure or a direct amendment to section 23. There is no room for section 1 to come into play.

The Supreme Court pointed out that section 23 is very concrete, and that it does not lay down great abstract principles such as those found in other charters.

Section 23 of the Canadian Charter is in its specificity, a unique set of constitutional provisions, which is very particular to Canada[1].

The Supreme Court affirmed its judgment on Bill 101[2] in the Mahé[3] decision. It reiterated the remedial character of section 23 of the Charter and held that, in this spirit, it should be interpreted broadly and liberally[4].

The guiding and fundamental principle arising from the Mahé[5] decision is that the Supreme Court recognises that linguistic minorities speaking an official language have the right to administer and control the language of education, the curricula and the educational facilities of the minority. The degree of administration and control may vary depending on the number of pupils actually registered. Administration and control are absolute when "numbers warrant", they are relative, i.e. there will not necessarily be a homogeneous school board or homogeneous educational facilities when the number of students registered is too small.

Chief Justice Dickson, on behalf of the Court, defined the minimum threshold of section 23 of the Charter as follows:

> "Section 23 requires at a minimum, that "instruction" take place in the language : if there are too few students to justify a programme which qualifies as

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[1] *Ibid., p. 79.*

[2] *Q.A.P.S.B. v. A.G. Quebec, see above, footnote 19.*

[3] *Mahé v. A.G. Alberta, [1990] 1 S.C.R. 342.*

[4] *See above, footnote 22.*

[5] *Ibid.*

"minority language instructions", section 23 will not require any programmes to be put in place[1]."

The higher level is the following:

"...the text of section 23 supports viewing the entire term 'minority language educational facilities' as setting out an upper level of management and control[2]."

Every case must necessarily be considered on its own because the Supreme Court neither gave a set number nor a magic figure which would meet the criterion "where numbers warrant". It did however mention two factors to be taken into consideration: (1) the determination of the appropriate services in relation to the number of pupils concerned; and (2) the cost of the services under consideration. The Supreme Court specified in this respect:

"Perhaps the most important point to stress is that completely separate school boards are not necessarily the best means of fulfilling the purpose of section 23. What is essential, however, to satisfy that purpose is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture. This degree of control can be achieved to a substantial extent by guaranteeing representation of the minority on a shared school board and by giving these representatives exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns[3]."

Section 23 of the Charter consequently amounts to a general right to education in the language of the minority, whose aim, as affirmed by the Supreme Court:

"is to preserve and promote minority language and culture throughout Canada[4]."

In the Mahé[5] decision, the Supreme Court also dealt with the right to equality and denominational rights. According to the Court, neither sections 15 (equality) or 27 (multiculturalism) of the Canadian Charter nor section 93 of the Constitution Act 1867 are inconsistent with section 23 of the Charter.

V-The rights of aboriginal peoples

The aboriginal peoples were given little protection in 1867. The Constitution of 1867 gave the central Parliament exclusive legislative powers over "Indians and Lands reserved for the

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[1] *Ibid., p. 367.*

[2] *Ibid., p. 370.*

[3] *Ibid., p. 375-376.*

[4] *Ibid., p. 371.*

[5] *Ibid.*

Indians". The protection of aboriginal peoples dates back to the Royal Proclamation of 1763 and the treaties concluded with the British Crown. The latter protection was however very relative. While the provinces could not alter these treaties by their acts, the federal Parliament, by contrast, could depart from these treaties by virtue of section 91(24) of the Constitution Act 1867[1]. This is the interpretation upheld by the courts.

Parliament defined the word "Indians" in the Indian Act[2]. In 1939, the Supreme Court declared that Eskimos (the Inuit) were to be included in the field of competence of the Federal Parliament.

The Constitution Act 1982 makes a reference to the word "Métis". This is a first in the Canadian Constitution.

While the rights of the aboriginal peoples are very much better protected today than in 1867, they are not yet adequately defined. The whole country has become aware of this fact. A constitutional mechanism under sections 35 and 35.1 of the Constitution Act 1982 is at the disposal of the aboriginal peoples -- who are the first majority to have become a minority in this country -- to have their rights defined and protected.

The first constitutional amendments carried out on Canadian territory since the patriation of the Constitution in 1982 were effected in June 1984 and relate to the rights of aboriginal peoples[3].

Section 25 of the Charter specifies that the Charter does not abrogate or derogate from any rights or freedoms of the aboriginal peoples of Canada. Aboriginals have a special status.

In the Sparrow[4] decision, the Supreme Court laid down the test for section 35 of the Constitution Act 1982. It is an extremely important decision. The Sparrow decision is to section 35 of the Constitution Act 1982 what the Oakes decision is to section 1 of the Charter.

Chief Justice Dickson and Justice La Forest wrote the unanimous judgment of the Court (6-0) and determined the framework for the interpretation of section 35(1).

The Court held that the exercise of a right under section 35(1) of the Constitution Act 1982 may be limited.

In its test of justification, the Court discarded two principles: the idea of "public interest" and the presumption of validity. On the subject of these two principles, it stated:

> "We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights[5]."

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[1] *In Re Indians, [1939] S.C.R. 104.*

[2] *Indian Actm L.R.C. (1985), ch. 1-6.*

[3] *Notably to the equality of aboriginal men and women.*

[4] *[1990] 1 S.C.R. 1075.*

[5] *Ibid. p. 1113.*

Although the "presumption" of validity is now obsolete given the constitutional status of the ancestral rights in question, it is clear that the importance of aims of preservation has been recognised for a long time in legislation and governmental action[1].

Finally, on the subjects of the right to fish for subsistence and preservation measures, absolute priority must be given to the rights of aboriginals to fish. The Supreme Court held as follows:

> "The constitutional entitlement embodied in section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously."[2]

It should be recalled that due to a constitutional amendment in effect since June 1984, aboriginal men and women are equal[3].

A Royal Commission, chaired by Justice René Dussault and Dr. George Erasmus, has been created by the federal government to study and report on the aboriginal question. One of the issues under study was aboriginal self-government. This report will be filed soon.

Conclusion

Constitutional protection of minorities existed in 1867. The Constitution Act 1982 completed this protection, notably for the aboriginals.

What is the position of the override clause in section 33 of the Canadian Charter of Rights and Freedoms? The democratic rights, mobility and residence rights, the language rights, the denominational rights and aboriginal rights and, in my opinion, the equality of the sexes are not subjected to this clause. However, as for the remaining rights, section 33 applies and allows the exclusion of the application of sections 2 (fundamental freedoms) and 7 (legal rights) to 15 (equality rights) of the Charter of 1982. We do not favour the use of this clause. The limitation clause in section 1 of the Charter is in our opinion sufficient.

The Canadian Charter of 1982 does not deal with social and economic rights. These are however dealt with by the provincial charters which exist in every province and have quasi constitutional effect.

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[1] *Ibid. p. 1114.*

[2] *Ibid. p. 1119.*

[3] *Proclamation of 1983 amending the Constitution of Canada, 21 June 1984, The Gazette, Part II, 11 July 1984, Vol. 118 p. 2984.*

When dealing with collective rights, one should, in my opinion, be cautious. They exist for certain purposes in certain states. In Canada, they are found in sections 91(24) and 93 of the Constitution Act 1867. They appear to be justified.

The main purpose of constitutional charters is to protect the ordinary citizen against the State, which has become more and more powerful. This is certainly what President Thomas Jefferson wanted in the United States[1] and what several American judges, starting with William O. Douglas subsequently declared[2].

Charters also exist to protect minorities from parliamentary majorities. The majorities change. Moreover, left to themselves, they could very quickly victimise the minorities. These rights must therefore be protected.

The Supreme Court of Canada, which is a powerful and independent court and which heads the Canadian judiciary, has by its constitutional interpretation protected minorities especially in the areas of language rights and rights and freedoms in general. It has taken the rights of aboriginal peoples under its wing. The work it has done in a few years commands admiration.

g. A note on the Faroe Islands home rule case[3] by Mr Árni OLAFSSON[4],
Counsellor on Faroe Affairs, Copenhague

1. Basics about the Faroe Islands

The Faroe Islands are an archipelago of 1400 square km, lying in the North East Atlantic Ocean between Britain, Norway and Iceland, 1,400 km away from the Danish capital, Copenhagen. The population is approximately 44,000, of which about one third live in the capital, Tórshavn.

The Faroese regard themselves as a distinct people or nation, with their own language, history, traditions, institutions, sense of unity and national identity.

Seen in the context of the total Kingdom of Denmark, the Faroese, like the Greenlanders, could be regarded as a national minority. However, for all political and practical purposes that is not a correct view. Within their own geographically well-defined territory, the Faroe Islands, the Faroese are themselves the overwhelming majority. To a slightly lesser extent, the same would apply to Greenland, where the indigenous population, of inuit origin, makes up the bulk of the population. As to Denmark proper, it has a classical national minority situation around its land border with Germany.

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[1] *The author of the Declaration of Independence and third president of the United States declared: "Nothing then is unchangeable but the inherent and unalienable rights of man". S. K. Padover, Thomas Jefferson on Democracy, New York, The New American Library, 1939, p. 68.*

[2] *W.O. Douglas, Go East Young Man. The Early Years. The Court Years 1939-1975, The Autobiography of William O. Douglas, New York, Random House. 1980. The famous expression of Judge W.O. Douglas is well-known: "Keep the government off the backs of the people".*

[3] *Opinions expressed in this Paper are the author's own and do not represent official views of Faroese or Danish authorities.*

[4] *Economist. Counsellor on Faroe Islands affairs in the Danish Ministry of Foreign Affairs. Adviser to the Faroese Government.*

The Faroe Islands have autonomy, or home rule, within the Kingdom of Denmark. Autonomies form a very varied category. Here a closer look will be taken at the Faroese case.

The reason why the Faroe Islands are constitutionally connected with far away Denmark, and not with some neighbouring country, nor form a State of their own, is found in a specific historical development.

2. Historic background[1]

The Faroese descend from settlers who came from Norway in the Viking era, 11 to 12 centuries ago, and established an independent society, with its own popular assembly with legislative and judicial functions: the Alting, later known as the Løgting.

In the middle ages, the Faroe Islands came under the Crown of Norway, which at that time reached across the North Atlantic, embracing a number of islands now parts of Scotland, the Faroe Islands, Iceland and Greenland. In the 14th century the king of Denmark became also king of Norway. Gradually all power in the two Kingdoms was centralised in Copenhagen. When the personal union was abolished after the Napoleonic wars, what was left of the Norwegian kingdom in the Atlantic Ocean - Faroe, Iceland and Greenland - remained under the Danish king.

In the middle of the 19th century, under the influence of the rise of democratic ideas and of Danish and German nationalism, the transnational conglomerate of countries and provinces ruled by the absolutist Danish king was transformed. In 1849 Denmark proper became a democratic Danish nation State, while following two local wars in the middle of the 19th century the wholly or partly German-speaking provinces were integrated into the emerging German nation State. The boundary between Denmark and Germany was finally settled after the first world war, in strict accordance with the nationality principle, but nevertheless leaving a national minority on each side of the border. Today the nationality situation around the border is tranquil and harmonious, the two minorities enjoying cultural rights guaranteed by mutual agreement between Denmark and Germany.

In the process of the transformation of Denmark from a transnational dynastic monarchy to a modern-day nation State, the three Atlantic provinces fared differently.

Greenland continued to be ruled as a colony until it was integrated into Denmark in a revision of the Danish Constitution in 1953. Greenland obtained home rule in 1979.

Iceland step by step became independent of Denmark and emerged as a full-fledged Republic in 1944.

After the introduction of the democratic Constitution in 1849, the Danish Parliament unilaterally extended the Constitution to the Faroe Islands.

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[1] *For an account in English of the history of the Faroes, see John. F. West: The Emergence of a Nation. C. Hurst & Co., London 1972.*

This was a democratic step forward, reducing the power of the royally appointed officials in the Islands. However, when the nationhood idea spread from Denmark to the Faroe Islands, the Faroese found that they had been incorporated into another people's nation state. A national movement was formed, following the usual pattern, starting with the collection of folksongs, then turning political, demanding first autonomy and later independence.

The old Faroese Løgting, abolished in 1816, was resurrected with advisory functions in 1852. Its powers were increased in 1923.

During the second world war Denmark was occupied by Germany, the Faroes by Britain. The link with Denmark was broken. An interim Constitution shared the power between the Løgting, its executive committee, and the Danish prefect. After the war the Faroese did not want a return to the "status quo ante bellum".

The post war negotiations between Denmark and Faroe on a new status for the Faroe Islands were difficult. Nationalist sentiment ran high on both sides. The talks were complicated by the Faroese delegates favouring different degrees of autonomy, but not full independence, while the Danish authorities insisted upon a solution compatible with their conception of Denmark as a unitary State.

On 14 September 1946 a Danish ultimatum was put to a referendum in the Faroe Islands. The alternative was between either limited autonomy or complete secession from Denmark. The voters could vote yes to either option. Votes indicating other preferences would be invalid. The result has been described[1] as "a masterpiece of inconclusiveness". The only certain outcome was the rejection of the Danish proposal. When disregarding those who had voted "no" to it without voting "yes" to secession, there was a narrow majority for secession. And a narrow majority in the Løgting was ready to implement it. The Danish government intervened. The Løgting was dissolved and new elections held. The new Løgting had no majority for secession. New negotiations resulted in the Home Rule Act of 1948.

3. Basic Principles of the Faroese Home Rule System

It follows from the foregoing that the Danish State in 1946 recognised the Faroese as a people entitled to decide its own constitutional status, including secession.

The Faroese Home Rule Act[2] is a pragmatic result of a purely political compromise between two conflicting viewpoints: on the one hand the Faroese quest for selfgovernment, on the other hand the wish to keep the Faroes in the Danish Realm.

In its Preamble, the Home Rule Act refers to the "acknowledgement of the special position held by the Faroe Islands within the Kingdom in national, historical and geographical respects", and points out that the Act has been approved by the Løgting.

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[1] *By the author referred to in the preceding note.*

[2] *Danish Law No. 137 of 23 March 1948 (Lov om Færøernes Hjemmestyre). An English translation was printed in Yearbook on Human Rights, UN, Lake Success, New York, 1950.*

Self rule is implemented through the concept of "special Faroese matters", whereby the Faroese Løgting takes over the legislative power and whereby the Faroese executive body, the Landsstýri, assures the administrative powers. Annexes to the Act specify which matters may be taken over. Items not included cannot be transferred under the Act. However, in nontransferred matters, Danish legislation is not promulgated in the Faroes until the Faroese authorities have had the opportunity to express their view on it. Another option is to transfer not the legislation, but only the administration of a matter, including matters not mentioned in the Annexes.

The recognition of the specific nationality of the Faroese manifests itself inter alia in the acceptance of the Faroese flag (which had already obtained international recognition from the Allies in 1940), and in the Faroese passport, indicating the holder's Faroese nationality as well as his/her Danish citizenship. The Faroese language is recognised as the primary language, but Danish may be used in all public affairs and shall be taught well and carefully.

The wish to retain the Faroe Islands within Denmark is manifested inter alia in the fact that the Faroese continue to elect two delegates to the Danish Parliament, and that the list of transferable items is limited, several important areas not being included.

Disputes about the competence of the Faroese home rule authorities in relation to the State authorities may be referred to a jointly appointed committee. To date, it has not been deemed necessary to establish such a committee.

4. Home Rule and the Danish Constitution

There has been controversy between Danish jurists as to the compatibility of the Home Rule Act with the Danish Constitution. The Danish Government wants to stress that home rule is compatible with Denmark's unitary State constitution. Some jurists have asserted that the home rule rests upon a delegation of powers which in principle could be reclaimed by the Danish authorities. Other jurists point to the recognition of the Faroese people's rights inherent in the Home Rule Act, to its character as a contract between the Løgting and the Danish legislature, and maintain that the powers taken over by the Home Rule Authorities cannot be unilaterally reclaimed.

Another school of thought, represented by Dr. Frederik Harhoff, Copenhagen University[1], has claimed that the two measures of home rule (Greenland obtained home rule in 1979) have made an illusion of the unitary State, and that Denmark today is a new kind of State construction, a "rigsfællesskab", a form of commonwealth. Or, as Dr. Harhoff puts it: "...a tripartite community of separate and autonomous parts, each with their own original powers, but with continental Denmark as the hegemonical part with residual authority".[2]

5. Characteristic Features of the Faroese Home Rule System

The Faroese home rule system has a number of special characteristics, when compared to other autonomies.[3]

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[1] *F. Harhoff: Rigsfællesskabet, Forlaget Klim, Århus, 1993 (includes a summary in English).*

[2] *Op. Cit. (note 5) P. 515.*

[3] *For a more detailed account, with special emphasis upon economic matters, see Á. Olafsson:*

5.1. Rights of citizens

Legally, the definition of a Faroese is without any hint of ethnic criteria: a person who is a Danish subject and a resident in the Faroes.

The Faroese Home Rule Act explicitly forbids any discrimination between Faroese and other Danish citizens, apart from the right to voting and eligibility to Faroese institutions, a possibility so far not utilised. This is in contrast to the Greenland Home Rule Act, which does not prohibit discrimination in favour of Greenlanders.

The Faroe Islands being outside the European Union, a Faroese is not regarded as a Union citizen unless he takes up residence in Metropolitan Denmark.

5.2. Legal matters

Matters relating to general civil legislation as well as the penal code are decided by the Danish authorities, through general Danish legislation or through laws specific to the Faroe Islands. If new Danish legislation is not approved by the Faroese authorities, it is habitually not promulgated, and the old Danish law remains in force. The judicial organisation is part of the Danish system.

5.3. Culture and education

The Faroese quest for autonomy has from the outset been associated with the wish to preserve and promote the Faroese language, which was recognised as the prime language by the Home Rule Act. As a medium of public school instruction, Faroese was not fully recognised until 1937. Under home rule, cultural affairs in general have been taken over as special matters. Education is in principle subject to Danish legislation, but the administration and laying down of detailed rules concerning schools and their curriculum is decided by the Home Rule Authorities. However, the curriculum has to pay due heed to the entrance requirements of universities and other institutions of higher education in Denmark or elsewhere, as the possibilities for education at university level in the Faroes are very limited.

5.4. Taxation and monetary matters

The Faroese Home Rule Authorities have the powers to levy taxes, including fiscal import duties.

The Faroe Islands are integrated into the Danish monetary area. Special Faroese notes are in circulation, issued by the National Bank of Denmark. Danish coins are used.

5.5. Linkage between decision making powers and financing

When the Faroese authorities take over a special matter, they also carry the burden of expenditure connected therewith.

The activities of the Home Rule Authorities are financed primarily by income tax, VAT and excise duties, and by a block grant from the Danish exchequer. The few local matters still in the hands of the Danish government, such as the police (which is Faroese staffed), are paid by the Danish authorities.

As the Faroese do not pay taxes to Copenhagen, Danish State expenditure, including the block grant, can be viewed as a transfer from Metropolitan Denmark to the Faroe Islands.

5.6. Resources and industries

Among the matters transferred in 1948 were those related to trades and industries such as agriculture, fisheries and manufacturing, as well as the authority to regulate the use of land and water, including hydroelectric production, and to manage the living marine resources of the Faroese fisheries territory.

With the increase in 1977 of the Faroese fisheries zone to 200 miles, the geographic scope of Faroese home rule expanded drastically.

However, one resource category, namely mineral resources, is on the special list of matters which according to the 1948 Act can be transferred to home rule only after negotiations with the Danish authorities. The competence in this area was transferred in 1992 after protracted negotiations between Tórshavn and Copenhagen.[1]

5.7. External Affairs[2]

According to the Home Rule Act, the competence of the Faroese authorities is subject to limitations due to international rights and obligations. Matters concerning the relations of the Kingdom to foreign countries are decided by the State authorities.

Nevertheless, the Home Rule Act guarantees the Faroese some influence upon foreign affairs concerning the islands, inter alia by retaining a special adviser on Faroese affairs in the Danish Foreign Ministry, by posting Faroese attachés with Danish foreign missions, and through Faroese participation in Danish delegations and negotiating teams. The Faroese authorities may be empowered to conduct negotiations on their own, assisted by the Danish Foreign Service, if the interests of the other parts of the Kingdom are not affected.

When extending new Danish International treaties to the Faroe Islands, the same procedure as for Danish legislation is followed, which implies that not all Danish treaties are in force in the Faroes.

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[1] *A detailed account of this matter (in English) can be found in "Report of the Faroese Hydrocarbon Planning Commission", Føroya Landsstýri, Tórshavn, 1993, pp. 33-43.*

[2] *This matter is dealt with in more detail in : Árni Olafsson: International Status of the Faroe Islands, Nordisk Tidsskrift for International Ret,(Nordic Journal of International Law) Vol. 51, 1982.*

In accordance with the choice of the Faroese at the time of Danish accession in 1973, Danish membership of the European Union does not cover the Faroe Islands (nor, since 1986, Greenland). Fisheries and trade relations with the EU are covered by special treaties between on the one hand the Danish Government and the Faroese Home Government, and on the other hand the EU (Formerly EEC). With a number of other countries, similar bilateral agreements have been made.

In relevant regional international fisheries management organisations, where Metropolitan Denmark is represented by the EU, Denmark has ensured a special membership in respect of the Faroe Islands and Greenland, where the Danish chair usually is occupied by representatives of the two home governments.

In accordance with Declaration 25 to the Treaty of Maastricht, cooperation on foreign policy between the member governments of the European Union does not prevent the Danish government from acting on its own when necessary in order to take care of the international interests of the Faroe Islands (and Greenland).

6. Conclusion

The Faroese autonomy model within the Kingdom of Denmark has some characteristics in common with most autonomy cases, such as cultural autonomy, including language rights, and administrative powers for local institutions. Other features are specific to the Faroes, reflecting inter alia their ancient history, their limited size and their separation from the other parts of the Kingdom of Denmark by large expanses of salt water. Some characteristics, particularly concerning economic matters, may be specific to the time of entry into force of the arrangement, or may reflect the immediately preceding historic events. Other traits may be best understood in the context of the Nordic democratic model, with its alleged preference for decentralised government, respect for cultural diversity, and income redistribution in favour of peripheral areas. Other traits, such as the lack of need for recourse to the special committee to deal with legal differences over the scope of home rule, may be attributable to the pragmatism which the Danish take a pride in exercising. All in all, there are so many factors specific to the Faroese case that the Faroese autonomy model could probably not be copied anywhere, but some of its specific traits might serve as a source of inspiration in other situations where regional or nationality problems are being dealt with through the establishment of autonomy.

Second working session - The Situation in certain Central and Eastern European countries chaired by Mr Ergun ÖZBUDUN

a. The Russian Federation and autonomy: a preliminary perspective
by Mr Nicolai VITRUK

b. Territorial autonomy in Ukraine - The case of Crimea
by Mr Serhiy HOLOVATY

c. The rights and autonomy of the national minorities in Slovenia
by Mr Anton BEBLER

d. The situation in Moldova
by Mr Alexei BARBANEAGRA

e. The ethno-national effects of territorial delimitation in Bosnia and Herzegovina
by Mr Joseph MARKO

f. Local and national minority self-government in Hungary
by Mr Janos BÀTHORY

g. Autonomy, human rights and protection of minorities in Central and Eastern Europe
by Mr Fernand DE VARENNES

a. The Russian Federation and Autonomy:, a preliminary perspective by Mr Nikolai VITRUK Judge of the Constitutional Court, Moscow

The Russian Federation is a federal State with a multinational population.

It consists of republics, krays (territories), oblasts (regions), cities of federal significance, an autonomous oblast and autonomous okrugs, which have equal rights as constituent entities of the Russian Federation (Article 5, para 1 of the Constitution of the Russian Federation). All the constituent entities of the Russian Federation may be regarded as autonomous formations, as they are self-governing territorial communities with autonomy under the Constitution and the law. What is involved here is State-regional autonomy. Historical peculiarities in the formation of the State structure in Russia have led to three types of State-regional autonomy:

a. national-state formations in the form of republics (States) (numbering 21). These republics are generally named after their incumbent nation and reflect the originality of the ethnic composition, life and culture of the peoples living in their territories. The status of a republic is determined by the Constitution of the Russian Federation and the constitution of the republic (Article 66, para 1, of the Constitution of the Russian Federation). A republic (State) has its own constitution and legislation (Article 5, para 2, of the Constitution of the Russian Federation);

b. territorial-State formations in the form of krays and oblasts (numbering 6 and 49) and cities of federal significance (of which there are two: Moscow[1] and Saint-Petersburg), their population being predominantly Russian;

c. national-territorial-State formations in the form of autonomous oblasts (of which there is one) and autonomous okrugs (numbering 10). All these formations, bar one (the Chukotka Autonomous Okrug), are parts of krays or oblasts[2] which seek to preserve and develop the originality of the national groups living in their territories.

The status of the krays and oblasts, the cities of federal significance, the autonomous oblast and the autonomous okrugs is determined by the Constitution of the Russian Federation and the charter adopted by the legislative (representative) body of the corresponding constituent entity of the Russian Federation (Article 66, para 2, of the Constitution of the Russian Federation). Krays, oblasts, cities of federal significance, the autonomous oblast and autonomous okrugs have their own charter and legislation (Article 5, para 2, of the Constitution of the Russian Federation).

On a proposal by the legislative and executive bodies of the autonomous oblast or an autonomous okrug, a federal law concerning the autonomous oblast or an autonomous okrug may be adopted (Article 66, para 3, of the Constitution of the Russian Federation). Relations between autonomous okrugs and the krays and oblasts of which they are part may be regulated by federal law or by a treaty between the organs of State power of the autonomous okrug and those of the kray or the oblast as the case may be (Article 66, para 4). So far, no such federal laws have been enacted; agreements between the organs of State power of the autonomous

[1] *The City of Moscow is the capital of the Russian Federation. The status of the capital is established by federal law (Article 70, para 2, of the Constitution of the Russian Federation).*

[2] *Two autonomous okrugs are parts of krays, seven come under six oblasts.*

okrugs and those of the kray or oblast of which the autonomous okrug is part have been concluded in a number of cases[1], but the majority are still being drafted.

Pursuant to Article 66, para 5, of the Constitution of the Russian Federation, the status of a constituent entity of the Russian Federation may be altered by mutual agreement between the Russian Federation and the constituent entity of the Russian Federation in accordance with federal constitutional law.

In the context of State (regional) autonomy (in its various forms), local autonomy exits in the Russian Federation, ie autonomy in the form of local self-government.

There are two types of local autonomy:

a. territorial local autonomy in the form of local self-government in urban, rural and other settlements, and

b. national-territorial local autonomy in the form of local self-government within the boundaries of the territory inhabited by a people of a particular national composition (a national region and other national-territorial communities), having regard to historical and other local traditions[2].

Local self-government is considered one of the fundamental elements of the constitutional order of the Russian Federation. According to Article 12 of the Constitution of the Russian Federation, local self-government is independent within the limits of its powers, and organs of local government do not form part of the system of State government bodies. The Constitution of the Russian Federation stipulates that the structure of bodies of local government shall be determined by the population independently (Article 131, para 1). Organs of local government manage municipal property independently, draw up, approve and implement the local budget, introduce local taxes and levies, ensure the preservation of public order and resolve other issues of local importance (Article 132, para 1, of the Constitution of the Russian Federation). Article 133 of the Constitution precludes restrictions on the rights of local self-government laid down in the Constitution of the Russian Federation and the federal laws.

The status of local autonomy in the form of local government is regulated in detail by Articles 12 and 130-133 of the Constitution of the Russian Federation as well as by the federal law of 28 August 1995 "On general principles governing the organisation of local authorities in the

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[1] *See, for example: the treaty on the fundamentals of relations between Krasnoyarsk Kray and Taimyr (Dolgano-Nenets) Autonomous Okrug, ratified by the Soviet of People's Deputies of the Krasnoyarsk Kray and the administration of the kray in 1993; the agreement on the delimitation of powers between the Tyumen Oblast, Khanty-Mansijsk and Yamalo-Nenets Okrug bodies of representative and executive government in the sphere of economic relations, approved by a decision of the Tyumen Oblast Soviet of People's Deputies of 11 June 1993 ("The Status of Small Peoples in Russia. Legal Acts and Documents". Compiled by V.A. Kryazhkov, Moscow, Legal Literature, 1994, pp. 289-96).*

[2] *At present there are four national regions in Russia (in the Republics of Buryatiya and Kareliya and two German-speaking regions in the Altay Kray and Omsk Oblast).*

Russian Federation"[1], which determines the areas of competence of local government, specifies the territorial, organisational, financial and economic basis of local government, outlines its guarantees and details the responsibilities of organs of State power in relation to organs of local self-government. A local authority has the right to adopt the charter of the municipal formation (Article 6 of the aforesaid federal law). Decisions taken by local authorities are binding and may be revoked only by decision of the courts (Article 44 of the same law). The independent normative regulation of local self-government by the constituent entities of the Russian Federation is envisaged on the basis of this law.

The federal law "On general principles governing the organisation of local authorities in the Russian Federation" envisages the possibility of creating national and territorial local autonomy as a specific organisation of local self-government, conditioned by the existence of compact settlements of national groups and communities and of indigenous/aboriginal nationalities and Cossacks in the territory of the municipal formation, with due regard to historical and other local traditions (Article 5, para 13; Article 8, para 14)[2]. Moreover, such a municipal formation of a national nature is also empowered to establish a range of advantages for the indigenous population, in particular as concerns the use of national languages, the naming of populated areas, the development of external economic co-operation and fraternal relations etc.

The basis and procedure for creating diverse forms of national and territorial local autonomy are currently regulated by laws in several of the constituent entities of the Russian Federation[3]. It would be expedient to adopt a federal law on this question first of all.

The variety of the forms of State (regional) and local autonomy contributes greatly to the safeguarding and protection of the rights of peoples and nations, national minorities, ethnic groups, human and civil rights and freedoms, their equality before the law and the courts and equal rights for all citizens regardless of race, nationality, language, attitudes to religion, convictions or other circumstances.

The concept of national minority, the diversity of national minorities

In the Constitution and laws of the Russian Federation a wide range of terms (which is not always justified) is employed to designate national minorities and their diversity ("ethnic groups", "ethnic communities", "minority indigenous peoples", "minority indigenous (aboriginal) peoples" etc).

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[1] *Collected Legislation of the Russian Federation, 1995, No. 35, page 3506.*

[2] *See also Article 7 of the draft federal law "On the fundamentals of the legal status of minority indigenous (aboriginal) peoples of Russia", adopted by the State Duma at a first reading on 19 May 1995.*

[3] *See, for example: the law of the Republic of Kareliya of 22 November 1991 "on the legal status of national regions, national urban and rural Soviets in the Republic of Kareliya" (Vedomosti of the Supreme Soviet of the Republic of Kareliya, 1992, No. 2, page 256); the law of the Buryatiya SSR of 24 October 1991 "on the legal status of Evenk rural (village) soviets of people's deputies in the territory of the Buryatiya SSR" (Vedomosti of the Supreme Soviet of the Republic of Buryatiya, 1992, No. 3, pp. 65-70.*

As is well known, the concept of national minority in terms of composition is controversial[1]. Article 1 of the Convention of the Commonwealth of Independent States on the Safeguarding of the Rights of Persons belonging to National Minorities[2] stipulates that "the term 'persons belonging to national minorities' is to be understood as meaning those persons permanently resident in the territory of one of the Contracting Parties and possessing its citizenship who, through their ethnic origins, language, culture or traditions, differ from the main population of the said Contracting Party."

The draft federal law "On national and cultural autonomy", adopted by the State Duma at a first reading on 22 November 1995, provides (in paragraph 2, Article 1) that "national minorities" shall mean "the communities of citizens of the Russian Federation who have a sense of belonging to peoples (nationalities) with State formations outside the Russian Federation or else without such formations but with the majority of their peoples residing outside the Russian Federation".

Moreover, according to paragraph 3 of the same Article, "Given the historical particularities of the State structure of the Russian Federation and the specific nature of the distribution of its peoples, the following may be considered national minorities:

- Communities of citizens having a sense of belonging to peoples (nationalities) with a corresponding republic, autonomous oblast, autonomous okrug within the territory of the Russian Federation but who live outside it;

- Other ethnic communities of citizens of the Russian Federation living in a numerical minority amidst another nationality within the territory of the Russian Federation".

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[1] *See on this subject: Mikhaleva N.A. "Certain Aspects of the Constitutional Status of National Minorities in Russia. Current Problems of Constitutional Legislation", Moscow, 1992, pp. 67-8; Shelov-Kovedyaev F.V. "Path to Eden. A Study of Experience in Protecting the Rights of National Minorities", Moscow, Ed."Polis", 1995, pp. 17-22; Tuzmukhamedov R.N. "Status of Minorities in International Law and Citizenship. Current Problems of Citizenship. Documents from the International Scientific and Practical Conference on Problems of Citizenship, 23-24 February 1995, Moscow", Moscow, 1995, pp. 142-3.*

[2] *Commonwealth Information Bulletin of the Council of Heads of State and the Council of Heads of Government of the CIS, 1995, No. 3 (16), pp. 74-80.*

In accordance with the draft law, when citizens are being assigned to a national minority, their personal, voluntary and ethnic self-identification is the deciding factor (Article 1, para 4)[1].

The Constitution and legislation of the Russian Federation distinguish autonomous groups of national minorities according to the effect of the corresponding acts of international law and the specific nature of Russia's history (minority indigenous (aboriginal) peoples, repressed national (ethnic) groups, etc). In the former USSR and in present-day Russia there are normative acts devoted to specific types of national minorities (Cossacks, Gypsies, Kurds and so on).

Normative regulation of the rights of national minorities

Normative regulation of the rights of national minorities in the Russian Federation is effected at three levels:

a. At federal level - in the Constitution of the Russian Federation, federal laws and regulatory acts (decrees of the President of the Russian Federation, resolutions of the Government of the Russian Federation and normative acts of the federal ministries and departments);

b. At the level of constituent entities of the Russian Federation - in the constitutions of the republics, the charters of the krays, oblasts and other constituent entities of the Russian Federation, in the laws of the constituent entities of the Russian Federation and in regulatory acts issued by the government bodies of the constituent entities of the Russian Federation);

c. At local government level - in normative acts of local government bodies and local government officials.

The Constitution of the Russian Federation lays down that "the regulation and protection of the rights of national minorities" are a matter for the exclusive jurisdiction of the Russian Federation (Article 71 (c)) and that the "protection of the rights of national minorities" and "protection of the traditional habitat and the traditional way of life of minority indigenous ethnic communities" fall within the concurrent jurisdiction of the Russian Federation and the constituent entities of the Russian Federation (Article 72, para 1 (b) and (l)). A certain lack of clarity in delimiting the jurisdiction of the Russian Federation and its constituent entities, as well as the existence of concurrent jurisdiction between the Russian Federation and its constituent entities on the subject of protecting the rights of national minorities, gives rise to a problem of an excess of information, ie duplication of the content of normative acts on national minorities.

Russia is currently faced with the urgent task of creating a harmonious system of normative acts devoted to national minorities, bearing in mind the federative nature of the Russian State and the

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[1] *However, there could be exceptions to this general rule. Thus, it should be acknowledged that freely determined ethnic self-identification should be acknowledged by the competent bodies, for example, when specific advantages are enjoyed by persons belonging to small indigenous (aboriginal) peoples, as is accepted in certain foreign countries (Norway, Finland). Additional legal regulation is needed on this question in the Russian Federation. (See on this subject: Vasilyeva T.A. "The Legal Status of Ethnic Minorities in the Countries of Western Europe. The State and the Law", 1992, No. 8, p. 140; Kriazhkov V.A. "Legal Problems of the Status of Small Indigenous Peoples of Russia". The State and the Law", 1994, No. 6, pp. 4-5).*

specific characteristics of the matter to be regulated. It would seem that the first element of the system of legislation on national minorities should be the federal law on the rights of national minorities, complemented by the federal law on national and cultural autonomy and the federal law on the rights of minority indigenous (aboriginal) peoples. These fundamental laws should provide the basis for the current legal regulation of the rights of national minorities at the different levels.

An abundance of laws does not, of course, always denote high quality in their contents. Many of the provisions in these laws which are devoted to the rights of national minorities are mere declarations, lacking the effective legal mechanisms necessary for their implementation.

The rights of national minorities

Pursuant to paragraph 2, Article 6, persons belonging to national minorities, as indeed all citizens of the Russian Federation, enjoy all rights and freedoms on its territory and bear equal responsibilities as envisaged in the Constitution of the Russian Federation.

The constitutional principle that all persons are equal before the law and the courts, and the constitutional guarantee by the State of the equality of rights and freedoms regardless of sex, race, nationality, language, origin, material and official status, place of residence, attitude to religion, convictions, membership of public associations or other circumstances (Article 19, paras 1 and 2), are equally valid for persons belonging to national minorities. The Constitution of the Russian Federation prohibits discrimination against national minorities and persons belonging to them. According to Article 19 para 2, of the Constitution of the Russian Federation, "all forms of limitations of human rights on social, racial, national, language or religious grounds shall be prohibited"; moreover, "propaganda or agitation which arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited" (Article 29, para 2). Protection of minorities from racial hatred, hostility and xenophobia is also ensured by the possibility of instituting criminal proceedings (Article 74 of the Criminal Code of the RSFSR).

Parallel to the rights of individuals of the Constitution of the Russian Federation[1], the constitutions of the republics[2], the charters of the krays[3], oblasts[1] and other constituent entities of

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[1] *See: Article 68, para 3; Article 69; Article 71 (c) and Article 72 (c) and (l) of the Constitution of the Russian Federation.*

[2] *The constitution (Fundamental Law) of the Republic of Sakha (Yakutiya) 1992 in particular envisaged the duty to protect the minority indigenous peoples of the North from any form of forced assimilation or ethnocide as well as from attacks on historic and holy places and monuments of spiritual and material culture; in areas of compact residence of the minority indigenous peoples of the North, nomadic councils (of clan communes) may be created and electoral constituencies may be formed with a lower number of voters (Articles 42, 85, 112). For representatives of the minority indigenous peoples of the North, military service may be replaced if they so desire by alternative civilian service (Article 27).*

[3] *"In the territory of the Stavropol kray" according to Article 3, paragraph 9 of the Charter (Fundamental Law) of the Stavropol Kray, 1994 "the inalienable rights of the peoples, Cossacks, minority indigenous ethnic communities which live there to preserve their original way of life, culture, language, customs and traditions" and to develop self-government are*

the Russian Federation[2], ordinary (sectorial) legislation acknowledges collective rights, ie special, supplementary rights of peoples, nations, national minorities and ethnic groups. They may be established for all, or even for only one, of the national minorities. The collective rights of the national minority determine the contents of specific laws arising therefrom for persons belonging to the national minority.

Constitutional and sectorial legislation in force in the Russian Federation guarantees the following fundamental rights for national minorities:

a. the right to use one's native language in the areas of communication, upbringing, education, creative activities and the mass media, the right to preserve, study and develop that language (this right may not be affected by the assignment of the status of official language to this or that language at the level of the Federation or its constituent entities)[3];

b. the right to satisfy one's economic (material) needs and interests through budgetary subsidies at different levels and the right to set up special assistance and development funds, etc;

c. the right to national and territorial self-government (through the creation of national, territorial, municipal and other formations);

d. the right to national and cultural autonomy as a special form of social cohesion and self-activity;

e. the right to participate in social and political life (through representation in legislative and executive organs of power, the creation of consultative councils and other consultative bodies under organs of executive power and through other forms of organisations);

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recognised and guaranteed.

[1] *"Minority indigenous peoples", according to Article 2, para 4 of the Charter of the Irkutsk Oblast, 1995, "have the right to preserve their traditional place of residence". Article 22 in the Charter of the Pskov Oblast, 1994, provides that: "on the territory of the oblast the inalienable rights of the ethnic group "seto" to their traditional place of residence, to the preservation of their original way of life, language, customs and traditions and to self-government are recognised.*

[2] *The Charter of the Khanty-Mansiysk Autonomous Okrug, 1995, for example, ensures 6-seat representation in the Duma of the autonomous okrug with the formation from among the elected deputies of the Duma Assembly of representatives of the minority indigenous peoples of the North, endowed with particular powers to protect the interests of aborigines (Articles 37 and 41).*

[3] *See: Article 26, para 2 of the Constitution of the Russian Federation, the law of the RSFSR of 25 October 1991 "on the languages of the peoples of the Russian Federation" (Vedomosti of the Congress of Peoples Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 50, Article 1740); Article 6 of the law of the Russian Federation of 10 July 1992 "on education" (Vedomosti of the Congress of Peoples Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 30, Article 1797).*

f. the right to receive education, the right to preserve and develop national culture and all forms of professional and amateur art, the right to publish printed material and the right to use the mass media[1];

g. the right to develop humanitarian and fraternal links within the country and abroad;

h. the right to State protectionism and State protection of the rights and legitimate interests of national minorities and persons belonging to them.

The conventional way to safeguard and protect the rights of national minorities is to permit the functioning of national and cultural autonomy in the context of a unitary or federative State.

The draft federal law "On national and cultural autonomy", adopted by the State Duma at a first reading on 22 November 1995, provides that "national and cultural autonomy in the Russian Federation is a means of socially unifying the citizens of the Russian Federation belonging to national minorities, encouraging their voluntary self-organisation in order to resolve questions concerning the preservation of their original way of life, and developing their language, education and national culture" (Article 1, para 1).

National and cultural autonomy in the Russian Federation is based on the principles of: citizens' free choice and voluntary choice of membership of a particular national minority; self-organisation and self-government; a variety of forms of internal organisation of national and cultural autonomy; a combination of public initiatives and measures of State support; respect for the language, culture, traditions and customs of the citizens of other nationalities; and the principle of legality.

National and cultural autonomous associations may be formed at the level of the Federation or of a constituent entity thereof, at interregional level or at local authority level.

Article 4 of the federal law "On national and cultural autonomy" provides for the rights of national and cultural autonomous associations: to receive such support from State government bodies of the Russian Federation, its constituent entities, and the organs of local self-government as is necessary to preserve the originality of national minorities and to develop their culture; to present their national and cultural interests to legislative (representative) and executive bodies and to local government bodies; to create their own mass media; to obtain and diffuse information in their mother tongue through such media; to have access to national and cultural treasures for the purpose of safeguarding and enriching the historical and cultural heritage of their peoples; to observe national traditions and customs and to revive and develop arts and crafts; to create teaching and scientific establishments, cultural establishments and ensure that they function; to participate through their plenipotentiary representatives in the activities of international non-governmental organisations; to establish and maintain, without any discrimination, humanitarian contacts with citizens of foreign States and their social organisations.

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[1] *See Articles 2, 3, 5 and 6 of the law of the Russian Federation "on education"; Articles 6, 8, 11, 20 and 21 of the law of the Russian Federation of 9 October 1992 "On the fundamentals of the legislation of the Russian Federation on culture" (Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation", 1992, No. 46, page 2675).*

Several chapters and articles (Chapters III and IV, Articles 10-17) of the federal law in question establish material, organisational, legal and other guarantees for the rights mentioned above and specify the duties of State government bodies of the Russian Federation, its constituent entities and organs of local self-government regarding the safeguarding of the right to preserve, develop and use a national language (mother tongue), including the receipt of corresponding education, and the right to preserve and develop national culture. Chapter V (Articles 18-22) is specifically devoted to the financial and economic basis of national and cultural autonomous associations, providing for the allocation of funds for national and cultural autonomy from budgets at different levels, the right of ownership and other specific State measures of support (creation of special funds, institution of advantages regarding taxes, levies, credits, etc).

The rights of minority indigenous (aboriginal) peoples

Minority indigenous (aboriginal) peoples are a separate variety of national minority. Pursuant to Article 1 of the draft federal law "On the fundamentals of the legal status of minority indigenous (aborigine) peoples of Russia", adopted by the State Duma at a first reading on 19 May 1995, peoples are recognised as minority indigenous peoples if they live in a territory traditionally settled by their ancestors, preserve their original way of life, number fewer than 50,000 and have a sense of belonging to independent ethnic communities. The authors of this draft law consider the threshold of 50,000 people to be the most appropriate. It is a relatively stable figure, and peoples numbering fewer than 50,000 would take a long time to exceed this threshold through natural reproduction. At present the largest of these peoples numbers fewer than 35,000 persons[1].

In contrast to other national minorities, minority indigenous peoples do not have any State formations outside the Russian Federation or do not have any at all; since time immemorial they have been living in the territory of their ancestors in a foreign national environment while maintaining the originality of their language, culture, economic activity and general way of life, marked by the surrounding natural conditions and the historical course of developments[2].

At present, the Institute of Ethnology and Anthropology of the Russian Academy of Sciences possesses a detailed list of minority indigenous peoples of the Russian Federation, including those peoples not registered during the 1989 census. The draft law on minority indigenous (aboriginal) peoples names 65 minority indigenous (aboriginal) peoples in Russia, totalling just over 500,000 individuals; 13 of these peoples comprise between 100 and 1,000 individuals. The minority indigenous peoples are distributed as follows: 6 in the territory of the European part of Russia, 23 in North Caucasus and 36 in the North, Siberia and the Far East. They belong to 28 different constituent entities of the Russian Federation.

Industrial expansion in the territory traditionally settled by indigenous peoples, a considerable reduction in areas suitable for traditional craft activities, and the fact that these peoples are ill-

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[1] *Almost all the peoples living in Russia and numbering from 50,000 to 100,000 have their own national-state formation in the context of the constituent entities of the Russian Federation.*

[2] *See, on this question, ILO Convention No. 169 of 26 June 1989 on indigenous and tribal peoples in the independent countries", which determines the particular status of indigenous (aboriginal) peoples in international law.*

adapted to new market relations, have led to the disruption of their natural living conditions. Over the last few decades, the State has by no means paid sufficient attention to minority indigenous peoples. In consequence, the original lifestyle and culture of these peoples have undergone a marked distortion and their very existence has been seriously threatened, not to say brought to the brink of extinction.

The Constitution of the Russian Federation provides (in Article 69) that 'The Russian Federation shall guarantee the rights of minority indigenous peoples in accordance with the universally recognised principles and norms of international law and international treaties of the Russian Federation". Additional rights, advantages and safeguards for minority indigenous peoples, in particular the peoples of the North, Siberia and the Far East, are laid down in the constitutions of several republics and the charters of krays, oblasts and other constituent entities of the Russian Federation as well as in a large number (more than 150) of ordinary law (sectorial and specific) at different levels concerning the use of land, forests, the sub-soil and other natural resources in connection with the privatisation of traditional craft firms and regarding taxation, financial and material support, language, education and culture[1].

The rights of minority indigenous (aboriginal) peoples in Russia, as well as the relevant guarantees and means of protection, are consolidated in a draft federal law entitled "On the fundamentals of the legal status of minority indigenous (aborigine) peoples of Russia", which was adopted at a first reading on 19 May 1995[2]. This draft law seeks to ensure ethnic survival and revival, preserve originality, to foster free economic, social and cultural development and to ensure the application of the additional rights and advantages of these peoples (Article 8). It guarantees (Article 3, para 2, and Articles 5 and 6):

- the maintenance for minority indigenous peoples of the territory where they live and of their economic activity within sufficient limits to ensure their original development, the preservation of the natural environment and the renewal of consumed natural resources;

- the creation of the necessary conditions to preserve the ethnic originality and the cultural, social and economic development of minority indigenous peoples;

- respect for the national dignity of minority indigenous peoples and for their culture, language, traditions and customs;

- the functioning of the public associations of minority indigenous peoples;

- to establish the liability of organisations, officials or citizens who violate the rights and legitimate interests of minority indigenous peoples.

Section I of the draft law is devoted to the political, social, economic and cultural rights of minority indigenous peoples (Articles 9-11). Other sections (III-V, Articles 14-19, 20-28, 29, 30,

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[1] *See: "The Status of Minority Indigenous Peoples of Russia, Legal Instruments and Documents", sections II and III.*

[2] *The federal law of 19 December 1995 was sent back to the State Duma by the President of the Russian Federation.*

34) deal with the mechanisms for their implementation as well as with specific measures on the responsibility of the competent bodies and officials for ensuring the exercise thereof.

Minority indigenous peoples have the right to legal protection from any form of discrimination, infringement of their rights and legitimate interests (Articles 12 and 36). During the judicial examination of a civil or legal case concerning persons from minority indigenous peoples, regard is had to the traditions and customs of these peoples in so far as they are not contradictory to the laws of the Russian Federation (Article 37).

Following the adoption of the federal law "On the fundamentals of the legal status of minority indigenous (aborigine) peoples of Russia", it is planned to draft several federal laws to consolidate and develop certain aspects of the legal status of indigenous peoples in Russia ("On territories of traditional use of natural resources", "On the commune", "On the general principles of local national-territorial self-government in the areas of compact occupation by national minorities and indigenous peoples of Russia", "On reindeer breeding").

Unfortunately, the rights and advantages envisaged for national minorities are often not implemented owing to the absence of the appropriate material and financial resources and the necessary State protectionism. To this end, in conformity with a resolution of the State Duma of 26 May 1995 "On the critical economic and cultural situation of minority indigenous (aborigine) peoples in the North, Siberia and the Far East of the Russian Federation"[1] as well as with the decree by the President of the Russian Federation of 22 April 1992 "On urgent measures to be adopted to protect the areas of occupation and economic activity of the minority indigenous peoples of the North"[2], the Government of the Russian Federation and the executive organs of State power of the constituent entities of the Russian Federation are required to carry out the following tasks:

- drafting and adopting, with the participation of the minority indigenous (aboriginal) peoples, through their public associations, a federal State programme for the social and economic development of the minority indigenous (aboriginal) peoples in the North, Siberia and the Far East of the Russian Federation by the year 2000;

- determining, in the areas of occupation and economic activity of the minority indigenous peoples of the North, the territories of traditional use of natural resources, which are the inalienable property of these peoples and should not be transferred from them without their agreement for the purpose of industrial or other forms of exploitation that are not linked to the traditional economy; handing over, free of charge, reindeer pasture, hunting grounds, fishing and other areas for comprehensive use by communes and families either on the basis of hereditary, life-time tenure or on the basis of a lease;

- drawing up arrangements for paying the minority indigenous (aboriginal) peoples of the North compensation for damage caused to the land of their compact occupation and economic activity as a result of the transfer and industrialisation of such land;

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[1] *Collected Legislation of the Russian Federation, 1995, No. 24, page 2226.*

[2] *Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 18, page 1009.*

- carrying out a land survey as well as surveys of natural resources of the North, Siberia and the Far East of the Russian Federation;

- possibly establishing an office of commissioner for the rights of minority indigenous (aborigine) peoples of Russia under the system of executive government;

- signing and ratifying ILO Convention 169 on indigenous peoples and tribes in independent countries[1].

The Rights of Repressed National Minorities

There is another specific aspect to the safeguarding and protection of the rights of national minorities in contemporary Russia, viz the rehabilitation of peoples repressed during the years of totalitarianism.

According to Article 2 of the law of the RSFSR of 26 April 1991 "On the rehabilitation of repressed peoples"[2], the term "repressed peoples" means the nations, nationalities or ethnic groups and other historically formed cultural and ethnic groups of persons, such as the Cossacks, who, on account of signs of their membership of a national or other group, were subjected to a State policy of defamation and genocide, together with forcible displacement, the suppression of national State formations, the redrawing of national- territorial boundaries and the establishment of a regime of terror and violence in special deportation areas.

Under current legislation, repressed peoples have a right to: the restoration of territorial integrity and of national State formations; redress for prejudice caused by the State as a result of its repressive actions; a return, according to their wishes, to their traditional living areas; the restitution of spiritual and cultural valuables as well as archives; and the re-establishment of former historical names for populated areas and settlements. Benefits and advantages in the social sphere have been instituted for citizens belonging to repressed peoples.

The Cossacks, as one of the cultural and ethnic communities repressed in the past, are entitled to: the revival of the traditional social and economic way of life and cultural traditions; the establishment of territorial public self-government; the revival of traditional forms of land ownership, use and disposal; the performance of military service; the re-establishment of traditional names for settlements and populated areas, streets, squares, cultural items and other items on the basis of the free expression of the will of all population groups in areas of compact Cossack occupation; the creation of Cossack social organisations; the choice of a form of self-government; the formation of voluntary paramilitary organisations for the patriotic and international education of the Cossacks, for training in the defence of the homeland and so on[3].

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[1] *This question was discussed during the first legislative period of the State Duma, but not definitively settled.*

[2] *Vedomosti of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 18, Article 572.*

[3] *See the Resolution of the Supreme Soviet of the RSFSR of 16 July 1992 "On the rehabilitation of Cossacks" (Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 30, page 1805).*

In recent years, federal organs of State power and the organs of State power of the constituent entities of the Russian Federation have adopted a series of financial, organisational and legal measures with a view to securing the rights and legitimate interests of the ethnic communities and Cossacks repressed in the past.

The rights of national minorities as refugees and displaced migrants

During the disintegration of the USSR, which was accompanied by violent inter-ethnic conflicts, there arose the problem of refugees and displaced persons, whose status is defined in special laws. Forced departures from places of permanent residence often took place on a massive scale as a result of violence or persecutions and the conduct of hostile campaigns precisely on account of possession of a specific nationality (the Osseto-Ingush conflict). The problem of refugees and displaced persons became even more acute with the onset of hostilities in the Republic of Chechnya (Chechens and Russians forced to leave the Republic of Chechnya, and to move to the neighbouring republics of Ingushetia and Dagestan, Krasnodar and Stavropol krays, Rostov oblast, etc). The law of the Russian Federation of 19 February 1993 "On refugees"[1] and the law of the Federation of Russia of 19 February 1993 "On forced migrants"[2], in the version of 20 December 1995[3], create an indispensable legal basis for ensuring the level of human rights protection prescribed by the Constitution of the Russian Federation, including the rights of national minorities, and for alleviating the fate of refugees and displaced persons as a whole, by guaranteeing them the necessary minimum of special rights and advantages. There is a substantial uncontrolled movement of populations in the northern Caucasus and the Far East. Amid the current economic difficulties, widespread poverty and large-scale unemployment in Russia, as well as the increase in crime, refugees and displaced persons are often perceived in a very negative way by the population. Both sides criticise the authorities for their inability to eliminate, not the consequences, but the causes of the forced exodus and the displacement of persons from their places of permanent residence. The Agreement on Assistance for Refugees and Displaced Persons, concluded by the member States of the Commonwealth of Independent States on 24 September 1993[4], is having little effect.

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[1] *Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 12, article 425.*

[2] *Vedomosti, of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 12, article 427.*

[3] *Rossyiskaya Gazeta, 1995, 28 December.*

[4] *Commonwealth Information Bulletin of the Council of Heads of State and the Council of the Heads of Government of the CIS, 1993, No. 4 (12), pp. 43-48.*

Legal protection of the rights of national minorities

Legal protection of the rights of national minorities is the duty of the State and the right of the national minorities themselves as well as of persons belonging to them. The Constitution of the Russian Federation stipulates that State protection of human and civil rights and freedoms in the Russian Federation shall be guaranteed and that everyone shall have the right to protect his/her rights and freedoms by all means not prohibited by law (Article 45, paras 1 and 2), including the right, in accordance with international treaties of the Russian Federation, to appeal to interstate bodies for the protection of human rights and freedoms if all available internal legal remedies have been exhausted (Article 46, para 3).

The protection of the rights of national minorities is one of the fields of activity of representative (legislative) and executive organs of State power of the Russian Federation and its constituent entities, of local government organs and officials and of the whole system of law enforcement agencies (judiciary, prokuratura, militia etc) within their areas of jurisdiction.

The President of the Russian Federation is the guarantor of the Constitution of the Russian Federation and of human and civil rights in the Russian Federation; he may use conciliatory procedures to settle disputes between the organs of State powers of the Russian Federation and those of its constituent entities (Article 80, para 2, and Article 85, para 1, of the Constitution of the Russian Federation), including disputes concerning the rights of national minorities.

Pursuant to Article 103, paragraph 1 (e) of the Constitution of the Russian Federation, the creation of a new institution under the State system is envisaged in Russia: a Commissioner for Human Rights. The draft federal constitutional law "On the Commissioner for Human Rights in the Russian Federation" was adopted at a first reading by the State Duma on 21 July 1994.

We presume that the Commissioner for Human Rights of the Russian Federation is expected to contribute to parliamentary monitoring and the provision of extrajudicial protection not just of human rights (on which the design of the above-mentioned federal constitutional law is based), but also of the special, collective rights of national minorities, including minority indigenous peoples and repressed peoples. We hope that this aspect of the issue will be reflected in the powers and other functions of the Commissioner for Human Rights.

Pursuant to paragraph 2 of Article 1 of the federal law "On the prokuratura of the Russian Federation" in the version of 17 November 1995[1], the Prokuratura of the Russian Federation is responsible for persecuting any cases of national discord and for ensuring the observance of human and civil rights by federal ministries and departments, by the representative (legislative) and executive organs of the constituent entities of the Russian Federation, by organs of local government, organs of military administration and surveillance organs as well as by the administrative bodies and managers of commercial and non-commercial organisations.

The courts - the Constitutional Court of the Russian Federation, general courts and arbitration courts - are required to play a particular role in the protection of the rights of national minorities. The Constitution of the Russian Federation stipulates that human and civil rights shall be

[1] *Collected Legislation of the Russian Federation, 1995, No. 44, p. 72.*

guaranteed by law (Article 18) and that everyone shall be afforded legal protection of his/her rights and freedoms (Article 46, para 1).

Amongst the powers of the Constitutional Court of the Russian Federation as defined by Article 125 of the Constitution of the Russian Federation and by Article 3 of the federal constitutional law "On the Constitutional Court of the Russian Federation", no direct reference is made to the protection of the rights of national minorities (there is scope for improvement of this law). However, the Constitutional Court of the Russian Federation ensures such protection indirectly in examining a wide variety of matters (in verifying the constitutionality of normative acts, in protecting the constitutional rights and freedoms of citizens in connection with individual complaints and so on). This is evidenced by several Constitutional Court decisions recognising the right of Cossacks to perform military service in special Cossack formations and units of the Armed Forces of the Russian Federation (decision of 15 September 1993)[1] as well as acknowledging the rights (advantages) of children whose parents were repressed during the years of totalitarianism[2]. In relation to the Osseto-Ingush conflict, the Constitutional Court of the Russian Federation recognised the unconstitutionality of provisions of a resolution of the Supreme Soviet of the North Ossetian RSS on the return of persons of Ingush nationality, not to their former places of residence, but to newly built settlements with a compact population of the said persons, with reference to a "public opinion" that cohabitation of citizens of Ossetian and Ingush nationalities is impossible (decision of 17 September 1993)[3]. The Constitutional Court of the Russian Federation recognised as unconstitutional the restrictions on electoral rights, during the elections to the republican parliament, for citizens of the Russian Federation of Ingush nationality who were forced to leave the Republic of North Ossetia-Alania and are temporarily living in the Republic of Ingushetia (decision of 24 November 1995)[4].

State unity, territorial integrity and the protection of the rights of national minorities

The costs of national policy during the years of totalitarianism, the disintegration of the USSR, "sovereignisation", the outbreak of aggressive separatism and the absolutisation of the principle of self-determination of nations and peoples have aggravated the problem of national relations in Russia, rendering urgent the task of preserving the State unity and territorial integrity of the Russian Federation at the same time as the effective safeguarding of the rights of national minorities in the spheres of language, education, culture, information, public self-government and so on, in conformity with the international commitments of the Russian Federation under the International Covenant on Civil and Political Rights, the Final Act of the CSCE, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Framework Convention on the Protection of National Minorities, the CIS Convention on the Safeguarding of the Rights of Persons belonging to National Minorities etc.

The Constitutional Court of the Russian Federation, in ruling on matters concerning the verification of the constitutionality of several normative acts of the Republic of Tatarstan

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[1] *Bulletin of the Constitutional Court of the Russian Federation, 1994, No. 6, pp. 2-11.*

[2] *Bulletin of the Constitutional Court of the Russian Federation, 1995, No. 2-3, pp. 51-56.*

[3] *Bulletin of the Constitutional Court of the Russian Federation, 1994, No. 6, pp. 18-25.*

[4] *Collected Legislation of the Russian Federation, 1995, No. 48, page 4692.*

(decision of 13 March 1992)[1] and of normative acts of the President and Government of the Russian Federation in connection with the settlement of the armed conflict in the Republic of Chechnya (decision of 31 July 1995)[2] as well as in other cases, has underlined that State integrity is one of the foundations of the constitutional order of the Russian Federation, an important condition of the equal legal status of citizens, regardless of their nationality and place of residence, and one of the guarantees of the rights of national minorities and the constitutional rights and freedoms of all citizens.

The consistent application of the constitutional provisions and of the whole body of ordinary legislation in Russia on the rights of national minorities in conformity with generally acknowledged international norms and standards helps to weaken the social basis for manifestations of nationalism, separatism and different kinds of political adventurism surrounding the problem of national minorities in Russia, to maintain the territorial integrity of the Russian Federation and to strengthen its State unity. The guarantors for this must be the whole world community and its international bodies and organisations (UN, Council of Europe, OSCE and others).

b. Territorial autonomy in Ukraine - The Case Of Crimea by Mr Serhiy HOLOVATY
Minister of Justice, Kyiv

I. Introduction

Similar to the events which took place in the former Yugoslavia, in particular in Bosnia, events unfolding in Crimea have for a long time been a detonator to a smouldering war, which has fortunately not yet broken out on the territory of Ukraine.

Crimea is a special part of the territory of Ukraine. Being the largest ex-Soviet resort area, Crimea is more concerned with integrating with Russia, in any case, if the restoration of the USSR is not possible.

Ex-officers of the Soviet Army and particularly those of the KGB, regarding themselves until today to be a part of the united system which is now temporarily disintegrated, are a destabilising factor in Crimea. The Russian Black Sea Fleet, which is economically, politically and administratively linked to Moscow, is of paramount importance there.

The pro-Russian political forces of Crimea are eager to tear Crimea away from Ukraine; as early as 1992 they gathered close to 300,000 signatures of those who favour the idea of holding a referendum on Crimea's independence.

Russian officials, for their part, escalated confrontation when the Verkhovny Soviet of Russia adopted the resolution of 23 May 1992 declaring the act of giving Crimea over to the territory of Ukraine in 1954 to be unlawful.

On 9 July 1993 the Verkhovny Soviet of Russia reaffirmed the status of Sebastopol as a Russian city. Attempts to expand the State sovereignty of Russia to this city are ongoing.

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[1] *Bulletin of the Constitutional Court of the Russian Federation, 1993, No. 1, pp. 40-57.*

[2] *Bulletin of the Constitutional Court of the Russian Federation, 1995, No. 5, pp. 3-79.*

What the Russian press predicted, against the background of all the developments in Crimea, and particularly those related to the restoration of the so-called Crimean Autonomous Soviet Republic in 1991, was either war between Russia and Ukraine or simply war in Ukraine.

The policy which Russia pursued in Chechenya was put forward by some as an example for Ukraine to emerge out of the crisis and to eliminate the Ukrainian-Russian face-off. In May 1994, a fairly influential Russian newspaper Argumenty i Fakty read: Russia has, after all, succeeded in overcoming the Chechen crisis by leaving Chechenya alone. Could Kyiv not have followed suit?

II. Historical background

The first settlers in Crimea, appearing in the 7th century B.C., were Greeks. In the 6th and the 5th centuries B.C., Greek colonies were established, the most famous being Khersones (near the city of Sebastopol) and Pantykapei (located where the city of Kerch stands today). In the 1st century A.D., the Crimean coast was occupied by Romans. In the middle of the 3rd century, Crimea was infiltrated by Goths. During the invasion of the Huns in the 70s of the 4th century, Crimea suffered devastation which caused further invasions of other nations. In the 7-8th centuries, the steppes of Crimea became part of the Khazar State, while in the middle of the 11th century, Polovtsians began to rule there. Until the middle of the 13th century, coastal Crimea was under Byzantine rule.

In the 980s, the Kyiv prince Volodymyr headed the campaign against Khersones, where he administered the rites of baptism.

In the 13th century, the steppes of Crimea were settled by Tatars, who began to reside there as early as the campaigns of Batyi. As a result of the battle for independence in the 15th century, Crimea broke away from the Golden Horde. In 1425 the capital of Crimea was moved to the city of Bakhchisarai.

In 1475, the entire coastal Crimea fell under the rule of Turkey. Turks managed to establish direct contacts with Tatars. In 1478 the Crimean khanate recognized its vassalage to Turkey.

In the 16-17th centuries, the Zaporozhian Cossacks fought heroically against the Crimean Tatars, who made devastating attacks on Ukrainian lands (particularly the Podillia and Kyiv regions).

In the 17th century, Crimea became the object of encroachments on the part of the Russian state. However, Turkey was standing in the way. As a result of war waged between Russia and Turkey in 1768 -74, Crimea proclaimed its independence from Turkey and on 9 April 1783 Crimea became part of Russia.

The colonial oppression of Crimean Tatars caused them to emigrate on a mass scale. Close to 300,000 persons left Crimea before 1790. The tsarist government attempted to settle colonists there. In the first half of the 19th century, 30,000 Germans, Bulgarians and other nationalities arrived in Crimea. Tatars continued to emigrate late into the 19th century; only 102,000 of them remained in Crimea. Brutal russification went on, and in the late 19th century, 70.8 per cent of the population was composed of Russians and merely 13 per cent of Tatars.

III. Crimean autonomy as part of the USSR

A. A part of the Russian Soviet Federative Socialist Republic

The Crimean peninsula was part of the Russian empire when the coup of October 1917 was carried out.

In the fall of 1917 the Soviet Narodnykh Komisarov (Council of People Commissars) appealed to all working Muslims of Russia and the East, declaring that Muslims of Russia and Crimean Tatars are granted the right to self-determination. Crimean Tatars began to exercise this right by forming the Crimean Democratic Republic proclaimed by Kurultai - the Congress of Crimean Tatar representatives held on 26 November - 13 December 1917 in the city of Bakhchisarai, where the national government - the Directorate - was elected and the national Constitution - the Fundamental Law of Crimean Tatars -was adopted. The Kurultai proclaimed Crimea's independence from Russia but did not break its ties with Ukraine.

However, the Soviet Narodnykh Komisarov of Russia could not be pleased with such a situation, as the foregoing proclamation was seen as a propaganda exercise. The self-determination of Crimean Tatars, for that matter, was called counter-revolutionary. In a bid to preserve Crimea as a part of the new Soviet empire and as a strategically important peninsula, the Bolshevik authorities of Crimea declared on 22 March 1918 the formation of the Soviet Socialist Republic of Tavrida, which was part of the Russian Soviet Federative Socialist Republic. The Republic of Tavrida, however, did not receive any international recognition or support from the population. Nevertheless, this had permitted the transportation of bread, grain and other products to Moscow and Petrograd in 1918-19.

The situation in Crimea was changing continuously. The reins of power were moving from Bolsheviks to White Guards and vice versa.

Crimea was not made part of the Russian Soviet Federative Socialist Republic at a legislative level until the rule of Soviet power was ultimately established. To eliminate the problem of national and territorial autonomy of the Crimean Tatars, the idea of Crimean territorial autonomy, for that matter, emerged once again. Pursuant to the resolution of the Central Executive Committee and the Soviet Narodnykh Komisarov of the Russian Soviet Federative Socialist Republic adopted on 18 October 1921, the Crimean Autonomous Republic was made part of the Russian Soviet Federative Socialist Republic. The overwhelming majority of the Republic's population was composed of Russians. Their number, both in terms of percentage and absolute figures, increased dramatically, whereas the indigenous Tatar population decreased. The reason for this was to be found in Russia's demographic policy, according to which Russian migrants were settled in Crimean cities and constituted 60 per cent of the residents. As was the case earlier on, Crimean Tatars were considered to be an unhealthy element; the elimination of practically all cultural figures of Crimean Tatars in 1930s provided a first indication of what was to come. The most tragic example of this genocide was the deportation of the entire nation: from April to June 1944, all Tatars were deported from Crimea.

Simultaneously, all possible measures were taken to annihilate everything preserving any memory in Crimea of the deportees. Between December 1944 and May 1948, the Presidium of the Verkhovny Soviet of the Russian Soviet Federative Socialist Republic issued a number of decrees, renaming the councils of villages, settlements, raions and regional centres of Crimea.

As a result of forceful deportation, mobilisation and drafts to serve in the Soviet Army, evacuation of the peaceful population as well as losses caused by the fascist occupation, the total population of the Crimean Autonomous Soviet Socialist Republic plunged down to a low 370,000 by autumn 1944. The Presidium of the Verkhovny Soviet of the USSR then issued a decree approving the initiative, by the Presidium of the Verkhovny Soviet of the Russian Soviet Federative Socialist Republic, to turn the Crimean Autonomous Soviet Socialist Republic into the Crimean Region as part of the Russian Soviet Federative Socialist Republic.

B. A part of the Ukrainian Soviet Socialist Republic

The Crimean Region is known to have been handed over to the Ukrainian Soviet Socialist Republic from the Russian Soviet Federative Socialist Republic in 1954. The analysis of documents pertaining to these issues shows that the legislative procedure for this transfer was performed in full compliance with the then effective Constitution of the USSR and was appropriately reflected in the Constitution of the Russian Soviet Federative Socialist Republic and that of the Ukrainian Soviet Socialist Republic.

For example, on 26 April 1954, with reference to Article 14 of the Constitution of the USSR which attributed the approval of changes of borders between the republics of the Union (point a) and the approval of forming new regions as part of the republics of the Union (point f) to the jurisdiction of the USSR in the person of its highest bodies of power and administration, the Verkhovny Soviet of the USSR adopted the Law of the USSR which approved the decree of 19 February 1954, issued by the Presidium of the Verkhovny Soviet of the USSR, on giving the Crimean Region to the Ukrainian Soviet Socialist Republic from the Russian Soviet Federative Socialist Republic. The decree was adopted due to a joint appeal of the Presidium of the Verkhovny Soviet of the Russian Soviet Federative Socialist Republic (Resolution on Giving the Crimean Region to the Ukrainian Soviet Socialist Republic from the Russian Soviet Federative Socialist Republic adopted by the Presidium of the Verkhovny Soviet of the Russian Soviet Federative Socialist Republic on 5 February 1954) and the Presidium of the Ukrainian Soviet Socialist Republic. In addition, this law introduced changes into Articles 22 and 23 of the Constitution of the USSR pursuant to which the Crimean Region was part of the Ukrainian Soviet Socialist Republic.

The legal status of Crimea was defined both in the Constitution of the Russian Soviet Federative Socialist Republic and that of the Ukrainian Soviet Socialist Republic. Pursuant to Article 18 of the 1937 Constitution of the Ukrainian Soviet Socialist Republic and the changes and amendments that followed as well as Article 77 of the 1978 Constitution of the Ukrainian Soviet Socialist Republic, the Crimean Region was a part of the Ukrainian Soviet Socialist Republic. Article 14 of the 1936 Constitution of the Russian Soviet Federative Socialist Republic was also appropriately altered in terms of removing the Crimean Region from the composition of the Russian Soviet Federative Socialist Republic in 1954.

All these facts testify that the act of handing over the Crimean Region to the Ukrainian Soviet Socialist Republic from that of the Russian Soviet Federative Socialist Republic was lawful. The formal and legal grounds for a review of the legal status of Crimea - as formerly stated in the resolution on the Legal Assessment of Decisions Taken by the Highest State Authorities of the Russian Soviet Federative Socialist Republic with Regard to Changes in the Status of Crimea in 1954, adopted by the Verkhovny Soviet of Russia on 21 May, 1992 -are absent.

IV. Crimean autonomy as a part of independent Ukraine

A. The restoration of the Soviet-type Crimean autonomy

Beginning in 1991, issues on the legal status of Crimea were repeatedly considered by the Verkhovna Rada of Crimea, but never ultimately resolved.

The legal status of Crimea as an autonomous Republic, being part of Ukraine, was defined by the Verkhovna Rada of Ukraine on 12 February 1991 by the Law of Ukraine on the Restoration of the Crimean Autonomous Soviet Socialist Republic, pursuant to which the Crimean Region acquired the status of an autonomous Republic, while the Crimean Regional Council of People's Deputies became the highest body of state power in Crimea with the status of the Verkhovny Soviet of the Crimean Autonomous Soviet Republic.

B. Autonomous Soviet Socialist Republic (A.S.S.R.) - an entity originating in conflicts

The autonomous Soviet Socialist Republic is a unique entity which possesses two main qualities:

(i) the A.S.S.R. has the nature of a State;

(ii) the A.S.S.R. has an autonomous legal status within the union Republic.

It is necessary to remember that A.S.S.R. became one form of Soviet-type statehood.

Autonomy is a widely approved form of self-determination and of state life of many nations and ethnic groups in the former Soviet Union. Under the USSR, there were 38 autonomous units of different type and character; among them: 20 autonomous republics, 8 autonomous regions and 10 autonomous districts. At the same time, there were several small nations in the former Soviet Union which had not yet formed their statehood on the basis of self-determination.

The following is most relevant to the problem of the restoration of earlier abolished autonomies for Crimean Tatars in Ukraine.

The most complex, most disputable and most undiscovered is the problem of the sovereignty of the A.S.S.R. On the one hand, A.S.S.R. is a republic; therefore it is a State. If it is a State, it should possess State sovereignty. On the other hand, the A.S.S.R. is an autonomous part of another State of a union Republic.

The question is as follows: is it possible for one nation state to be an autonomous part of another nation State ? If it is possible, then one more question evolves: what is the relationship between the State sovereignty of an autonomous State and that State in which an autonomous State is included?

Unfortunately, Soviet law did not provide a clear answer to these questions. Moreover, the absence of a strict legal regulation of the status of a Soviet autonomous republic is still the origin of a number of serious conflicts, particularly in the post-Soviet period.

Soviet policy on the issue of autonomy also shows that the notion of an autonomous Soviet republic was often used in order to create tension in different regions of the Soviet Union, with the aim of keeping the situation under control and preventing any attempts to secede from the Soviet Union.

The Soviet doctrine is presented by three standpoints on this issue:

(i) some academics consider that an autonomous republic is not a sovereign State, and thus it does not possess State sovereignty;

(ii) another group of scientists considers that the A.S.S.R. has some elements of State sovereignty, some sovereign rights or exclusive powers, similar to those of a union republic;

(iii) according to a third group of academics, A.S.S.R. is a sovereign State which possesses State sovereignty of a special level with a limited scope of powers.

The Soviet autonomous republic was not a territorial unit (like regions or districts). The Soviet autonomous republic was a specific form of statehood, which was created in regions of constant and compact inhabitation of certain nations within the territories which historically belonged to these nations.

The division of all ex-Soviet republics into so-called union republics and autonomous republics served to fix inequality of nations and peoples in the Soviet State. Autonomisation of many nations in the Soviet federation deprived these nations of a sovereign and wilful resolution of their status.

Soviet autonomous republics were created on a national basis. Thus, each nation creating an autonomous republic in the Soviet federation had the right to self-determination on the basis of national sovereignty. And there should not be any difference between those nations that created the union republic and those that created the autonomous republic. The only exception was the Crimean Autonomous Soviet Socialist Republic, restored as part of Ukraine.

C. The problem of defining the legal status of Crimea after the restoration of autonomy (1992-1995)

The Verkhovna Rada of Ukraine introduced appropriate changes into the Constitution of Ukraine (Article 75-1) and adopted the Law of Ukraine of 29 April 1992 on the Status of the Autonomous Republic of Crimea, which legally established the constitutional status of Crimea as an autonomous republic, which addresses the issues of its competence independently, being part of Ukraine.

Since the restoration of Crimean Autonomy, the Verkhovna Rada repeatedly adopted resolutions on the status of Crimea which were contradictory to the Constitution and other Laws of Ukraine. For example, on 4 September 1991 the Verkhovna Rada of the Crimean Autonomous Soviet Socialist Republic adopted the Declaration on Crimea's State Sovereignty which came in disagreement with the Constitution and the Declaration on the State Sovereignty of Ukraine of 1990.

On 26 February 1992, the Law of the Crimean Autonomous Soviet Socialist Republic on the Republic of Crimea as a Formal Name of the Democratic State of Crimea was adopted, which did not correspond to the name mentioned in the Constitution of Ukraine.

On 5 May 1992 the Verkhovna Rada of the Republic of Crimea adopted the Act on Proclaiming State Independence of the Republic of Crimea and the resolution on the Act of Proclaiming the State Independence of the Republic and on Holding a Crimean-Wide Referendum which virtually declared Crimea's breakaway from the composition of Ukraine.

On 6 May 1992 during its seventh session the Verkhovna Rada of Crimea adopted the Constitution of the Republic of Crimea, which virtually defined the status of the Republic of Crimea as an independent State. The Republic of Crimea was proclaimed as a legal and democratic State fully exercising its rights and power on its territory as well as all other authority, except that which it voluntarily delegates to Ukraine (Article 1).

On 30 June 1992, in order to specify the status of the Republic of Crimea and to remove contradictions from the legislation, the Verkhovna Rada of Ukraine adopted the Law on Making Changes and Amendments in the Law of Ukraine on the Status of the Autonomous Republic of Crimea which in its new wording was named on the Division of Authority Between the Bodies of State Power of Ukraine and those of the Republic of Crimea. Simultaneously, the Verkhovna Rada of Ukraine adopted the resolution envisaging that this Law will not be effective until the Verkhovna Rada of the Republic of Crimea brings the Constitution and the legislation of the Republic of Crimea into conformity with the Constitution and laws of Ukraine. What should be pointed out here is that these changes were not made and, therefore, the Law of Ukraine on the Division of Authority Between the Bodies of State Power of Ukraine and those of the Republic of Crimea failed to become effective.

Settling the issue of the status of the Republic of Crimea became much more complicated because of the Law on the Restoration of Constitutional Foundation of Statehood in the Republic of Crimea, adopted by the Verkhovna Rada of the Republic of Crimea on 20 May 1994. The Law restored the effectiveness of the Constitution of the Republic of Crimea in the wording of 6 May 1992. The decision taken by the Verkhovna Rada, which was actually aimed at Crimea's breakaway from the composition of Ukraine, broke Ukraine's territorial integrity and State sovereignty, and was contradictory to generally accepted principles of international law.

The situation in Crimea was a cause of deep anxiety and concern both in Ukraine and in the international community. The autonomous area continued the policy of ignorance and negligence as far as the requirements of the Constitution and the laws of Ukraine were concerned. Given the situation, the Verkhovna Rada of Ukraine adopted the resolution on the Political and Legal Situation in the Autonomous Republic of Crimea of 22 September 1994, committing the Verkhovna Rada of the Autonomous Republic of Crimea to bring the Constitution and the laws on autonomy into conformity with the Constitution and the legislation of Ukraine prior to 1 November 1994 and with the resolution of 17 November 1994 on Compliance with the Resolution of the Verkhovna Rada of Ukraine "on the Political and Legal Situation in the Autonomous Republic of Crimea", which repealed those legal acts which were contradictory to the Constitution and the laws of Ukraine adopted by the Verkhovna Rada of the Republic of Crimea.

Due to the fact that the Verkhovna Rada of the Autonomous Republic of Crimea did not comply with the resolutions on bringing the Constitution and laws of the Autonomous Republic of Crimea into line with the Constitution and laws of Ukraine adopted by the Verkhovna Rada of Ukraine on 22 September and 17 November 1994, the purpose of which was to ensure the application of the Constitution and the laws of Ukraine to the whole of its territory and to protect the state sovereignty of Ukraine, the Verkhovna Rada of Ukraine adopted the Law on Repealing

the Constitution and some laws of the Autonomous Republic of Crimea of 17 March 1995. This repealed the Constitution of the Autonomous Republic of Crimea adopted by the Verkhovna Rada of the Autonomy on 6 May 1992 with the following changes and amendments as well as laws of the Autonomous Republic of Crimea on the Election of the President of the Republic of Crimea of 17 September 1993, on the President of the Republic of Crimea of 14 October 1993, on the Restoration of the Constitutional Foundation of the Statehood in the Republic of Crimea of 20 May 1994, the constitutional law of the Autonomous Republic of Crimea on the Constitutional Court of the Republic of Crimea of 8 September 1994 and the Law of the Autonomous Republic of Crimea on the Election of Deputies and Heads of Councils of Villages, Settlements, Raions, Cities and Districts of 18 January 1995 with changes and amendments of 10 March 1995 because of their being contradictory to Articles 31, 70, 71, 75-1, 77, 112, 149, 150 of the Constitution (Fundamental Law) of Ukraine.

The resolution concerning the implementation of this law says that the status of the Autonomous Republic of Crimea shall be defined only by the Constitution and laws of Ukraine prior to the adoption of the new Constitution of the Autonomous Republic of Crimea.

On 17 March 1995 the Verkhovna Rada of Ukraine adopted the Law on the Autonomous Republic of Crimea, which defined its status as an administrative and territorial autonomy in the composition of Ukraine.

Article 59 of the Constitutional Accord between the Verkhovna Rada of Ukraine and the President of Ukraine on the Fundamental Principles of Organisation and Functioning of the State Power and Local Self-Government in Ukraine Pending the Adoption of the new Constitution of 8 June 1995 defined that the Autonomous Republic of Crimea is an administrative and territorial autonomy in the composition of Ukraine. The Autonomous Republic of Crimea independently addresses issues which fall under its jurisdiction as stipulated by the Constitution and laws of Ukraine.

Article 77 of the Constitution of Ukraine defines the status of the city of Sebastopol as a city of republican subordination.

Pursuant to Part II of Article 5 of the Law of Ukraine on the Autonomous Republic of Crimea, the city of Sebastopol is an administrative and territorial unit of general state subordination and is not a part of the Autonomous Republic of Crimea. The status of the city of Sebastopol is defined by the laws of Ukraine.

There are no legal grounds to establish another status for the city of Sebastopol, such as a Russian legal one. The resolution on the Status of the City of Sebastopol defining the Russian legal status of this city and its part as principal base of the Black Sea Fleet of the Russian Federation adopted by the Verkhovny Soviet of the Russian Federation on 9 July 1993 is therefore devoid of any legal effectiveness and consequences.

D. The draft Constitution of the Autonomous Republic of Crimea of 1 November 1995

On 1 November 1995 the Verkhovna Rada of the Autonomous Republic of Crimea adopted a new draft Constitution which was submitted to the Verkhovna Rada of Ukraine.

Conceptually, the draft was elaborated as the Constitution of a sovereign State with all parts pertaining to it: its official name of Republic of Crimea (Article 1), the principle of state power

division (Article 5), independent legislative (Part 21), executive (Part 22) and judicial (Part 24) branches of power, the direct form of effectiveness of the Constitution of the Republic of Crimea (Article 4), the citizenship of the Republic of Crimea (Article 5), State and official languages (Article 6), its territorial division proper (Part 2), institution of protecting human rights and freedoms (Section III), system of local self-government proper (Part 23) and State symbols (Section 2).

Respectively, the draft relies on principles and numerous formulations which are totally inconsistent with the main principles of the Constitution of Ukraine as a unitary State and the provisions of the Constitutional Accord between the Verkhovna Rada of Ukraine and the President of Ukraine on the Fundamental Principles of Organisation and Functioning of the State Power and Local Self-Government in Ukraine Pending the Adoption of the new Constitution of 8 June 1995 and the Law of Ukraine on the Autonomous Republic of Crimea. Thus, making any compromising correction, changes or amendments to the draft is impossible. Assuming there is even a chance (theoretical rather than practical) of removing all provisions contradicting the constitutional order of Ukraine from the draft and of leaving its structure unchanged, the renewed attempts to fill the Constitution of the Autonomy with a separatist content causing more conflicting situations and insecurity for Ukraine, would still be inevitable.

The fact that most members of parliament of the Verkhovna Rada of the Autonomous Republic of Crimea are consciously not willing to establish the status of autonomy within the legal limits of Ukraine and methodically attempt to adopt their own Constitution which is not only contradictory to both the Constitution and laws of Ukraine but is also inconsistent with the international practice of constitutionalism (one unitary State cannot contain two sovereign States and two constitutions) - is an element of permanent destabilisation standing in the way of a stable Crimea and touching off tensions in Ukraine's relations with other states and international organisations. This situation poses a serious threat to the national security of Ukraine.

With regard to the national interests of Ukraine, the Ministry of Justice of Ukraine came to the conclusion that the legal status of the Crimean Autonomy can be established through the adoption of the Constitutional Law of Ukraine on the Autonomy of Crimea (the version of the Statute of Crimea established by the law of Ukraine). The Article on a Special Status of Crimea was proposed to be included in the draft of the Constitution of Ukraine in the following wording:

> "Crimea is a part of Ukraine with a special autonomous status defined by the Constitutional Law of Ukraine on the Autonomy of Crimea (version -Statute of Crimea established by the law of Ukraine)."

V. The ethnopolitical situation in Crimea

At the beginning of the 1990s, the peninsula had a population of 2.4 million people of various ethnic origins. Five of the ethnic groups comprised over 10,000 members. The ethnic majority was represented by Russians (67% of the total population); one-quarter (25,7%) by Ukrainians; and the rest by Crimean Tatars, Belorussians and Jews. The Russian language was the mother tongue for the vast majority of Crimean residents (82,6%), but for only half of Crimean Ukrainians (52,7%).

The actual ethnopolitical situation in Crimea is characterised by the existence of tensions on three levels:

- within Crimean society (between ethnic communities as well as between local administration and Crimean Tatars);

- within Ukraine (on the official and unofficial political levels between Simferopol and Kyiv as well as between pro-Russian separatists and Ukrainian radical nationalists);

- between Russia and Ukraine (on the official and unofficial levels).

VI. The problem of Crimean Tatars

Though not having been an autochthonous population, Crimean Tatars are a united and large ethnic group of the southern part of Ukraine possessing its own centuries-old history and a national development on these lands.

In the early 1920s, the Crimean Tatars were 164,200 in number and constituted 25,9% of the peninsula's population. The peculiarity of the ethnic situation in Crimea was that the Slavic population (Russians and Ukrainians) considerably outnumbered the Tatars and made up 51,5% of the total population, whereas the others (Jews, Greeks, Armenians, Germans, Bulgarians,etc...) were not much more numerous (23,6%) than the Slavic population. Their interconnected national interests and difficult social and economic situation resulted in an extremely complicated and contradictory ethnopolitical situation in Crimea in the period between the wars. During that period, however, the proportion of Crimean Tatars in the peninsular population diminished greatly due to the growing number of Russians and Ukrainians. In 1939, Crimean Tatars made up only 19,4% of its population, whereas Russians made up 49,6%, Ukrainians 13,7%, and others 17,3 %. Abrupt changes in the demographic situation were the cause of escalated tensions in interethnic relations in Crimea.

Political persecution suffered by the Crimean Tatars very much reminiscent of the battle against national-deviationism in Ukraine, began as early as 1928 because of the so-called Veli Ibraimov case. Difficulties of forceful collectivisation and the battle against Tatar nationalism triggered off repression on a large scale in the second half of the 1930s, thereby only adding to the Crimean Tatars anti-Soviet attitude and stimulating some of them to collaborate with the authorities of the German fascist occupation during World War II.

Notwithstanding the fact that less than 10% of Crimean Tatars collaborated with the occupants, on 11 May 1944 almost the entire 200,000-strong nation was subject to repression and deportation to Siberia and Central Asia. In June 1945, the Crimean Autonomous Soviet Socialist Republic was turned into the Crimean Region and in 1954 it was handed over to Ukraine.

Dispersed in Kazakhstan, Uzbekistan, Tadzhikistan, the Trans-Ural region and Northern Caucasus, for all their tragic hardship which lasted for half a century after deportation, the Crimean Tatars managed to preserve their national consciousness, ethnic integrity and the desire to go back to their historical homeland.

The reversed migration to Crimea began as late as 1989 and today close to 300,000 Crimean Tatars have returned.

VII. Legal protection of the rights of the national minorities in Ukraine

A. Protecting the rights of the Russian national minority

In protecting the personal rights of national minorities, the Ukrainian State proceeds from the fact that they are an integral part of generally accepted human rights. The effective legislation guarantees the national minorities residing in Ukraine, including Russians, the right of free development.

Pursuant to Article 32 of the Constitution of Ukraine, citizens of Ukraine are equal in law, regardless of their extraction, social and property status, racial and ethnic origin, sex, education, language, religion, business and occupation, residence and other circumstances. The equality of all citizens of Ukraine is ensured in all spheres of economic, political, social and cultural life.

Pursuant to Article 34 of the Constitution of Ukraine, citizens of Ukraine, regardless of their racial and ethnic origin, enjoy equal rights. Any kind of restriction of rights, be it direct or indirect, establishing direct or indirect advantage on a racial or an ethnic basis as well as any propaganda of racial or ethnic exclusiveness, feud or hatred are punishable by law. These provisions are reflected, for example, in the Laws of Ukraine on All-Ukrainian and Local Referenda, on the Election of People's Deputies of Ukraine, on Making Changes and Amendments in the Law of the Ukrainian Soviet Socialist Republic on the Election of the President of Ukrainian Soviet Socialist Republic, on the Election of Deputies and Heads of the Councils of Villages, Settlements, Raions, Cities, Districts and Regions, envisaging that any direct or indirect restriction of rights of citizens of Ukraine, regardless of their racial and ethnic origin, is prohibited.

Article 7 of the Law of Ukraine on Public Associations prohibits any refusal to accept or to dismiss a person from a political party on the basis of his or her ethnic origin.

The Law of the Ukrainian Soviet Socialist Republic on Languages in the Ukrainian Soviet Socialist Republic envisages the use of Russian and other languages along with Ukrainian in all areas of life.

The Declaration of Rights of Nationalities of Ukraine adopted by the Verkhovna Rada of Ukraine on 1 November 1991 and put into effect by the Law of Ukraine on National Minorities in Ukraine adopted on 25 June 1992, establish equality and guarantees of political, social, economic and cultural rights and freedoms for all nations, national groups and citizens residing on the territory of Ukraine.

This brief analysis of the effective legislation of Ukraine gives us reason to believe that the Russian national minority in Ukraine is guaranteed a whole spectrum of political, social, economic and cultural rights and freedoms.

B. The problem of protecting the rights of indigenous peoples

The issue of the status of nations residing in Crimea is one of the most critical. Which national groups residing in Crimea can be granted the status of indigenous nations? Crimean Tatars enjoy a special status among the deportees, since Crimea is their historical homeland. How might the status of Armenians, Greeks, Germans, Bulgarians, Krymchaks and Karaites be interpreted? Armenians, Greeks, Germans and Bulgarians are national minorities, as they represent single nations possessing their own statehood outside Ukraine. In regard to the Karaites and Krymchaks, the latter are true historical ethnoses of the Crimea. Today, however,

they have practically lost their culture and language, and some of them (predominantly youth) practically do not identify themselves with the aforesaid nationalities. The number of Krymchaks is close to 500,000, Karaites, 600,000 and Crimean Tatars, 300,000.

The effective legislation of Ukraine does not embody the notion of indigenous nation. To solve the problems of indigenous peoples and to protect their rights, the Ministry of Justice submitted to the Government of Ukraine proposals on studying the status of indigenous nations, their representative bodies, with consideration for their specific interethnic relations on the Crimean peninsula, and the practice of countries with a developed democracy in solving similar problems related to legal relations.

C. The problem of protecting the rights of Crimean Tatars

Pursuant to the Law of Ukraine on National Minorities in Ukraine, Crimean Tatars enjoy the same status as Germans, Bulgarians, Armenians and other national minorities residing in Crimea and Ukraine as a whole. However, Crimean Tatars themselves accentuate the need to recognise their status of the indigenous nation of Crimea and to legitimise the Medjlis their representative body.

Resolution No. 636 on Measures to Solve Political Legal, Socio-Economic and Ethnic Problems in the Autonomous Republic of Crimea, adopted by the Cabinet of Ministers on 11 August 1995, testifies to the fact that the State has in principle reviewed its policy, as far as this problem is concerned. The resolution covers the most delicate problems of Crimean Tatars. Among them are:

- the legal status of the Medjlis of Crimean Tatars;

- the representation of Crimean Tatars in the Verkhovna Rada of Ukraine and Crimea;

- the organised return of deported nations to Crimea, their resettlement and establishment;

- granting repatriates citizenship of Ukraine, etc.

To comply with this resolution, the Ministry of Justice of Ukraine formed a working group elaborating proposals on defining the status of Medjlis in conjunction with persons who represent the Government of the Autonomy, the Kurultai faction of the Verkhovna Rada of the Autonomous Republic of Crimea, and a number of ministries and departments of Ukraine.

The new wording of the draft Law of Ukraine on Citizenship of Ukraine prepared by the working group formed by the Commission of the Verkhovna Rada of Ukraine on Human Rights, National Minorities and Interethnic Relations stipulates that the issue of confirming the citizenship for persons and members of their families, who, as a result of unlawful repression, including deportation, were moved out of Ukraine, be resolved.

c. The Rights and autonomy of the national minorities in Slovenia by Mr Anton BEBLER Permanent Representative of the Republic of Slovenia to the UN Office in Geneva

Independent since 25 June 1991, the Republic of Slovenia has accorded various aspects of autonomy to two traditional national minorities on its territory. At the request of these groups, the new Slovenian Constitution of 1991 replaced the term "national minority" with the term "ethnic community", in order to avoid possible negative connotations of the term "minority". These groups are the Hungarian and the Italian ethnic / national communities. Most of their

members have lived for centuries and are at present concentrated in two extremities of Slovenia's territory, close to the borders with Hungary and Italy. The present combined numerical strength of the two communities is about 12,000 people or close to 0.6 percent of the total population of the Republic of Slovenia. The Hungarian community is roughly two and a half times more numerous than the Italian one, but is on the average more rural in habitation and more peasant in social composition, with relatively fewer intellectuals, civil servants and entrepreneurs. The Italian community is better equipped with secondary and professional schools and with printed and electronic media in the Italian language.

These two groups are the only ones who were accorded the constitutional status of "autochthonous ethnic communities". This official designation, setting them aside from other groups of ethnic non-Slovenes in the Republic of Slovenia, refers to several objective sociological and historical facts. These two communities are formed by descendants of the culturally distinct and spatially concentrated populations which have maintained for many centuries their sedentary habitat in rural and urban areas on the present State territory of Slovenia. By this combination of characteristics the members of the Hungarian and Italian communities differ from the partly migrant and geographically more dispersed Roma (of Indian origin), from the spatially dispersed and much smaller groups of remaining German - speakers and Jews, as well as from the much more numerous population of Bosnian Moslems, Croats, Serbs, Montenegrians, Kosovar Albanians, Macedonians and nationally undefined or mixed "Yugoslavs". The latter groups were formed mostly by relatively recent immigrants - workers, former Yugoslav federal officials, entrepreneurs and some members of liberal professions who found employment and settled mostly in Slovenian industrial towns during the last several decades of Yugoslavia's existence. Sociologically and culturally they are very similar to the corresponding groups of mostly urban and geographically dispersed "guest workers" from the Balkans in Germany, Austria, France, Switzerland etc. A majority of them, about 180,000 people, or nine percent of Slovenia's total population, were individually granted Slovenian citizenship if they were permanent residents in Slovenia before June 1991. The occasionally raised solicitations from these groups to be accorded the collective rights of national minorities (including separate schools) were only partly met in the case of Roma (Gypsies). The latter obtained official recognition as a distinct "ethnic group", instruction in their language in several primary schools and State support for their cultural activities.

The recognised Hungarian and Italian ethnic communities enjoy the status of political and cultural autonomy in nationally mixed areas in Slovenia, falling however short of territorial autonomy. Their members enjoy both collective and individual rights. Some rights are realised mostly as collective, others mostly as individual rights. Some of the rights accorded to the two communities and their members are territorially defined (by the statutes of communes and municipalities) while others are extra territorial in nature. For instance, the right to vote for the two constitutionally guaranteed deputies of the National Assembly out of the total 90 could be enjoyed by the registered members of the two communities irrespective of whether at the time of an election they reside in the nationally mixed areas, elsewhere in Slovenia or abroad (in the latter case they vote by mail). Apart from this constitutionally guaranteed representation in the Parliament, the most important political right of the two minorities concerns their own constitution as autonomous and self-governing communities. For electoral purposes these communities act as political parties in legal matters as public corporations and non - profit organisations.

Many of these rights were accorded well before Slovenia's declaration of independence under the constitutional and legal system of the preceding State -the "Socialist Federal Republic of

Yugoslavia" (SFRY). It should be added that these rights were further expanded in the Constitution of the "Socialist Republic of Slovenia" - then a constituent federal unit. Furthermore, the corresponding provisions in Slovenian laws, municipal statutes, other regulations (for instance, concerning educational institutions, mass media, public display of national symbols etc.) and more importantly their application in Slovenia have been more liberal and generous towards minorities than in the other federal units, notably in Serbia and Croatia. The SFRY diplomacy had been for decades active in promoting enhanced international protection of national minorities. This zeal had visibly evaporated in the late 1980s when the leadership of the then largest federal unit - Serbia - started its crackdown on the political autonomy and other rights of the Albanian minority in the province of Kosova. Nevertheless, as far as the Hungarian and Italian communities were concerned, the SFRY had followed until its breakdown most recommendations contained in the UN "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities" even before it was adopted by the General Assembly in December 1992. Slovenia, already a UN member, of course voted for this Resolution and implemented all its recommendations.

In its Articles one to six the Declaration states the following obligations of UN members:

- to protect the existence of national minorities and encourage conditions for the promotion of their identity;

- to adopt appropriate legislation and other acts;

- to honour the following rights of minorities:

  • to enjoy their own culture and to publicly use their language without interference or discrimination;

  • to participate effectively on the national and regional levels in cultural, religious, social, economic and public life;

  • to establish and maintain their own associations, free and peaceful contacts with other minorities as well as with citizens of States to which they are related;

  • to enjoy their rights both individually and collectively;

  • to exercise effectively all their human rights in full equality before the law;

  • to develop their culture, language, tradition and customs;

  • to learn their mother tongue and have instruction in it;

  • etc.

Slovenia's compliance with these norms and with the stipulations in the 1995 European Framework Convention on the Protection of National Minorities can be seen in the selection of constitutional and other legal provisions at present valid in the Republic of Slovenia, which are presented in Annex I. The rights of the Italian community (and the equal rights of the Hungarians) in Slovenia are summarised in column one of the table presented in Annex II. These are:

- the protection of national minorities regardless of their numerical strength;

- guaranteed political representation in the national parliament and in local administration;

- the right of a veto on any motion regarding fundamental problems of the minority;

- the recognition of the minority language as an official language, the right to use it in parliament, in local administration, with administrative authorities and with the courts;

- the authorities' obligation to use the minority language during official celebrations, in public notices and inscriptions as well as to display the minority flag:

  • obligatory bilingual official forms, identity cards, topographic inscriptions, notices and inscriptions by enterprises, craftsmen and self - employed persons;

  • the minority organisations' veto right on decisions made by local institutions when affecting that minority;

  • radio and television broadcasts in the minority language;

  • obligatory teaching of the minority's language in schools of the majority;

  • nursery, kindergarten, primary and secondary education for the minority in the minority language;

  • financial support for minority periodicals, dailies and weeklies, and for cultural activities.

It is clear from this enumeration that the two recognised ethnic communities in Slovenia are beneficiaries of very considerable public protection and assistance. In some respects their members are in a better position than the Slovenian majority. For instance, they are over-represented in the Slovenian parliament. In addition to the reserved seats (1.8 percent of the total) they vote for the second time and their representatives are usually elected also on party tickets. The mayor of the largest coastal town Koper / Capodistria comes from the ranks of the Italian minority. The two communities are also not subjects of discrimination or of intended or publicly promoted assimilation. On the other hand, every small minority living in nationally mixed areas faces the problems of attrition and gradual assimilation due to intermarriages, better employment opportunities elsewhere, advantages of university education, specialised training, careers, career advancement in many professions etc. which are obtainable only outside their territorially restricted habitat and in the majority language (This is true of even such a well-protected European minority as the Rheto - Romans in the host country of this conference). Coupled with low birth rates and generally small families, these long-term social processes led to a decline over the last decades in the Hungarian community's absolute numerical strength and its share in Slovenia's total population (11.019 people and 0.75 percent in 1953 as compared with 8.503 and 0.43 percent in 1991). The process of assimilation is still faster among the members of the small Slovenian minority in Hungary, whose position is considerably less favourable than that of the Hungarian community in Slovenia.

The present Italian community of about 3.000 people represents only a fraction of what used to be a relatively sizeable community of Italian speakers living mostly in the coastal area of today's Slovenia. A numerically, economically and intellectually very strong minority under the long Austro - Hungarian rule, it became by 1941 under Italian rule a regional majority in Istria. This turnabout was due to two decades of brutal fascist policies of national repression, expulsion of the Slavs, "ethnic cleansing" and forced italianisation which were applied also in the area of the Italian minority's present habitat in Slovenia. In 1947 the peace treaty with Italy allotted most of the Istrian peninsula to the zone "B" of the tampon "Free Territory of Trieste" (FTT). This zone was controlled then by the Yugoslav army. In 1954 the "FTT" was dissolved by agreement and the line of demarcation between the two zones became an international frontier between Italy and Yugoslavia. Following these events, a great majority of the local Italians, Italianites (of Slavic and other origin), many thousands of Slovenes and of nationally undefined bilingual "Istrians" used their legal right from the peace treaty to "opt out" of the Yugoslav controlled part of Istria. In several waves they moved to Italy and elsewhere (also overseas) and claimed Italian or other citizenship. The mass exodus of the optanti (or esuli as they were called in Italy) from "godless communist Yugoslavia" was actively (and unwisely) encouraged by the Italian authorities, Italian radio and the Roman Catholic bishop of Trieste. After this huge drain, the numerical strength of the remaining Italian minority became stable. From the late 1950's it has grown slowly, particularly in recent years, no doubt stimulated by increased Italian economic presence in the region and by the additional support and advantages provided for the minority by the Italian government. The enrolment into Italian minority kindergartens and schools went up as a number of non Italian families (Slovenian and other South Slav) started sending their children to them.

Despite the fact that the position enjoyed by the Italians in Slovenia differs substantially from the less favourable treatment granted to Slovenes in Italy (see annex II), previous Italian governments blocked the completion of the association treaty between Slovenia and the European Union in order to force the Slovenes to confer more advantages on their Italian minority. After a couple of years of tension, the new Italian government dropped the conditions for bilateral reasons, and the treaty could eventually be signed in June 1996.

ANNEX I

A selection of principal constitutional and legal provisions concerning special collective rights of the Hungarian and Italian minorities in the Republic of Slovenia

1. Basic Provisions

The Basic Constitutional Charter on the Independence and sovereignty of the Republic of Slovenia

III

In accordance with the Constitution of the Republic of Slovenia and with international agreements binding upon it from time to time, The Republic of Slovenia guarantees the protection of human rights and fundamental freedoms of all persons within the territory of the Republic of Slovenia, irrespective of nationality and without any discrimination whatsoever.

Italian and Hungarian ethnic communities and persons thereof living in the Republic of Slovenia are guaranteed all rights under the Constitution of the Republic of Slovenia and all rights recognised by international agreements binding on the Republic from time to time.

Article 5

Within its own territory, Slovenia shall protect human rights and fundamental freedoms. It shall uphold and guarantee the rights of autochthonous Italian and Hungarian ethnic communities. It shall attend to the welfare of the autochthonous Slovenian minorities in neighbouring countries and of Slovenian emigrants and migrant workers abroad and shall promote their contact with their homeland. It shall assist in the preservation of the natural and cultural heritage of Slovenia in harmony with the creation of opportunities for the development of civilised society and cultural life in Slovenia.

Slovenians not holding Slovenian citizenship shall enjoy special rights and privileges in Slovenia. The nature and extent of those rights and privileges shall be determined by statute.

Article 64

The autochthonous Italian and Hungarian ethnic communities and their members shall be guaranteed the right to freely use their national symbols and, in order to preserve their national identity, the right to establish organisations, foster economic, cultural, scientific and research activities, as well as activities associated with mass media and publishing. These two ethnic communities and their members shall have, in accordance with the law, the right to education and schooling in their own languages, as well as the right to plan and develop their own curricula. The State shall determine by statute those geographical areas in which bilingual education shall be compulsory.

2. Areas Inhabited by the Italian Ethnic Community

Nationally mixed areas are determined by the statutes of communes, for instance, of the Municipality of Izola.

Extract from the Statute of the Municipality of Izola

Article 2, Paragraph 2

Nationally mixed areas shall include the town of Izola and the villages of Dobrava pri Izoli, Jagodje, Livade, and Polje pri Izoli. In this territory the Italian language shall be equal to Slovenian in public and social life. All public and other signs in this territory must be correctly written in both languages.

Article 97

In the local communities in the nationally mixed areas, the bodies of local self-government must assure the representation of the citizens of the Italian national minority.

3. Use of Language and National Symbol

The Constitution of the Republic of Slovenia (1991)

Article 11

The official language of Slovenia shall be Slovenian. In those areas where Italian or Hungarian ethnic communities reside, the official language shall also be Italian or Hungarian.

Article 61

Each person should be entitled to freely identify with his national grouping or ethnic community, to foster and give expression to his culture and to use his own language and script.

Article 62

In order to give effect to his rights and obligations, and in all dealings with State bodies and other bodies having official functions each person shall have the right to use his own language and script in such a manner as shall be determined by statute.

The Law on the Register of Births and Deaths (1987)

Article 30, Paragraph 2

In areas where members of Italian or Hungarian national minorities reside the registrar shall also be obliged to issue reports and certificates from the register of births and deaths in the Italian or Hungarian language.

The Law on Personal Names (1987)

Article 3

The personal names of members of the Italian or Hungarian national minorities shall be recorded in the Italian or Hungarian script and form, unless otherwise decided by the members of these national minorities.

Regulations on Determining the Names of Settlements and Streets and the Marking of Settlements, Streets and Buildings (1980)

Article 25

In areas where members of the Italian or Hungarian national minorities live alongside members of the Slovenian nationality the names of settlements and streets on signs shall be written in both languages. The Slovenian name shall be above and the language of the minority below. Both names shall be the same size.

The Law on Regular Courts (1977)

Article 18

The language used by courts shall be the Slovenian language.

In courts in areas in which the law or the statute of the socio - political community determines equality of the Italian or Hungarian language, proceedings shall also be held and decrees issued in the Italian or Hungarian language, if the party concerned uses the Italian or Hungarian language.

When a higher level court decides on legal matters in cases in which the court of the lower level also used the Italian or Hungarian language, it shall also issue decrees in Italian or Hungarian translation.

If, in arriving at its decision in accordance with the preceding paragraph, a higher level court holds proceedings, it shall apply the provisions of the second paragraph of this article.

Each person shall have the right to use his own language and script in court proceedings, in accordance with the law. The court shall be obliged to provide material and inform him of its work in his own language, making use of the services of court interpreters.

Law on the Office of Public Prosecutor (1987)

Article 11

Offices of public prosecutors in areas where the law or the statute of the socio-political community determines equality of the Italian or Hungarian language shall also use the Italian or Hungarian language in their work.

Extract from the Statute of the Municipality of Izola

Article 156

Administrative bodies and other bodies who issue official acts in legal proceedings must issue these acts to citizens of the Italian national minority in both languages, whereby both acts shall be understood as originals.

Article 159

Marriages between citizens of the Italian national minority shall be conducted in the Italian language.

Marriage between citizens of both nationalities shall be held in the Slovenian and Italian language, if the marriage partners cannot agree on only one language.

Article 160

At celebrations and other public events in nationally mixed areas intended for all citizens of both nationalities, both languages must be represented.

Reports and other public authorizations in nationally mixed areas must be written in both languages.

A body which calls an assembly of citizens in nationally mixed areas must ensure that the material for the assembly is prepared in both languages.

Article 161

Forms intended for use by working people and citizens in nationally mixed areas must be bilingual.

The use of bilingual forms shall be obligatory, especially for registry offices, tax services, health services, safety at work services, social security services, social insurance services, self management courts, courts of associated labour, regular courts, bodies for administering procedures on offences and services of organisations of associated labour, self managing interest groups and other self managing organisations and communities which regularly communicate with working people and citizens.

Article 162

State bodies, local communities and other communities based in nationally mixed areas shall use bilingual stamps in their work with working people and citizens in nationally mixed areas, in accordance with positive regulations.

Article 163

Public signs in nationally mixed areas shall be bilingual.

Announcements and decrees or bulletin boards of State bodies and other public announcement and communications of local communities must be bilingual.

Posters and announcements inviting citizens to cultural, sporting and other events must be bilingual, irrespective of who organises them.

Article 164

The statute of the municipality, changes and amendments to it and decrees and other general acts of the municipal assembly and its bodies shall be published in both languages.

Article 165

In nationally mixed areas of a municipality, at all locations and on occasions when state flags are flown, the flag of the Italian minority shall be used equally.

4. Organisation of the National Communities and Cooperation in Government Bodies

Constitution of the Republic of Slovenia (1991)

Article 64, Paragraphs 2,3,4 and 5

In those areas where the Italian and Hungarian ethnic communities live, their members shall be entitled to establish autonomous organisations in order to give effect to their rights. At the request of the Italian and Hungarian ethnic communities, the State may authorise the respective autonomous organisations to carry out specific functions which are presently within the

jurisdiction of the State, and the State shall ensure the provision of the means for those functions to be effected.

The Italian and Hungarian ethnic communities shall be directly represented at the local level and shall also be represented in the National Assembly.

The status of the Italian and Hungarian ethnic communities and the manner in which their rights may be exercised in those areas where the two ethnic communities live, shall be determined by statute. In addition, the obligation of the local self-governing communities which represent the two ethnic communities to promote the exercise of their rights, together with the rights of the members of the two ethnic communities living outside the autochthonous areas, shall be determined by statute. The rights of both ethnic communities and of their members shall be guaranteed without regard for the numerical strength of either community.

Statutes, regulations and other legislative enactments which exclusively affect the exercise of specific rights enjoyed by the Italian or Hungarian ethnic communities under this Constitution, or effecting the status of these communities, may not be enacted without the consent of the representatives of ethnic communities affected.

Article 80

The national Assembly shall consist of 90 deputies, representing the citizens of Slovenia.

Deputies must be directly elected by secret ballot on the basis of universal adult franchise.

The Italian and Hungarian ethnic communities shall always be entitled to elect one deputy each to the National Assembly.

The electoral system shall be regulated by statute by the National Assembly by a two thirds majority of all elected deputies casting their votes in favour of the same.

Law on Elections to the National Assembly (1992)

Article 2

Deputies shall be elected in constituencies.

Deputies shall be elected according to the principle that each deputy shall be elected by an approximately equal number of inhabitants, and according to the principle that different political interests shall be proportionally represented in the National Assembly.

The Italian and Hungarian minorities shall have the right to elect one deputy each to the National Assembly.

Article 3

Except where specific provisions are made by this Law, the election of deputies of Italian and Hungarian minorities shall be regulated for these elections by the provisions of this Law which apply to other deputies.

Article 8

Members of the Italian and Hungarian minorities who enjoy the right to vote shall have the right to vote for and be elected as deputy of the Italian or Hungarian minorities.

Article 17

If the mandate of the deputy ceases, unless he resigns within six months of the confirmation of the mandate, he shall be replaced for the rest of the mandate by the candidate from the same list of candidates who would have been elected if the replaced deputy had not been elected.

If the mandate of the deputy of a national minority ceases, he shall be replaced for the rest of the term by the candidate from the list of candidates who would have been elected if the replaced deputy had not been elected.

If the candidates from the first or second paragraph of this article fail to accept the mandate within eight days, the right shall be transferred to the next candidate on the list.

Article 20

Eight constituencies shall be formed for the election of deputies to the National Assembly. Each constituency shall elect eleven deputies.

Constituencies shall be formed according to the principle that each deputy shall be elected by an approximately equal number of inhabitants.

In the forming of constituencies and electoral districts, geographical, cultural and other features shall be taken into account.

An electoral district may cover the area of a single community, two or three communities or part of a community.

Each constituency shall be divided into eleven electoral districts, each with an approximately equal number of voters. In each electoral district one candidate shall be elected.

Special constituencies shall be formed in the areas inhabited by the Italian and Hungarian minorities for the election of national minority deputies.

Article 23

Electoral commissions shall be:

1. republic electoral commission,

2. constituency electoral commissions,

3. district electoral commissions.

Electoral boards for special constituencies shall be formed for the election of deputies of the Italian and Hungarian national minorities.

Article 33

At least one national minority member must take part in a constituency electoral commission of minority deputies.

Article 37

The republic electoral commission may transfer, from its own jurisdiction, authority to a constituency electoral commission for the election of national minority deputies.

Article 45

A candidate for Italian or Hungarian minority deputy must be nominated by at least thirty voters who are members of the Italian or Hungarian minority.

Article 95

The electoral commission of a special constituency for the election of deputies of the Italian and Hungarian minorities shall ascertain the number of voters enrolled on the electoral register, the number of voters who voted, the number of voters who voted by post, the number of invalid ballot papers, and the preferential order of candidates.

The preferential order of candidates shall be determined by the award of points. For each first position the candidate shall receive as many points as there were candidates on the ballot paper. For each successive position a point less. The points of each candidate shall be totalled.

Article 96

The candidate who receives the majority of votes in a constituency shall be elected as the deputy of the Italian or Hungarian national minority. If two or more candidates receive an equal number of votes, a draw shall determine who shall be elected. The draw shall be conducted by the special constituency electoral commission in the presence of the candidates or their representatives.

The election results from the preceding paragraph shall be determined by the special constituency electoral commission, which shall keep minutes on its work and on its work under the previous article. The minutes shall be signed by the president and members of the commission. The minutes and other electoral material shall be sent to the republic electoral commission.

Law on the Determination of Constituencies for Election of Deputies to the National Assembly (1992)

Article 2

For the territory of the Republic of Slovenia eight constituencies shall be determined, encompassing the territories of several neighbouring municipalities. ...

For the territories of municipalities where the Italian and Hungarian national minorities live, two special constituencies shall be determined in which one Italian and one Hungarian national minority deputy shall be elected respectively.

Article 4

For the election of deputies to the National Assembly the following constituencies and electoral districts and municipalities where the constituencies have their headquarters shall be designated...

- the ninth electoral district encompassing territories of the municipalities of Koper, Izola and Piran for the election of a deputy of the Italian national minority (headquarters Koper);

- the tenth electoral district encompassing territories of the municipalities of Murska Sobota and Lendava for the election of deputy of the Hungarian national minority (headquarters Lendava).

Law on the Records of Voting Rights (1992)

Article 2

Voting rights of citizens for the election of deputies of Italian and Hungarian ethnic communities shall be recorded in the electoral register for citizens of Italian and Hungarian ethnic communities.

Article 19

The electoral register for citizens who are members of the Italian or Hungarian ethnic communities in the territories where these communities live shall be compiled by the commission of the relevant self-governing ethnic community.

A separate electoral register shall be compiled for each polling station.

Article 22

Citizens who are members of the Italian or Hungarian ethnic communities and who do not have permanent residence in the territory where these minorities live shall be registered in the electoral register for citizens of the Italian or Hungarian ethnic communities upon written request to the relevant self-governing ethnic community.

The Law on Implementation of Special Rights for Members of the Italian and Hungarian National Minorities in the Field of Education (1992)

Article 4

For the implementation of the special rights of the Italian and Hungarian national minorities and for the implementation of the equality of the languages of these nationalities with the Slovenian language, educational organisations which perform educational work in the Slovenian language and in the language of the nationalities (hereinafter: bilingual educational organisations) and

educational organisations which perform educational work in the language of a national minority (hereinafter: educational organisations in the language of the national minority) shall be founded in areas in which members of the national minorities live together with members of the Slovenian nationality (hereinafter: nationally mixed areas).

In bilingual educational organisations members of Slovenian nationality shall be educated together with members of the corresponding national minority.

In educational organisations of national minorities pupils must learn the Slovenian language; in educational organisations which perform educational work in these areas in the Slovenian language, the pupils must learn the language of the national minority, thus acquiring the foundations for bilingual communication, an understanding of the cultural and other values of both nationalities as well as deepening bilateral coexistence.

For the realisation of the social aims and tasks from article 3 of this Law, study of the language of the national minority shall also be organised at the appropriate university.

Extract from the Statute of the Municipality of Izola

Article 150

Citizens of the Italian national minority in nationally mixed areas shall be assured primary schooling in their mother-tongue.

In cooperation with other municipalities where citizens of the Italian national minority live, the municipality shall assure their education in general secondary educational and professional schools as well as in other educational organisations with Italian as the teaching language.

ANNEX II

The rights of the Italian minority in Slovenia
compared with the rights of the Slovenian
and German-speaking minorities in Italy

Error! Bookmark not defined. RIGHT	ITALIAN MINORITY IN SLOVENIA	SLOVENE MINORITY IN ITALY	GERMAN MINORITY IN ITALY
1. Protection of minority's basic rights regardless of its numerical strength	YES Constitution of 1991, art. 64	NO	YES Statute of Autonomous Region Trentino-Alto Adige of 1976
2. Territorial autonomy	NO	NO	YES The German population is majority in Autonomous province Bolzano
3. Guaranteed political representation in Parliament	YES Constitution, art. 64	NO	NO
4. The right of a representative of the minority to put a veto on any notion regarding fundamental problems of the minority	YES Constitution, art. 64	NO	NO
5. Guaranteed representative in local administration and (in Italy) in regional council	YES Constitution, art. 64	NO	YES Indeed in executive organs, Reg. Statute, art. 36, 50, 61
6. The language of the minority is recognised as an official language	YES Constitution, art. 64	NO	YES Regional Statute, art.99
7. The right of using the minority's language in Parliament	YES Parliamentary regulations	NO	NO But this right guaranteed in reg. council
8. The right of using the minority's language in local administrations	YES Constitution, art. 11, the statute of communes	YES Only in some communes, Memorandum of London of 1954, The Osimo agreements of 1975	YES Regional Statute, art. 100

Error! Bookmark not defined. RIGHT	ITALIAN MINORITY IN SLOVENIA	SLOVENE MINORITY IN ITALY	GERMAN MINORITY IN ITALY
9. The right of using the minority's language with the administrative authorities	YES Constitution, art. 11, the statutes of communes	YES Only in some communes, Memorandum of London 1954, The Osimo agreements of 1975	YES Regional Statute, art. 100
10. The right of using the minority's language with the Courts of Justice	YES Constitution, art. 11 and 62	YES Procedure of the penal law, art. 109, sentence of the Const. Court 62/1992	OUI Regional Statute, art. 89, 90-96, 100
11. The authorities are obliged to exercise the right of using the minority's language during official celebrations	YES Statutes of the communes	NO	NO
12. The authorities are obliged to exercise the right of using the minority's language in public notices and inscriptions London of 1954	YES Statutes of the communes	YES In part in the Province of Trieste only on the basis of the Memorandum of London of 1954	YES Regional Statute art. 100
13. The authorities are obliged to expose the minority's flag	YES Statutes of the communes	NO	YES Indeed the provincial flag
14. Private entrepreneurs, craftsmen and self employed persons are obliged to expose bilingual notices and inscriptions	YES Statutes of the communes	NO	NO
15. Obligatory bilingual topographic inscriptions	YES Statutes of the communes	NO	NO
16. Recognise the minority organisations as public institutions which can put a veto on decisions made by local institutions	YES Constitution, art. 64	NO	NO
17. Radio programmes broadcasted in minority language	YES	YES	YES

Error! Bookmark not defined. RIGHT	ITALIAN MINORITY IN SLOVENIA	SLOVENE MINORITY IN ITALY	GERMAN MINORITY IN ITALY
18. TV programmes in the minority language	YES	NO In spite of the law n° 103 of 1975	YES
19. Bilingual forms	YES	NO	YES
20. Bilingual identity cards	YES	NO Only in 4 of 34 communes	YES
21. The duty of teaching the minority's language in schools of the majority	YES Constitution, art. 64	NO	YES Reg. Statute, art. 19
22. Nursery, primary and secondary schools for the minority	YES Constitution, art. 64	YES Law n° 1.012 of 1961 and law n° 932 of 1973, but only in provinces of Trieste and Gorizia	YES
23. Financial support regarding minority periodicals, daily and weekly newspaper	YES Constitution, art. 64	YES In part according to the law regarding the press	YES
24. Financial support regarding the minority's cultural activities	YES Constitution, art. 64	YES Regional law in Friuli-Venezia Giulia n° 46 of 1991	YES
25. Distribution of public employments and benefits on the basis of "ethnic proportionality"	NO	NO	YES Decree of the President of Republic n° 752 of 1976
26. Independent economic structures and activities	NO Only some activities after 1990	YES	YES

d. The situation in Moldova by Mr Alexei BARBANEAGRA
Vice-Rector, Chişinau

The seminar on "Local self-government, territorial integrity and protection of minorities", organised by the European Commission for Democracy though Law, has come at just the right time; it is of great importance both for my country - Moldova - and for stability and democracy across the entire European continent.

Moldova, which is a member of the UN, the Council of Europe and the OSCE and has ratified the principal international legal instruments on democracy, human rights and freedoms, sincerely desires to construct a State based on the rule of law, to make the transition to a market economy and to establish civil peace in this region of Europe.

My country, like all those which emerged after the fall of the USSR, has travelled a difficult path to be able to assert itself as an independent State. It has always faced insoluble problems, which are being addressed by State and public bodies in Moldova and by international organisations.

The Moldovan Parliament has adopted several important documents which are aimed at consolidating the State of Moldova, these are:

- The Declaration of Sovereignty of 23 April 1990;

- The Declaration of Independence of 27 August 1991;

- The Constitution of 29 July 1994.

For the first time in the history of my country the fundamental law proclaims the separation of legislative, executive and judicial powers, political pluralism and a commitment to respect the UN Charter and International Covenants to which Moldova has acceded. The law also reflects the principal rights and responsibilities of citizens and the principles of State organisation.

Following the Declaration of Sovereignty, two areas of tension were created in Moldova: in the South - the Gagauzes - and on the left bank of the Dniestr - the anticonstitutional Transnistrian Moldovan Republic.

The origins of these conflicts are extremely complicated and diverse.

In his speech on 8 December 1995, the President of Moldova made it known that external forces, supported by units of the 14th Russian Army stationed in Transnistria, had sparked the armed conflict in 1992.

As concerns the settlement of the Transnistrian conflict, some decisions taken by the Russian Duma are most disturbing; for example, on the 17 November 1995, the Russian Duma adopted a decision proposing to President Eltsin that he recognise Transnistria as an area of strategic interest for Russia and to plan a tripartite meeting between representatives of Russia, Moldova and the anticonstitutional Transnistrian Republic in order to recognise Transnistria as an independent sovereign State.

In his appeal to the Russian President, the Moldovan Head of State qualified this decision as "a hostile act towards Moldova, direct interference in its internal affairs and detrimental to the efforts of the two Presidents to solve the Transnistrian problem".

It should be noted that the Moldovan Parliament, when debating the bill on the special status of Transnistria, created a special committee to inquire into all the reasons and circumstances of the armed conflict.

The conflict in southern Moldova
The Gagauz issue

153 thousand Gagauzes, a people of Turkish origin and Christian faith, live in the South of Moldova. On 19 August 1990, they unilaterally proclaimed the "Gagauz Republic". Note that

the Gagauz population are not concentrated; Gagauz villages are scattered throughout the districts of the South, among Moldovan, Ukrainian, Bulgarian and other villages.

The Gagauz make up 67% of the population in only two districts: Comrat and Ceadir-Lunga. There are also Gagauz villages in the districts of Vulcanesti, Basarabaesca and Taraclia.

Following the proclamation of the Gagauz Republic, relations between Chisinau (the capital of Moldova) and Comrat (the centre of Gagauzia) became more than strained. However, armed conflict was avoided. On 27 February 1994, the Gagauz even participated in the Moldovan parliamentary elections.

After long negotiations, the bill on the status of Gagauzia was adopted. Before adopting the draft in question, Moldova and representatives of Gagauzia presented two drafts to the Council of Europe for an expert legal opinion.

After numerous debates, the Moldovan Parliament, on 23 December 1994, adopted the law on "the special legal status of Gagauzia (Gagauz Yeri)".

The Law (Art. 1) stipulates that Gagauzia is an autonomous territorial entity with a special status as a form of self-determination of the Gagauz, forming an integral part of the Republic of Moldova.

Gagauzia is empowered to settle independently, within the limits of its jurisdiction, questions concerning political, economic and cultural development in the interests of the population as a whole. Within the territory of Gagauzia all rights and freedoms provided for in the Constitution and legislation of the Republic of Moldova are guaranteed.

In the event of a change in the status of the Republic of Moldova as an independent State, the people of Gagauzia have the right to external self-determination. Administration in Gagauzia is to be conducted on the basis of the Constitution and laws of Moldova (those laws that do not contravene the enactments of the National Assembly of Gagauzia).

Moldovan, Gagauz and Russian are recognised as the official languages of Gagauzia.

Gagauzia has its own symbols to be used alongside the State symbols of the Republic of Moldova.

In accordance with a joint decision, localities where Gagauzes constitute more than 50% of the population form part of Gagauzia.

Localities where Gagauzes constitute less than 50% of the population may be included in Gagauzia on the basis of the will of the majority of the electors, as freely expressed in a local referendum conducted at the request of at least one-third of the electorate of the locality in question.

Localities are included in Gagauzia according to a local referendum conducted by their Government of the Republic of Moldova.

Localities included in Gagauzia retain the right to withdraw from Gagauzia by means of a local referendum conducted at the request of at least one-third of the electorate not earlier than one year from the date of their inclusion in Gagauzia.

The representative body of Gagauzia is the People's Assembly, which is empowered to adopt legal instruments mandatory in the territory of Gagauzia.

The People's Assembly is empowered to adopt local laws in the following fields:

- culture and education;
- public services and utilities;
- health care, physical culture and sport;
- local budgetary, financial and fiscal activities;
- the economy and ecology;
- labour relations and social security.

The People's Assembly also deals with:

a. the regional planning of Gagauzia, the establishment and revision of categories of localities, boundaries of regions, towns and villages and the naming and renaming thereof;

b. participation in the political process of the Republic of Moldova;

c. the organisation and activities of the organs of local public administration as well as associations of citizens, with the exception of political parties and other socio-political organisations;

d. the organisation and conduct of local elections;

e. the conduct of local referenda on questions falling within the jurisdiction of Gagauzia;

f. the approval of regulations on the symbols of Gagauzia;

g. the adoption of honorary titles and the approval of awards;

h. consideration of the question of and the submission of motions to the Parliament of Moldova concerning the declaration of a state of emergency in the territory of Gagauzia as well as the introduction in such cases of a special form of government to ensure the protection and safety of the people of Gagauzia;

i. the right of submission to the Constitutional Court of the Republic of Moldova in accordance with the procedure prescribed by law, of the question of declaring invalid legal Acts of the legislative and executive authorities of the Republic of Moldova in the event of infringement of the powers of Gagauzia. Where the Constitutional Court of the

Republic of Moldova declares invalid the Acts in question, the Parliament or the President of the Republic of Moldova regulates the legal aspects resulting from the implementation of the Acts. Implementation of contested Acts shall be suspended pending a decision of the Constitutional Court.

Legal Acts of Gagauzia which contradict the Constitution of the Republic of Moldova and the special status law are invalid.

The highest official of Gagauzia is its Head, the Bashkan. The Bashkan is elected for a term of four years on the basis of universal suffrage by a free and secret ballot.

1. The Executive Committee is the permanent executive organ of Gagauzia. It is elected by the People's Assembly at its first session.

Under Article 17 of this law, the Executive Committee has responsibility for:

a. the implementation and the observance of the Constitution and laws of the Republic of Moldova as well as the legal Acts of the People's Assembly;

b. participation in the activities of the organs of central public administration of the Republic of Moldova regarding matters affecting the interests of Gagauzia;

c. in accordance with the law, throughout the territory, regulation of property relations, management of the economy, social and cultural system, local budgetary and financial arrangements, social security, remuneration, local taxation, protection of the environment and the rational use of natural resources;

d. the definition of the structures and priority objectives of economic development and scientific and technological progress;

e. the drawing up of programmes for economic, social and national-cultural development and the protection of the environment as well as the implementation thereof after approval by the People's Assembly;

f. the drawing up of the budget of Gagauzia, its submission to the People's Assembly for approval and its execution;

g. the settlement of questions concerning ecological safety, rational use, protection and reproduction of natural resources, introduction of quarantine and declaration of natural disaster areas;

h. drawing up and implementation of programmes in the fields of education, culture, public health, physical education and sport, social security as well as the protection and use of historical and cultural monuments;

i. equality of rights and freedoms between citizens, civil and national consensus, rule of law and maintenance of public order;

j. drawing up and implementation of a scientifically based demographic policy and the establishment of programmes for town planning and development of housing and public services;

k. functioning and development of national languages and cultures in the territory of Gagauzia.

2. The Executive Committee has a right of legislative initiative in the People's Assembly.

3. Decisions and orders of the Head of Gagauzia and the Executive Committee must be forwarded, for information, to the Government of the Republic of Moldova within ten days of their adoption.

Gagauzia has its own budget. Certain Gagauz officials (judges, procurators, the head of police,) are appointed by their counterparts in Moldova and approved by the People's Assembly.

The Government of Moldova has adopted several decisions with a view to implementing the law "on the special legal status of Gagauzia (Gagauz Yeri)".

On 5 March 1995, the Government of Moldova organised a referendum on the inclusion of localities of the South in autonomous Gagauzia.

Autonomous Gagauzia has elected its People's Assembly, which in turn elected the Head of Gagauzia.

After the elections, the situation in the South of Moldova became calmer.

Autonomous Gagauzia has established constructive co-operation links with the central organs in Moldova.

The problems of Transnistria

On 2 September 1990, the Congress of Deputies of the Transnistrian Soviets proclaimed the Transnistrian Moldovan Republic and adopted the "Decree on State power in the T.M.R." and "The Declaration of Sovereignty of the T.M.R.".

These instruments were adopted following the Moldovan Parliament's adoption of the "Declaration of Sovereignty" and the "Decision on the illegality of Bessarabia's annexation by the USSR" on 28 June 1940.

On 17 March 1991, the Transnistrian authorities organised the federal referendum on the issue of preserving the USSR, even though the Supreme Soviet of Moldova had already decided not to participate in this.

Legal authority was overthrown in Transnistria in 1991 and has been seized by the "Soviets". After March 1992, the armed conflicts worsened and finally degenerated into a war which has caused large numbers of casualties.

Urgent measures aimed at resolving the armed conflict, which had attained great proportions, have been implemented.

On 16 June 1992, the Parliament of Moldova adopted "the basic principles for a political settlement of the armed conflict and the restoration of peace in the districts of East Moldova" and in particular:

1. Setting up effective monitoring of the cease-fire.

2. Separation of the parties in conflict.

3. Disarmament and the disbandment of voluntary military formations as well as the return of the participants to their homes.

4. An end to the mobilisation of citizens to participate in military actions.

5. Drawing up a special legal status for the districts of East Moldova, in conformity with the requirements of international practice in this sphere and the historical peculiarities of the formation of the Transnistrian area.

6. Reorganisation of guard formations as military units of the National Army of Moldova.

7. Re-establishment of a joint economic structure.

8. The return of refugees to their homes, ensuring their safety and compensation for war damage.

9. Conduct of new free elections for organs of power at all levels across the territory of the whole country, monitored by foreign observers.

10. Re-establishment of organs of legal power in the districts of the East (local authorities, legal, judicial, financial organs, banks and so on); creation of suitable conditions for their activities.

11. Formation of a national Government of Conciliation; ensuring proportional participation of nationalities in the creation of administrative and governmental institutions at all levels.

12. Confirmation of the Parliament's position concerning the withdrawal of the Russian 14th Army stationed in the country's eastern districts. The Army Command must guarantee neutrality with regard to events in Transnistria.

    After the withdrawal, military officers serving in these units will be guaranteed employment in the Armed Forces of the Republic of Moldova, with no loss of rank, and will be granted the social benefits provided for by law.

13. Joint investigation of crimes that either of the sides is suspected of having committed; prosecution for terrorist or subversive acts; freeing of hostages and prevention of further hostage taking and seizure of technical, communications, transport and armament resources; return of captured property.

On 7 July 1992, the Parliament of the Republic of Moldova issued a statement declaring that all measures designed to settle the armed conflict by political means were encountering open resistance from the separatist leaders.

As a means of achieving a political settlement of the conflict, the anticonstitutional authorities of Transnistria proposed the examination and adoption of a document determining the legal status of this area. In accordance with the decisions of the Parliament, the Local Self-Government Committee and the Committee on Human Rights and National Relations submitted a bill to Parliament.

Two alternative drafts, one formulated by Deputies from districts of the East, were laid before Parliament. However the absence of the Deputies from the eastern districts hampered the examination of these drafts and postponed a settlement of the problem.

The Parliament stated that the refusal to settle the conflict by political means threatened the implementation of agreements signed by the Heads of the four countries at their meeting in Istanbul on 25 July 1992, the meeting between Presidents M. Snegour and B. Eltsin on 3 July 1992 and the meeting of the Heads of the Member States of the CIS which took place in July 1992 in Moscow.

Thanks to diplomatic activity and the intermediary of the President of Russia, the conflict has been stopped; Russian peace-keeping forces have been deployed in the area. The T.M.R. has created its own army (experts have noted a large quantity of arms and military equipment in Transnistria), established bodies of government and issued its own currency.

In the period from 1992-1995, the Heads of State and Government and international organisations such as the OSCE have made great efforts to settle the Transnistrian dispute.

The joint Declaration by the Presidents of Moldova, Russia and Ukraine of 19 January 1996 is one of the most recent documents concerning the Transnistrian conflict.

Faithful to the principles and objectives of the UN Charter, the Helsinki Final Act and other OSCE, Council of Europe and CIS documents, the Presidents have made every effort to settle the conflict by negotiation and to accelerate the co-ordination and the signing of a document granting Transnistria special legal status as an integral part of an indivisible Moldova.

Russia and Ukraine have demonstrated their readiness to ensure observance of the decisions envisaged in the documents on the status of Transnistria as a condition of maintaining peace and security in this region of Europe.

In January 1996, the Moldovan Parliament examined one of the most recent bills on the special status of localities situated on the left bank of the Dniestr. The Parliament decided to recommend that the experts publish this bill and continue efforts to reconcile conflicting points of view.

The bill defines Transnistria as a territorial formation with the structure of an autonomous republic, including the localities situated on the left bank of the Dniestr, and with special status in conformity with the Constitution of Moldova and the law in question; Transnistria is an integral part of the Republic of Moldova.

The special status of Transnistria provides for:

a. special forms and conditions of autonomy;

b. guaranteed delimitation of powers between the central organs of Moldova and Transnistria;

c. guaranteed conditions to encourage cultures, traditions, languages and religions of different ethnic groups living in the region to be developed and flourish.

Moldovan, Russian and Ukrainian are recognised as official languages of Transnistria.

The localities situated on the left bank of the Dniestr are to be included in the T.M.R. Inclusion in Transnistria is to be decided by referendum, if more than 50 % of the electorate of the locality in question vote in favour.

The supreme organ of power in Transnistria is to be the Legislative Assembly, elected for a term of four years. The Legislative Assembly is empowered to adopt the status of Transnistria, laws and statutory provisions.

The Legislative Assembly elects the President and members of the Government of Transnistria.

The status entails the following distribution of powers:

The Republic of Moldova has responsibility for:

a. monitoring observance of the Constitution;

b. foreign policy;

c. national defence and security, guarding State borders;

d. customs;

e. citizenship;

f. legal system governing ownership and inheritance;

g. organisation and functioning of judicial organs, the prosecutor's office and internal affairs bodies;

h. civil, administrative, criminal and labour legislation, legislation on marriage and the family;

i. organisation of the financial, banking, fiscal and monetary system;

j. State statistics, management of the railways, air transport, pipe systems, defence units, energy system, communications and information.

Only the Republic of Moldova possesses full legal personality in international law. Foreign policy, diplomatic and consular relations, participation in international organisations, the

conclusion of international agreements and treaties are the prerogative of the Republic of Moldova.

Matters of defence come under the jurisdiction of the central government of Moldova. Military units stationed on the territory of Transnistria constitute an integral part of the National Army of Moldova. Their commanders are to be appointed by the Minister of Defence of Moldova with the agreement of the Government of Transnistria.

Special Services are to be united and subordinate to the central organs of power of the Republic of Moldova in accordance with the legislation of the country. The chief of special services in Transnistria is to be appointed and dismissed by the Moldovan Minister of National Security, with the agreement of the Government of Transnistria. The territory of the Republic of Moldova is to be a unified area.

In Moldova there is to be only one citizenship.

In Moldova there will be only one system of legal institutions.

Questions of the national currency, circulation and issuing of money, defining financial policy, price and fiscal policies as well as the approval and implementation of the State budget are the exclusive preserve of the public government authorities of the Republic of Moldova and are to be defined by the Government and the National Bank of Moldova, as guarantors of the country's financial stability.

Transnistria will be responsible for:

a. adopting the status and legislation of Transnistria and monitoring observance thereof;

b. organising the election of Deputies to the Legislative Assembly;

c. the organisation and functioning of organs of public government on republican and local level;

d. the organisation and conduct of referenda on problems which are under the jurisdiction of Transnistria and local organs of public government;

e. territorial and administrative planning of the region;

f. definition of the structures and priority directions of economic development in Transnistria and scientific and technical progress;

g. budgetary, financial and fiscal activities and local taxes;

h. ensuring observance of the law, public order and safety;

i. creation of a municipal police force (milice);

j. industry, construction, agriculture and forestry;

k. implementing entrepreneurial activity;

l. solving problems of health care, social security, education, science, culture, sport, protection of the environment;

m. guaranteeing employment (job offices);

n. guaranteeing the activities of regional television and radio;

o. establishment and functioning of means of communication;

p. establishment of a regional statistical service;

q. other questions which come under the jurisdiction of Transnistria.

Transnistria will participate in the foreign policy of Moldova when matters arise affecting its own interests, but shall also have the right to maintain international contacts in the economic, technical, scientific and cultural spheres.

Unfortunately, the authorities of Transnistria reject all these constructive proposals. The authors of the alternative draft Agreement on the joint competencies of Transnistria and the Republic of Moldova in fact propose that Transnistria be recognised as an independent State and that bilateral relations be constructed on the basis of mutual agreement.

Article 1 of the draft Agreement proposed by the Transnistrian experts declares that :

> "The Transnistrian Moldovan Republic and the Republic of Moldova shall construct their relations on the basis of constitutional norms and mutual understanding.
>
> The Constitutions shall be adopted by the superior legislative bodies of the two parties.
>
> The Constitutions shall comprise no elements contradicting the present Agreement."

Article 2 reads:

> "The Presidents of the Transnistrian Moldovan Republic and the Republic of Moldova shall confer with good-will to solve problems of common interest."

The Transnistrian side also propose to initiate interaction as regards the armed forces, foreign policy and the budget (etc) on the basis of the conclusion of a whole series of bilateral agreements on this subject.

It follows that the Transnistrian authorities do not recognise the territorial integrity of the Republic of Moldova, do not wish to define the powers of the central government bodies and refuse to accept special status for the regions of East Moldova.

The proposals of the OSCE mission on the settlement of the Transnistrian conflict are extremely positive.

The OSCE mission is in favour of the territorial integrity of the Republic of Moldova, the granting of special status to Transnistria, the distribution of powers between the central

government bodies and the regions with special status. The OSCE experts thus propose three levels of jurisdiction: the exceptional powers of the organs of central government; the powers of the regions with special status and joint powers.

Exceptional powers concern: citizenship, State symbols and the National Anthem, foreign policy, defence, security service, financial and credit policies.

Regional powers would concern matters of self-government, the region's symbols, cultural life and the education system.

Joint powers would cover: language, including languages spoken in the region, local finances, the economy, regional police force and legal system (subordinate to the Constitutional Court).

The region with special status must be proportionally represented in the Parliament of the Republic of Moldova and in certain central ministries.

Transnistria would naturally have its own legislative and executive powers. The inhabitants of Transnistria would take part in elections for the President and the Parliament of the Republic of Moldova as well as in regional elections.

These are only some of the aspects of the Transnistrian crisis. The ideas outlined highlight the need for a constant search for political solutions. The Transnistrian conflict must also be settled in accordance with international standards, as Moldova is responsible for events occurring in all its territory.

In the opinion of international experts, Moldova is steadily and successfully conducting programmes of democratisation, economic transition, judicial and legal reform. The democratisation process is constantly progressing. This will create the real preconditions which will enable a solution to the Transnistrian conflict to be found.

e. The ethno-national effects of Territorial delimitation in Bosnia and Herzegovina by Mr Joseph MARKO
Professor, Graz

After alleged secret negotiations with the Serbian President Milosĕvić on the partition of Bosnia and Herzegovina, the Croatian President Tudjman proposed the "cantonisation" of this country along ethnic lines in the summer of 1991.[1] In a secret meeting held in Split in November, Serbs and Croats agreed on the formation of six "cantons" with two each providing for an ethnic majority of Muslim, Serbian or Croat populations. Nonetheless, due to the intermingling of the population which Bosnia and Herzegovina was famous for, each of the cantons would have had a minority population of up to 35%.[2] Whereas the Muslim party rejected such plans on "cantonisation" in a conference held in Sarajevo in February 1992[3], a preliminary accord on future constitutional regulations was adopted in Sarajevo by all parties under the auspices of the EC on 9 March 1992. Most important was the proposal to subdivide Bosnia and Herzegovina into a federation of three "sovereign" territories.

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[1] *See Der Standard (Wien), 13/14 July 1991, at p. 2 and 23 July 1991, at p. 2.*

[2] *See Der Standard, 14 November 1991, p. 3.*

[3] *See Der Standard, 14 February 1992, p. 2.*

However, the catch-word "cantonisation" after the "Swiss model"[1] must not serve as a smoke-screen for entirely differing interests of the three ethnic groups represented by their respective political parties, which can obviously be derived from terms such as "partition", "sovereign" or "autonomy". In particular the opposition of "autonomy" versus "sovereignty" provides a theoretical guideline for the question of what were the intended effects of a territorial delimitation of the multi-ethnic State of Bosnia and Herzegovina, the institutions of which were based on the idea of integration of three ethnically distinct peoples through legal instruments enabling these ethnic groups to be represented in the State organisation and to participate in the decision-making process under the proportionality principle. Was the demand for "territorial autonomy" thus simply aimed at the mere administrative devolution of power to foster the preservation and protection of ethnic identity also at the regional and municipal level? Or were such demands aimed at the creation of "national territories" despite the obvious intermingling of the population in order to provide the basis for secession and, in the long run, the Anschluß to Serbia or Croatia ? Already in the wane of the Habsburg monarchy, however, two prominent Austrian lawyers had warned that all ideas of cantonisation after the Swiss model could not be exported into areas with "mixed" populations[2]. Thus, the creation of national territories required the, more or less, forceful transfer of the population which, after all the atrocities committed in Bosnia and Herzegovina, became known as "ethnic cleansing" with the term "clean" providing for an obvious racist undertone. It was Karl Renner, the great lawyer and Austro-Marxist politician, who developed the concept of "cultural autonomy" instead of territorial autonomy to meet the challenge of a "mixed" population. Last but not least the conflict in Bosnia and Herzegovina must be seen in the international context, with the dissolution of communist Yugoslavia after the breakdown of communism all over East Central Europe. The conflict thus is not only based on the alleged, ethnic cleavages, but must be seen also in terms of a liberal, market oriented, pluralist democracy versus authoritarianism which had changed its legitimising ideology from communism to nationalism. Hence nationalism versus democracy and a multi-ethnic State versus partition along ethnic lines provide the respective conflict dimensions which have to be analysed.

1. Bosnia and Herzegovina in the process of the disintegration of communist Yugoslavia

On 23 November 1991 the final results of the first round of multiparty elections in Bosnia and Herzegovina were announced. The ethnically based parties of Muslims, Serbs and Croats had won a landslide victory in the elections to the bicameral National Assembly with cynics concluding that these elections had actually been a census. In the 130-seat Chamber of Citizens the Party for Democratic Action (PDA) representing Muslims won 41 seats, the Serbian Democratic Party (SDP) 34, and the Croatian Democratic Community (CDP) 20. The former League of Communists-Party for Social Change (LCBH) won 13 seats as well as an additional five in coalition with the Democratic Socialist Party, formerly the Communists' front organisation. The Alliance of Reform Forces of Yugoslavia which had been founded by the last Prime Minister of Yugoslavia, Ante Marković, gained eleven seats, with the rest won by splinter

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[1] *For a warning see Nicholas Gillett, The Swiss Constitution: Can it be Exported ?, Bristol 1989.*

[2] *Cf. Adolph Fischhof, Die Sprachenrechte in den Staaten gemischter Nationalität, Wien 1885, in particular at p. 22 and Karl Renner, Der Kampf der österreichischen Nation um den Staat, Wien 1902, at p. 34.*

parties. Despite the constitutional requirement for proportional representation, the cross-cutting of ethnic cleavage along party lines thus failed insofar as, for instance, a more "liberal" oriented Muslim party or the "multinational" party of Marković could not compete with these three nationally oriented parties. The candidates from the same ethnically based parties secured the seven seats on the Republic's Presidency which, in accordance with the proportionality principle, had to be composed of three Muslims, two Serbs, one Croat, and one person representing the "other" nations and nationalities.[1]

Hence the electoral results of 1990 resembled very much the ethnopolitical division of Bosnia and Herzegovina as can be seen from the following figures[2]:

Percentage of Population		Party	Percentage of vote	
Muslims	43.7		PDA	37.8
Serbs	31.3	SDP	26.5	
Croats	17.5	CDP	14.7	
			LCBH 6.0	
			ARFBH	5.6

With the breakdown of the Communist Yugoslav Federation after the 10 days war in Slovenia, the Brioni moratorium in summer 1991, and, finally, the international recognition of Slovenia and Croatia as independent, sovereign States, the tripartite Bosnian government came into a precarious situation: with Slovenia, Croatia and Macedonia breaking away from Yugoslavia, both Muslims and Croats feared becoming part of a Serb dominated and by no means democratically oriented "rump-Yugoslavia." This was exactly the goal of the Serbian leadership not only in Bosnia, but also in Belgrade. In a dramatic session of parliament, these antagonistic interests then clashed on the adoption of two resolutions, a so-called "Memorandum" and a "Platform" on 14 October 1991, with ongoing warfare in neighbouring Croatia. In order to authentically explain all the political restraints and the pressure which laid on the Bosnian government it is worth quoting from the following documents[3]:

§ 1 of the Memorandum states that Serbia, through the adoption of its new constitution, as well as Slovenia, Croatia and Macedonia -- through their referenda and Declarations of Independence -- had created an essentially new and unalterable situation both de facto and de jure. The

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[1] *The proportional representation of the so-called "nations and nationalities" in the parliament and presidency was prescribed by the constitutional amendment LXI, Slu_beni list Socijalisti_ke Republike Bosne i Hercegovine (henceforth: Sl. l. SRBiH), br. 21/1990. Respective provisions for the implementation of this principle are laid down in Articles 19 - 22 Ustavnog Zakona za sprove_enje amandmana LIX-LXXIX na Ustav Socijalisti_ke Republike Bosne i Hercegovine, Sl. l. SRBiH br. 21/1990, pos. 247 and in Article 1 para 2 Zakona o izboru i opozivu _lanova Predsjedništva Socijalisti_ke Republike Bosne i Hercegovine, Sl. l. SRBiH, br. 21/1990, pos. 251. See also Election Update, RFE/RL Research Reports, 7 Dec. 1990, p. 27.*

[2] *Quoted after Robert M. Hayden, The Partition of Bosnia and Herzegovina, 1990 - 1993, RFE/RL Research Reports, Vol. 2, No. 22, 28 May 1993, at p. 2.*

[3] *Cf. Slu_beni list Socijalisti_ke Republike Bosne i Xercegovine, Br. 32/1991, pos. 357.*

parliament then recalls Article LX of the Constitutional Amendment, which had been adopted with the participation of the Serbian delegates in July 1990[1] and reads as follows: "Socijalisti_ka Republika Bosna i Hercegovina je demokratska suverena država ravnopravnih gracana, naroda Bosne i Hercegovine - Muslimana, Srba i Hrvata i pripadnika drugih naroda i narodnosti, koji u njoj žive"(The Socialist Republic of Bosnia and Herzegovina is a democratic sovereign State based on the equality of its citizens, the people of Bosnia and Herzegovina - Muslims, Serbs and Croats and the members of other people and nationalities living there). This constitutional provision is then seen providing the constitutional basis for the relations inside Bosnia and relationships with others.

§ 2 is a political declaration of support for the Yugoslav Federation also in the future, but under new auspices which all can agree upon. In the meantime Bosnia should support the normal functioning of common institutions, but its delegates should not participate in the meetings of the Federal Parliament and Presidency as long as the delegates from all republics and provinces do not either. Resolutions of these organs, adopted without the required quorum, are deemed not binding for Bosnia.

§ 3 states that, with regard to the national composition of Bosnia and Herzegovina, Bosnia will never enter into a constitutional arrangement for a future Yugoslavia without both Serbia and Croatia being members of it.

§ 4 declares that Bosnia and Herzegovina will serve as a mediator for the military conflict in Croatia, but, in case of continued fighting, it will remain neutral.

§§ 5 and 6 reflect the abstention of the Serb delegation: the Serbs, under the leadership of Radovan Karadžić, threatened open warfare in case the Memorandum should be adopted and withdrew from parliament in the course of the meeting, thus causing the final break up the legitimate tripartite Bosnian government. These activities provide the background for §5, holding that all views expressed in the Memorandum represent the will of the majority of the members of parliament and the will of the majority of the people. Hence these views are deemed binding policy statements for both State and political bodies of the Republic. §6 finally underlines the right of a parliamentary majority to decide for the Republic as a whole while recognising the right of the minority to represent and enforce any legitimate interest - be it ethnic, cultural, economic or social - under the condition, however, that this is done in a peaceful and democratic way based on the legal order.

Most of the text of the so-called Platform on the position of Bosnia and Herzegovina in a future Yugoslav community repeats the views expressed in the Memorandum. One of the provisions, however, differs slightly from the stance of §§ 5 and 6 of the Memorandum. If "the most important questions for the equal rights of nations and nationalities" are in issue, the possibility of "majorisation" in the decision-making process should be excluded. Secondly, as a necessary prerequisite for negotiations on a future Yugoslav community, the Platform requires a preliminary convention comprising mutual guarantees for the sovereignty and inviolability as well as invariability of the borders of the now existing Republics.

Because of all the constitutional arrangements for equal representation and participation which gave the Serbs in Bosnia their share in parliament, the presidency and government, there was no

[1] *Sl. l. SRBiH, br. 21/1990, pos. 246.*

"clear and present danger" that the Serbian population would be discriminated against if Bosnia, with regard to the process of dissolution of communist Yugoslavia, was to become an internationally recognised sovereign State. Hence this leads to only one conclusion: as the Serb political leadership was not given an absolute veto enabling them to force their will on the parliamentary majority, they were not willing to participate any longer in a "common" governmental structure[1].

Moreover, as can be seen from the successive steps to create the so-called Republika Srpska after the model of the Croatian Krajina, the Bosnian Serbs were inclined to destroy the legal-institutional structures of the Republic of Bosnia and Herzegovina.

Already by the end of October 1990 a so-called Serbian National Council was founded in Banja Luka which was supposed to "represent" the Serbian population and thus provide for a "parallel" structure to legitimate parliamentary representation. Even before the first free elections of a Bosnian parliament based on a multi-party system, this body - which totally lacked democratic legitimacy - declared all resolutions of a future democratic parliament null and void in case it should vote for independence[2]. When this became unavoidable because of the disintegration of communist Yugoslavia in the course of 1991, immediately after the adoption of the Memorandum and Platform, the SDP organized a "referendum" on the "will of the people" to remain in the Yugoslav Federation in the beginning of November. The "democratic intentions" of this referendum can be seen from the fact that there were no regular electoral lists and Serbs got blue coloured ballots whereas non-Serbs got yellow ones with differently formulated questions[3]. In reaction to the resolution of the democratically elected Presidency of the Republic of Bosnia and Herzegovina to ask for international recognition, a so-called "Serbian Parliament" then proclaimed the so-called "Republika Srpska" comprising so called Serbian "autonomous regions", namely Bosanska Krajina with the "capital" Banja Luka[4], Romanija near Sarajevo[5], the Serb dominated Eastern part of Herzegovina[6], Šemberija in Northeast Bosnia[7] and, as it was stated explicitly, all the "territories where Serbs had become a minority due to the genocide

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[1] *Hayden, The Partition, at p. 6 speaks of a "facade" of a tripartite, trinational coalition in Bosnia and Herzegovina which was "destroyed" with the sovereignty resolution of Croats and Muslims "over the objections of the SDS" (i.e. the Serbo-Croatian acronym of the Serbian party) and set up the political configuration of the official governmental agencies, namely a coalition of the HDZ (i.e. the Serbo-Croatian acronym of the Croatian Democratic Community) and the SDA (i.e. the Serbo-Croatian acronym of the Muslim Party) "that favored severing Bosnia and Herzegovina from Yugoslavia." This assessment totally ignores not only factual cause and consequence, but also constitutional as well as international law.*

[2] *See Kleine Zeitung Graz, 31 Oktober 1990, at p. 3.*

[3] *See Der Standard (Wien), 11 November 1991, at p. 2.*

[4] *See Borba, 18 September 1991.*

[5] *See Borba, 19 September 1991.*

[6] *See Borba, 14 September 1991.*

[7] *See Politika, 20 September 1991.*

during World War II"[1]. These "autonomous regions" - which were not territorially linked - had already been created in September 1991 after the model of the Croatian Krajina. As was revealed by the Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)[2] in the exemplary case of the municipality of Prijedor, these Serbian "autonomous regions" did not provide for local or regional self-government but were intended to topple the legitimate governmental structures in these territories in order to establish "alternative" structures of power. First, the SDP started to hand out weapons to civilians, which then took over local police stations. In a next step, the former legally elected community council, reflecting the ethnic composition of the municipality, was dissolved. After this coup d'état Serb police forces were created which began to control all means of communication and, together with paramilitary forces, the entire territory. On 27 March 1992 the "Serbian parliament" adopted the Constitution of the Republika Srpska with Mom_ilo Krajišnik, the former President of the Republican Parliament, stating that Republika Srpska was now part of "Greater Serbia."[3]

In contrast to the Serb position, the political leadership of the Croatian Democratic Community, HDZ in the Croat acronym, did not pursue this policy of fragmentation of legitimate State power from the very beginning. Moreover, it has to be taken into consideration that there was no "uniform" Croatian "side": in particular two wings have to be differentiated, namely the Bosnian Croats, in particular these of Sarajevo, Tuzla, and other towns with a secular, urban, multicultural background, and the ultra-nationalist Herzegovinian Croats. Unlike the latter, Bosnian Croats were a minority in ethnically mixed areas situated far from the borders of Croatia. They generally supported the maintaining of the territorial integrity of Bosnia and Herzegovina. Among Croats, however, in the course of actions they lost ground to the Herzegovinian leadership, headed by Mate Boban. Thus the first leader of the HDZ, Stjepan Kljui_, who was in favour of maintaining Bosnia and Herzegovina as a unitary state, lost his leadership position in the HDZ. In the beginning of 1992, he was dismissed by Mate Boban who asserted that Kljui_ was "too much Bosnian, too little Croat." After a plan on the territorial delimitation of the Republic of Bosnia and Herzegovina into three nationally defined "cantons" had already been adopted under EC auspices in March 1992, and after the outbreak of full scale warfare in April, a political entity, called "Herceg-Bosna", was then proclaimed also by the Croats inside the territory of Herzegovina on 3 July 1992.

Hence the creation of the Republika Srpska and, later, of Herceg-Bosna were not intended to attain "autonomy" on a regional level and to provide for municipal self-government in order to preserve and foster "ethnic identity" under the conditions of a multi-ethnic State, but to form quasi-State structures: Not only were institutions like Serbian or Croatian "parliaments" and "governments" and "presidents" created, but also territorial "defense" systems with paramilitary

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[1] *The text of the Deklaracija o proglašenju Republike Srpskog Naroda Bosne i Hercegovine was published in Borba, 10 January 1992, at p. 3. In particular see §1.*

[2] *Cf. United Nations, Security Council, 27 May 1994, S/1994/674, pp 38-40.*

[3] *See Archiv der Gegenwart (AdG), 7 April 1992, p. 36651 and NZZ, 28/29 March 1992, p. 1. The Serbian text of the constitution is published in "Novi ustavi na tlu bivše Jugoslavije (New constitutions on the territory of former Yugoslavia), Beograd 1995, pp 249-279. An English translation was published by Albert P. Blaustein, Serbian Republic of Bosnia-Herzegovina, in Constitutions of Dependencies and Special Sovereignties, ed. by Albert P. Blaustein, New York 1994.*

organisations. In both the Serbian and Croatian held territories parallel structures were established in the sphere of economics and administration. However, one of the most serious consequences under these new parallel structures was a policy of ethnic homogenisation. As later reports[1] reveal, ethnic conflict was provoked by extremist forces terrorising local communities. Reports on actual or fictional atrocities committed by the respective ethnic enemies served to polarise local communities and to legitimise "retortions" so that the extremists could play the part of "defenders" of their ethnic communities. In such a general atmosphere of hate and anxiety, ethnic conflict was not the cause, but the result of civil strife and warfare. Ethnic cleansing thus was not a consequence of civil war, but a means to achieve such ethnically homogenised territories and to consolidate territorial expansion.

2. In search of ethnic accommodation: Models of territorial delimitation and institutional elements of the EC-UN Peace Plans

2.1. "Cantonisation" along ethnic lines

As already outlined above, President Tudjman had proposed the "cantonisation" of Bosnia and Herzegovina along ethnic lines in the summer of 1991, whereas the Muslim party rejected such plans of "cantonisation." Nonetheless, the preliminary accord on future constitutional regulations, which was adopted by all parties under the auspices of the EC on 9 March 1992, provided for a federation of three sovereign territories.

On March 12, however, Radovan Karad_i_ rejected the respective proposal of the EC to delimitate Bosnia into "three cantons" after "the model of Switzerland", because such a proposal would favour strong central government and thus restrict Serbian "sovereignty" and relations with other Republics. On March 18, the Serbian leadership agreed on a tripartite Bosnia with internationally recognised borders, whereas the internal borders of the cantons were to be drawn by a joint commission[2]. In the course of the negotiations that followed, the parties submitted a variety of proposals on the territorial division, drawing respective cantonal boundaries.[3] Whereas Croat drafts proposed the creation of two Croat cantons with about 32% of the whole territory, the Serbian proposal required a single Serbian canton with about 70% of the whole territory of Bosnia. A compromise submitted by the EC with 45% of the territory for Muslims, about 42% for the Serbs and 12% for Croats was rejected by all parties. With the follow up conference in Brussels on March 30, both Croats and Muslims began to argue that the territorial delimitation could not only follow ethnic lines but also had to take into consideration historical and economic facts. The conference ended without any result.

The Serbian leadership then began to withdraw from the Republican Ministry of the Interior and to establish its own "police forces." The Serbian "parliament" declared all Bosnian legislation

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[1] *See, for instance, Janusz Bugajski, Balkan Futures: Understanding Ethnic Conflict, in Ministry of Defence/Center for Strategic Studies (ed.), Armed Conflicts in the Balkans and European Security, Ljubljana 1993, pp 279-291 or Hannes Tretter et. al., "Ethnische Säuberungen" in der nordostbosnischen Stadt Zvornik von April bis Juni 1992, Wien 1994.*

[2] *See AdG, 7 April 1992, at p. 36651 and Izjava o principima za novo ustavno uredjenje, in Oslobodjenje, 19 March 1992, at p. 1.*

[3] *Cf. Hayden, Partition, at p. 5.*

void. In April, intensive fighting started[1] all over the country. In mid-May the Serbs had occupied two thirds of the territory of Bosnia, as did the Croats with their share of Herzegovina. Karad_i_ and Boban therefore secretly met in Graz/Austria to negotiate on the partition of Bosnia and Herzegovina[2].

Hence, the effect of the concept of "cantonisation" along ethnic lines was the outbreak of full-scale warfare all over Bosnia in order to gain as much territory as possible before the drawing of borderlines. The early fixation on the ethnic principle thus proved to be fatal. All the fighting and ethnic cleansing made "sense" when future ethnically separated cantons were kept in mind.

2.2. The Vance/Owen plan: From regional self-government to nation States

In June 1992 the Presidency of the Republic of Bosnia and Herzegovina declared that, after the Serb aggressions, it could no longer stand for the EC plan for a common State consisting of three nations, and that they would not negotiate with a "war criminal" like Karadžić. On June 26 the Presidency submitted a new proposal for the future internal structures of the Republic. Bosnia and Herzegovina was defined as a "multinational and multireligious community based on regional and local self-government with regard to economic, cultural, historical and ethnic criteria." The partition along the Cantonisation model of the EC was expressly rejected.[3] After new efforts to stop the war in BiH through negotiations during July - with Prime Minister Silajdžić rejecting the territorial partition by frankly stating that "Cantonisation is now a synonym for ethnic cleansing[4]" - President Izetbegović submitted, after a meeting with the Yugoslav President Ćosić in mid-October in Geneva, a proposal for a democratic and decentralised BiH. Bosnia should no longer be divided into three ethnic cantons, but into eight to ten regions in terms of local self-government.

This very concept finally found its way into an annex entitled "Proposed Constitutional Structure for Bosnia and Herzegovina" in a "Report on Progress in Developing a Constitution for Bosnia and Herzegovina"[5] which was submitted by Cyrus Vance, the personal representative of the secretary-general of the UN, and Lord Owen representing the EC. The report shows the differing views of the parties: whereas the Muslims initially advocated a centralised, unitary State with mere administrative decentralisation through a number of regions, the Serbs wanted the country to be divided into three independent States with each of these States having its own legal personality and only a loose confederation to coordinate certain activities. The Croats supported a middle position. It was also noted that, given the intermingled population of Bosnia and Herzegovina, a plan to create ethnically based States would require the forced transfer of populations, which was however condemned by the international community.

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[1] *See AdG, 7 April 1992, pp. 36651-2.*

[2] *See Der Standard, 15 May 1992, at p. 2.*

[3] *See AdG, 29 July 1992, p. 37016.*

[4] *Ibid., p. 37023.*

[5] *Cf. Intenational Conference on the Former Yugoslavia (ICFY), document STC/2/2, 27 October 1992.*

The solution proposed was a "decentralised State ... in which many of its principle functions, especially those directly affecting persons, would be carried out by a number of autonomous provinces. The central government, in turn, would have only those minimal responsibilities that are necessary for a State to function as such and to carry out its responsibilities as a member of the international community"[1]. The central government would have responsibility for foreign affairs, international commerce, citizenship, and national defense. The provinces then were to have all other governmental functions, including education, radio and television, provincial communications, airports, energy production, financial institutions, and the police. In particular, control of the police would rest solely with the provinces. The boundaries of the provinces were to be "drawn so as to constitute areas as geographically coherent as possible, taking into account ethnicity, geographical features(i.e. natural features, such as rivers), history, communications (i.e. the existing road and railroad networks), economic viability, and other relevant factors."[2]

After further negotiations a final version of a "Constitutional Framework for Bosnia and Herzegovina" was published on 4 January 1993[3]. The future Constitution should be based on the following principles:

1. Bosnia and Herzegovina shall be a decentralised State, with most governmental functions carried out by its provinces. The Provinces shall not have any international legal personality and may not enter into agreements with foreign States or with international organisations. ...

4. The Constitution shall recognize three "constituent peoples", as well as a group of "others".

5. All matters of vital concern to any of the constituent peoples shall be regulated in the Constitution, which as to these points may only be amended by consensus of these constituent peoples; ordinary governmental business is not vetoable by any group.

For both the Presidency and the Constitutional Court, the respective provisions required the principle of proportional representation.

As far as maps are concerned[4] (these were drawn supposedly using the criteria mentioned above), they resembled, more or less, the EC's proposed "cantonisation." However, Croats were given land that they had not even asked for in 1992 but which they controlled militarily in 1993. The Serbs received about what they would have received in March 1992. But their holdings, unlike those of the Croats, were fragmented and to a great extent not contiguous either with the rump Yugoslavia or with each other. Big losers since March 1992 were the Muslims. They lost land both to Croats and Serbs. Despite the denial of creating "ethnic territory", the map seems to have been drawn so as to ensure that each province would have a very large majority of one ethno-national group. As the plan was most favourable to the Croats, they were the only party

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[1] *Ibid., p. 5.*

[2] *Ibid., annex, Art. I.B.1.*

[3] *Cf. document ICFY/WG.II/3, 4 Jan. 93.*

[4] *For the following see Hayden, Partition, pp. 10-11.*

who signed it in all parts. Shortly after the map was made public, the Croats attacked Muslim forces in order to consolidate their control over the territories the Vance/Owen plan had assigned to them. The Serbian offensive in eastern Bosnia in March and April 1993 amounted to the Serbs' definitive rejection of the plan by a resolution of the so-called parliament of the Srpska Republika on 2 April 1993.

To sum up, the Vance/Owen plan failed in two ways: whereas the first version had firmly established the principle of ethnically "mixed" cantons in order to prevent "national" territories, the map finally drawn seemed to resemble the latter. Secondly, despite all good intentions to revise the results of ethnic cleansing, to secure the territorial integrity of the Republic and to put limits to Greater Serbian aspirations - insofar as Serb held territories in Bosnia and Croatia were not to be linked to a single territorially adjacent unit - the Vance/Owen plan, in the final analysis with the maps taken into consideration, seemed to legitimate both ethnic cleansing and Serb occupations[1].

2.3. The Owen/Stoltenberg plan: A "Union" of nation-states?

After the break-up of the Muslim-Croat coalition, a further multi-ethnic solution seemed to be no longer realistic against the declared will of two of the three parties. Thus, in a new round of negotiations in Geneva in June 1993, Lord Owen stated that his proposal to form ten multi-ethnic "autonomous provinces" had no more chances of being implemented. The Presidents Milosĕvić and Tudjman urged upon Izetbegović a radical change of the internal structures for a future Bosnia by returning to their initial plans of three "national territories" with some sort of central government.[2] Izetbegović, however, rejected such a "partition". In the course of negotiations Karadžić and Boban agreed upon a "Confederation of three Republics". The text of the agreement[3] followed the "Constitutional Framework" of the Vance/Owen plan with the exception that the term "confederation" was used instead of Republic whereas the "provinces" were upgraded into "Republics". A "confederative" parliament was to be indirectly elected through the legislatures of the three constituent Republics. At the same time Boban declared that the Croats no longer regarded the legitimate Presidency of the Republic of Bosnia and Herzegovina as representatives of "the State" but of a "third party."[4]

A "Constitutional Agreement of the Union of Republics of Bosnia and Herzegovina"[5] submitted by the mediators Lord Owen and Thorwald Stoltenberg in August 1993 followed the basic structure of the Serbian-Croatian agreement. According to Article I. 1. the "Union of Republics of Bosnia and Herzegovina" was composed of "three Constituent Republics and three constituent peoples: the Muslims, Serbs and Croats, as well as a group of other peoples." Article 3 then introduced "dual citizenship" for the Constituent Republics as well as the Union. Under Article II. 3. all governmental functions, except expressly assigned to the Union, should be those

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[1] *Cf. Marie-Janine Calic, Der Krieg in Bosnien-Hercegovina. Ursachen - Konfliktstrukturen - Internationale Lösungsversuche, Frankfurt/M. 1995, at p. 187-8.*

[2] *See AdG, p. 38019.*

[3] *See AdG, p. 38022.*

[4] *See AdG, p. 38022.*

[5] *Appendix I of the Agreement relating to Bosnia and Herzegovina, 20 August 1993.*

of the Constituent Republics. The Presidency of the Union and a Parliament were to be composed after the parity principle could be deduced from the provision on the composition of a Council of Ministers (Article III. 3.) that only foreign affairs and international trade were seen as explicit competences of the Union. Article III.3. also provided for a "block veto" of the members of any of the Constituent Republics in the legislative decision-making process. The Agreement then provided for a Supreme Court, a Constitutional Court, a Court of Human Rights, the latter with membership of non Bosnian citizens, and four Ombudsmen, one from each recognised group. As far as international relations were concerned, the Constituent Republics were allowed to become a party to an international treaty. Art. VII. 2. then even allowed for secession from the Union with prior agreement of all of the Republics. A Boundary Commission was to assure that the territory of the Muslim majority Republic should not be less than 30% of the entire territory of the Union. The Agreement provided also for a UN-administrator for the Sarajevo district and EC-participation in the government of the city of Mostar.

Being the big loosers, the Muslim side rejected the plan, whereas both Serbs and Croats accepted the plan. Moreover, on August 24 the Croats "officially" proclaimed their "Republic" Herceg-Bosna with the capital Mostar, withdrew all Croat representatives from the institutions of the still internationally recognised Republic of Bosnia and Herzegovina and formed their own parliament. Due to the "realistic approach" in international relations, the Muslim side and in particular the "stubborness" of the legitimate President Izetbegovic now seemed to block "peace." As fighting and negotiating continued, it became obvious that this peace plan had failed too.

2.4. The Washington Accord: the integration of Muslims and Croats into parallel State-structures

After a massacre in Sarajevo in the beginning of February 1994 and intensive pressure by the US, Mate Boban resigned as "President" of Herceg-Bosna and the more liberal Kresimir Zubak was elected chairman of a newly founded Presidency of Herceg-Bosna. On 19 February the Foreign Ministers of the Republic of Bosnia and Herzegovina and Croatia, Silajdžić and Granić, agreed on a new coalition of Muslims and Croats in order to form a union in Bosnia and Herzegovina which then should enter into a confederative relationship with Croatia itself. Under the influence of the Clinton administration negotiations started in Washington with the participation of Silajdžić, Granić and the new leader of the Bosnian Croats, Zubak. On March 1 all sides agreed on the creation of a new "Federation of Bosnia and Herzegovina" based on territorially delimited cantons. This Federation then should form a confederation with Croatia. This "Washington Accord" was formally signed in the White House on March 18.

In the new "Constitution of the Federation of Bosnia and Herzegovina"[1], according to Article I. 1, Bosnians (Bosnjaci) and Croats are called "constituent peoples" who perform their sovereign rights by transforming the internal structure of the territory inhabited by a Bosniac and Croat majority population into a Federation composed of federal entities. These are called "cantons." The constitutional status of the territory with a Serb majority population was to be fixed in the course of the negotiations of the International Conference on the Former Yugoslavia. Article I. 6. then proclaimed a "Bosnian" language and Croatian the official languages of the Federation, which was to be called "Federation of Bosnia and Herzegovina" (Article I. 3).

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[1] *The Washington Agreements were published in a special issue of VeËernij list, poseban prilog, Potpisani sporazumi izme u Hrvata i Bo njaka: Washingtonski dokumenti za mir, 20. 3. 1994, pp. 13-16 and 33-36.*

According to the text of the Constitution, the Federation is made up of an unspecified number of cantons.[1] Each Canton comprises a number of local Municipalities which had existed before the war. The Federation government is responsible for foreign affairs, defence, citizenship, economic policy, regulation of commerce and all financial matters. The federal government and the cantonal authorities will share responsibility for the protection of human rights, health, environmental policy, communications, social welfare, tourism, immigration and asylum. The Cantons shall be responsible for all policy areas not expressly granted to the Federation, namely education, housing, public services, TV and radio facilities and regulation, etc. Most important, however, is the establishment and control of police forces, which must reflect the ethnic composition of the population and have identical Federation uniforms and individual Cantonal insignia.

As far as the institutional structure of the Federation government is concerned, there should be a bicameral legislature with a House of Representatives and a House of Peoples. The House of Representatives is to comprise 140 delegates on the basis of a proportionate vote system with a 5% threshold. The House of Peoples is to comprise 30 Bosnian delegates, 30 Croat delegates and a number of "others" in proportion to the number of Bosnian-Croat delegates. They will be elected indirectly from their respective cantonal legislators with each Canton being allocated a number of delegates proportional to its population. Generally, decisions of the Legislature require the approval of both Houses. According to Article IV. A. 18., resembling the Belgian "alarm-bell" procedure, decisions that concern the vital interests of a constituent people require a majority of both Croat and Bosnian delegates in the House of Peoples, thus providing some sort of "suspensive" block veto. However, if the procedure is opposed by a majority of the remaining representatives, then a Joint Commission of the Bosnian and Croat delegates will be established to resolve the issue, with the Constitutional Court as the final arbiter if a solution is not found within one week. Under Article IV. B. 1. the President is called "Head of State." The election process for the President and Vice-president requires a "double majority" of both Houses and of the respective Bosnian and Croat delegates. The process has to be repeated until the quorum is attained. The Cabinet shall consist of a Prime Minister, a Deputy Prime Minister and other Ministers. The Deputy Prime Minister will serve alternately as either Defence or Foreign Minister. The President, acting on the advice of the Prime Minister, appoints the Cabinet after prior approval of the nominations by the House of Representatives. At least one third of all ministerial posts is reserved for Croats (Article IV. B. 5). The President and the Prime Minister shall be jointly responsible for conducting foreign affairs within guidelines laid down by the legislature (Article IV. B. 7. e.). The Cabinet is entitled to adopt emergency regulations with the binding force of laws in case of "extraordinary circumstances of national importance." The Judiciary shall be "independent and autonomous." Three courts shall function in the Federation: the Constitutional Court, the Supreme Court and the Human Rights Court. There will be an equal number of Bosnian and Croat judges in each of the federal courts with proportional representation of the group of "others" as well. The Constitutional Court shall consist of nine judges and will resolve conflicts between government agencies or the Federation, Cantons and municipalities. Second, the judicial review of all legislation, be it "abstract" or "concrete", is vested in the Constitutional Court. Thirdly, the Court has to decide on all constitutional matters submitted by the Supreme Court, the Human Rights Court, or any cantonal court. The Supreme Court shall have a minimum of nine judges and is supposed to be the highest court of appeal of

[1] *Calic, Krieg, at p. 197 reports that the Federation was delimitated into eight cantons along ethnic lines, namely four Croat, two Muslim and two "mixed."*

the Federation. Its jurisdiction includes complaints from cantonal courts concerning federal legislation. The Human Rights Court will initially consist of three judges, one Bosnian, one Croat and one "other." The Court's jurisdiction covers all matters relating to human rights and fundamental freedoms, in particular to the human rights instruments set out in the Annex.

The institutional structure of the Cantons comprises a unicameral legislature, a President, a Cabinet which must reflect the ethnic composition of the cantonal population, and courts with defined jurisdiction. Where municipalities within a Canton have majority populations other than that of the Canton, the Cantonal authorities are required by the Constitution to delegate education, culture, tourism, local business, charitable organisation functions as well as radio and television to the Municipal authorities (Article V. 2. para 2), thus delimitating some sort of "functional autonomy" to local self-government. The third territorial level of the Federation will be comprised of municipalities which will exercise self-rule on local matters.

In comparison with the general principles of both the Vane/Owen, and the Owen/Stoltenberg plans, the constitutional draft of the Washington Accord for the "Federation of Bosnia and Herzegovina" is a highly elaborated text comprising all institutional matters necessary for a functioning State. The very name "Federation of Bosnia and Herzegovina" and the double institutional structure, however, raise the question of the relationship with the "Republic of Bosnia and Herzegovina." First, the preamble of the constitutional draft asserts that the creation of the Federation is based on the "sovereignty and territorial integrity" of the Republic and, as outlined above, the territory of the Federation comprises only the territory with Bosnian and Croat majority population. Second, Article VII. 1. proclaims that the international relations of the Federation are based on the "international identity, territorial integrity and continuity of the Republic Bosnia and Herzegovina." And third, the transitional provisions of Article IX. 11. para 1 and 2 provide for the further functioning of the Parliament, Presidency and Cabinet of the Republic on the basis of the Constitution of the Republic until decisions are made in a "Final Peace Treaty for Bosnia and Herzegovina."

The Confederation Agreement[1] provides for a "Council of the Confederation" which is responsible for coordinating its policy decisions, in particular in the economic and cultural fields. The aim of the Confederation is the establishment of a common market and monetary union. Most important for the immediate future was the provision of Article 6: Croatia will grant the Federation free access to the Adriatic sea near Ploce whereas the Federation will grant Croatia free transit through Neum.

After negotiations from 7 to 11 May 1994, further agreements to specify the conditions of the Washington Accord were signed by the "new partners" in Vienna. First, principles for the establishment of the cantons[2] were specified. Cantons are deemed to be federal entities and as the result of a form of decentralisation. In order to avoid the image of "national territories", the names of the cantons have to follow the seat of the respective cantonal government or regional-geographic characteristics. Cantons have to be organised along ethnic, economic, natural-geographic and communicative principles. The territory of the cantons comprises all municipalities with a Bosnian and Croat majority population according to the 1991 census.

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[1] *Cf. Ve_ernij list, poseban prilog, at p. 16.*

[2] *Cf. Na_ela konstituiranja kantona, signed by Krešimir Zubak and Haris Silajd_i_ on 8 May 1994.*

Boundaries of municipalities at the borderline may be corrected by including or excluding territories of settlements with Bosnian or Croat majority populations in the respective cantons. Municipalities with a majority population other than that of the Canton will have a "special status" defined in the Federal Constitution. The borders of the cantons may not be altered without the vote of the Federal parliament which is formally required for the vital interests of one of the constitutive peoples. A joint parliamentary commission of Bosnians and Croats has to decide on the specific determination of the borders by consensus. There will be no border controls between the cantons.

The next text concerns "Criteria for the Determination of the Territory of the Federation of Bosnia and Herzegovina"[1]. After repeating the respective constitutional provisions for the problem of drawing borders vis-a-vis the Serb held territory, a solution is proposed whereby boundaries of municipalities at the borderline shall be corrected either by excluding territories of settlements with Serbian majority population or including territories of settlements with Bosnian and Croat majority populations from neighbouring municipalities. It is then proclaimed to be in the basic interest in determining the territory of the Federation that it shall comprise all areas with Bosniac and Croat majority populations in Eastern Bosnia - along the river Drina - in the Bosnian Posavina and in Western Bosnia. In addition, the parties agree that all refugees, displaced persons and emigrants shall return to their homes on the whole territory of the Republic of Bosnia and Herzegovina.

In a text simply entitled "Sporazum"[2] both sides finally agreed on the principle of parity and rotation for the President and Vice-President of the Federation, the number and ethnic composition of Cabinet portfolios, a special regime and further details for two of the cantons, namely Middle Bosnia and the Neretva canton. Already on 13 May the foreign ministers of the United States, Russia, France, Great Britain, Germany, Greece and Belgium urged upon the warring parties a territorial partition of 51:49, i.e. 51% of the whole territory of Bosnia for the newly established Federation and 49% for the Serbs[3] thus de facto recognising the Republika Srpska as a political entity vis-a-vis the Federation. On 31 May 1994 the first Bosniac-Croat Parliament was convened, the creation of the Federation formally proclaimed and the Constitution adopted. Krešimir Zubak was unanimously elected first President of the Federation and Ejup Ganić, until then member of the Republican Presidency and deputy of President Izetbegović, became Vice-President of the Federation.

The Serbs, however, rejected all the plans[4] because "their" territories would have been separated with most of the industry lying outside. The corridor in Brčko had been restricted to a few hundred metres whereas the Muslim enclaves in Goražde, Žepa and Srebrenica were to be linked with Sarajevo. Moreover, the Serbs feared the construction of a territorial "bridge" with the Muslim inhabited Sandžak-region in Serbia. They requested access to the Adriatic sea and

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[1] *Cf. Kriteriji za odre_ivanje teritorija Federacije Bosne i Hercegovine, signed by Krešimir Zubak and Haris Silajd_i_ on 8 May 1994 in the American embassy in Vienna.*

[2] *This text was signed by Krešimir Zubak and Haris Silajd_i_ on 11 May 1994 in Vienna.*

[3] *See AdG, 19 July 1994, p. 39138.*

[4] *See Patrick Moore, Bosnian Partition Plan Rejected, RFE/RL Research Reports, Vol. 3, Nr. 33, 26 August 1994, pp 1-5.*

the international recognition of the Republika Srpska together with the possibility of an Anschluß with Yugoslavia.

2.5. The Dayton Agreement: a bi-partite solution for Bosnia and Herzegovina?

Fighting and negotiating continued with all the atrocities of warfare against the civilian population. Finally, with the Bosnian army in advance and under the mediating leadership of the US, on 26 September 1995 a framework agreement was concluded in New York by the Bosnian, Croat and Yugoslav governments.[1] Along the formula 51:49 the Republika Srpska was formally recognized as an entity of the existing Bosnian Republic and both federal entities obtained the right to establish specific relations with neighbouring countries. As far as institutions were concerned, an absolute block-veto was provided for decisions in the Presidency. On 5 October all parties agreed on a truce and on 1 November "proximity peace talks" started at the Wright-Patterson Air Force Base in Dayton/Ohio.

A first success was seen in a further strengthening of the Bosniac-Croat cooperation. On 15 November Presidents Izetbegović, Tudjman and Zubak signed an "Agreement on the Establishment of the Joint Cooperation Council" of Croatia and "the Republic and Federation of Bosnia and Herzegovina" (Article 1). This Joint Council was to promote and to coordinate cooperation in virtually all policy fields. It was to consist of ten members, five from Croatia and another five from "the Republic and Federation of Bosnia and Herzegovina" with Mr. Tudjman as President and Mr. Izetbegović as Vice-President. This Joint Council was then formally established in the Paris meeting in December and had its first meeting on 4 January 1996, when it adopted its standing orders.[2]

The "Constitution" for Bosnia and Herzegovina, attached as Annex 4 to the Dayton Agreement, first asserts that the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law, but will be composed of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Citizens of Bosnia and Herzegovina may also hold citizenship of another State. Article II then provides for Human Rights and Fundamental Freedoms. In particular, all refugees and displaced persons have the right freely to return to their homes of origin and to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Foreign policy, customs policy, monetary policy, immigration, refugee and asylum policy, inter-Entity criminal law enforcement, and common as well as international communications facilities are the responsibilities of the central government. All other governmental functions and powers thus are those of the Entities. Moreover, the Entities will have the right to establish parallel relationships with neighbouring States. Each Entity may also enter into agreements with States and international organisations with the consent of the Parliamentary Assembly.

As far as the institutional structure is concerned the Constitution provides for a bicameral legislature. The Parliamentary Assembly will consist of a House of Peoples comprising no more than 15 delegates, indirectly elected by the respective parliamentary bodies of the Entities along

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[1] *The text of this agreement is published in AdG, 12 October 1995, at p. 40425.*

[2] *Cf. Poslovnik Vije_a za suradnju Republike Hrvatske i Republike i Federacije Bosne i Hercegovine.*

the principle of parity for the three ethnic groups. The House of Representatives shall comprise 42 members, two-thirds directly elected from the territory of the Federation, one-third from the territory of the Republika Srpska. Procedural rules provide for rotating chairs, the necessity of approval by both chambers and an absolute block veto in case two-thirds of the Delegates elected from either Entity dissent. The Presidency shall consist of three members, one Bosnian, one Croat and one Serb, directly elected from the territory of their respective Entities. Any decision of the Presidency may be blocked in case of a veto of one of its members and a two-thirds vote of the parliamentary delegates of the respective ethnic group. Each member of the Presidency shall have civilian command authority over armed forces. The Presidency will also elect a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Presidency will nominate the "Chair of the Council of Ministers" who then will nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers. All of them need the approval of the House of Representatives and, together, they form the Council of Ministers. The Constitutional Court will have nine members. Four of them will be selected by the House of Representatives of the Federation, two of them by the Assembly of the Republika Srpska and the remaining three, not being citizens of Bosnia or of any neighbouring state, by the President of the European Court of Human Rights. The Constitutional Court shall then have exclusive jurisdiction to decide any dispute that arises between the Entities or between Bosnia and Herzegovina and an Entity or Entities, including the question of whether a special parallel relationship with a neighbouring State or any provision of an Entity's constitution or law is consistent with this Constitution. The Constitutional Court shall also have appellate jurisdiction arising out of a judgment of any other court in Bosnia and Herzegovina on whether a law, on whose validity its decision depends, is compatible with the Constitution, the European Convention for Human Rights and its Protocols, or with the laws of Bosnia and Herzegovina. Article IX prescribes that no person serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment before that Tribunal, may stand as a candidate for public office in the territory of Bosnia and Herzegovina.

Annex 6, the Agreement on Human Rights, provides for a bundle of institutions to be active in this field. In particular, there will be a Human Rights Ombudsman and a Human Rights Chamber. Moreover, the UN Commission on Human Rights, the OSCE, and other intergovernmental or regional human rights missions or organisations are invited to monitor closely the human rights situation in Bosnia and Herzegovina.

To sum up the final constitutional implications after the Washington Accord and the Dayton Agreement, Bosnia and Herzegovina will comprise three constituent peoples as before, but only two federal entities with the Federation of Bosnia and Herzegovina forming a "federation in the federation." Both these agreements led to the full international recognition of the Republika Srpska and, much more important, to the full recognition of nationalist principles, with the result that the concept of a multi-ethnic State with legal institutions providing for integration through representation and participation was replaced by a territorial delimitation along ethno-national lines. The very small number of representatives in the institutional "supra-national structure" of Bosnia and Herzegovina, the provisions for dual citizenship and the possibility of parallel relationships for the federal entities with neighbouring countries are indicators that the federal entities will not preserve "autonomy" but stand for separation. Moreover, there exist all the problems of implementation. There is among others the local Croat refusal to "unite" Mostar, which is still under EC-administration. The most serious problems will be the return of refugees on the whole territory of Bosnia and Herzegovina and the establishment of a "civil society" through free elections in the Serbian part.

3. Concluding remarks

From the first Bosnian Constitution which was adopted under Habsburg rule in 1910[1] to the last communist Constitution in 1974 with the respective amendments of 1989 and 1990[2] and the electoral laws for the first elections under a multiparty system, the following legal principles and respective institutions were in force:

1. The recognition of "ethnic difference": in 1910 and 1974 Muslims, Serbs and Croats were constitutionally recognised as ethnically different groups;

2. In conjunction with the recognition of their ethnic difference all these three groups thought themselves as being basically equal with an entitlement to proportional representation and participation in the political decision-making process at least at the "national" level. Hence proportional representation in parliament and even parity could be found in constitutional provisions for the highest executive and judicial bodies.

3. Despite this understanding of equality of three "constitutive" peoples or nations, a fundamentally different assessment of the consequences of "equality" can be seen as the source of conflict in terms of constitutional theory - whether, in reality, this was only a masquerade for naked interests to construe a "legitimate" claim in the course of the conflict or not. The basic constitutional problem was the relation of equality, popular sovereignty and self-determination which amounted to an inevitable political problem because of the dissolution of communist Yugoslavia. Hence the Bosnian government was confronted with the alternative of remaining in a communist and Serb dominated "rump Yugoslavia" or to claim "sovereignty" and to ask for international recognition in order to secure the process of democratic transformation which had already begun with the first free elections. This alternative was most dramatically expressed in the course of the parliamentary meeting which ended with the adoption of the Memorandum and Platform and the obstruction of most, but not all (!) of the members of the Serbian party under the leadership of Radovan Karadžić.

The Serbian viewpoint was based on the understanding that the Serbian population living in Bosnia - as part of the Serbian "people" as a whole and forming one of the tree "constitutive" peoples of Bosnia - had a right to claim "original power" in the sense of popular sovereignty. Two political claims, consecutively and/or simultaneously, were then based on this alleged right. First, in the course of the parliamentary meeting they derived a block veto from this alleged right with the consequence of forcing their minority position on the majority, despite the fact that both the Muslim and Croat leadership had not excluded membership in a Yugoslav Federation, but under democratic auspices. When both Muslims and Croats joined to deny the veto claim, the Serbian leadership asserted a right to secession and to forge an Anschluß with Serbia based on an alleged right to self-determination. Although there was no "clear and present danger" of

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[1] *The text of this constitution is published in Edmund Bernatzik, Die österreichischen Verfassungsgesetze, 2nd ed., Wien 1911, pp 1037-1050. The respective provisions for the proportional representation of the Muslim, Orthodox, Catholic and Jewish population is to be found in § 4 of the Wahlordnung (Electoral Law), ibid., pp 1050-1.*

[2] *A text of the Constitution 1974 with all amendments incorporated was published in Sl. l. RBiH, br. 5/1993.*

discrimination against them in an independent and internationally recognised Bosnia, they did not, however, try to exercise this right to self-determination in a democratic and peaceful way, but through armed insurrection. Interestingly enough, not only proportional or equal representation, but exactly such an absolute block veto is provided in the constitutional principles of the Dayton Agreement now.

4. The concept of "territorial autonomy" was used by both Serbs and, later on, also Croats to establish nationally homogenised regions in order to provide for secession and the Anschluß with the respective neighbouring Republic of Serbia or Croatia. Ethnic cleansing thus was not a consequence of civil strife but a terrorist means by the paramilitary organisations to achieve this goal. After an initial phase when both the Muslim leadership and the EC had agreed to form "cantons" on an ethnic basis, they soon recognised the danger for the territorial integrity of the Republic of Bosnia and Herzegovina. Whereas the Muslim leadership then returned, more or less, to the concept or phrase of "multiculturalism plus territorial integrity through a unitary State", the Vance-Owen plan provided for a further territorial division into 10 cantons as a means of mere regional devolution of power in order to avoid the carving out of three ethnically separate political entities which, with the proclamation of Republika Srpska and Herceg-Bosna, already existed de facto. The very same concept of "cantonisation" thus had entirely different goals according to the differing interest of the parties including the EC-UN mediators.

5. However, the institutional design of "cantonisation" or territorial autonomy, even in Vance-Owen's initial idea of ethnically mixed cantons, had a basic defect from the very beginning, namely the necessity of drawing boundaries under the condition of a severe ethnic split. Hence territorial subdivision did not "neutralise" the "supra-national" level and thus contribute to the resolution of ethnic conflict as conceived in sociological theories[1], but the necessary drawing of boundaries actually started or intensified fighting all over Bosnia with the aim of gaining more territory on the battlefield for future negotiations. With occupying territory and ethnic cleansing hand in hand, the concept of territorial delimitation thus served the goal of national homogenisation which was a declared aim from the very beginning for one of the parties and at the same time a consequence for all the others.

6. With the (military) failure of, more or less, "ethnically indifferent" cantonisation, the EC-UN mediators, in particular Owen-Stoltenberg, returned to the concept of a "tri-partite" Bosnia thus legitimising not only "ethnic difference", but some sort of territorial division on an "ethno-national" basis. However, even this concept failed because of the Serbian inclination to form a State of their own which could unite with Yugoslavia.

7. With the Washington Accord, first to stop Croat-Muslim fighting and then the military success of the alliance, the situation in Bosnia was invested with a new complex institutional "quality". The creation of a Muslim-Croat "Federation of Bosnia and Herzegovina" not only provided a dual State structure, but, in actual fact, also the basis for a bi-partite political solution. As this new Federation was linked with Croatia in a "confederation" similar claims of the Republika Srpska could no longer be called illegitimate.

8. The Dayton Agreement, finally, legitimised the "Republika Srpska" not only as a federal entity of Bosnia, but also granted a legitimate claim for "confederate" relationships with Serbia. A closer look at the map, not only of Bosnia, but of the whole region, obviously reveals that the

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[1] *See, in particular, Donald L. Horowitz, Ethnic Groups in Conflict, Berkeley 1985.*

partition of Bosnia between Serbia and Croatia is almost finished. Whether this was the only realistic approach to stop military aggression and genocide or a betrayal of all the principles of international law and of minority protection is not only a question of the "right" approach, but remains to be seen.

f. Local and national minority self-government in Hungary by Mr János BÁTHORY
Head of Political Department, Government office for Hungarian Minorities Abroad, Budapest

The Constitution of the Republic of Hungary guarantees to national and ethnic minorities' the right to representation. Through the approval of law 1993: LXXVII on National and Ethnic Minorities' Rights and Law 1994: LXII on Local Government Elections, the Hungarian Parliament desired to completely meet the autonomy ambitions of minorities on the one hand, and the recommendations of international documents concerning minorities on the other.

Therefore the principle of "participation in public life" of minorities as set forth in international documents is applied in the Hungarian model.

According to the Hungarian minorities, the functioning of independent free associations is a necessary but not sufficient framework for public activities. They required a solution which would allow for the creation of organisations with a broader mandate functioning as an integral part of "public administration" together with other associations. This principle was accepted by the Government, and adopted by the Hungarian Parliament as well.

With local government elections on 11 December 1994, local minority governments were elected too, for the first time ever in the history of Hungary.

This unprecedented event has been made necessary by the specific situation of thirteen national and ethnic minorities living in Hungary. These minorities, relatively small in number, are geographically dispersed, and normally constitute a minority even within the settlements where they coexist with Hungarians and other minorities.

According to the law, minority local authorities can be elected in two ways. Their election is an indirect one if, after the elections held, the delegates of a minority make up a majority of the municipal corporation in any local government and they declare the whole council a minority local government. If the representatives of a minority get at least 30% of all mandates, the candidates of each minority will constitute a separate list. The condition for their election is at least 50 votes in settlements smaller than 10,000 people, or 100 votes with settlements larger than that. Such votes do not necessarily have to come from voters belonging to their minority.

Local minority governments, irrespective of the manner of their election, have the right to consent in all areas of primary importance for minorities. In any question related to local public education, culture, local media, local traditions and the collective use of language, the settlement's local authority can only decide about new regulations if they get the consent of the local minority government. In other matters, the rights of local minority governments are solely consultative.

Minorities will not be left under-represented even if they can't or don't want to establish any of the various forms of local self-government. If a minority candidate does not get the minimum number of votes required, the requirement will be eased in order that he/she may become a full-fledged member of the local self-government. If this solution is not workable, then the candidate

receiving the highest number of votes will become a non-voting advisory member of the local self-government in the role of local spokesman for the given minority.

Results of the local elections on 11 December 1994

On 11 December 1994, in roughly 1500 settlements, including also those comprising minority population, 654 minority local government elections were held, 644 of which proved to be valid. It was notable too that Hungarian voters belonging to the majority part of the population, receiving the idea of minority local governments with sympathy, at many places voted for the minority candidates. Minority candidates received nearly 1,800,000 votes all over the country, and obtained 2,342 mandates altogether.

The high number of votes cast for minority candidates may be due to the fact that, because of the prohibition on preliminary registration, any person including ethnic Hungarians had the right to vote in favour of a minority candidate. Thus, it may be presumed that the majority of the votes were given by majority subjects sympathising with the minorities. One year later, on 17 November 1995, a minority self-governmental bye-election was held for those minority collectivites which, for various reasons, had failed to elect local governments on the occasion of the general municipal election. This time only 1.73% of the population turned out to vote. The participation rate was very low, especially in towns, while in smaller settlements this ratio was 10%. Even so, the bye-election resulted in the establishment of 138 new self-governments in small settlements, their number now being above 800, which operate, alongside the local self-government, a minority self-government.

The National Minority Government

One of the important tasks of minority representatives elected on 11 December 1994 will be to hold national assemblies with the minority spokesman and electors delegated by settlements where there was no minority representative or minority spokesman, so as to thereby establish the national self-government of their minority. These highest instances, possessed of perfect legitimacy on account of the manner of their election, will work as negotiators with the national government, and will have the right to take over all minority institutions and to fully determine their functioning.

By April 1995, every minority, excepting the Ruthenian and Ukrainian ethnic groups, had elected their national minority self-government. The Minority Law obliges the government to provide the national self-governments with headquarters and money for their functioning. The local minority self-governments also get central financial assistance, and the local self-government is obliged to provide technical assistance for the functioning of the minority self-governments.

Debates, on both local and national level, centre on rate of financial assistance and on the definition of self-governmental competences. The debates are especially fierce in the case of the gypsies. The Roma population's legal knowledge is very low, and many of them are discontent with the Minority Law since it only regulates the rights of the use of language, education and culture, whereas the Gypsies expected a change in their detrimental social situation. They demand competencies for the gypsy self-government which do not fall within the jurisdiction provided for by the Minority Law.

Discussion is now under way in Hungary about how national self-governments can assert their rights under the Law. Those institutional structures in which government organs and national self-governments could square their dealings in matters concerning minorities in a regulated way are not yet developed. In 1995, minority items provided for in the national budget have given rise to debates, in the course of which the minority leaders had to exercise political pressure in order to force the Ministry of Finance into negotiations. The matter of radio and television transmissions for minorities was likewise hard hit by the Law on the Media, and minority leaders had limited possibilities to effectively influence the debates on this Law.

There was some talk about setting up a "Minority Interest Conciliation Board". Half of its members were to consist of the leaders of the national self-governments, while the other half were to have been made up by representatives of the State administration. The Government has been willing to adopt a solution of this kind. At the moment, the minority leaders cannot agree among themselves about the development of their own inner decision-making mechanism. The small ethnic communities stick to the principle of equal votes, while those of greater strength consider that voting in proportion to strength is the best principle to be adopted in practice. Especially gypsy leaders think it unfair that a minority with a population of but 3,000 should have the same influence as half a million Roma subjects. This being so, the gypsies feel inclined not to take part in the work of the Minority Interest Conciliation Board comprising all minorities, and rather wish to develop their own consultative mechanism with the Government.

A consultative mechanism is of special importance in States where there is no other way of effective participation in public life. The Hungarian model offers governmental competences to the minority self-governments, thereby surpassing the consultation level in many respects. This is the reason why the setting up of the above Board does not seem to be so very important. To participate in the work of the advisory Board of the Minority Foundation, where they not only may express their opinion but can also make decisions, is of far greater importance to the minority leaders.

g. Autonomy, human rights and protection of minorities in Central and Eastern Europe by Mr Fernand DE VARENNES
Lecturer, Perth

If the autonomy and identity of various cultural spheres is smothered, if these spheres are squeezed together, as it were, by thousands of civilisational pressures, and forced to behave in a more or less uniform way, then one understandable response is an increased emphasis in these communities on what is really proper to them, on what is their own, on what makes them different from others. As a result, their antipathy to other communities is augmented as well. The more that completely diverse, autonomous cultures have been drawn into the single maelstrom of contemporary civilisation, the more vigorously aroused seems to be their need to defend their original autonomy, their otherness, their authenticity ...

Only on the basis of respect of one group for another can what binds us be sought, a kind of common worldwide minimum whose binding nature make it possible for mankind to co-exist on a single planet. It could only work if the commitment grew out of a climate of equality and a common quest. It is no longer possible for one group to force it upon others.

Vaclav Havel, New Delhi, February 1994

1. Introduction

The modern State is a political community capable of grouping together members of various races, religions or languages. But we often wrongly attribute to the State the characteristics of the "nation" or the "people", ie the majority population[1]. English is the language of the United States, Ireland is a Catholic State, Saudi Arabia is a Muslim State.

The adoption of an official or unofficial language or religion does not in itself necessarily amount to a denial of minority rights. Even if the State is invested with the language, religion or culture of the majority, certain human rights - in particular, freedom of expression and religion and freedom from discrimination based on language, religion and ethnic origin - can ensure that these preferences or "characteristics" of the State do not place an onerous or unacceptable burden on any individuals diverging therefrom, those being usually members of a minority. On the other hand, the absence in a State of a system for protecting human rights means that members of a minority are entirely at the mercy of a majority whose degree of tolerance may vary.

Whilst human rights are the first form of defence against the oppression, intolerance and prejudices of the majority, the effectiveness of the protection they afford will largely depend on the existence of a well-developed legal system and to a certain extent on the good will and co-operation of political leaders, ie leaders of the majority community. In the absence of such circumstances, the majority community can easily brush aside certain human rights on the pretext of protecting the language, religion or culture of the "nation State", or it can interpret the scope of human rights in an over-restrictive way.

For members of a minority, self-government is a second form of defence against the whims of the majority and the State apparatus under the latter's control. Self-government means that the members of a minority control in turn part of the State apparatus in matters or territories within their jurisdiction. In this way, they protect themselves from certain human rights abuses affecting their characteristics, or at least increase the chances of having their identity and political will recognised and respected within the State.

Rather than being perceived as a threat to the territorial integrity of a State and a first step towards possible secession, self-government should be seen as a compromise aimed at ensuring respect for human rights within a State which recognises and accommodates the diversity of its population. Self-government viewed from this standpoint is a means of contributing to the maintenance of the territorial integrity of a State, rather than a Trojan horse aimed at its destruction.

2. The Modern State: Nation-State, State of the majority?

The idea that the modern State faithfully represents the entire population forming part of the "people" or the "nation" should be dismissed from the outset. On the one hand, this image, which largely results from the liberal model of the State based on a social contract between free and fully identical individuals, fails to take account of the fact that men are not simply economic production units; on the other hand, it perpetuates the illusion that the State apparatus remains unbiased and entirely neutral in law and in fact towards the whole population.

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[1] *For example, the preamble to the Constitution of Macedonia provides that this State was created as "a nation State of the Macedonian people" where Albanians, Turks, Vlachs, Romanians and others are nevertheless equal in law.*

Neither the Marxist nor the neo-liberal State can entirely dismiss what forms part of human nature: human beings are above all social animals, and, as such, have a natural tendency to prefer their "own kind" and to mistrust or fear "others" or "foreigners". "Others" are those outside "one's own community". Depending on the period or the context, certain human characteristics play a determining role in the definition of "others" - in particular, race, ethnic group, language and religion, which have contributed to the creation of barriers between communities.

Although a certain universalism and the feeling of belonging to one and the same human race have enabled real progress in international co-operation and universal human values to be made, it is nevertheless the case in such countries as Sri Lanka, Bosnia and the Sudan that human differences are widely evident as key factors of human identity. For better or for worse, each individual is marked by the language, religion, moral values and culture of his or her community.

The fundamental mistake made by many legal and political experts is to treat such questions in simplistic terms of "tribalism", "irrationalism" or "nationalism" and to maintain the illusion that the modern State can remain completely aloof from such differences.

Let us take the example of religion. Whilst it is true that the State can to a large extent be secular and thus avoid unconscionably favouring those who practise a particular religion, it is clear that certain practices of the State indirectly call into question a distinction based on religion if the same advantages or privileges are not granted to that part of the population whose religious practices are different. When the State imposes the observance of Sunday, Christmas and Easter as public holidays, non-Christians do not enjoy public holidays coinciding with their own religious festivals. Whilst such a distinction is probably non-discriminatory in a State where the vast majority of the population is Christian, it may be discriminatory in a country where a high percentage of the population is Muslim or Hindu. The example of Singapore, where all religious festivals of the main religious communities are public holidays, demonstrates one way of reaching a just and reasonable balance that is non-discriminatory in international law.

Whilst it is difficult for a State, even a secular one, to avoid favouring a particular religion, the problem is even more acute as regards the linguistic preferences of the State apparatus and those who control it:

> [L]anguage is central to the whole communication network of any political system. Public authorities, particularly in a modernising situation, are inevitably and increasingly drawn into language questions through the spread of citizen participation in politics, the provision of more administrative services, and perhaps most of all through the development of State-supported education. This means that one of the most successful methods for pacifying religious differences at an earlier date, namely, the withdrawal of the State from the arena of conflict, or de-politicisation, is not available for most linguistic conflicts, and other methods of conflict resolution must be found. One can have separation of Church and State, but in advanced societies separation of language and State is simply not possible. A major consequence of this central role of language in the communication network is that it is closely linked with most of the professional and bureaucratic employment opportunities, with the result that conflicts over language frequently involve high personal stakes in terms of career prospects for the groups concerned, and most of all for their most articulate and well-educated elites. Language

conflicts therefore concern not simply languages as such, but tangible economic benefits as well[1].

Consequently, the State has no alternative but to reflect to a certain degree the characteristics of its population in its administrative and legislative behaviour, and in the choices and the values underlying its structures and functioning.

The difficulty is that in most States there is one part of the population that is linguistically, religiously or ethnically different from the majority. Since the State apparatus usually remains under the control of the majority (although, as shown by the situation in South Africa and Rwanda, this is not always the case), it is the majority that generally monopolises control of the State apparatus and guarantees to its "own kind" a larger share of the resources, benefits and privileges offered by the modern State: employment in the public sector, public teaching in the official language (normally that of the majority), recognition of religious holidays as "public" holidays, etc.

Instead of being completely aloof from all linguistic, cultural or religious preferences, the modern State, by means of its laws and functioning, will tend to a varying degree to favour the characteristics of the majority of its population.

The problem of minorities is in fact a problem of balance between the majority's preferences as directly or indirectly favoured by the State apparatus, and the need not to be excessively unfavourable or restrictive towards the preferences or expression of identity of those who do not share the preferences or characteristics of the State, ie, in general, the members of a minority.

In other words, members of a minority do not always accept this seizure of the State apparatus by a section of the population which thus reaps a greater benefit therefrom. "If we were all equal in the eyes of the State, why does the majority receive a disproportionate share of the State's privileges, benefits and resources? Why should my language/religion/culture count for less than that of my neighbour?"[2]

3. Democracy and sovereignty of the State: the danger of tyranny by the majority

There are two types of response to the "problem" of minorities and their demands: the State can either put up with or eliminate the differences underlying the identity of a minority. The first approach opens the door to a compromise between the preferences and needs of the majority and

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[1] *McRae, Kenneth D. (1986), Conflict and Compromise in Multilingual Societies: Belgium, Wilfrid Laurier University Press, Waterloo, Canada, p. 3-4.*

[2] *On the subject of the Albanian minority in Macedonia, see Munuera, Gabriel (1994), Preventing Armed Conflict in Europe: Lessons from Recent Experience, Institute for Security Studies of the Western European Union, Paris, p. 47-48: "[T]he Albanians of FYROM are poorly represented within the administration, the army, the police and the economic sector. Education in the Albanian language is considered to be insufficient; there is no university using the Albanian language and the number of Albanian teachers is considered to be too low. The Albanians are seeking to use their language and alphabet in all national institutions, create a university that would use the Albanian language, and increase their participation in all sectors ...".*

those of the minority within the State. Such a compromise or balance is what both inspires and moulds what are known as human rights.

The second approach is one of rejection, intolerance, fear or contempt vis-à-vis human differences and the "outsider". It is the approach of a State where the "nation", ie the linguistic, religious or ethnic majority, reigns supreme. In extreme cases this approach takes the form of forced assimilation, ethnic cleansing and genocide. Clearly, it is based on rejection of the universal values of respect, justice and reasonableness that are reflected by human rights.

In a substantial number of States, there is a danger of all compromise being rejected and of refuge being taken in stability, the pure and noble historic model, the nation-State or such slogans as "national sovereignty", "the will of the people" or "Asian values". Very often, the exercise of political power within a State takes the form of tyranny by the majority over those who are different, unless measures are taken to protect those who are both numerically and politically at a disadvantage.

Thus, in most States (including democratic States), there not only is a tendency to favour the majority, whether religious, linguistic or ethnic, but also a regrettable practice of describing the State in anthropomorphic terms: the State is assigned a language, it is perceived as being "Christian" or in the Christian tradition, etc.

This also means that those who control the State apparatus can make use of it to favour their "own kind" and accord less favourable treatment to those who do not fall within this category. In certain circumstances, a citizen having a language and culture different from the majority and different from the "official" language and culture of the State may be regarded as a threat or an affront to the State simply because he or she is different.

It must not be thought that this type of behaviour has nothing to do with the spirit of tolerance in which democratic liberalism is steeped: democracy signifies first and foremost a universal suffrage that can very easily be expressed through tyranny by the majority. History shows that minorities, whether Blacks, Hispanics or Red Indians in the United States, Aborigines in Australia, or Gypsies and Jews in Europe,[1] have always served as scapegoats for the frustrations, prejudices and intolerance that can emerge among the majority.

Thus, all too frequently the State plays the role of alter ego of the majority: if a critical mass of the majority of the electorate displays certain prejudices against a minority in one way or another, its elected representatives may have a tendency to do likewise or, even worse, could try to seize the banner of the exclusive and intolerant (nationalist) nation-State in order to gain control of the levers of political power. This is the approach successfully used in extreme cases by the Milosevice's and Karadzice's of this world, but they are far from being the only or last examples of such behaviour.

For the members of a minority, the absolute sovereignty of the State, the absence of safeguards against the excesses of the "will of the people", whether or not a democratic State is concerned, means blind reliance on the good will and the tolerance, or otherwise, of the majority.

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[1] *For example, last year an American judge ordered a mother not to speak Spanish to her own daughter, on the ground that in an "English-speaking country" this type of behaviour constituted a form of abusive treatment.*

4. Human rights: protective measures against the excesses of the State and the majority

Human rights are a first defence against the excesses of the State apparatus, and indirectly against the majority population which largely controls it. In other words, these rights are a means of protecting those in a position of weakness in relation to the State apparatus (the minority individual in particular) and those who control it.

Such a statement may seem surprising, and yet it is by no means extraordinary. One of the first human rights to have been recognised in international customary law, namely freedom of religion, owes its origin precisely to recognition of the fact that seeking to impose the State religion (ie the religion chosen by the sovereign) on an entire population in accordance with the principle cuius regio, eius religio1 is unacceptable.2

Recognition of freedom of religion in Europe almost five hundred years ago was therefore an acknowledgement that the State must never be allowed to have "carte blanche" in certain areas, as political and legal power could otherwise be abused ad infinitum. However, it was only after the second world war that the international community and a large number of countries accepted the idea that the powers of the State and the "will of the people" should be subjected to certain restraints. Before the adoption of the Universal Declaration of Human Rights, most governments, including the western ones, were fiercely opposed to any restrictions on their power, always because of the so-called need to protect national sovereignty, the will of the people, etc.3

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[1] *A principle which was mainly developed in 1555 with the Peace of Augsburg and which contributed to the religious wars in Europe up to the Treaty of Westphalia.*

[2] *Originally, freedom of religion was respected more because of the need to guarantee order and peace between European States, than because of any fundamental concern for human dignity.*

3 *The system for protecting minority rights after the first world war was aimed at only a very restricted number of States, most of which emerged defeated from the war. It was not comprehensive and was not aimed at the great powers. Indeed, it was ipso facto doomed to failure.*

As shown by the fate of Blacks in the United States until recently and by the horror of the Holocaust, the effect of this opposition was to sanction during this period the vulnerability of members of minorities vis-à-vis the diktats of governments under the influence of a majority capable of being insensitive, intolerant or worse.

It is in this context that human rights must be assessed. For the first time on a world-wide scale, it is now recognised that the State must be subject to restraints in certain areas. For members of a minority, such rights therefore represent a first line of defence against an oppressive, intolerant or indifferent State: freedom of religion, freedom of expression, freedom from discrimination based on language, religion, race or ethnic origin, the right of minorities to use their own language among themselves and to practise their religion or observe their culture - these are all victories against possible excesses of the majority controlling the nation-State and the State machinery.

Interaction between language and freedom of expression is a concrete example of the relevance of these individual rights for members of a minority. Until recently several States, including France, Canada, Turkey and Estonia, had statutory provisions prohibiting the private use of certain languages in notices or the media.1

On the one hand, the governments concerned regarded such provisions as authorising the deliberate exercise of their powers in the name of "national sovereignty" for the sake of protecting or promoting the national heritage, ie the language of the majority. On the other hand, members of numerically large linguistic minorities saw them as evidence of intolerance and an attack against one of their fundamental identity-related qualities as well as an unjustified interference in and lack of respect for their identity.

It was thanks to the protection afforded by freedom of expression that the non-francophone minority in Quebec was finally able to overcome the legislative restrictions enacted by the State in the use of languages for the purpose of notices.2 Similarly, freedom of expression may also result in the eradication of certain practices still existing in Indonesia, Estonia and Turkey. In these three States, it is apparent that linguistic minorities (in particular, Chinese, Russian and Kurdish respectively) can be protected, not through the creation of new "collective" rights, but partly through recognition of the fact that certain rights may impose certain limits on the behaviour of the State or majority.

Few legal experts appear to have considered the possibility that human rights can have some impact or other in areas relating to language, religion or culture, ie the principal characteristics of a minority. And yet, the example of freedom of expression and freedom to use a particular

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[1] *Certain statutory measures still in force in Estonia and Turkey probably constitute a violation of freedom of expression. On this subject see de Varennes, Fernand (1994), Language and Freedom of Expression in International Law, Vol. 16 Human Rights Quarterly, pp. 163-186.*

[2] *Ballantyne, Davidson and McIntyre v. Canada, Communications 359/1989 and 385/1989, 31 December 1993. See also de Varennes, Fernand (1996), Language, Minorities and Human Rights, Martinus Nijhoff, The Hague, pp. 42-44.*

language for notices shows that the traditional point of view has wrongly neglected an approach capable of having highly concrete results for minorities.

Although it is not possible to explain here in detail the possible nature and scope in international law of all the human rights mentioned earlier, several general points can be set down. In the area of language, the protection that might be enjoyed by minorities demanding freedom of expression, non-discrimination and a right to use their own language freely among themselves can be summarised as follows:

In practice, these three rights may interact, mingle and complement each other in a number of areas. As far as general use of a single official or majority language by public authorities is concerned, the prohibition against discrimination prohibits invocation of an "official language" policy by a State as a shield against the need to respond to any language demands from its population. Official language should never be seen as permitting exclusive use of a language in complete disregard for fundamental human rights.

As far as the human right which has the greatest impact when a State is involved in offering services or any type of advantage or benefit to individuals, it appears the prohibition of discrimination is of major significance. When considering what constitutes a non-discriminatory language preference by State authorities, a "sliding-scale model" offers a practical formula which is able to take into account important factors such as the number of speakers of a language, their territorial concentration, the level of public services being sought, the disadvantages, burdens or benefits a State's linguistic practice imposes on individuals, and even a State's human and material resources. In essence, it means that the level of services provided by public authorities in a given language must, by and large, reflect the relative numerical strength of the population in a municipality, district, region or province which uses this language.

Since judicial proceedings are conducted as part of a State's structure, they can also be described as a State "service" or activity. But in addition to going through the same balancing process of the sliding-scale model when considering whether a State's linguistic preferences are consistent with the prohibition of discrimination, there are situations where a State is obliged to make some type of concession in language matters even if only one individual is adversely affected by the language of proceedings chosen by a State. Because of the very serious consequences of criminal proceedings, it is universally recognised that an accused who does not understand the language of proceedings must have a right to the free assistance of an interpreter. In this and in a few other examples of a State's obligations in judicial matters, even if it only involves a single individual, it can be said that the disadvantage suffered by one person with no or little knowledge of the language of court proceedings is so serious that a State can never derogate from the obligation to provide some compensation for the inequality suffered, through means of an appropriate degree of interpretation services.

Where a State provides public education, the prohibition of discrimination also imposes generally a duty to offer instruction in the languages spoken by its population to a level that roughly corresponds to the number of speakers of a language. This is the so-called sliding-scale model. Once again, this approach is linked to the advantages derived from being able to use one's primary language. Children are clearly disadvantaged, or do not receive the same benefit, if some are not educated in the language with which they are most comfortable. It then becomes a matter of determining if a State's conduct is a reasonable measure when considering the degree of disadvantage, the goals of the State's policy, the number of individuals adversely affected, etc.

Because of the need to balance the various rights and interests involved, and because of the ultimate aim of attaining factual as well as legal equality, the prohibition of discrimination in public education can never be invoked in an attempt to deprive children the benefits of learning the official or majority language of the State in which they live. This means that even though the prohibition of discrimination may call for the use of a non-official or minority language as the exclusive or quasi-exclusive medium of instruction in appropriate circumstances, it cannot be used to support an educational policy which would isolate these individuals in "linguistic ghettos" and exclude them completely from other benefits that may only be available in the official or majority language. In other words, all individuals should at least have the opportunity to learn the official or majority language, even if the medium of instruction used in public schools is different.

Private schools which use a minority language as the medium of instruction are an example of the combined effects of non-discrimination and the right of members of a minority to use their language with other members of their group. The latter right means that a State must allow these schools to open and operate freely, although public authorities are entitled to impose requirements as to appropriate academic standards and may also require that all students attain a reasonable level of proficiency in the official or majority language. This last aspect again reflects the application of non-discrimination in order to avoid the creation of linguistic ghettos to the ultimate disadvantage of pupils in private minority language schools.

States are not obligated to provide financial or other resources to private schools. If they do, private schools using a minority language as medium of instruction should also be entitled to these benefits in conformity with the prohibition of discrimination. Because non-discrimination should not be confused with identical treatment, a State may legitimately find it desirable to provide greater resources to minority schools in recognition of the higher costs, the more numerous difficulties in operating such establishments, or the need to compensate for previous disadvantageous State practices and policies towards the minority.

The public/private divide is also relevant when dealing with the issue of the language of the media. In the case of public media, such as State-owned or operated television, radio or publications, the prohibition of discrimination in language matters requires that the level and type of these benefits or services be generally available in direct proportion to the number and concentration of speakers of a specific language.

As for private operations, freedom of expression would demand that State authorities not interfere in the language of the media. Some additional requirement such as a degree of biligualism could be imposed on private media, as long as it does not constitute an obstacle to the free use of language as a constituent of freedom of expression, and as long as it does not impose a discriminatory requirement by imposing unacceptable burdens or disadvantages to which others are not subjected. If a State provides some form of assistance to private media, it follows that private media operating in a minority language should also be eligible for these resources in a non-discriminatory way, although the prohibition allows for a flexible formula permitting States to tailor such assistance in ways that suit its social and factual background.

In the case of linguistic minorities, the entitlement of members to use their language with other members of their group would appear to signify that they should always have the right to private media, although this does not impose on a State the obligation to provide the resources to make this possible. One exception to this principle exists in the allocation of telecommunications

frequencies for radio or television. Since such frequencies are generally considered to be public resources, the balancing of a linguistic minority's right for its members to freely use their language amongst themselves and a State's control of the only means to apply this in the field of private radio or television would seem to be particularly troublesome. However, the allocation of public radio or television frequencies raises the issue of non-discrimination. It therefore imposes a duty on a State to ensure that linguistic minorities have access to an appropriate number and type of frequencies, but not an unfettered number since frequencies constitute a public good to which minorities cannot claim unrestrained ownership.

Finally, no area of State activity falls naturally outside the protection of human rights. This becomes particularly important when dealing with naturalisation matters which until recently were mistakenly thought to be immune from the scope of the prohibition of discrimination. On the contrary, naturalisation is clearly subject to fundamental human rights such as non-discrimination on the ground of language. Any decision as to citizenship and naturalisation must reflect a proportionate and reasonable outcome in light of a State's interests and goals, the linguistic composition of its population, and the interests, rights and impact on the individual(s) affected.1

Even though these rights are not specifically aimed at protecting minorities as groups, they indirectly provide protection for the identity-related characteristics underlying linguistic, religious and cultural communities by prohibiting the State from (1) imposing the characteristics of the majority on the minority against its will; (2) restricting the expression of linguistic, religious or cultural characteristics among members of a minority2; or (3) using unreasonable or unjustified distinctions which underline human characteristics (language, religion, ethnic origin, etc) when laying down conditions governing the accessibility or quality of services, privileges and benefits furnished or allowed by the State.

This interpretation of the interaction of these fundamental rights and of their role in the protection of minorities has already been recognised in a series of regional and bilateral treaties, including the Framework Convention for the Protection of National Minorities (Council of Europe), the terms of which deserve to be quoted:

Article 5

1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons

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[1] *De Varennes, Fernand (1996), Language, Minorities and Human Rights, Martinus Nijhoff Publishers, La Haye, pp. 247-249.*

[2] *Restrictions adopted by the State to ensure that such expressions are consistent with other human rights guaranteed by the International Covenant on Political and Civil Rights would not be a breach of the Covenant. See, on this subject, de Varennes, Fernand (1996), Language, Minorities and Human Rights, Martinus Nijhoff Publishers, The Hague, pp. 168-169.*

belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

Article 9

1. The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

2. Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

3. The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

Article 10

1. The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

3. The Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.

Article 11

1. The Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system.

2. The Parties undertake to recognise that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.

3. In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications.

Article 12

1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

2. In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.

3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

Article 13

1. Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.

2. The exercise of this right shall not entail any financial obligation for the Parties.

Article 14

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Article 16

The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights

and freedoms flowing from the principles enshrined in the present framework Convention."[1]

5. Self-government: a second defence for the protection of minorities?

Whilst freedom of expression, non-discrimination and the right of members of a minority to practise their religion, use their language or enjoy their culture with other members of their community constitute a first line of defence for minorities, such rights are often considered to be insufficient by minorities. Throughout the world, there are many indigenous peoples and minority groups that demand a form of political self-government.

Several factors serve to explain this phenomenon:

1. By virtue of their individualistic nature, human rights cannot guarantee to members of a minority a degree of participation and a role in the State in proportion to their numerical size. Unless there is a system of local or regional self-government where a minority is in a situation of control or force, the State apparatus and its officials are generally in danger of being dominated by members of the majority who have the demographic weight to impose their diktats.

2. Human rights cannot counterbalance the "minority deficit" on their own. In every government based on universal suffrage, the voice and interests of a minority tend to be neglected or brushed aside in comparison with those of the majority.

3. In the event of conflict between the interests of the majority population and those of the minority, it is far from certain that human rights will be respected, or that they will be interpreted in conformity with international norms. Since the State apparatus, including the judiciary, tends to reflect the interests and points of view of the majority, it may be difficult to accept that the wishes of the "people" or the "nation" (ie of the majority and the State) can be contrary to human rights. For the members of a minority, the existing judicial system and executive system does not necessarily inspire confidence.[2]

The fact that a devolution of power can mean greater control over certain aspects of the State apparatus for minorities and indigenous peoples, and shield them, at least in part, from the domination (benevolent or otherwise) of the majority, can therefore explain the enthusiasm of minorities and indigenous peoples for self-government.

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[1] *De Varennes, Fernand (1996), Language, Minorities and Human Rights, Martinus Nijhoff Publishers, The Hague, pp. 337-339.*

[2] *History shows that this mistrust is not necessarily completely unjustified: the Supreme Court of the United States held in the case of Scott v Sandford 60 US 393 (1857) that Blacks could not be part of the American people and be recognised as citizens under the American Constitution, whilst a little further north, the government and courts of Manitoba, in Canada, refused for almost a century to observe a clause in the provincial constitution imposing legislative bilingualism.*

Seen from this standpoint, self-government - when feasible - complements human rights by allowing minorities and indigenous peoples to govern themselves, or at least it appreciably increases their influence in certain areas and agencies of the State apparatus.1

Quite obviously, self-government is not a realistic or desirable model either everywhere or for all the groups demanding it. When national practices and such treaties as the Framework Convention are closely examined, there appears to be a certain consensus on the conditions required for the introduction of local self-government, viz:

1. A well-defined geographical territory where a linguistic, religious or ethnic minority represents the majority or a substantial percentage of the population.2

2. The minority community should generally have been established for a long period in the territory (national minority or indigenous people).

3. In the case of a non-national minority, territorial autonomy should not be excluded if this minority constitutes a clear majority of the local or regional population.

4. Members of the minority community should clearly indicate their preference for territorial autonomy.

5. The exercise of the powers related to an independent structure must be in conformity with human rights.3

6. When the minority population is too dispersed, a State should consider the possibility of instituting a non-territorial autonomous regime.1

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[1] *The Hungarian law of 7 July 1993 (Law LXXVII) on the rights of national and ethnic minorities is a good example of the kind of arrangements that are designed to combine respect for the human rights of members of minorities with measures of local self-government. This law provides for the creation of independent councils of local minorities and confers a right to education in the mother tongue of members of minorities, as well as a right to use their language in official organs and to receive from civil servants answers in the languages of the regions in which they traditionally live. The law also provides for television and radio stations to broadcast programmes in the languages of minorities and for the establishment of a mediation process for national minorities.*

[2] *In particular, the excellent monograph by Bugajski, Janusz (1995), Ethnic Politics in Eastern Europe, Center for Strategic and International Studies, Washington, D.C., p. 438: In some instances, where minorities reside in reasonably compact territorial units, whether in towns, municipalities, communes, or distinct regions, they may be provided with a measure of local administrative autonomy without undermining the government's key economic, political, and security functions. Of course, exact arrangements depend largely on historical and administrative precedents in the country in question. Some states have a tradition of local or regional autonomy; in others political and economic decentralisation combined with cultural autonomy and local bilingualism can mitigate against majority-minority conflicts.*

[3] *Every level of government, whether or not territory-based, should be subject to the human rights recognised in international law.*

There have already been several interesting attempts to define in legal terms the nature and scope of a right to self-government for certain human communities. As far as indigenous peoples are concerned, Articles 19 and 31 of the draft Declaration on the Rights of Indigenous Peoples2 and Articles XV and XVI of the Draft of the Inter-American Declaration on the Rights of Indigenous Peoples3 recognise the right of these peoples to govern themselves.

Certain non-governmental organisations, including the Federal Union of European Nationalities, the General Assembly of Non-State Nations of Europe, and the Internationales Institut für Nationalitätenrecht und Regionalismus4, have tried to be more precise by combining respect for human rights, protection of minorities and territorial autonomy.

i) The draft convention prepared by the last-named organisation, the Draft of an International Convention on the Protection of National or Ethnic Groups or Minorities, is, incidentally, an excellent document which explains how the various principles concerned can be integrated into an international treaty:

Article 13

1. The protection of a national or ethnic minority or group may be organised on a national or international level or on both levels. The kind, range and scope of the protection depends on the freely expressed will of the members of the minority group, on its demographic distribution as well as on international obligations of the given State.

2. The main kinds of protection on a national level are the following:

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[1] *By way of example, in March 1996, the Serbian minority in Croatia, which only represents 2 to 3% of the population, nevertheless asked the Croatian State to guarantee its civil, cultural and national rights, including that to cultural autonomy. A Serbian minority organisation in Croatia is demanding - in the tradition of the Austro-Hungarian empire - personal ethnic autonomy rather than territorial autonomy because of the geographical dispersion of Serbs in Croatia. See also "L'Europe centrale et ses minorités: vers une solution europeénne?" (1993), André Liebich and André Reszler (Eds), Presse Universitaires de France, Paris, p. 16:*

Consequently, if a national community knowingly distinguishes itself from the majority, shows itself capable of integration in an independent manner and forms the majority in a certain territory, it is possible to envisage granting it local or regional autonomy (self-government). For diasporas, the principal of organisation which it would be desirable to adopt is that of personal autonomy. This principle is for example applied to the Danish and German minorities of Schleswig-Holstein and prevailed under the system which came into force in 1925, when cultural autonomy was granted in Estonia.

[2] *Document E/CN.4/Sub.2/1994/56.*

[3] *21 September 1995, Document OEA/Ser/L/V/II.90.*

[4] *See de Varennes, Fernand (1996), Language, Minorities and Human Rights, Martinus Nijhoff Publishers, The Hague, pp. 308-315.*

(a) the right of self-determination as expressed in the UN Declaration of Principles of International Law on Friendly Relations and Co-operation among States in accordance with the Charter of the UN (GA Res. 2625, XXV);

(b) cultural autonomy;

(c) linguistic autonomy.

Article 14

The modes of implementing the right of self-determination of a national or ethnic minority or group consist in the right to (...):

(b) free emergence into any other political status (for instance, territorial autonomy, self-government, personal autonomy or any other agreed arrangement within the framework of the State directly concerned) or

(c) freely form legislative and/or administrative regional or local autonomy within the framework of the State directly concerned.

Article 16

The types of self-determination mentioned in Article 14 (b) and (c) may also be granted if, in a given territory of the State, nationals reside possessing ethnic or linguistic characteristics differing from the rest of the population and showing if only implicitly, a sense of solidarity with a view towards preserving their culture, traditions, or language and also possessing an adequate representation, ask for such an arrangement.

Article 19

Cultural autonomy consists further in an educational system providing instruction on all educational levels in the language of the group. Every child belonging to the group has the right to this education, provided the persons responsible for his education are willing to make use of this right. The relevant curricula have to take into account the needs of the group as well as the principles enshrined in the State's Constitution. Diplomas and certificates issued by the educational institutions of the group shall have public recognition. The provisions of the UNESCO Convention against Discrimination in Education of 1960 shall be applied respectively.

Article 20

1. Linguistic autonomy consists in facilitating the use of the mother tongue before administrative and judicial authorities. If more than a certain percentage of the inhabitants of a certain judicial or administrative district - the percentage to be fixed by agreement between the competent State authorities and the representatives of the minority or group - belong to one or more national or ethnic minority or group, their language has to be recognised as official languages. District may not be delimited in a way so as to prevent the realisation of this right. In cases of linguistic autonomy, topographic signs have to bear bi- or multilingual inscriptions.

2. This linguistic autonomy should particularly be observed with regard to the rights of personal liberty, of fair trial and in all matters of social welfare.

3. If necessary, State authorities shall consider the possibility of applying ethnic criteria with regard to the assignments of posts, especially in regions where the group language is recognised as the official language. In areas where the group resides, a percentage of the posts in the public service of the State, the provinces and communes - the percentage to be fixed by agreement between the competent State authorities and the representatives of the relevant minority or group - shall be made available to members of that minority or group.

Article 24

The State (in federal States their composite territorial units as well), the provinces and municipal bodies where national ethnic minorities or groups reside in considerable strength (the relevant percentage to be fixed by agreement between the competent State authorities and the representatives of the relevant minority or group), may create Councils in order to render if possible for the groups to formulate and articulate their interests and desires, in particular with regard to the provisions laid down in the present Convention.

Despite these promising signs, it is clear from the opinion of several experts in international law that an examination of international treaties, decisions and resolutions does not necessarily enable the existence of a right to independence to be ascertained in the present state of customary law:

ii) The report of the CSCE meeting of experts on national minorities, adopted in Geneva in July 1991, is timidly innovative in that, for the first time,

the participating States noted with interest that 'positive results have been obtained by some of them (...) by, inter alia: (....)

- elected bodies and assemblies of national minority affairs;
- local and autonomous administration, as well as autonomy on a territorial basis (....);
- self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply (...).'

Thus, the prospect of collective self-government for minorities is adumbrated as an 'interesting' possibility, but in no event as a right;

iii) Even more timidly, the Draft Declaration on the Right of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the United Nations Commission on Human Rights on 21 February 1992, imposes on the State (in its first Article) the obligation to protect the identity of minorities in its territory;

iv) Finally, in its opinion No. 2, the Commission of Arbitration for Yugoslavia refers to the rights which 'the Serb populations of Bosnia-Herzegovina and Croatia' should enjoy.

In all these texts there are the beginnings of a reluctant and awkward move towards recognition of the collective rights of minorities.

Clearly, however, one cannot deduce therefrom the existence of any territorial rights in favour of minorities, let alone any right to secession."1 (Free translation)

It should also be emphasised that the forms of autonomy "noted with interest" in the report of the CSCE experts establish a link between such forms of autonomy and the need to adopt appropriate machinery to ensure respect for the human rights of national minorities.

> The [participating States] further recall the need to take the necessary measures to protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity; any such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned.
>
> They recognise that such measures, which take into account, inter alia, historical and territorial circumstances of national minorities, are particularly important in areas where democratic institutions are being consolidated and national minorities issues are of special concern.
>
> Aware of the diversity and varying constitutional systems among them, which make no single approach necessarily generally applicable, the participating States note with interest that positive results have been obtained by some of them in an appropriate democratic manner ...2

Several States have recognised the legitimacy of this approach in practice. The autonomy of the Åland Islands in Finland, Trentino-Alto Adige in Italy and the Atlantic coast region in Nicaragua as well as the division of most of the States of India on a linguistic basis are all concrete examples of the flexibility and effectiveness of a State structure which takes account of the presence and rights of minorities.3

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[1] *Franck, Thomas M., Higgins, Rosalyn, Pellet, Alain, Shaw, Malcolm N. and Tomuschat, Christian (1995). L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté, Quebec, pp. 433-434.*

[2] *Report of Experts on National Minorities - Conference on Security and Co-operation in Europe (1991) Human Rights Law Journal, Vol. 12, p. 333.*

[3] *See also Senghaas, Dieter (1993) "Conflits ethniques ou le refus des nationalismes" in "War and Peace: European Conflict Prevention", Institute for Security Studies of the Western European Union, Paris, pp. 25-26:*

> *"In the case of nationalism linked to the conservation of the heritage, the idea of separation becomes of interest in pluri-ethnic States, where separatism could lead to a viable state structure. A less radical approach would consist in establishing regional autonomy within the conventional State structure. This solution, which was in fact chosen in Catalonia (Spain) offer several decades, has a chance of being successful. In the former Yugoslavia, Slovenia and Croatia have tried to set up a confederal structure based on the principles of substantial decentralisation and subsidiarity. However, after several failures in this area owing to the lack of interest of the other republics of the former Yugoslavia, Slovenia and Croatia prudently decided to proclaim their independence." (Free translation)*

Even if, at first sight, political autonomy for minorities, in particular for national minorities, does not appear to be a necessary consequence of respect for human rights or of protection of the specificity of linguistic, religious or ethnic minorities, it is nevertheless clear that, in certain circumstances, it can be a desirable means of ensuring that such rights are more fully respected.1

Autonomy consequently seems to be perceived as a way of improving the protection of the human rights of members of certain minorities, whilst allowing them to demonstrate and develop their fundamental characteristics.

6. Political autonomy and self-determination: is there such a right?

[N]eglecting the issue of group rights may have the reverse effect, by unwittingly giving certain governments a green light to pursue assimilationist policies in order to eliminate minority groups politically and undermine and even eradicate distinctive minority identities. The consequences could be grave: repressive action may provoke direct conflict with neighbouring States seeking to defend specific minorities from persecution, discrimination and assimilation. This in turn could precipitate international involvement by way of conflict prevention and peacekeeping, or in a worst-case scenario trying to cope with a low-intensity war. One way or another, international institutions could find themselves embroiled in a local or even a regional conflict.2

Several of the sources previously mentioned establish a tentative link between autonomy and the right to self-determination as recognised in international law. Should it therefore be concluded that minorities constitute a people in international law, with the various consequences attaching to such status?

It would appear not. In the present state of international law it is clear that minorities do not constitute a people having a right to self-determination capable of leading to secession:

"However, in reality, independence is not the only purpose of the right of a people to self-determination. In its full sense, this principle means that, after accession to sovereignty, all peoples and all parts of a people have the right to see their identity recognised and to participate in the expression of political will within a State. This is the established position of the Human

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[1] *See, however, the Council of Europe's Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, which seems to denote a readiness to recognise a right to autonomy for national minorities:*

> *"Article 11*
>
> *In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State."*

[2] *Bugajski, Janusz (1995), "Ethnic Politics in Eastern Europe", Center for Strategic and International Studies, Washington D.C., p. 440.*

Rights Committee, and States - including Canada - take the same approach, confirming the merits of such an interpretation through their attitude."1 (Free translation)

It should nonetheless be specified that self-determination could have an internal dimension which does not threaten the territorial integrity of a State, so that the identity and political expression of "all peoples and all parts of the people", may be recognised. Thus in the case of indigenous peoples and probably national minorities,2 there exists at present a trend suggesting a progressive and flexible interpretation of the right to self-determination:

Self-determination, in its many forms, must be recognised as the basic precondition for the enjoyment by the indigenous peoples of their fundamental rights and the determination of their own future. It must also be recognised that the right to self-determination exists at various levels and includes economic, social, cultural and political factors. In essence, it constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities. The right may in fact be expressed in various forms of autonomy within the State, including the individual and collective right to be different and to be considered different.3

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[1] *Franck, Thomas M., Higgins, Rosalyn, Pellet, Alain, Shaw, Malcolm N. and Tomuschat, Christian (1995), "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté", Quebec, p. 422.*

[2] *See Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA\Ser.L\V\II.62, 16 May 1984, a somewhat confusing decision since, after indicating that there was no right to political autonomy in international law, the members of the Commission concluded that Nicaragua nevertheless had the obligation in law to grant a type of territorial autonomy to ethnic groups occupying the Atlantic coast region:*

> *"15. Although the current status of international law does not allow the view that the ethnic groups of the Atlantic Zone of Nicaragua have a right to political autonomy and self-determination, special legal protection is recognised for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity.*
>
> *Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous. For that reason, the Commission considers that it is fundamental to establish new conditions for coexistence between the ethnic minorities and the Government of Nicaragua, in order to settle historic antagonisms and the serious difficulties present today. In the opinion of the IACHR, the need to preserve and guarantee the observance of these principles in practice entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan State. Such an institutional organisation can only effectively carry out its assigned purposes to the extent that it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua through their freely chosen representatives."*

[3] *Martinez Cobo, José R. (1986), Study on the Problems of Discrimination against Indigenous*

In short, the right to self-determination may be seen to embody a principle in various forms, including a form of internal political autonomy, aimed at the people or a part thereof, or even the various peoples within a State.

Nevertheless, it is too early, in the present state of international law, to conclude that linguistic, religious or ethnic minorities necessarily constitute a people for the purposes of self-determination in its internal form, even though this proposition may be receiving increasing support. This principle should possibly be examined by an international authority which will need to take account of all the practical difficulties and the expectations that such an approach is liable to raise.

In any event, even if it is accepted that minorities (or at least national minorities) and indigenous peoples can have a right to self-determination, it is clear that such a right must be exercised in a context of respect for the territorial integrity of the State.

7. Self-government: a guarantee for the territorial integrity of the State

Self-government should not be seen as a first step towards the possible disintegration of the State. If it is accepted that there is a justification for recognising such a collective right to minorities, it should initially be accepted that there is virtual unanimity in international law for an interpretation precluding any violation of the territorial integrity of a State:

"In particular, like a leitmotif, all of these instruments contain a reservation relating to respect of the territorial integrity of States, which totally excludes any secessionist implication in the rights recognised to minorities, even collective ones. This is equally clear from Opinions Nos. 2 and 3 of the Arbitration Commission for Yugoslavia, which, while reflecting a wide conception of minority rights (which they link to the principle of the right of peoples to self-determination), insist that whatever the circumstances, the right to self-determination cannot lead to any alteration to the frontiers existing at the time of independence (uti possidetis juris) unless agreed otherwise by the States concerned."1 (Free translation)

No other result is possible or even desirable. Self-government for minorities means first and foremost the putting in place of legal and political structures that reflect the identity and political will of the various components of the population. There must consequently be a compromise that takes account of the interests, needs and characteristics of members of the various communities living side by side in the same State, a compromise that seeks a balance allowing the majority - which in fact and in law controls the State apparatus - and the main minority populations to ensure that their rights and identities are respected and protected.

If such structures are appropriate and reasonable, it is more likely that they will enable the kinds of tension and conflict that constitute real threats to the territorial integrity of a State to be avoided, whether in Sri Lanka, the Transnistria region or the Crimea. In other words, certain

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Populations, United Nations, New York, E/CN.4/Sub.2/1987/7, paragraphs 579 and 580.

[1] *Franck, Thomas M., Higgins, Rosalyn, Pellet, Alain, Shaw, Malcolm N. and Tomuschat, Christian (1995), "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté", Quebec, p. 435.*

forms of autonomy are guarantees of the territorial integrity of a State rather than a danger, since they constitute a second bulwark for the protection of the rights of minorities. If human rights involving the characteristics of members of a minority are respected by the State and the majority and if their identity and political will are recognised and protected by a measure of autonomy, particularly in the case of a minority occupying a traditional territory where it is demographically in a strong position, it is less likely that this part of the population of a State will be tempted to create a climate of instability and uncertainty. The stability of Switzerland and of the compromise represented by the status of the Åland islands shows that several kinds of autonomy can be envisaged in order to reach a balance reflecting the historical and human characteristics of a State.

States which ignore the need to reach such a balance when they have large national minorities or indigenous peoples in their territories increase the risk of a hardening of positions among the members of a minority and of a retreat into the community identity to the detriment of a feeling of belonging to the nation and allegiance to the State. What actually leads to so-called ethnic or nationalist conflicts is very often a mistaken belief that the State must reflect the characteristics of the majority and a refusal to temper this point of view by applying the norms of international law regarding human rights, or else a rejection of a political structure ensuring the recognition and the protection of the identity of large or traditional minority communities.1

Measures such as that of 22 March 1996, when the Slovak Parliament adopted a law providing for the division of the country into 8 regions and 79 administrative districts, can lead to conflicts. The representatives of the Hungarian minority in Slovakia are furious because these new political-administrative structures will mean that no region will have more than 30% of Hungarian-speakers. Moreover, these limits could affect the number of elected representatives for the Hungarian-language minority and result in a reduction in the number of deputies (17) in the Slovak Parliament.

The present Latvian law on citizenship could also lead to conflicts. It contains provisions which are probably discriminatory, as suggested last year by the Human Rights Committee of the United Nations, since the effect of the law is to deny Estonian citizenship to a high percentage of the population because they are of Russian origin.2

Grigorjy Lukyantsev, the head of the Russian delegation during the last session of the United Nations Commission on Human Rights, issued a warning in Geneva last month, when he spoke of a new racism affecting ethnic minorities and of the discrimination passed over in silence in

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[1] *The abolition of the political autonomy of Kosovo by Serbia in 1989 was the violation of the Yugoslav constitutional system that finally led to its destruction in 1991.*

[2] *See the comments of the Human Rights Committee in the document "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant", CCPR/C/79Add.53, p. 4:*

> *[T]he Committee remains concerned that a significant segment of the population will not enjoy Latvian citizenship due to the stringent criteria established by the law, and the policy deliberately chosen to consider each case on an individual basis and pursuant to a timetable calculated to delay the naturalisation process for many years. In the view of the Committee, the legislation still contains criteria of exclusion which give room to discrimination under articles 2 and 26 of the Covenant...*

certain countries in the name of "historical injustice". His comments indicate an imminent danger: the fate of some 25 million Russian-speakers outside Russia will threaten the stability and balance of the whole of Europe if a Russian president or government seeks to use this as a pretext to regain its past glory. This threat has in fact already been clearly expressed on several occasions:

"The argument officially adopted by Russia to ask for special powers in the ex-URSS is based on the following points: given the discrimination from which Russian-speakers living outside the Russian federation suffer, Russia has a duty to protect them; it is in Russia that thousands of victims of inter-ethnic conflicts are placing their hopes; the conflicts occurring on the Russian periphery are threatening to 'ignite Russia itself'; finally, the international community is still avoiding actively participating in the peace-keeping efforts in ex-Soviet territory."1 (Free translation)

If the human rights of a minority are not respected, the territorial integrity of a State may be threatened as a result:

1. From the interior, by the members of the minority who might try either to escape completely from the control of the State/the majority, or to create a new State where the minority would in turn become the majority, or to integrate the territory they occupy into a neighbouring State with which they share the same identity.

2. From outside, by a neighbouring State which, for geopolitical or historical reasons, felt "obliged" to intervene in order to protect the rights and identity of such a minority.

8. Conclusion

"The only constructive approach to nationalism linked to a minority's fear of being politically and culturally assimilated by the majority is the official protection of minority rights. For this purpose, at least the following conditions need to be fulfilled: active protection of minorities, with the aim not only of encouraging tolerance but also of actively promoting their identity; wide cultural autonomy in the areas of language, education and the media; specific rights concerning participation in political life, thanks in particular to proportional representation voting, a right of veto and a blocking power; procedural guarantees and legal protection."2 (Free translation)

Whilst it is appropriate to seek a compromise which takes account of the concerns of minorities, it should also be recognised that failure to respect human rights in matters of language, religion or culture contributes very often towards inflaming the climate between the State/majority and the members of a minority and can lead to an outbreak of so-called ethnic conflict. Unfortunately, difficulties in the interpretation of the norms of international law regarding the content and the scope of fundamental rights such as freedom of expression and of religion,

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[1] *Allison, Roy (1994), Peacekeeping in the Soviet Successor States, Institute for Security Studies of the Western European Union, Paris, p. 59.*

[2] *Senghaas, Dieter (1993) "Les conflits ethniques ou le retour des nationalismes" in War and Peace: European Conflict Prevention, Institute for Security Studies of the Western European Union, Paris, p. 26.*

freedom from discrimination based on language, religion, or ethnic origin, and the right of members of a minority to practise their religion, use their language and enjoy their culture among themselves have meant that the implementation of these rights has always been a problem.

Another point to be emphasised is that observance of such norms is still under the sway of the majority who de facto control the State apparatus, including the judiciary. Nevertheless, these human rights form a first important line of defence for members of a minority. For example, contrary to the view still held by certain legal experts, freedom from discrimination based on language requires that, in geographical areas containing substantial numbers of people belonging to minorities, the State must ensure, as far as possible, the use of the minority language in relations between such persons and the administrative authorities whenever there is sufficient demand.

In the absence of a territorial or personal form of autonomy, a minority may find itself in a vulnerable situation vis-à-vis the linguistic, religious or ethnic majority which controls the State apparatus. Even a democratic State which generally respects human rights is not necessarily free from the excesses of the State apparatus or the intolerance or prejudice of a substantial part of its population. Self-government offers a second bulwark for the protection of minorities by allowing them to control part of or play a more determining role within the State, thanks to devolution of legal and political powers in certain matters or in a particular territory, thus increasing the chances of ensuring respect for their rights.

Even if it is too early in the present state of international law to affirm that minorities constitute a people entitled to self-government, there is at least substantial support for this proposition. In its internal dimension, self-determination can be implemented in many "sub-State" forms without radically altering the structure of the State, whether in the form of administrative territorial autonomy, the guaranteeing of cultural autonomy, regional self-government or collective autonomy.

In the case of a minority with an adequate critical mass largely concentrated in a certain territory, it may be desirable to adopt a territorial form of autonomy. Whether a cantonal government, an oblast or a local district is involved, such communities ought to be allowed to keep, express and develop their identities.

It goes without saying that territorial autonomy is not a practical model for diasporas. Cultural or personal autonomy might be more suitable in their case.

Self-government, or the protection of minority rights, should not be seen as a mere ploy threatening the territorial integrity of the State. Indeed, it seems more likely that respect for human rights, combined with certain types of autonomy resulting from a reasonable political compromise, can help to safeguard the territorial integrity of a State by avoiding the tensions and conflicts that are still the most common causes of separatist and irredentist movements.

Third working session - Which international guarantees of local self-government? - chaired by Mr Heinrich KOLLER

a. The OSCE and international guarantees of local self-government
by Mr John PACKER

b. Territorial integrity of States, minority protection and guarantees for autonomy arrangements: approaches and roles of the United Nations
by Mr Asbjørn EIDE

c. Which international guarantees of local self-government? Council of Europe work
by Mr Ferdinando ALBANESE

a. The Osce and international guarantees of Local Self-Government by Mr John PACKER
Adviser to the OSCE High Commissioner on National Minorities

I. INTRODUCTION

The Organization for Security and Co-operation in Europe (OSCE)1 has no instrument comparable to the Council of Europe's 1985 Charter of Local Self-Government. However, particularly since the end of the Cold War, the participating States of the OSCE have expressed an increasing commitment to respect for human rights and democratic governance from which is to be derived a preference for decentralization of political power or, conversely, an increase in the power of local self-government. The application and effects of this preference are only especially evident in those States which were until recently subject to central planning of the economy and totalitarian control of the socio-political order. However, while one may speak of such a tendency as illustrated through the progressive elaboration of OSCE standards, the development of specific institutional guarantees within the OSCE has not kept pace with OSCE standard-setting.

There have nevertheless been some important developments within the OSCE. These have taken place in the context of the conceptual and operational development of the OSCE's notion of "comprehensive security". Specifically, the OSCE conceives of European security as encompassing the interplay and interdependence of its three "baskets" of concerns: security (in the traditional sense of absence of war), i.e. inter-State peace and stability; economic development; and respect for human rights (subsumed under "the human dimension", to use the phraseology of the OSCE). At least since the end of the Cold War, there has been broad agreement that respect for human rights (including the rights of persons belonging to national minorities) is to be best achieved and secured through open societies based upon democratic

1 The entity under discussion was created as an inter-State conference in 1973. It functioned under the title "Conference on Security and Co-operation in Europe" until 6 December 1994 when the Heads of State and Government adopted the Budapest Document "Towards a Genuine Partnership in a New Era" which, pursuant to paragraph 3, determined that "the CSCE will henceforth be known as the Organization for Security and Co-operation in Europe (OSCE)"; for the full text of the Document, see Human Rights Law Journal, Vol. 15 (1994), No. 11-12, pp. 449 ff. While the change of name certainly reflected various political and institutional developments, it does not imply any substantive change in the entity, i.e. the change in name does not in itself mean that the entity has acquired legal personality as a public international organization. For some considerations and a specific view on this interesting, if relatively minor, question, see the note by Miriam Sapiro, "Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation", American Journal of International Law, Vol. 89 (1995), No. 3, pp. 631-637. For ease of reference, the name "Organization for Security and Co-operation in Europe" *or "OSCE" will be used throughout this paper to refer to the entity.*

governance while economic development is to be best achieved and secured through the free market. Together with these two pillars of domestic organization (i.e. conditions within the State), and buttressed by an unequivocal commitment to respect for territorial integrity including the permanence of international borders (i.e. conditions between States), regional peace and stability may be further enhanced by a logical reduction in arms, both conventional and non-conventional.

Viewed from this perspective of comprehensive security, we may examine the relevant OSCE standards relating to local self-government and the relevant OSCE mechanisms which may be said to offer some "guarantees". Following this examination, some observations may be drawn particularly in the light of acquired experience. Finally, some conclusions may be derived from the established tendency and acquired experience.

II. RELEVANT OSCE STANDARDS

As expressed in the preamble of the Final Act signed in Helsinki on 1 August 1975 by the Heads of State and Government of the 35 States participating in the Conference on Security and Co-operation in Europe held in Helsinki and Geneva from 3 July 1973 through 21 July 1975, the fundamental impetus for the process was the shared objective to ensure "conditions in which... people can live in true and lasting peace free from any threat to or attempt against their security" and "the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process".1 In simple terms, it was to avoid "hot" war between East and West – between the countries of the Warsaw Pact and those of the NATO alliance. To fulfil this objective, the participating States recognized in the preamble of the Helsinki Final Act "the close link between peace and security in Europe and in the world as a whole" and "the promotion of fundamental rights, economic and social progress and well-being for all peoples". In other words, the notion of "comprehensive security" was agreed from the beginning through acknowledgement of the fact that absence of armed conflict in Europe did not constitute "peace". On the basis of this conceptual foundation, the participating States adopted in the Helsinki Final Act a declaration of ten principles, subsequently known as the "decalogue", to guide their relations. With express reference to "their commitment to... justice" and "in conformity with the Charter of the United Nations", the participating States articulated the following principles: I. sovereign equality; II. refraining from the threat or use of force; III. inviolability of frontiers; IV. territorial integrity of States; V. peaceful settlement of disputes; VI. non-intervention of internal affairs; VII. respect for human rights and fundamental freedoms; VIII. equal rights and self-determination of peoples; IX. co-operation among States; and X. fulfilment in good faith of obligations under international law.

There is no mention of "democracy", much less "self-government", in the Helsinki Final Act. Nor does the content of Principle VIII on "self-determination" in any way refer to what has since been described as "internal self-determination".2 However, the important language of human rights in Principle VII, including the rights of persons belonging to national minorities, expressly

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1 For the full text of the Final Act of Helsinki, see Arie Bloed *(ed.) The Conference on Security and Co-operation in* Europe; Analysis and *Basic Documents, 1972-1993,* Dordrecht: Kluwer *Academic Publishers, 1993, pp. 141 ff.*

2 For a thorough and interesting discussion of the idea of "internal self-determination" as a manifestation of democratic governance within the State, see Allan Rosas, "Internal Self-Determination" in Christian Tomuschat (ed.) Modern Law of Self-Determination, Dordrecht: Martinus *Nijhoff Publishers, 1993, pp. 225-252.*

commits the participating States "to act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights" and to "fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound." This set a firm basis for people to seek greater control over their lives, individually and in communities, and it pointed in the direction of further specification within the on-going Helsinki process as foreseen in the "follow-up" which had been agreed in the Helsinki Final Act.

Through the decade following adoption of the Helsinki Final Act, progress was slow.1 Indeed, the Cold War re-acquired some of its previous momentum with the Soviet Union's invasion of Afghanistan in December 1979 and the Western boycott of the Moscow Olympic Games in 1980. This precluded much progress in the field of human rights in general and especially in relation to democratic rights. There was nevertheless some progress, for example, through the 1983 Concluding Document of the Madrid Conference's further specification of "human contacts" across frontiers and encouragement of the freer and wider dissemination of information.2

The second decade following the adoption of the Helsinki Final Act was preceded by a fundamental change of policy in the Kremlin following Mikhail Gorbachev's ascendance to the position of Secretary-General of the Communist Party of the Soviet Union in March 1985.3

Gorbachev's introduction of glasnost, perestroika and "new thinking" in the Soviet Union had a direct effect upon the Soviet Union's international relations both in terms of its perception and reception in the West and in terms of its own disposition towards the West. At the Vienna Follow-Up Conference held from 4 November 1986 to 19 January 1989, the new flexibility of the Soviet Union was clearly manifested in the then-surprising proposal of the Soviet Foreign Minister, Eduard Shevardnadze, to convene a conference on human rights in Moscow. With the Cold War noticeably thawing, the Concluding Document of the Vienna Conference4 was able to include yet further specification of human rights commitments in relation to "human contacts" and "information". But it also underlined the OSCE approach to comprehensive security by articulating among the "principles" elaborated under the rubric "Questions Relating to Security in Europe" several paragraphs supporting human rights, including: "the right of... citizens to contribute actively, individually and in association with others, to the promotion and protection of human rights and fundamental freedoms" (paragraph 13.5); non-discrimination also on the basis, inter alia, of "political or other opinion" (paragraph 13.7); and "promotion of the ethnic, cultural, linguistic and religious identity of national minorities" (paragraph 19). In a similar demonstration of new "openness", it was also agreed in the context of "Co-operation in the Field of Economics, of Science and Technology and of the Environment" to allow "persons and

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1 For a good and concise summary of the "Follow-Up Meetings" of the Conference on Security and Co-operation in Europe which were held from 1977 to 1992, i.e. from Belgrade through Madrid and Vienna to Helsinki, see Arie Bloed, supra (note 2), pp. 50-66.

2 For the full text of the document, see Arie Bloed, supra (note 2), pp. 257-281 especially at pp. 274-277.

3 For a concise and intimate description of the influences upon Gorbachev's new policy direction, see Elizabeth Teague and Julia Wishnevsky, "Russia at the Gates – Gorbachev's European House", in Martyn Bond, Julie Smith and William Wallace (eds.), Eminent Europeans, London: The Greycoat Press, 1996.

4 For the full text of the Concluding Document, see Arie Bloed, supra (note 2), pp. 327 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 10 (1989), Part 3, pp. 270 ff.

organizations dedicated to the protection and improvement of the environment... to express their concerns" (paragraph 35 of the "second basket"). As such, the participating States effectively encouraged the further development of civil society and public discourse regarding government. There was also agreement on a wide-range of expert meetings and specialized conferences to be held between 1989 and 1991, including in particular a three-meeting Conference on the Human Dimension to be held in Paris from 30 May to 23 June 1989, in Copenhagen from 5 to 29 June 1990 and in Moscow from 10 September to 4 October 1991.

By 1989, the Cold War thaw had taken on the dynamics of a permanent melt featuring relatively violence-free revolutions in several East European States. Against this background, Gorbachev suggested a summit meeting of the Heads of State and Government of the participating States. As the Cold War drew to a close, totalitarian governments fell all over Europe, Germany was re-unified and a democratic wind blew across the continent. In particular, this fresh air filled the lungs of delegates at the Copenhagen Meeting in June 1990 where they applauded the great advances in the implementation of the Helsinki Final Act and recognized that "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms".1 Consequently, they welcomed "the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law." Within the evolving notion of comprehensive security, they also expressed "their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that [participating States] seek to establish in Europe."

The 1990 Copenhagen Document goes on to articulate in great detail the contents of the new accord on democracy and the rule of law. In particular, participating States recognized and agreed upon: "the importance of pluralism with regard to political organizations" (paragraph 3); "that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government [and that] participating States will accordingly respect the right of their citizens to take part in the governing of their country" (paragraph 6); that the will of the people as the basis of the authority of government is to be ensured through free and fair elections (paragraphs 5.1 and 7 through 7.9); that there will be "a clear separation between the State and political parties" (paragraph 5.4); that "the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law" (paragraph 5.5); and that "the independence of judges and the impartial operation of the public judicial service will be ensured" (paragraph 5.12). Of considerable importance to the functioning of democracy, the participating States also "reaffirmed" the rights to freedom of expression (paragraph 9.1), peaceful assembly (paragraph 9.2), freedom of association (paragraph 9.3) and freedom of thought, conscience and religion (paragraph 9.4). That these values should apply at the local level as well as the national level is expressed in paragraph 26 whereby participating States recognized "that vigorous democracy

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1 For the full text of the Copenhagen *Document adopted on* 29 June 1990, see Arie *Bloed, supra (note 2), pp. 439 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 11 (1990), Parts 1-2, pp. 232 ff. For some discussion on the* Copenhagen *meeting and some comments on the final Document, see Thomas Buergenthal, "The* Copenhagen *CSCE meeting: A new public order for* Europe", *Human Rights Law Journal, Vol. 11 (1990), Parts 1-2, pp. 217-232. It may be noted that the preparatory work for the* Copenhagen *Conference had essentially been accomplished by the* Paris *Meeting where 36 proposals for a substantive concluding document had been submitted, but consensus had not been achieved.*

depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions" and so "[t]hey will therefore encourage, facilitate and, where appropriate, support practical co-operative endeavours and the sharing of information, ideas and expertise among themselves and by direct contacts and co-operation between individuals, groups and organizations in areas including", inter alia, "local government and decentralization". This emphasis on popular participation in government and democratic legitimacy also partly explains the very significant provisions regarding "the questions relating to national minorities" which participating States concluded could "only be satisfactorily resolved in a democratic political framework based on the rule of law" (paragraph 30). As such, the Copenhagen Document elaborates an impressive list of provisions protecting the rights of persons belonging to national minorities, including their "right to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities" (paragraph 35). To underline that such participation could take place at any appropriate level of government, the participating States noted in paragraph 35 "the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned."

Amid the euphoria of the end of the Cold War, the Heads of State and Government of the participating States met in Paris on 21 November 1990 to sign the Charter of Paris for a New Europe.1 In its first sub-heading, the Charter heralds "A New Era of Democracy, Peace and Unity" and declares ended "[t]he era of confrontation and division in Europe". Most significantly, the main themes and elements of the 1990 Copenhagen Document on the Human Dimension are promoted front and centre in the Paris Charter. Perhaps more surprisingly, the Heads of State and Government also embraced "prosperity through economic liberty"; under the sub-heading "Economic Co-operation", they further stressed "that economic co-operation based on market economy constitutes an essential element of our relations", that "[d]emocratic institutions and economic liberty foster economic and social progress", that "free enterprise [should be] encouraged and trade increased and diversified according to GATT rules" and that there is a "link between respect for and promotion of human rights and fundamental freedoms and scientific progress" with science and technology playing "an essential role in economic and social development". In doing so, the Heads of State and Government expressed their strong support for the Document of the Bonn Conference on Economic Co-operation2 which had been adopted by the participating States on 11 April 1990 and which recognized: "the relationship between political pluralism and market economies"; "that the performance of market-based economies relies primarily on the freedom of individual enterprise and the consequent economic growth"; "that economic freedom for the individual includes the right freely to own, buy, sell and otherwise utilize property"; and that these principles should apply for "businessmen at all levels of commerce". In sum, the Charter of Paris for a New Europe commits participating States to political and economic liberalism.

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1 For the full text of the Charter, see Arie Bloed, supra (note 2), pp. 537 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 11 (1990), Parts 3-4, pp. 379 ff.

2 For the full text of the Document, see Arie Bloed, supra (note 2), pp. 425 ff.

In the year following the Paris Summit (which may be considered the apogee of post-Cold War euphoria), three important human dimension meetings were held: the Geneva Meeting of Experts on National Minorities, held from 1 to 19 July 1991; the Moscow Meeting of the Conference on the Human Dimension, held from 10 September to 4 October 1991; and the Oslo Seminar of Experts on Democratic Institutions, held from 4 to 15 November 1991. With a view to improving implementation of OSCE commitments relating to national minorities, the participating States meeting in Geneva emphasized "that human rights and fundamental freedoms are the basis for the protection and promotion of rights of persons belonging to national minorities" and "that questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary."1 More precisely, they further detailed their support for the effective participation of persons belonging to national minorities in public affairs in considering "that appropriate democratic participation of persons belonging to national minorities or their representatives in decision-making or consultative bodies constitutes an important element of effective participation in public affairs." Most significantly in this connection, participating States noted "with interest that positive results have been obtained by some of them in an appropriate democratic manner by, inter alia: ... decentralized or local forms of government".

The Geneva Meeting was followed in August 1991 by the attempted coup d'état in the Soviet Union. This turn in the wind cast a pall over the Moscow Meeting of the Conference on the Human Dimension which was convened only weeks later. With the sovereignty of the three Baltic States newly restored despite tense relations with the Soviet Union, and in light of the fact that large numbers of ethnic Russians remained in the Baltic States, the question of the international protection of the rights of persons belonging to national minorities was of considerable interest. However, only a modest substantive development of OSCE commitments was possible.2

The Moscow Meeting was followed one month later by the Oslo Seminar of Experts on Democratic Institutions. While the Report of the Seminar "does not purport to express any new commitments on the part of the participating States", it emphasized the necessity of developing "a democratic culture, on the local, regional and national level" and, with respect to local government, it reported as follows:

"In the context of constitutional reform, reference was made to the utility of vertical decentralization and division of the functions of government on a federal, regional and local basis for a wide range of purposes. Numerous forms were available to take account of historical, regional, linguistic or ethnic distinctions. Administrative decentralization, development of governmental functions on a regional basis, and reinforcement and reform of local government institutions might in varying ways respond to the needs of groups, including national minorities."3

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1 For the full text of the Geneva *Document, see Arie Bloed, supra (note 2), pp. 593 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 12 (1991), No. 8-9, pp. 332 ff. For a brief comment on the Geneva meeting and its report, see also Stephen Roth's note in Human Rights Law Journal, Vol. 12 (1991), No. 8-9, pp. 330-331.*

2 For the full text of the Document of the Moscow Meeting, as adopted on 3 October 1991, see Arie Bloed, supra (note 2), pp. 605 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 12 (1991), No. 11-12, pp. 471 ff.

3 For the full text of the Report, see Arie Bloed, supra (note 2), pp. 631 ff.

The winds of change had not all blown sweet across Europe. With totalitarian government having come to an end in most States, old enmities were released to feed existing insecurities borne of new uncertainty and the manifold difficulties of transition to democracy and, in particular, the market economy. As the Socialist Federal Republic of Yugoslavia had dissolved into armed conflicts, and with similar prospects feared throughout much of the now "former Soviet Union", the Helsinki Follow-up Conference was held from 24 March to 8 July 1992. Reflecting the new circumstances, the Heads of State and Government of the then 52 participating States (with the exception of rump Yugoslavia) adopted on 10 July 1992 the Helsinki Summit Declaration and Helsinki Decisions under the telling overall title "CSCE Helsinki Document 1992: The Challenges of Change".1 Despite the "serious difficulties and disappointments" acknowledged by the participants in paragraph 3 of their Declaration, they reaffirmed in paragraph 7 "the validity of the guiding principles and common values of the Helsinki Final Act and the Charter of Paris" and, in paragraph 8, they emphasized that "[t]he protection and promotion of human rights and fundamental freedoms and the strengthening of democratic institutions continue to be a vital basis for our comprehensive security." In relation to democracy at the local and regional levels, the participating States undertook in paragraph 53 of the Helsinki Decisions to "endeavour, in order to strengthen democratic participation and institution building and in developing co-operation among them, to share their respective experience on the functioning of democracy at a local and regional level..." To accomplish the tasks, the Helsinki Decisions concentrated on methods of implementation. Indeed, concern over implementation of OSCE commitments - as opposed to standard-setting - has been the main preoccupation and challenge of the OSCE ever since the second Helsinki Summit.

The transition to democracy and the market economy in the countries of Central and Eastern Europe clearly entails a broad process of social and political liberalization which empowers people, including persons belonging to national minorities. The OSCE standards driving this process have the logical implication of enhancing local self-government, with this implication having been expressed in several documents as noted above. It is the clear consensus of the OSCE participating States that the transition to democracy is necessary to ensure security and, in turn, to create the conditions necessary for the creation of wealth on a sustainable basis, i.e. through decision-making which involves the persons directly concerned both in terms of traditional security and also in terms of the market where products are brought, goods purchased and sold, jobs created and wealth distributed. To this end, some mechanisms have been developed within the OSCE.

III. RELEVANT OSCE MECHANISMS

(a) Introduction

There exists no mechanism within the OSCE specifically designed as a guarantee of local self-government. However, the obvious and intimate relationship between respect for human rights and effective democracy at the local level implies the direct effect of OSCE mechanisms implementing the human dimension. A variety of mechanisms have been developed within the

1 For the full text of the document, see Arie Bloed, supra (note 2), pp. 701 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 13 (1992), No. 7-8, pp. 284 ff.

OSCE through which human dimension matters in general, and questions specifically relating to decentralization and local government, may be discussed. These range from quiet inter-State discussions and investigations to the unique work of the OSCE High Commissioner on National Minorities. The breakthrough in this relation was achieved in the Vienna Concluding Document, with momentum being gained subsequent to the Paris Summit meeting of November 1990. The development of these mechanisms generally reflects the recognition by the participating States that paper commitments are neither politically sufficient nor to be considered an end in themselves. However, in keeping with the political nature of the Helsinki process, existing OSCE mechanisms do not generally share the judicial or quasi-judicial nature of implementation mechanisms typically generated by inter-governmental organizations.1 As Ambassador Audrey Glover, Director of the OSCE Office for Democratic Institutions and Human Rights, has noted:

"Most international human rights instruments have a state reporting mechanism or a right of individual petition – sometimes both – to realise the process of implementation. The OSCE has neither. Within the OSCE there is no supervising body to examine state reports or individual complaints."2

To be sure, the preference for a political rather than legal approach does not lessen effectiveness. To the contrary, the flexibility, speed and quiet nature of the mechanisms allows for progress which would be more difficult to achieve through public, judicial processes. However, the strength and ultimate success of the OSCE mechanisms depends on the level of support they may enjoy from the participating States – a conclusion which no doubt also reflects upon the seriousness of the substantive commitments undertaken. So far, support has been strong such that respect for commitments is maintained.

(b) The Vienna Mechanism

In the 1989 Concluding Document of the Vienna Meeting, the participating States recognized "the need to improve the implementation of their CSCE commitments and their co-operation in these areas [i.e. "respect for all human rights and fundamental freedoms, human contacts and other issues of a related humanitarian character"] which are hereafter referred to as the human dimension of the CSCE".3 Specifically, the participating States agreed on a four-part mechanism as follows: 1) to exchange information and respond to requests for information made by one or more participating State(s) to another participating State concerning questions of the human dimension; 2) to hold bilateral meetings on the initiative of one participating State "in order to examine questions relating to the human dimension of the CSCE, including situations and specific cases, with a view to resolving them"; 3) to allow any participating State to raise

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1 The sole exception is the OSCE Court of Conciliation and Arbitration established pursuant to the Convention on Conciliation and Arbitration within the CSCE adopted by the Council of Ministers meeting in Stockholm on 15 December 1992 (in force since 5 December 1994). For the full texts of the relevant decision of the Council of Ministers together with annexes including the Convention, see Human Rights Law Journal, Vol. 16 (1995), No. 4-6, pp. 210 ff. The Court is not discussed here because it is an institution designed for the peaceful settlement of inter-State disputes in the nature of conflict prevention; it is not foreseen as a guarantee of local self-government and it is unlikely ever to be employed as such.

2 Audrey Glover, "The Human Dimension of the OSCE: From Standard-Setting to Implementation", Helsinki *Monitor, Vol. 6 (1995), No. 3, pp. 31-39 at 34.*

3 This section appears near the end of the Document under the heading "Human dimension of the CSCE"; for the full text of the Document, see supra (note 7).

with third participating States situations and cases in the human dimension occurring within any participating State; and 4) to allow any participating State to raise with all other participating States concerns relating to the human dimension within any participating State "at the meetings of the Conference on the Human Dimension [i.e. Paris in 1989, Copenhagen in 1990 and Moscow in 1991] as well as at the main CSCE Follow-up Meetings." The mechanism was given more precision, including time-limits for responses and modalities for exchanges, in subsequent OSCE meetings.1

The "Vienna mechanism", as it has become known, functions as a kind of self- or community-supervised system of inter-State complaints. If responses to enquiries are considered satisfactory at the bilateral level, then nothing more comes of the matter(s) raised. However, bringing the matter before the community of participating States creates a kind of "public" scrutiny – at least among this part of "the international community". Although the mechanism formally lacks an independent element, participating States are evidently free to obtain supplemental information from other sources and the possible scrutiny of disinterested third States offers a kind of judgment by peers.

While it is hard to establish how successful the Vienna mechanism has been, it is known to have been implemented many times – at least between 100 and 150 times – especially in the first two years (1989 and 1990) after its creation, i.e. prior to the development of other mechanisms and the admission of most Central and Eastern European States into the Council of Europe.

(c) The Moscow Mechanism

The lack of a truly independent element in the Vienna mechanism was partly remedied by the development of the "Moscow mechanism" as a result of the 1991 Moscow Conference on the Human Dimension. This was achieved by directly supplementing the Vienna mechanism and by establishing additional procedures. In the former case, paragraph 8 of the Moscow Document provides that the State initiating the Vienna mechanism may request the requested State to receive "a mission of experts to address a particular, clearly defined question on its territory relating to the human dimension of the CSCE." According to paragraph 9 of the Moscow Document, the State initiating the Vienna mechanism may also initiate the sending of a mission of up to three "rapporteurs" to the other State even against the will of that State, provided that five other participating States support the initiative. The method of appointment of the rapporteurs and their tasks are prescribed in paragraphs 10 and 11 of the Moscow Document. In particular, it is to be noted that, pursuant to paragraph 3 of the Moscow Document, a "resource list" of independent experts has been established by the OSCE.2

Whether or not recourse has been made to the Vienna mechanism, three other procedures are foreseen by the Moscow Document. According to paragraph 4, a participating State may at any time invite a mission of up to three experts "to address or contribute to the resolution of

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1 See the 1990 Copenhagen *Document at paragraph 42, the 1991* Moscow *Document at paragraph 2 and the 1992* Helsinki *Decisions at paragraphs 5a and 7 of chapter VI.*

2 Each participating State is entitled to appoint up to 3 experts to the list. The appointees are to be "eminent persons, preferably experienced in the field of the human dimension, from whom an impartial performance of their functions may be expected." Experts are to be appointed for a period of 3 to 6 years with the possibility of no more than a second consecutive term. Participating States may place reservations against no more than 2 of the experts appointed by another participating State.

questions in its territory relating to the human dimension of the CSCE." In the case of a perceived "particularly serious threat to the fulfilment of the provisions of the CSCE human dimension", a participating State may, according to paragraph 12 of the Moscow Document, initiate the sending of a rapporteur's mission to the State concerned as long as the initiative receives the support of at least nine other participating States. Finally, according to paragraph 13 of the Moscow Document, a participating State may request the Senior Council (then the Committee of Senior Officials) "to establish a mission of experts or of CSCE rapporteurs".

As may be surmised from the term "rapporteur", a mission of OSCE rapporteurs aims to provide independently established facts to the concerned States together with observations and recommendations as may be appropriate. However, resolution of the concerns remains between the participating States. By comparison, experts may be given more powers than rapporteurs; paragraph 5 of the Moscow Document reads as follows:

"The purpose of a mission of experts is to facilitate resolution of a particular question or problem relating to the human dimension of the CSCE. Such mission may gather the information necessary for carrying out its tasks and, as appropriate, use its good offices and mediation services to promote dialogue and co-operation among interested parties. The State concerned will agree with the mission on the precise terms of reference and may thus assign any further functions to the mission of experts, inter alia fact-finding and advisory services, in order to suggest ways and means of facilitating the observance of CSCE commitments."

While the precise terms of reference for expert missions will vary, they are clearly intended to achieve results in terms of concrete solutions.

Resort to the Moscow mechanism has been limited. Still, it has been employed in various ways, notably with regard to situations in Croatia, Estonia, Moldova and the former Yugoslavia (regarding human rights violations in Serbia-Montenegro). However, with respect to minority concerns (much less issues of local self-government), it has been criticized as not the most effective means for addressing such issues; in particular, the mechanism cannot be initiated by those directly concerned, i.e. non-State actors representing minorities or local communities.1

(d) The Office for Democratic Institutions and Human Rights

With the new commitment to democracy proclaimed in the 1990 Charter of Paris for a New Europe, the participating States understood that they would need assistance in realizing the standards they declared. As such, they established an Office for Free Elections (OFE) to be located in Warsaw in order "to facilitate contacts and the exchange of information on elections within participating States"; more specifically, the OFE was mandated to "foster the implementation of paragraphs 6, 7 and 8 of the Document of the Copenhagen Meeting",2 i.e. assist with the election process. Although the commitment to democracy was undertaken with

1 See Katherine Birmingham, "The OSCE and Minority Issues", study prepared for The Foundation on Inter-Ethnic Relations, The Hague, October 1995, *at p. 21.*

2 See the Charter of Paris, supra (note 9), under the heading "New Structures and Institutions of the OSCE Process" and part G (paragraph 1) of the "Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe", ibid.

respect to "all government", the work of the OFE (concentrating especially on election observance) was foreseen principally at the national level.1

At the second meeting of the CSCE Council of Foreign Ministers, held in Prague from 30 to 31 January 1992, it was decided to strengthen the OFE and enhance the monitoring and promotion of the human dimension.2 Accordingly, the OFE was transformed into the Office for Democratic Institutions and Human Rights (ODIHR) and mandated, inter alia, to: develop co-operation with the Council of Europe; "establish contacts with non-governmental organizations active in the field of democratic institution-building"; "facilitate co-operation in training and education in disciplines relevant to democratic institutions"; and organize meetings and seminars3 on matters relating to democratic institutions, including the free media. The Ministers meeting at Prague also requested the Helsinki Follow-up Meeting "to further specify the task of the Warsaw Office [i.e. ODIHR]". This was achieved in Chapter VI of the 1992 Helsinki Decisions whereby the ODIHR was mandated, inter alia, to: be "the main institution of the Human Dimension"; act as a "clearing-house" for information, whether official exchanges in relation to the "emergencies" foreseen in the Moscow mechanism or in the functioning of the Vienna mechanism; "communicate, as appropriate, with relevant international and non-governmental organizations"; and "contribute to early warning in the prevention of conflicts". The ODIHR was also charged to fulfill "the tasks as defined in the 'Programme of co-ordinated support to recently admitted participating States'"; the Programme aims at making diplomatic, academic, legal and administrative expertise available and, to this end, arranges seminars, study programmes and training for public officials.

It is evident that the work of the OFE and ODIHR has been principally of a promotional nature and, as such, might not normally be considered a "mechanism" to guarantee commitments. Certainly, its engagements were not conceived, nor are perceived, as constituting sanctions. Rather, they embody a series of tasks which aim to facilitate and encourage compliance by participating States with their undertakings relating to the human dimension in general and to democracy (at all levels of government) in particular. Essentially, the work of the ODIHR combines educational activities with technical assistance and advice. However, the ODIHR does play a role in relation to the functioning of the Vienna and Moscow mechanisms. Perhaps more interestingly, at the Budapest Summit in 1994 the participating States decided (in paragraph 4 of Chapter VIII of the Budapest Decisions) to "encourage the Chairman-in-Office [i.e. the Foreign Minister who presides over the OSCE on an annual rotation] to inform the Permanent Council [i.e. the Permanent Representatives of all OSCE participating States who meet in Vienna on a weekly basis] of serious cases of alleged non-implementation of human dimension commitments, including on the basis of information from the ODIHR..." Since the ODIHR has also been mandated to receive information "provided by NGOs having relevant experience in

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1 Paragraph 8 of the 1990 Copenhagen *Document requires States to invite observers to their national election proceedings and only to "endeavour to facilitate similar access for election proceedings held below the national level." Given the extremely limited resources available to the OFE, observance of national elections has been a sufficient task.*

*2 For the full text of the "*Prague *Document on Further Development of CSCE Institutions and Structures", see Arie Bloed, supra (note 2), pp. 830 ff.; the text is also reproduced in Human Rights Law Journal, Vol. 13 (1992), No. 4, pp. 174 ff.*

3 Of particular note in this connection is the "CSCE Human Dimension Seminar on Local Democracy" organized by the ODIHR and held in Warsaw *on 16-20 May 1994. Aside from the plenary meetings of the Seminar, Discussion Groups addressed the following topics: "Constitutional Aspects of Local Democracy", "Civic Society and Local Democracy", and "Implementation of Democracy at Local and Regional Level".*

the human dimension field"1 and otherwise to be a clearing-house for information on the human dimension, the Budapest decision opens the door for the ODIHR, through the Chairman-in-Office, to perform a reporting function relating to human rights violations within OSCE participating States, including in relation to respect for democratic rights at the local level. While consideration of such reports would remain in the restricted confines of the Permanent Council, i.e. beyond the scrutiny of the media and the general public, this function could become an additional guarantee for fulfilment of human dimension commitments.2

(e) The OSCE High Commissioner on National Minorities

The OSCE High Commissioner on National Minorities (HCNM) is not normally considered an implementation mechanism of the human dimension. Indeed, it is worth noting that the HCNM was established as an instrument of the first basket, i.e. as a security mechanism aiming at the prevention of armed conflict between participating States.3 However, unlike other security mechanisms of the OSCE, the essential task of the HCNM requires him to address the political relationship between minorities and majorities, i.e. the democratic process in the largest sense – with the powers and practices of local government and administration sometimes being at the centre of minority-majority disputes. In this connection, the rights of persons belonging to national minorities are of primordial relevance, in particular "the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities", according to paragraph 35 of the 1990 Copenhagen Document. In this way, the rights of persons belonging to national minorities, as part of human rights (especially political rights), constitute a direct link between the human dimension and the security dimension with the HCNM playing a unique role as a concrete manifestation of the OSCE's concept of "comprehensive security".

As was the case for other OSCE institutional developments, the establishment of the mandate of the HCNM was largely in reaction to other current developments. In particular, the Heads of State and Government meeting at the Helsinki Summit in the summer of 1992 were preoccupied with the rapidly deteriorating events in the former Yugoslavia.4 Ethnic conflicts had become the main cause of political tensions and armed conflicts in the region, with the complex and delicate questions relating to national minorities often at the source of these conflicts – and potentially at the source of many more inter-State conflicts via escalation of tensions as a result of the "kin-State" phenomenon, i.e. the relationship between persons of one ethnicity/nationality who constitute a numerical minority in one State but the numerical majority in another State. Feeling the need to act in Helsinki, the Heads of State and Government agreed upon a considerable

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1 See paragraph 4 of Chapter IV of the Decisions of the Rome Council Meeting, 30 November to 1 December 1993, as reproduced in Helsinki Monitor, Vol. 5 (1994), No. 1, pp. 97-110 at 104.

2 For regular information on the work of the ODIHR and other OSCE activities in the human dimension, see the Bulletin published by the ODIHR on a quarterly basis.

3 The mandate of the HCNM was elaborated in the 1992 Helsinki *Decisions at Chapter I (paragraph 23) and Chapter II passim. For the text of the mandate, see Arie Bloed, supra (note 2), pp. 714 ff.; see also Human Rights Law Journal, Vol. 13 (1992), No. 7-8, pp. 284 ff.*

4 On the political environment at the origin of the mandate of the HCNM, see Rob Zaagman and Hannie Zaal, "The CSCE High Commissioner on National Minorities: Prehistory and Negotiations" in Arie Bloed (ed.), The Challenges of Change; The Helsinki Summit of the CSCE and Its Aftermath, Dordrecht: Martinus Nijhoff Publishers, 1994, pp. 95-111 at 95.

number of institutional developments touching a wide variety of areas in an effort to respond to the "challenges of change" by making OSCE commitments meaningful.

In response to the challenge of the day, the Dutch delegation to the Helsinki Follow-up Meeting proposed the establishment of the HCNM. The idea had come to the Dutch during their Presidency of the European Community in the second half of 1991; concerned by the events in Europe between 1990 and 1992, the Dutch picked up and refashioned the idea of a "CSCE Representative for National Minorities" which the Swedish delegation had unsuccessfully proposed to the Copenhagen Conference on the Human Dimension in 1990. Sharing the Dutch concerns over the then current events, the other participating States adopted the proposal.1

The mandate of the HCNM has been analyzed in detail elsewhere.2 As compared with other OSCE mechanisms, the HCNM is to be seen as a progressive development featuring a high degree of "intrusiveness": with a view to providing '"early warning' and, as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States" (paragraph 3 of the mandate), the HCNM may travel freely to and in any participating State and meet with virtually any person of interest to him. In other words, the HCNM enjoys through his mandate the prior consent of all participating States to his free movement within the State and unrestricted contacts with all persons (with the exception of terrorists or their public supporters). In doing so, the HCNM is actively to pursue de-escalation of tensions. Should he be unable to do so, or should tensions begin to flair beyond his control, the HCNM is required to 'sound the alarm' by informing the Chairman-in-Office and the Permanent Council.

The concepts of "early warning" and "early action" in the mandate of the HCNM require him to confront the root causes of those inter-ethnic tensions which, in the judgement of the HCNM, present the prospect of erupting into armed conflict. The issue of root causes raises the question of "How deep?" Here, the nature of the mandate as a security mechanism is determinative: the HCNM may address all matters to which he may draw a link with prospective armed conflict, i.e. which could be viewed as possible sparks of "hot" conflicts. The determination is made easier as a result of certain exclusions which exist in the mandate: the HCNM is precluded from considering "national minority issues in situations involving organized acts of terrorism" (paragraph 5b) or from considering "violations of CSCE commitments with regard to an individual person" (paragraph 5c). The latter exclusion makes it clear that the HCNM is not a general supervisory mechanism for the implementation of minority rights. Moreover, since the essential task of the HCNM is conflict prevention, his function is that of an independent, impartial and learned third party and not that of either an advocate or an ombudsman for persons belonging to national minorities. This last point is reflected in the title of the HCNM, i.e. he is the High Commissioner "ON" National Minorities rather than "FOR" National Minorities.

A root causes approach also raises the question of time, i.e. the immediacy or otherwise of the perceived threat to security. This is mainly a question of degree which ultimately turns on the

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1 For more details on the development of the concept of the HCNM, see ibid., pp. 96-98.

2 For a thorough analysis of the mandate of the HCNM, see Rob Zaagman, "The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context", in Arie Bloed (ed.), The Challenges of Change, supra (note 28), pp. 113-175.

HCNM's ability to foresee events; e.g., if a situation is left untouched, will it escalate sooner or later and will that escalation be containable or not? Based on his own judgements of various situations, the HCNM determines which cases to address. Then, as a sort of fireman, he acts to control, resolve or contain the situation so that it does not burst into flames. Motivated by the imperatives of the security dimension, the choices for his interventions are thus explained. From the perspective of comprehensive security, the HCNM then acts to create confidence between disputant parties, to facilitate mutually acceptable solutions, to identify areas for special attention and action, and so forth. While his recommendations are usually quite detailed, viewed from a broader perspective his functions might also be seen as buying time for fundamental, democratic processes and institutions to take hold and to acquire their own vigour. Overall, the HCNM is directed by security concerns, i.e. conflict prevention, but he endeavours in fact to reconcile human dimension issues with security dimension concerns.

The HCNM is mandated to conduct his activities in confidence and through direct contacts with both the representatives of the minorities concerned and governmental authorities at all levels. His work is thus one of essentially quiet diplomacy. There are several advantages to this approach. However, the recommendations of the HCNM, as contained in a formal exchange of letters with the Foreign Ministers of the States of concern, are discussed before the Permanent Council and ultimately published. This now-established practice affords the parties adequate time without public scrutiny in which to act in good-faith, then brings the matter before the international community by virtue of the Permanent Council and, usually at that time, opens the matter to public scrutiny. The system of delayed publication thus affords the opportunity for quiet diplomacy to achieve the desired ends, yet ultimately maintains the public scrutiny sometimes necessary to keep parties from making misrepresentations and exposing States to public shame if they fail to respect their commitments or to co-operate for mutual security. The eventual publication also makes the HCNM resemble other international human rights mechanisms.

The specific activities of the HCNM have been focused in Central and Eastern Europe because in his judgement there exist several situations which present the prospect of erupting into armed conflict.1 The HCNM is currently involved in Albania, Croatia, Estonia, the Former Yugoslav Republic of Macedonia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Romania, Slovakia, Ukraine; he has also been involved in Lithuania and Moldova. The HCNM has taken from the beginning of the mandate a pro-active approach, not hesitating to take initiatives or to facilitate dialogue and confidence-building exercises. As "an eminent international personality with long-standing relevant experience from whom an impartial performance of the function may be expected" (paragraph 8 of the mandate), the HCNM is often a valuable impartial and independent third party in a dispute. Perhaps most importantly, the HCNM has taken a decidedly human rights approach in his work, employing human dimension commitments as the framework for his analysis and the basis from his recommendations.

Of course, in a mandate which is to draw so heavily on the judgement, experience, and political and diplomatic senses of the personality to be appointed, it is evident that much turns on the personal traits of the HCNM. The present HCNM, Ambassador Max van der Stoel of The

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1 For a concise description and analysis of the functions of the HCNM, see Anders Rönquist, "The Functions of the OSCE High Commissioner on National Minorities with Special Regard to Conflict Prevention" in Eckert Klein (ed.) The Institution of a Commissioner for Human Rights and Minorities and the Prevention of Human Rights Violations, Menschenrechtszentrum der Universität Potsdam, Berlin: A. Spitz Verlag, 1995, pp. 43-52.

Netherlands, fits the bill especially well. Having taken up the position on 1 January 1993 as the first HCNM, Amb. van der Stoel has brought to the position almost fifty years of political experience including parliamentary and governmental offices: as a parliamentarian, he was a member of the Parliamentary Assembly of the Council of Europe (including Rapporteur on Greece in 1968-1970); as a member of government, he was twice Minister for Foreign Affairs (1973-1977 and 1981-1982); as a diplomat, he was Permanent Representative of The Netherlands to the United Nations (1983-1986) and headed the Dutch delegation to the Conference on the Human Dimension of the CSCE (Paris 1989, Copenhagen 1990, and Moscow 1991); as a human rights advocate, he has also been since 1991 Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in Iraq (a function he continues to perform in a pro bono capacity). Especially notable is the fact that Ambassador van der Stoel has been involved in the Helsinki process since its inception when he was Dutch Foreign Minister. Above all of his formal qualifications (he is also a jurist) and developed skills, Ambassador van der Stoel enjoys wide respect among all OSCE participating States.

In carrying out his mandate, the HCNM has so far achieved significant success in promoting dialogue and through such dialogue the resolution of numerous specific disputes. Whether due to his own skills or simply due to fate, the HCNM has so far not had to "sound the alarm" in any case. It is, of course, extremely difficult to measure what has worked and what has not worked (and why), but it would appear that the essential combination of the HCNM's personal experience, skills, discipline and dedication to human rights has been well-received by participating States in which the HCNM is involved. Moreover, the HCNM has demonstrated the seriousness with which he addresses the issues and this has translated into strong endorsements at inter-governmental meetings. In particular, the Council of Ministers meeting at Rome in 1993 "recognized the HCNM as an innovative and effective asset in early warning and preventive diplomacy" and encouraged him to pursue his activities.1 At the meeting of Heads of State and Government in Budapest in December 1994, the participating States also commended the HCNM for his work.2

IV. THE OSCE EXPERIENCE: SOME OBSERVATIONS AND CONCLUSIONS

In terms of standard-setting, it is clear that OSCE commitments require democratic government at all levels, including at the local level. This general requirement is further specified in several provisions on human rights, in particular political rights. As part of human rights, there are additional special protections for persons belonging to national minorities, especially as pertains to effective participation in public affairs.

The guarantees for the above-noted OSCE standards are relatively few and do not concern local self-government expressly. Nonetheless, the Vienna and Moscow mechanisms were developed at the time of democratic (re)birth in Europe and may continue to be accessed – having proved their utility at the time. Given the transition to democracy and the market economy currently taking place in Central and Eastern Europe, unsettled times may still lie ahead. In this light, the work of the HCNM is especially interesting as it marries the security dimension with the human dimension. Indeed, the HCNM has characterized the human dimension as "the heart of the

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1 See Chapter III of the Decisions of the Rome *Council Meeting, supra (note 25).*

2 See paragraph 21 of Chapter VIII of the Budapest *Decisions, supra (note 1) at 460.*

matter" within the entire OSCE process – a process which began and has been maintained principally as a security process.1

Drawing upon some three years of experience in the field, and with reference to the recommendations of the HCNM which are publicly available, it is possible to make some general observations, as follows:

1. The lack of developed structures for dialogue in many States negatively affects the quality of communications leading to prejudices and interrupting negotiations.

2. Respect for human rights, including the rights of persons belonging to national minorities, can contribute significantly, if not conclusively, to the settlement of most situations involving minorities.

3. Decentralization and enhancement of local self-government contributes substantially to giving people greater power over their own destinies. This can be especially important for ensuring effective participation of persons belonging to national minorities in public affairs.

4. Claims for "self-determination", including secession, do not generally arise in situations where all human rights are respected. Conversely, where human rights, including minority rights, are not respected, and, more specifically, in the absence of democratic procedures or their effective functioning, frustrations may well lead to claims of a secessionist nature.

5. The pluralist nature of the population of every State requires efforts to locate and implement appropriate political forms. The free search for such forms requires openness, inventiveness, and guarantees for basic human rights. The fact that the process and outcome may be complex is not to be considered undesirable: a complex world requires complex solutions. There is, in any case, no viable alternative.

6. The most effective "guarantees" of genuine local self-government and decentralization of power are the development of democracy and respect for human rights, i.e. certain fundamental standards of treatment of persons and certain procedures for decision-making.

7. The closer decisions are made to those who are to be affected by them, the more democratic they are to be considered. From this perspective, decentralization and subsidiary are generally to be considered good.

8. According to the OSCE's approach to "comprehensive security", there is a direct inter-linkage between peace and security, economic development and prosperity, and respect for human rights.2 Since this inter-linkage also underlines the general interest each participating State may have in the fulfilment of the commitments of each other State, it would be preferable for international guarantees of local self-government to be provided by multilateral institutions and not to leave the question to the bilateral level where direct interests are at play and where a State may resort to measures of self-help – possibly igniting an escalation of tensions.

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1 See Max van der Stoel, "The Heart of the Matter: The Human Dimension of the OSCE", Helsinki *Monitor, Vol. 6 (1995), No. 3, pp. 23-30.*

2 For an examination of the link between the security and human dimension baskets of the OSCE, see Rob Siekmann, "The Linkage between Peace and Security and Human Rights in the CSCE Process", Helsinki Monitor, Vol. 5 (1994), No. 1, pp. 43-51.

9. Finally, there remains a significant lack of conceptual and legal clarity in the meaning and use of a variety of politically sensitive terms, such as "autonomy", "nation", "people", "minority", "self-determination", and "independence". Clarification of these terms would reduce their exploitability and enhance security in general.

In conclusion, democratic governance at all levels is necessary to ensure maximization of freedom which is the foundation of an efficient market economy and the basis of interdependencies which, in turn, militates against resort to armed means of settling conflicts. From the perspective of comprehensive security, the OSCE is committed to all these ends. As an instrument of conflict prevention, the HCNM exemplifies this commitment in situations involving national minorities.

b. Territorial integrity of states, minority protection, and guarantees for autonomy arrangements: approaches and roles of the United Nations1 by Mr Asbjørn EIDE
Director, Norwegian Institute of Human Rights, Oslo

Introduction

The organisers have requested me to identify "International Guarantees for Territorial Autonomy - work of the United Nations". The conclusion drawn in this paper is that the United Nations does not, except possibly as a temporary measure, provide such guarantees and is unlikely to do so in the foreseeable future. There may, however, be alternatives with somewhat greater prospects. The paper will therefore first explain why such guarantees fit badly with United Nations normative approaches and practical roles, and then explore the alternatives available.

Under the framework of international law constituted by the United Nations Charter, no general right to territorial autonomy exists. Indeed, the notion of "autonomy" is not a term of art in international law, for reasons which will be explained below. Autonomy may be one among several possible options which can be chosen by the populations of non-self-governing territories (NSGT), under the rubric "free association with another State", as examined below under section 3. Even when this option has been chosen, the UN has not extended tangible guarantees for the preservation of the autonomy agreed upon. The evolution of the rights of indigenous peoples, a process which is only beginning, may eventually open up a more generalised system of territorial autonomies, but the scope of this is still uncertain.

The analysis and arguments in this paper proceed in the following steps: Step 1 is a conceptual exploration of the meanings of "territorial autonomy", "international guarantees", and "the work of the United Nations". Step 2 examines the normative basis of the international legal order as based on the Charter of the United Nations, observing that it gives primacy to territorial integrity over group autonomy, and that it builds on a territorial concept of "nation" or "people" in contrast to ethnic concepts. Step 3 examines the relevance of the right of peoples to self-determination in United Nations law and practice. Step 4 contains a presentation of what I call "the other side of the coin", the requirements articulated within the United Nations for States to promote peaceful and constructive accommodations between groups, making the State their

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1 A preliminary working paper by Asbjørn Eide, prepared for the UniDem seminar on "Local Self-Government, Territorial Integrity and Protection of Minorities", Lausanne *April 25-27. (A subsequent version after the meeting will contain more extensive references to UN resolutions and secondary sources).*

common home on a basis of equality for all. This necessitates a gradual realisation of a social and ethnic contract, through democratic processes based on human rights and respect for the existence and identity of minorities. Step 5 elaborates on the analysis in the previous section by identifying three possible levels of accommodation within States. The third among these are territorial subdivisions created in accordance with some form of decentralisation, symmetric or asymmetric, of which territorial autonomy would be one major category. Step 6 contains a concluding review of past experience and draws some observations on the likely and the desirable future - reiterating, however, that the United Nations is unlikely to provide any tangible guarantees for territorial autonomies other than those which are essential to the maintenance of international peace and security.

1. Contextual and conceptual exploration

1.1 Autonomies within sovereign States

"Territorial autonomy" is understood as an arrangement, normally within a sovereign State, whereby the inhabitants of a defined part of the territory have extensive scope for self-government. In ideal forms, territorial autonomy would require the existence of a locally elected legislative body with some power to legislate independently in some substantive domains, as well as an executive with power to implement the legislation of the local authority in those areas, whereas the executive in other areas is subject to the laws and orders of the central authorities. Territorial autonomy of this kind may be intended as a permanent solution or as a temporary arrangement. The scope of autonomy and its degree of constitutional entrenchment varies considerably. It is not the purpose of the present paper to discuss the variations.

"Autonomy" is here understood as different from a strictly federal arrangement. The dividing line consists in the symmetric versus asymmetric relations between the territorial components: A federal system consists of a number of equal entities, each with the same scope of self-government within the Constitution, whereas an autonomous entity differs, in terms of the scope of its competence, from other entities in the State. The rationale underlying federal arrangements may or may not be ethnic in orientation; autonomies almost invariably have an ethnic, linguistic or sometimes a religious intent.

In some cases the label "federation' is rather artificial, not being based on a democratic system with genuine self-government for the entities. This has particularly been so in some cases when federations have been proclaimed to provide for self-government of the different ethnic groups and nationalities, but where the level of self-government of the units has been effectively blocked by the central power. "Federations" under the control of a single, centralised political party, as was the case of the USSR, left little power to be exercised by the units. The "federation" between Ethiopia and Eritrea, established by the United Nations in 1950 (UNGA res. 390(V)), was artificial since the emperor had nearly absolute power. The autonomy envisaged for the Eritrean part of the federation was effectively eliminated by the Ethiopian emperor, resulting in a long drawn out war until Eritrea became independent.

1.2 Territorial autonomy under occupation regimes

Territorial autonomy may occur also when the territory is not strictly speaking a part of a sovereign State, but under its occupation, where the occupying power has asserted an overall competence to maintain law and order in the occupied territory but leaves to the authorities representing the population of the occupied territory a certain scope of self-government. To

some extent this is regulated in the Fourth Geneva Convention of 1949. Such situations are intended to be transitional. At least since the adoption of the UN Charter in 1945, acquisition of territory by the use of force is considered illegal; consequently, occupation can only be temporary and has to be brought to an end when peace is restored. The prime example of efforts to establish transient autonomy arrangements is the political status of the Israeli-occupied areas of Gaza and the West Bank, with the Camp David accords in 1978 as the first step, the next being the agreements achieved through the "Oslo channel" in August 1993 and which are now slowly being implemented.

1.3 Autonomy in transitions from non-self-governing status

Territorial autonomy has in earlier times been used in colonial territories, particularly in the form of "home rule" of various kinds, most frequently as stages towards full independence. In some cases it has become a permanent solution where this has been the preference of the majority of the population living in the territory concerned. An example is Puerto Rico, initially listed by the United Nations as a non-self-governing territory but taken off that list when Puerto Rico adopted its new Constitution in 1952, which made it a territory in association with the United States, a status which has been reconfirmed by the majority through several subsequent referenda.

1.4 Territorial autonomy and the dissolution of composite States

Finally, territorial autonomy has emerged during periods of transition when a multi-ethnic federation has been dissolved. The two major examples are the dissolutions of the USSR and the former Yugoslavia. The autonomies arising from this process, some of which have already ceased to exist, were responses to the complex interaction between ethnicity and territory when established territorial frameworks disappeared and new ones were being constructed. Such autonomies may be transitional or become permanent; it may be difficult to determine in advance whether it will be the one or the other.

These contextual examples indicate that autonomy arrangements arise in very different settings and with great variations as to the intention and the future of the arrangements.

1.5 International guarantees

The meaning of "international guarantees" is also not clear. It gives rise to at least the following questions: What is to be guaranteed? Who are the beneficiaries of the guarantee? Who shall provide the guarantees? Of what shall the guarantee consist - or, more precisely, what is expected from the guarantor when the guarantee has to be implemented?

Not all these questions will be answered here, but a cursory comment may be required. Presumably, the object of the guarantee is the territorial autonomy. It has to be recognised, however, that such autonomies often are the products of a compromise arising from efforts at conflict resolution. The compromise itself is often precarious, sometimes intended to be transitional - and the parties to the compromise often have different interpretations of the autonomy agreement as well as different intentions regarding future developments. The central authorities of the State, or the colonial or the occupying power as the case may be, are probably not ready to accept full independence for the territory. On the other side, groups inside the territory seeking autonomy are often dissatisfied with the limitations on independence imposed on them. Some may also be dissatisfied by the territorial extent of the autonomous area. Yoram Dinstain has noted that autonomies are often grudgingly given and received without gratitude.

Assuming that autonomies are the product of such compromises, there is a latent or open controversy over the scope of such autonomy: the authorities previously in control (the central government or the colonial or occupying power) might want to restrict it, whereas the local authorities might want to extend it. An international guarantee might therefore have to be double-faced. It would have to guarantee both against extension and against reduction of the autonomy. This, however, depends on what is the future intention with regard to the autonomy, as perceived by the parties and the guarantor. Since that is often not clear, the guarantor would have great difficulty in determining the scope of the guarantee and the conditions under which the guarantee would be upheld in the sense of requiring action, or the direction of that action.

The intended beneficiary of the guarantee would also be double: it would primarily be the population of the autonomous area, as represented by their local authorities, but this would not always be enough. The guarantee must also address the concerns of the central government, and sometimes also the concerns of the withdrawing occupying power, as illustrated by the present situation in the Palestinian areas of self-rule. Autonomies can generate security risks which may have to be held in check, or they can provide a cover for ethnic cleansing and other serious violations of human rights for minorities within the autonomous area. Examples are easy to find in recent history.

1.6 The work of the United Nations

The UN is involved in two ways: in developing the international normative system based on the principles contained in the Charter, and in taking action in concrete cases. The development of the normative system, through soft and hard law, is pursued by the General Assembly and its various subordinate bodies, including the Commission on Human Rights and the International Law Commission. Actions in concrete cases may be taken by various bodies, but most of them can only do it by way of recommendation and persuasion. Significant for the purpose of this paper has been, i.a., the Special Committee on Decolonisation.

Can, then, the United Nations be the guarantor of territorial autonomy? Treaties of guarantees, entered into between individual States, were in the past often aimed at protecting small or threatened States against armed attack. With the adoption of the Charter and the general prohibition on the use of force against the territorial integrity and political independence of States, this practice lost its significance - the collective security arrangement which the Security Council is supposed to administer can now be seen as a general guarantee, for all States, against aggression. This also points to the framework within which ‘guarantees’ by the United Nations are conceivable: as international law presently stands, these can only arise when the maintenance of the autonomy is seen as essential to the maintenance of international peace and security.

"Guarantees" could be upheld only through a decision by the Security Council under Chapter VII, requiring a finding of a threat to peace, breach of the peace or act of aggression. The Security Council would assess the situation in its particular context at that particular time, evaluating the actions of the central authorities, the local authorities, and third States, and would focus primarily on the line of action which was least likely to lead to an escalation of the conflict, rather than guaranteeing the preservation of the autonomy in the form it had.

2. The normative basis: territorial integrity and the territorial nation

2.1 Territorial integrity, sovereign equality, and non-intervention

The primary emphasis by the United Nations is on the requirement that all parties respect the territorial integrity of existing sovereign States. A major purpose of the UN Charter was to outlaw the use of force and to prevent intervention directed against the territorial integrity and political independence of States1, which also is applicable in situations where there are group conflicts inside a State.

Under contemporary principles of international law as contained in the Charter of the United Nations, all populated territories throughout the world are expected to be or to become sovereign and independent States or parts thereof. The governments of each sovereign State are expected to be representative of all segments of its population. The choice between constitutional models - unitary, federal or with asymmetric autonomy arrangements- is generally considered a purely internal matter with which international society is not concerned. What is important is the protection of the territorial integrity of States against any form of external aggression or intervention.

The principle of the sovereign equality of States has contributed to the elimination of the wide varieties of "statehood" under pre-Charter international law. Categories such as "protectorates", "dependencies" and States under the "suzerainity" of other States are now considered anomalies. From the perspective of international law, a given political unit is either a sovereign State - or it is not a State. In practice, territorial entities which are not States can still have some international capacity.

The emphasis on territorial integrity is contained not only in the United Nations Charter and the Declaration on Friendly Relations2, but also in regional instruments. The CSCE Final Act Principle IV is an explicit endorsement of the principle. The Council of Europe has repeatedly stressed the paramount importance of this principle. In the Declaration emerging from the Summit Meeting of Heads and States and Governments of the Council of Europe, held in Vienna 1993, its members committed themselves to the protection of the rights of national minorities "within the rule of law, respecting the territorial integrity and the national sovereignty of States."

Ethnic or religious conflicts can easily lead to regional and international tension, and in some cases to overt intervention, with its profoundly destabilising effects for international peace. Intervention may be initiated by the "mother country" or kin State with the claim that its ethnic relatives are subjected to intolerable violations. Intervention can be open or disguised, including the organisation, assistance, fomenting, financing, incitement or tolerance of subversive, terrorist or armed activities directed against the violent overthrow of the regime of another State or interference in the civil strife of another State through such behaviour3. So-called "humanitarian intervention", involving transboundary use of force not based on a Security Council resolution, is generally considered illegal4. The Security Council may initiate the use of force to protect

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1 UN Charter Article 2(4).

2 General Assembly resolution 2625(xxv), 24 October 1970.

3 This language describing the prohibited acts is taken from the principle of non-intervention contained in the Declaration on Friendly Relations, 1970 (General Assembly resolution 2625 (XXV)).

4 See e.g. Bothe, M.: The legitimacy of force to protect peoples and minorities" in Christian Tomuschat (ed): Modern Law of Self-

groups or minorities if (a) there is a threat to peace when oppression of groups has international implications, or (b) where there is a gross and constant violation of human rights.

In recent years, there has been a growing emphasis on the notion of "common security", achieved through cooperation among States. The handling of minority conflicts would be substantially helped if a regional attitude of cooperation and common security could be developed.

Ethnic conflicts with external involvement destroys the prospects for a policy of common security and places in its stead a policy of confrontation, leading to an armaments race and a search for future revenge for present and past defeats.

A regional and international climate of stability is essential. The States members of the United Nations have a duty to co-operate in the creation of world-wide conditions to bring about freedom from want (through realisation of economic and social rights) and freedom from fear (through co-operative security policies, moving away from the confrontational policies of the past). Peaceful and constructive approaches to minority issues are therefore essential also for the realisation of economic and social rights for all.

2.2 The nation is territorially defined

From the perspective of international society, 'nations' are understood in a territorial sense. International law presumes the existence of States which are already constituted and generally recognised. The criteria for statehood contained in the 1933 Convention on the Rights and Duties of States Art. 1 are still generally held to be the valid: (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other States1. From the standpoint of international law, the "permanent population" is identical to the nation. "Nationality" refers to the country in which a person is citizen. From an international law perspective, the nationality of a citizen of Belgium is simply Belgian, not Flemish, Wallonian or whatever else the person might be by internal, Belgian traditions or practice.

The point is that international law is built on an ordering principle based on the existence of sovereign States; within each of those States there is a national society. The view from within, that this national society is composed of individuals belonging to different ethnic or national communities, is less relevant from the international perspective. From a social or anthropological perspective, and therefore also from the perspective of domestic politics, the concept and understanding of "nation" is quite different.

3. The right to self-determination: Its relevance to territorial autonomy

3.1 Claims of self-determination

Claims of self-determination have in UN practice been made mainly in four categories of situations: (a) The situation of non-self-governing territories, including occupied territories; (b) the situation of independent countries where the population demands democratic governance; (c)

Determination, Nijhoff 1993.

1 165 L.N.T.S. 19.

in the aftermath of the dissolution of a larger entity, particularly when multi-ethnic federal States are dissolved, and where ethnic conflicts over the boundaries to be drawn for the new entities has been paramount, and (d) the situation in parts of a territory of a sovereign State where an ethnic group challenges the legitimacy of the central government to exercise authority over that group.

Summing up the approaches taken at the United Nations, the following observations can be made:

(a) There is near-universal consensus that the population of non-self-governing and occupied territories have a right to self-determination; the main content of the right is to determine the political status of the territory as a whole. In these cases, the beneficiary of the right (the "people") is the population of the territory as a whole. The integrity of the territory must be respected; the right to self-determination therefore does not give separate parts of the population of any part of the non-self-governing territory a right to break out of the territory; if the territory is to be divided, it must be on the basis of agreement between the constituent groups of the population.

(b) There is a broadening consensus, though still contested by some States, that the population in every independent country (the "people" as a whole) has a right to self-determination, then often referred to as "internal self-determination". The content of the right is for the population as a whole to be able to determine the economic, social and cultural development of the country concerned. This means that the population must have an effective democratic system of governance where all parts of the population participate. It needs underlining that the beneficiaries of this right are the people as a whole, meaning that members of different ethnic, religious, linguistic and other groups must be allowed to participate without discrimination in the government of their country and that no part of the population has a right under international law to govern alone within its territory.

(c) Special difficulties have arisen in the context of dissolving federations. Even in these complicated cases, there has been a broad consensus within the United Nations that the borders of the union Republics, such as in the former USSR and in former Yugoslavia, should be drawn not on the basis of ethnic habitats but should follow the principle of uti possidetis juris, which has been interpreted to mean that the new borders should be those which previously existed as the borders of the union Republics of the federation. The application of this principle has met strong resistance among some of the ethnic groups concerned. The ensuing armed conflicts with their concomitant practices of ethnic cleansing are familiar to all and need no examination here. However, the UN did become involved in experiments with autonomy arrangements during the process of transition, and this experience will be further examined below.

(d) There is very little if any support in international law for claims by separate ethnic, linguistic or religious groups inside sovereign States to secede from the territory of sovereign States. Such claims are generally held to be invalid except under extreme circumstances. This is so also when the ethnic group claiming the right calls itself a "nation", a "people" or something else.

(e) There is, however, some emerging support for claims made by indigenous peoples for a right to a degree of autonomy within sovereign States. The scope and modalities remain vague, however, and further discourse within international law will be required before its content can become clear.

3.2 Restatement by the UN of the right of peoples to self-determination: Vienna 1993

In 1993, the United Nations organised the World Conference on Human Rights. The resulting Vienna 1993 Declaration and Programme of Action (DPI/1349-39399) deals with self-determination in its Article 2. It is an important source since more than 170 states were represented, and it can be considered a widely shared expression of opinio juris on the subject.

In the Declaration, the Conference recognises and endorses the right of all peoples to self-determination, but the principle of territorial integrity and political unity of existing sovereign and independent States is held to exclude a right to secession. The different components of the Vienna provisions are derived from earlier sources of international law but have introduced some minor modifications.

Article 2 para.1 reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development."

This is a verbatim restatement of Article 1 para.1 of the 1966 Covenants of Human Rights, and leaves open all the ambiguities of that article: Who are the people (the self)? and what do the people have a right to? To answer those questions, we must take a closer look at the two other parts of the Vienna Declaration Article 2.

Art. 2 para. 2: "Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognises the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realise their inalienable right of self-determination. The World Conference on Human Rights considers the denial of self-determination as a violation of human rights and underlines the importance of the effective realisation of this right."

By "the people" in the quotation above is meant the population as a whole living in a non-self-governing territory or in an occupied territory. The "people" is defined by the territory in which the population lives, not by the ethnicity, language or religion of the different groups which constitute the population. This becomes clear when looking at United Nations practice, which will be done at greater length below.

The right of a population living in a non-self-governing territory to "freely determine its political status, and freely pursue its economic, social and cultural development" is readily understandable. What it means has been further clarified in practice through the efforts by the United Nations to ensure that non-self-governing territories reach a status of sovereignty, separately or in other ways. This will be discussed further below.

Art. 2 para. 3: "In accordance with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind."

What this provision does, is to exclude the use of the right to self-determination as a basis for secession. The same point had already been expressed in the 1962 Declaration on Decolonisation, operative article 6: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". However, the 1993 Vienna formulation, building on the 1970 Declaration on Friendly Relations, adds that the government shall conduct itself in compliance with the principle of equal rights and self-determination of peoples by being possessed of a government representing the whole people belonging to the territory without distinction of any kind. The Vienna formulation therefore does not imply that the people of an independent State do not have a right to self-determination. What it does mean is that its right to self-determination consists in a right to have an inclusive, representative and democratic government which on behalf of the population as a whole freely can pursue the economic, social and cultural development of the country as a whole. The political status of the territory has already been settled by becoming a sovereign, independent State. The right to self-determination for the people (population) of a sovereign State is a right to democracy and respect for human rights.

3.3 Approaches in practice: Self-determination of populations in non-self-governing territories

The UN practice has evolved over time. When the UN was founded, large parts of the world were still territories in a subordinate position under some kind of external rule, as mandates, trusteeships or colonial territories. The Charter envisaged, through the principle of self-determination, that all such subordination was eventually to be brought to an end. All populated territories were to become sovereign or part of existing sovereign States on a basis of internal equality. Institutions and procedures were therefore set in motion to ensure that these territories could become self-governing. At the basis of the UN efforts was initially the Declaration Regarding Non-Self-Governing Territories (Article 73 and 74 of the Charter). During the 1950s, the main focus was twofold: to determine which territories were non-self-governing and to ensure that information was transmitted by the administering power concerning the advancement of self-government within the territory. During that period, some autonomy arrangements were established which were held to have satisfied the requirements of the Charter.

One such case which turned out to be disastrous was that of Eritrea. The UN arranged for an "autonomy" status through a federation with Ethiopia. Nominally, the autonomy of Eritrea within the federation was extensive. However, the arrangement was seriously flawed, the Emperor of Ethiopia controlling power in reality. In 1962, Eritrea was annexed by Ethiopia and by 1967 it had been placed under direct military rule. A long period of war ensued until Eritrea emerged as an independent State. In spite of the fact that the UN had played a central role in the drafting of the Ethiopian-Eritrean federation, the UN took no further interest after the parties in the early 1950s had adopted the Federal Act and the Constitution. When the autonomy for Eritrea, which had been spelled out in great detail by the United Nations in the annex to resolution GE res. 309 (V) in 1950, was effectively eliminated by the Ethiopian emperor, the UN remained silent.

Some other, and more successful, autonomies emerged during the same period, by which territories were taken out of the list of non-self-governing territories. Here can be briefly mentioned the case of Puerto Rico and of Greenland, territories which were initially included in the list of non-self-governing territories.

Self-determination in the context of decolonisation is territorially based. The "people" is a composite body, comprising the total population of the non-self-governing territory. The boundaries of the territory are normally identical to the pre-independence administrative boundaries, in conformity with the principle of uti possidetis juris. As a general rule, this has been applied to processes of decolonisation in Latin America, Africa and Asia. It has been considered an overriding task not to allow territories to be torn apart between the different ethnic and religious groups, since this would lead to devastating violence.

The UN practice accelerated and underwent a considerable change with the 1960 General Assembly Declaration on the granting of independence to colonial countries and peoples (GA res. 1514/XV). While that Declaration refers to "independence", it has not been understood by necessity to require a separate, independent status for the territory; it can become part of a larger sovereign and independent State. The population itself might opt for several permissible forms of self-government. These options are outlined in General Assembly resolution 1541 (XV), Principle VI:

(a) Emergence as a sovereign State;

(b) Free association with an independent State,

(c) Integration with an independent State.

Since 1960 the choice between these options belongs exclusively to the population of the territory concerned, and the administering power is no longer entitled to limit the options to alternatives (b) and (c) as happened earlier.

It was found necessary to determine with greater precision which territories are non-self-governing rather than integral parts of sovereign States by revising the criteria for the obligation of administering States to transmit information about non-self-governing territories. The revised criteria were elaborated in 1960 by General Assembly resolution 1541 (XV). Principle IV states:

"Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."

This is the criteria of separateness - geographically and culturally.

The other criteria concerns the nature of the relationship between the administering State and the people living in the territory. When that relationship is based on unequal rights, particularly in the political field, the presumption is strengthened that it is a non-self-governing territory. Principle V of resolution 1541 (XV) reads:

"Once it has been established that such a prima facie case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be inter alia of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter."

Additional to geographical and cultural separateness, the other criteria is therefore subordination. In essence, it is a question of lack of democratic participation in the State as a whole. The characteristic feature of non-self-governing territories was that the population on those territories did not have an equal right to participate in the political life of the metropolitan territory.

The Decolonisation Committee (Committee of 24) was set up under resolution 1514 (XV) which contained the Declaration on Decolonisation. It has since drawn up a list of non-self-governing territories, almost all of which have since obtained independence or have joined some other State. Among the major remaining territories defined by the Decolonisation Committee as non-self-governing are East Timor and Western Sahara.

In the same category as the non-self-governing territories arising from colonial situations must be included territories which have been occupied by external armed forces after the entry into force of the United Nations Charter and thus in violation of the Charter. Acquisition of territory by the use of force is, since 1945, illegal; consequently, such territories must be placed at the same level as the traditional non-self-governing territories. While in the traditional colonial cases, the non-self-governing territory is usually remote from the administering State, in the case of occupied territories these are often immediately bordering on the territory of the administering State. The main case in the United Nations practice is that of the situation of the Palestinian population in areas occupied by Israel after the 1967 war. The General Assembly has repeatedly adopted resolutions demanding the application of the right to self-determination of the Palestinian people. The Security Council has been cautious, however, taking into account the overall security problems in the Middle East. In this context, plans for autonomy arrangements have had a prominent place, though mainly negotiated outside the framework of the United Nations, such as the Camp David Accord in 1978 and the agreements reached through the Oslo channel in August 1993.

The Security Council has endorsed and supported the autonomy arrangements which have led to a limited self-rule in parts of the territories formerly occupied. From some of these territories, the Israeli army has withdrawn and a Palestinian administration has been established. The future, however, is quite uncertain - whether it (a) will emerge into an independent Palestinian State (which is the explicit requirement of the General Assembly) and if so with what territories, or (b) as a federation with Jordan, or (c) possibly become a part of a wider confederation involving other States in the region including Israel. Since the present partial autonomy is a step in a process, it is misleading to say that the Security Council is "guaranteeing" the autonomy as it now stands, but it is indeed an issue of central importance for the maintenance of international peace and security, and the Council will undoubtedly pay close attention to the behaviour of the parties during the process of determining the status of the territory.

3.4 Self-determination of populations in sovereign and independent States

Independence freezes territory. There is no unilateral right under international law to secession by part of the territory of an independent State from its other parts, with a possible exception when the government is profoundly undemocratic and unrepresentative. The main and near-uncontested rule is that secession is not a right under international law. The rule has solid justification also in human rights law.

The right to self-determination does exist, however, as a right for the population as a whole. Firstly, as a right to continue to remain independent and thus not be subjected to alien rule; and

secondly, as a right for the population to effectively govern itself, which means a right to a fully representative and democratic government.

The crucial point: Demos versus ethnos

From the above, it can be seen that the main function of self-determination in our time is the advancement of democracy. It is the population as a whole (the demos) which is to benefit from self-determination in the fullest sense of the word, not the separate ethnic groups (the ethnoses) with their different languages, religions and cultures and which together form the demos. Physically separating from each other the members of these groups, which over a period of centuries have come to live more or less interspersed, many of whom have intermarried and given rise to new generations who have links to both cultures, is generally a destructive process.

This imposes constraints also on the major ethnic group. Democracy and equality requires that all settled groups can consider the State as their common home. Hyper-nationalism, by which the State is exclusively oriented towards the culture, language and symbols of the majority ethnic group or "nation", is in conflict with ideals of human rights and democracy as articulated by the United Nations. Should the dominant ethnic group pursue such ethnification of the State, the minor groups must be entitled to do the same within the regions where they predominate. In such cases, this can take the form of cultural or even territorial autonomy within the wider State, as negotiated between the parties.

3.5 The special problems arising from the dissolution of larger, ethnically defined federations

The principle of uti possidetis juris has also been applied to the territorial and frontier disputes arising from the dissolution of the former USSR and Yugoslavia into its constituent Republics. Both the United Nations and the CSCE quickly took the position that the territory of the newly independent States was the same as the territory of the union Republics within the federation prior to dissolution. Three major cases have occurred in recent years: The dissolution of the USSR, of former Yugoslavia, and of Czechoslovakia. There were considerable differences between these cases. In the case of the USSR, a major question was the future status of the entities within some of the Union Republics which under the Soviet constitution were defined as "autonomies", but on a lower level in the hierarchy than the union republics themselves. The main cases of controversy have been the South Ossetian and the Abkhazian autonomies within Georgia, and the autonomous region of Nagorno-Karabakh within Azerbeidjan. In the situation of former Yugoslavia, the situation was even more complex. On the one hand, the Serbian authorities had already several years prior to the dissolution of the former Yugoslav federation eliminated the autonomy of Kossovo, a step which generated tremendous tension within other regions and probably was the single most important factor in bringing on the subsequent dissolution of the federation itself. On the other hand, Serbs in Croatia and Bosnia sought to establish "autonomies" which gradually became full-fledged efforts at secession from the newly independent States of Croatia and Bosnia-Herzegovina.

3.6 A case study: UNPROFOR and the UNPAs in Croatia

Probably the only case where an effort has been made by the UN to preserve through direct, military presence an autonomy until a final solution could be found, is that of the so-called UNPAs in Croatia from 1992. The UN did not take any position on whether the areas should have autonomy in the future; only that they should be protected within Croatia as a demilitarised

area, ensuring human rights for all within the autonomous region until a political solution could be found.

Preparations for UNPROFOR took place during the last months of 1991, which was before international recognition of the separate Republics had taken place. The actual deployment took place only in February 1992. In the meantime, great changes had occurred. While in 1991 the predominant efforts were to find a solution which did not result in the full break-up of Yugoslavia, the presidency of the EU on 15 January 1992 announced that the EC and its Member States had decided to recognise Slovenia and Croatia. Others States quickly followed. The break-up was therefore an accomplished fact.

Prior to these recognitions, the Serb enclaves in Croatia consisting of the Serb Autonomous Region of Krajina and the Autonomous Region of Slavonia, Naranja and Western Srem proclaimed themselves the Serbian Republic of Krajina on 19 December 1991. These two enclaves did not share a common border but together comprised a third of Croat territory and about 300 000 inhabitants. The new 'Republic' was recognised by Serbia on the following day.

By the time of the deployment of UNPROFOR, however, Croatia had been recognised as an independent State. Applying the principle of uti possidetis juris, international society could not recognise the Serbian Republic of Krajina since it formed part of Croatia. Nevertheless, the UN sought as a transitional measure to extend some protection which by some stretch of the concept could be considered a "guarantee" for a temporary autonomy.

UNPROFOR forces were initially deployed in Serb-held areas of Croatia designated as UNPAs, in which the Security Council judged that special interim arrangements were required to ensure that a lasting ceasefire was maintained, and where the Serbs constituted a majority or substantial minority and where inter-community relations had led to tensions. There were three UNPAs: Eastern Slavonia. Western Slavonia and Krajina. As noted, these areas taken together had by the Serbs been defined as the Republic of Krajina. The original UN plan in Croatia rested on three central elements: (a) Withdrawal of the Yugoslav Army (JNA) from all parts of Croatia; (b) demilitarisation of the UNPAs; (c) the continuing functioning, on an interim basis, of the local authorities and police, under UN supervision, pending the achievement of an overall political solution of the crisis. The withdrawal of JNA did indeed take place. UNPROFOR's mandate to ensure demilitarisation of the UNPAs through disbandment of all armed forces within them did not take place, however. Nor was UNPROFOR able to ensure that all persons residing in the area were protected.

UNPROFOR was authorised to control access to the UNPAs, to seek to ensure that they remained demilitarised, and to monitor the functioning of the local police to help ensure non-discrimination and the enjoyment of human rights. It did not work. Krajina was even used as a basis for Serb air attacks against regions in Bosnia.

In February 1993 the Croatian army launched its first attack in Sector South; in May 1995 Croatia launched a military offensive and took control over Western Slavonia; and in August 1995 its army did the same with Krajina.

The UN efforts did not succeed, in part due to the intransigence of the Krajina authorities until it was too late (a meeting in Geneva in late July 1995 showed some signs of willingness by the Krajina authorities to accept Croatian supremacy, but at that time the Croat side had already decided to attack).

Eastern Slavonia is still under a transitional arrangement of protection by the UN, with a view to returning the territory to Croatian sovereignty but preserving a degree of local self-government which may protect the continued existence of an ethnically mixed population there. It remains uncertain whether it will hold or whether a military action by the Croat Army, comparable to that of "Operation Flash" in May 1995 and "Operation Storm" in August 1995, will be the end result - and, if so, whether the remaining Serbs in Croatia will flee or be displaced, as in Krajina.

The inability of the UN both to ensure the demilitarisation of Krajina and to control the local police, and its inability to oppose the military offensive by the Croat side, showed that the UN could not guarantee even this transitional "autonomy". It also shows how guarantees for an autonomy, if they are to work, must take into account both the concerns of the central government and of the local group. Since their respective intentions were almost completely contradictory, and the UN was not prepared for massive use of force, the apparent guarantee implicit in the concept of "protected areas" turned out to be empty. Admittedly, it is not a typical case of an autonomy, but the UN is very unlikely ever to be called on to provide guarantees for a typical autonomy.

3.7 Do indigenous peoples constitute a special category?

The Vienna World Conference on Human Rights in June 1993 emphasised the importance of continued promotion and protection of the right of indigenous groups. Controversy arose, however, over the formulation chosen, centering around the question of inclusion or non-inclusion of the letter "s": should the United Nations concern be with "indigenous people" or with "indigenous peoples"? All the indigenous representatives and their supporters preferred the term "indigenous peoples", but the outcome in the government-adopted Declaration was different: The term used in the Vienna Declaration Article 20, is "indigenous people".

Underlying this controversy are issues closely related to the right to self-determination. By using the term "indigenous peoples" the UN would have reinforced the view that the various existing indigenous groups constitute separate peoples, and they could then argue that each of them as a people has a right to self-determination under international law. By the adoption in 1989 of ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the indigenous groups had achieved a half victory: The convention uses the term "indigenous peoples" but states in Article 1 para. 4 that

> "the use of the term "people" shall not be construed as having any implications as regards the rights which may attach to the term under international law".

The main point was to exclude the possibility that by calling the indigenous groups "peoples" they would claim to have an unqualified right to self-determination.

The problem to be faced is that the notion of an "indigenous people" has an ethnic, rather than a territorial connotation. It opens up the possibility that the right to self-determination is given to the ethnic group as such, rather than to the population as a whole of a given territory. When this is applied to other situations, the consequences can be terrible, as evidenced by the current situations in the Trans-caucasus and in former Yugoslavia; therefore, caution is required and appropriate forms of group accommodation should be sought.

In relation to indigenous peoples, however, the right to "self-determination" is normally not understood as a right to an independent State, but rather to some limited form of autonomy on

ethnic grounds. The word "self-determination" is used in this sense, e.g. in United States legislation.

In the most recent draft of the Declaration on the Rights of Indigenous People (UN doc. E/CN.4/sub.2/1993/19, annex I), the term "right to self-determination" (Article 3), when read in conjunction with draft Article 4, apparently also intends to provide for a right to autonomy short of independence. Article 3, using almost verbatim the language of common Article 1 paragraph 1 of the 1966 United Nations Covenants on Human Rights, reads:

"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments".

Article 4, however, reads:

"Indigenous peoples have the right to maintain and to strengthen their distinct political, economic and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State".

While, therefore, in spite of the use of the word "self-determination" the indigenous people is assumed to remain within the existing sovereign State, a degree of autonomy is required for them to be able to preserve their political, economic and cultural characteristics.

This is also apparent from a number of other provisions in the draft, including article 16, according to which States shall take "effective measures to promote tolerance, understanding and good relations among indigenous peoples and all segments of society."

This corresponds to the general desire of the indigenous people. The "right to self-determination" of indigenous peoples must therefore be understood to mean some form of autonomy. In practice, the degree and nature of autonomy must be negotiated with the authorities of the State; the outcome is likely to be different in the various societies where indigenous peoples form a part. The key elements that should guide the negotiations should be sought in the Declaration on the Rights of Indigenous Peoples when it is adopted; prior to that, the terms of ILO Convention No. 169 may be of help.

4. Internal self-determination and human rights

The counterpoint to the strong emphasis in UN law and practice on territorial integrity is the principle of popular sovereignty, which can be based both on the right of peoples to self-determination (see above) and explicitly on the right to political participation. UDHR Article 21 reads in para. 3:

"the will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections..."

The right to full participation of all individuals and groups, as provided for in the International Covenants and in the Universal Declaration, is essential. There are two aspects to this. One is that government is to be based on the participation by members of all ethnic or religious groups, not only by one of them. There has to be democracy, not ethnocracy. The second aspect is that

the participation by the different groups must be effective; it is not enough to have formal participation if the minor groups are consistently outvoted by the majority representatives. The act of balancing between majoritarian decisions and proper attention to the demands of minorities constitutes a core element in democratic evolution.

The ideal state: An emancipating agent

The international system of human rights imposes obligations on States to advance the emancipation of all its inhabitants, based on three principles: Universality, equality, and individual rights and freedoms.

Every State has a dual task under international law: to participate at the international level in the promotion of the international rule of the law, including the adoption of international measures to advance compliance with that law; and on the other hand to implement, at the national level, those obligations contained in international law which are intended to ensure good governance and protection of human rights.

Most important is the principle of non-discrimination, fundamental to the whole human rights system. Closely related is the importance of positive measures to restore or create equality where it did not exist in the past. At the same time, the State must respect and maintain conditions for pluralism.

Human rights are inconceivable without the existence of States. Without a functioning legal and administrative order, human rights are empty words. On the other hand, for the State to ensure human rights, States must be accountable for their compliance with human rights. Their obligations are spelled out in the international human rights instruments. Without the existence of organised States which accept their human rights obligations, individuals would be each other's prey and therefore at the mercy of the most aggressive and assertive persons.

Article 2 of the International Covenant on Civil and Political Rights reads, in part:

"Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind..."

To respect and to ensure: On the one hand, the State and its agents must abstain from violating the rights of individuals. But the State must also ensure those rights: the State must provide protection under the law in such a way that human rights can be enjoyed without threats from other, private parties. For this to be possible, there must exist a functioning legal order with legislative, administrative and judicial functions, including criminal law which can restrain individuals or groups from attacking each other.

Comparable provisions can be found in the International Covenant on Social, Economic and Social Rights Article 2. Together, they provide a framework of State obligations under international human rights law which is threefold:

States must, at the primary level, respect the integrity and the freedom of individuals, in so far as that freedom is not used to deny the enjoyment of human rights by others.

State obligations consist, at a secondary level, in the protection of the freedom of action and the use of resources as against other, more assertive or aggressive subjects: protecting the right to life, and to freedom from slavery and servitude, from violence and maltreatment by third parties.

At the tertiary level, the State has the obligation to fulfil certain claims based on internationally recognised human rights, when these can otherwise not be enjoyed.

Freedom is inconceivable without a political and legal order with institutions and procedures to ensure protection of the human being within the framework of social and economic co-operation necessary for common welfare. The primary agent for political and legal order is the State. By its law and administration it is required to ensure the scope of freedom for the individual which is compatible with the equal enjoyment of freedom by others and with the common welfare of society at large.

5. The requirement of a social and ethnic contract: Three levels of group accommodation

Taking into account the two facts of the contemporary international legal order elaborated on the basis of the UN Charter - on the one hand, the predominant emphasis on territorial integrity of sovereign States, and on the other the awareness that most national societies are multicultural - the United Nations is exploring ways to find appropriate, constructive accommodations between the different groups co-inhabiting the same State. This constructive accommodation has to be arranged through a combination, as appropriate, between three elements, starting with the fundamental importance of the protection of human rights on an equal basis for all individuals, whether members of minorities or majorities.

5.1 Equality and non-discrimination in the common domain

Members of minorities shall not be discriminated against in larger society; nor shall members of majorities be discriminated against in favour of minorities. This is the essential bottom line. Many group conflicts emerge from real or sometimes imagined discrimination, mostly by the majority against the minority, but sometimes by minorities against majorities. All human rights instruments give priority to the principle of equality and non-discrimination. For the purpose of this paper, particular attention should be paid to the Convention on the Elimination of All Forms of Racial Discrimination (hereafter: CERD). Article 1 of the Convention defines "racial" to include also ethnic discrimination.

5.2 Pluralism in togetherness

The main international instruments with a global scope regulating the rights of persons belonging to minorities are the International Covenant on Civil and Political Rights (CCPR) article 27, and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. This working group has the 1992 Declaration as its basis. A brief review of the rights and obligations contained in it might be of some help.

Existence and identity: Protection and promotion (Art. 1)

The existence and the national or ethnic, cultural, religious and linguistic identity of minorities shall be protected by States within their territories, and States shall encourage conditions for the promotion of that identity. Under article 1 (2) States are required to take appropriate legislative and other measures for this purpose.

The rights of persons belonging to minorities (Art. 2)

Article 2 (1) essentially contains the rights already found in CCPR Article 27: to enjoy one's culture, to profess and practice one's religion, and to use one's language, alone and in community with others. Article 2 (2) of the Declaration introduces rights of participation, which may differ widely, depending on the circumstances in which minorities find themselves, but shall be exercised in a manner not incompatible with national legislation (Article 2 (3)). Under article 2(4) persons belonging to minorities have the right to establish and maintain their own associations, and under article 2(5) they have the right to maintain contacts with other members of the groups, including contacts across frontiers with citizens of other States with whom they are related by national or ethnic, religious or linguistic ties.

Article 3 provides that the rights listed in article 2 and other rights of minorities may be exercised individually as well as in community with other members of the group without any discrimination, and that no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights contained in the Declaration.

Obligations of States

Article 4 lists measures to be taken by States in favour of persons belonging to minorities. Firstly, they shall take measures to ensure that such persons, as well as anybody else in society, can fully and effectively enjoy their human rights and fundamental freedoms without any discrimination and in full equality before the law.

Under Article 4(2), States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and develop their culture, language, religion, traditions, customs etc. Article 4(3) deals with the opportunities of minorities to learn their mother tongue or to have instruction in their mother tongue, and article 4(4) calls on States, where appropriate, to take measures in the field of education to encourage knowledge of the history, traditions, language and culture of the minorities within their territory. Finally, under article 4(5) States should consider appropriate measures so that persons belonging to minorities may participate in the economic progress and development of their country.

Minorities and development planning (Art. 5)

Under Article 5, due regard for the legitimate interests of persons belonging to minorities shall be taken into account when national policies and programmes are planned and implemented. Similarly, programmes of co-operation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

The right to separate identity

The minimum requirement in this regard is found in CCPR Article 27, reiterated in the Minority Declaration article 2(1). It must now be considered to form part of customary international law. The right of any person in community with other members of the group to profess and practice one's own religion, follows already from UDHR Article 18 and CCPR Article 18. The right to use one's own language in communication with others who use that language follows already from the general right to freedom of expression and information in UDHR article 19 and in CCPR article 19. Article 27 CCPR and article 2(2) of the Declaration help to clarify these rights.

The minimum obligation of States is therefore to respect the right of members of minorities to use their language, enjoy their culture and profess and practice their religion. According to the Declaration of 1992 article 1, States shall go beyond this minimum by protecting the existence and identity of minority groups and encourage conditions for the promotion of that identity. Under Article 4 they shall take a series of vaguely defined steps, as appropriate to the circumstances.

The ascending scale of comprehensiveness

Two sets of concerns are important for minorities in preserving and developing their identity: the existence and preservation of a material basis to sustain their livelihood, and the use of constructive organisational, legal and administrative structures in the relations between the State and the minority concerned.

Consociational democracy

Various devices have been developed to compensate for this problem. In an effort to sum up the many variations in democratic experiences which seek to accommodate a degree of pluralism, recent political science has seen the introduction of the notion of "consociational democracy". Its main theoretical analyst is Arent Lijphart (see, e.g, "Majority Rule versus Democracy in Deeply Divided Societies", in Politicon 4 (2), 1977). It is a form of power-sharing through a multiple balance of power among the segments of a plural society which allow for decision-making by the "grand coalition method". The notion of consociational democracy is seen as an alternative to the majoritarian type of democracy, and more suitable for good government in plural societies divided by ethnic, linguistic, religious or cultural differences, where the groups are clearly identifiable. Consociational democracy is built on the principle of executive power-sharing and a certain degree of self-administration for each group, whether they live together or separately.

5.3 Pluralism by territorial sub-division

Territorial sub-division is here used as a generic term to refer to all forms of local self-government within a sovereign State. The extent of local self-government can range from a minimum (local councils with authority over minor issues within the municipality) to a maximum which comes close to full sovereignty. It can include federalism, autonomy, regional and municipal local government. The options available can be examined from two different perspectives. What safeguards do they contain for the minorities? Conversely, do they create inequality for other members of society?

Territorial sub-division is not without problems from a human rights perspective. To mention only some: is there freedom of movement and residence for all inhabitants in the State throughout the whole of the national territory, in accordance with the Universal Declaration Article 13, or is that freedom (particularly of residence) restricted to the ethnic, linguistic or religious group concerned? Similarly, is there freedom of employment, the right to own property, including land and other fixed assets, and a right to participate in economic activity within the different regions of the sovereign entity as a whole for all inhabitants, or are there restrictions on ethnic, religious or linguistic grounds?

The way in which the territorial sub-division is brought about requires attention. It has sometimes in the past as well as the present sought to be brought about by inhuman policies of

"demographic homogeneity", leading to population exchanges and forced removal. Such policies are blatantly in violation of contemporary human rights.

6. Lessons learned and prospects for the future

Territorial autonomy has been found convenient within several independent States, but very few have in the United Nations period been negotiated at the international level. A few examples of autonomy arrangements between an administering power and a former colony have been mentioned which have been found satisfactory by the United Nations as a realisation of the right to self-determination (Greenland, Puerto Rico), and others could be added (such as the Netherlands Antilles, Nieue), but none of these involved any guarantee of the territorial autonomy by the United Nations. The UN played some role, at least in the sense of providing a forum for political attention and encouragement of conflict resolution, in the case of South Tyrol, but again it would be difficult to claim that the UN has extended a guarantee for the preservation of the autonomy arrangements obtained.

In what is probably the only case where the UN temporarily had a military presence within areas which could have been described as temporary, territorial autonomies - the cases of the UN Protected Areas in Croatia - the UN was not able to achieve its dual role of demilitarisation and protection.

The democratic functions of territorial subdivision

Territorial sub-division may be done in ways which make it possible for a compactly settled minority to have greater influence over political, cultural and economic decisions affecting its members. However, it should not serve to give ethnic groups the sense that the local government is exclusively their government. The sub-division should only serve to bring the institutions of power and the services of the State closer to them and to give them greater influence over them. Decentralisation of power from the centre and the extension of authority to smaller territorial units can lead to a more homogenous ethnic composition. Very rarely, however, will even the smaller unit be entirely "pure" in the ethnic sense. The local majority will have to share power with members of other groups living in the same territorial unit. Groups which are minorities in the nation at large can be majoritarian in the region, but they will have to be as pluralistic within the region as the majority has to be in the country at large if minority rights are to be respected.

By sharing democratic power, the local majority may become more sensitive to the interests of other groups living in the same territorial unit. There will be also at that level an ethnic, cultural and possibly linguistic mosaic which must be respected.

Decentralisation must therefore be coupled with genuine pluralistic democratic governance in each territorial unit and with the same respect for human rights and minority rights as on the national level. Were this to be safeguarded, the prospects for decentralisation are much better, and could help also to ease the burden of overgrown central governments without causing fear for groups which are in a minority position within the smaller units.

The benefits of decentralisation can be several. It reduces government overload, it facilitates pluralism within the country as a whole by diffusing centres of power, it broadens the allocation of prestigious political and administrative functions, and it facilitates the organisation of mother-tongue education, to mention only a few.

In the transition from authoritarian to democratic rule in Germany and Southern Europe (Spain, Italy, Germany), democratisation proceeded together with a peaceful process of decentralisation from the extremely centralistic governance of Franco, Mussolini and Hitler. Until now, the transition from authoritarian rule in ex-Yugoslavia and some parts of the former USSR, which indeed has resulted also in a decentralisation, has been much more violent and problematic.

In search of transient and negotiable autonomies

From a world order perspective, autonomy arrangements within sovereign States can have a useful function as an intermediate solution preferable both to secession, which can be extremely harmful, and to complete integration and subordination to the central authorities, which for some groups can be intolerable.

The autonomy arrangements must be tested for their compatibility with the principles of the Charter of the United Nations and the requirements of international human rights.

The upsurge of ethnic mobilisation and strong emotional investment in group separateness has given rise to ethnic cleansing and to a tragic fate for persons of mixed marriages. The negative consequences in terms of denial of equality in the common domain, freedom of movement and residence is often overlooked in the heat of conflict.

Human beings who are mobilised by ethnic entrepreneurs pushing them towards a confrontation for purposes of self-determination often do not see the full consequences, which are not predictable in light of the swift but confusing changes presently taking place. Secession in order to create new entities or the redrawing of borders probably has many negative consequences also for members of the group concerned.

On the other hand, a denial of ethnic identity leads in many cases to an escalation of conflict, a hard and repressive policy which generates its own counter-forces, including the potential for terrorist action. Therefore, it might be desirable to opt for a transient and soft form of autonomy which can be further developed either in the direction of greater integration resulting from gradual confidence-building, or a consensual transfer of expanded autonomy when proof is rendered that this neither negatively affects legitimate security concerns of the sovereign State concerned, nor negatively affects the situation of those inhabitants within the autonomy who belong to different ethnic groups.

The main problem is the lack of international guarantees. Both parties to the uneasy compromise of autonomy might want some safeguards. The government might want a guarantee that it does not lead to violent separation; the local group concerned would like a guarantee that the autonomy is not annulled by the central government. As we have seen, however, the UN has so far not been able to develop credible guarantees which could help both parties to find a constructive solution.

c. Which international guarantees of local self-government ? Council of Europe work by Mr Ferdinando ALBANESE

Director of Environment and Local Authorities, Council of Europe

1. The question which is to be the subject of my talk - "Which international guarantees of local self-government?" - can be interpreted in two different ways:

a. which are the international guarantees of local self-government in general?

b. do international texts deal with the question of local self-government in conjunction with that of the protection of national minorities?

2. As concerns the first possible interpretation - which I do not feel to be the crux of the problem which has been entrusted to me - I will just remind you that the European Charter of Local Self-government, which was opened for signature on 15 October 1985 and by which 21 member States are currently bound (four States have signed but not yet ratified the Charter), is a genuine international guarantee of the principle of local self-government.

3. This guarantee is reinforced by the fact that the Committee of Ministers and the Congress of Local and Regional Authorities of Europe (CLRAE) have reached agreement on a system for monitoring the implementation of the Charter, making it possible to check whether its principles are actually being applied in the member States.

4. Furthermore, the CLRAE is currently drawing up a draft convention - the European Charter of Regional Self-government - which will deal with the phenomenon of regionalism in Europe.

5. As concerns the second possible interpretation of the subject on which I have been asked to speak - local self-government and minorities - it should be pointed out straight away that neither the European Charter of Local Self-government nor the draft European Charter of Regional Self-government contains any reference to minorities. As we shall see later, certain principles in the Charter of Local Self-government can apply to the problem of minorities, but minorities are not specifically referred to in the Charter.

6. We must therefore turn our attention to the two instruments drawn up by the Council of Europe on minorities - the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages - to see if, and to what extent, the question of local self-government is dealt with in relation to national minorities.

7. The Framework Convention does not deal with the question of local self-government in any of its articles. The European Charter for Regional and Minority Languages contains two direct or indirect references to local self-government, in Article 7 (1) (b) and Article 10.

8. Article 7 (1) (b) - included in Part II of the Charter and so applicable to all regional or minority languages existing within the territory of a State - refers to the well-known temptation for certain States to alter the boundaries of local authorities in which the speakers of a regional or minority language live in large numbers, in order to alter the balance of the population in favour of the speakers of the national language.

9. Article 7, 1 (b) calls for respect for the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question. Although it does not refer to administrative divisions, the Framework Convention, in Article 16, reinforces this principle by making it a duty of the Parties to refrain from measures which would alter the balance of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the Framework Convention. If we also consider that the European Charter of Local Self-government provides in Article 5 that changes in local authority boundaries shall not be made without prior

consultation of the local communities concerned, we may conclude that the boundaries of local authorities where minorities live in large numbers are well protected by existing international instruments. A similar article to Article 5 is envisaged in the draft European Charter of Regional Self-government.

10. In addition, the same principle is set out in Article 13 of the "Proposal for a European Convention on the Protection of Minorities", prepared by the European Commission for Democracy through Law (Venice Commission)1.

11. Article 10 of the European Charter for Regional or Minority Languages concerns the use of these languages in national administration, public services and local and regional authorities. Paragraph 2 of this article regulates the use of the languages in question in local and regional authorities in which the number of residents who are users of regional or minority languages justifies the measures proposed, in particular providing for:

a. the use of regional or minority languages within the framework of the regional or local authority;

b. the possibility for users of regional or minority languages to submit oral or written applications in these languages;

c. the publication by regional authorities of their official documents also in the relevant regional or minority languages;

d. the publication by local authorities of their official documents also in the relevant regional or minority languages;

e. the use by regional authorities of regional or minority languages in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;

f. the use by local authorities of regional or minority languages in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;

g. the use or the adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in regional and minority languages.

12. Article 10 is therefore very specific, but neither Article 10 nor the Charter in general deals with the issue of the right of the users of regional or minority languages to benefit from the establishment of local or regional authorities corresponding to the geographical area in which they live.

13. In reality, only the text prepared by the Venice Commission and the Recommendation 1201(1993) of the Parliamentary Assembly on an additional protocol to the European Convention on Human Rights on the rights of minorities deals with this question.

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1 The text of the "Proposal for an European Convention or the Protection of Minorities", as well as the text of its explanatory report, have been published by the European Commission for Democracy through Law in the volume entitled "The Protection of Minorities" in the Collection "Science and Technique of Democracy" (n°9), Strasbourg, Council of Europe Press 1993, pp. 10-41.

Article 11 of the Assembly's proposal for an additional protocol states: "In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State". The principle is clear, but no tangible follow-up action has been taken on the Assembly's Recommendation.

14. The proposal of the Venice Commission seeks to establish a compromise between the demands of minorities and the requirements of the territorial integrity of the State. Without addressing the question of the particular structure of the State - whether unitary, decentralised or federal - it provides that "States shall favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them." (Article 14.1).

15. In addition, without pronouncing on the powers of the various types of intra-State bodies, the draft provides that "as far as possible, States shall take minorities into account when dividing the national territory into political and administrative sub-divisions, as well as into constituencies." (Article 14.2).

16. As stated in the explanatory report to the Venice Commission proposal, Article 14 is not concerned exclusively with concentrated minorities, but may also apply to dispersed minorities. The word "region" should thus be understood in its geographic sense, and not in a political, judicial or administrative sense. In other words, the territorial autonomy of regions where a concentrated minority is in a majority is but one of a number of solutions for ensuring the participation of minorities in public life.

17. The same principles appear in the "Opinion on the interpretation of Article 11 or the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of Parliamentary Assembly"1, prepared at the request of the Parliamentary Assembly. The interpretation of this Article is inspired particularly by the European Charter on Local Self-Government and by the Venice Commission's proposed Convention. It should be understood as not imposing any rigid solution, but as allowing to States a wide margin of manoeuvre in determining how best to guarantee protection of concentrated minorities who are in a majority in a defined area.

18. In order to illustrate the diverse forms of participation by persons belonging to a minority in public life, the Venice Commission also adopted, at its 26th meeting (March 1996), a questionnaire on this subject. The summary report which will be prepared on the basis of the answers to this questionnaire should allow for emphasis to be placed on the variety of measures taken by States to guarantee such participation.

19. Previous work of the European Commission for Democracy through Law had already shed some light on the connection between territorial autonomy and the protection of minorities.

20. Thus, in particular, studies of the protection of minorities in federal or regional States (Austria, Belgium, Canada, Germany, Spain and Switzerland), highlighted the importance of the

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1 *The text of this provision is quoted supra at point 13. The reference of the opinion of the* Venice *Commission is CDL-INF (96) 4.*

guarantees which may be accorded to concentrated minorities by a federal structure or by a wide measure of regional autonomy1.

21. Within the framework of a more general study on the protection of minorities at national level, the Venice Commission has indicated that a federal or regional structure which grants to a minority its own territorial seat is a sure means of ensuring an effective participation of minorities in political life. Here again, the accent has however been placed on the variety of solutions adopted by national laws to ensure such participation2.

22. The conclusion which should be drawn from this preliminary discussion is therefore that, with the exception of Recommendation 1201 of the Assembly and the text proposed by the Venice Commission, neither of the international conventions drawn up by the Council of Europe on the subject of the protection of minorities deals directly with the question of granting local self-government to linguistic or other minorities.

23. Having said this, if we look more carefully at the European Charter for Regional or Minority Languages as a whole and certain provisions [Articles 10 (2), 11 (3) and 14 (2)] of the Framework Convention, we can see that the concept of local self-government underlies the protection measures proposed.

24. In fact, the Charter in general and the above-mentioned articles of the Framework Convention use the territorial principle to grant protection: the promotion and protection measures proposed are to be applied within the territory in which the minority or regional languages are used.

25. This continual reference to the territory in which the regional or minority languages are used does indeed constitute a geographical limit to the application of the Charter but, at the same time, it turns the territory in question into the geographical area and the legal and administrative framework in which protection is to be provided. A legitimate conclusion would therefore be that local or regional self-government is one of the key instruments for guaranteeing effective protection of minorities.

26. Back in 1992, the Standing Conference of Local and Regional Authorities of Europe - of which the present Congress is the successor - realised the importance of local self-government for settling the problem of national minorities. In its Resolution 232 (1992), the CLRAE clearly asserts that the subsidiarity principle may, whilst respecting the territorial integrity of the State, be used to provide an effective framework in which to protect minorities.

27. The CLRAE decided in 1993 to hold a conference on "Federalism, Nationalism, Local Self-government and Minorities" in order to look at European experience of local and regional self-government in relation to minorities, with a view to drafting a Recommendation on this subject. For various reasons, we have not yet been able to organise such a conference and I am

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1 These studies have been published in the volume: "The Protection of Minorities" (already quoted), under the title "The Protection of Minorities in Federal and Regional States", *pp. 325-437.*

2 The general study on the protection of minorities has been published in the same volume of the collection "Science and Technique of Democracy", under the title: "The protection of Minorities at the National Level: Diversity of Legal Models", pp. 43-423. On the participation of minorities in political life, see especially the report on the replies to the questionnaire, point IC.D, pp. 70-75.

extremely pleased that the Venice Commission's interest in the problem has led to the organisation of this seminar.

28. I can however tell you that, thanks to the collaboration of the Friuli-Venezia-Giulia Region, the CLRAE will be holding the conference in question at Cividale del Friuli on 24-26 October 1996 in order to establish, on the basis of Europe's experience hitherto of local and regional self-government in relation to minorities, the general principles which could be used to guide States' actions in this field.

29. Before concluding, I would like to remind you of another aspect of local self-government which is used increasingly within the Council of Europe to help to protect minorities, namely transfrontier co-operation.

30. In the Declaration adopted by the Heads of State and Government in Vienna on 18 October 1993, three principles were set forth regarding transfrontier co-operation:

a. the Heads of State and Government recognised the importance of transfrontier co-operation for the construction of a united Europe, stating: "The creation of a tolerant and prosperous Europe does not depend only on co-operation between States. It also requires transfrontier co-operation between local and regional authorities, without prejudice to the constitution and the territorial integrity of each State. We urge the Organisation to pursue its work in this field and to extend it to co-operation between non-adjacent regions";

b. the Heads of State and Government asserted the potential usefulness of transfrontier co-operation for the peaceful settlement of problems concerning national minorities who live in border areas;

c. the Heads of State and Government considered that transfrontier co-operation, in so far as it boosts confidence between peoples, can help to combat racism and intolerance.

31. In keeping with these principles, the Council of Europe's work in this area currently has four aims:

a. to encourage the signature and ratification of the Outline Convention on transfrontier co-operation and its additional Protocol;

b. to remove obstacles to the efficient functioning of transfrontier co-operation;

c. to assist the countries of Central and Eastern Europe in preparing domestic laws determining the principles which their local authorities must respect in concluding transfrontier co-operation agreements;

d. to encourage transfrontier co-operation agreements as well as specific projects in the countries of Central and Eastern Europe:

i. by acting as an "intermediary", a force putting in contact authorities who could, potentially, conclude a transfrontier co-operation agreement;

ii. by assisting these authorities in drawing up the transfrontier co-operation agreement;

iii. by assisting the parties to the agreement with the workings of their co-operation, for example by preparing studies, designing specific projects and seeking funding.

32. To conclude, it is my opinion that local self-government, either through the creation of local authorities with appropriate powers or through transfrontier co-operation, has become one of the most important areas of action, not only in terms of promoting local democracy within the Council of Europe, but also in terms of contributing to satisfactory protection of minorities in Europe.

33. However, the existing international texts do not allow local self-government to be used to its full potential as an instrument contributing to the protection of minorities. A new international instrument - a Recommendation of the Committee of Ministers in this case - would therefore need to be drawn up, which would draw governments' attention to the possibilities offered by local self-government in this field.

34. Before this is done, certain misconceptions regarding the idea of self-government which continue to exist not only in the countries of Central and Eastern Europe but also in some Western countries would first need to be dispelled. Self-government does not mean independence. As is stated in Article 3 of the European Charter of Local Self-government, it in fact consists of the "right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".

35. It would also need to be explained that self-government does not necessarily have to be identical for all local authorities within a State. Experience in Europe has in fact shown that, depending on the circumstance, some local or regional authorities may have wider powers and responsibilities than others. The presence of a linguistic or other minority is one such condition, but it is not the only one, as historical or cultural traditions and geographical or economic situations could also justify the allocation of special powers and responsibilities.

36. I am sure that this seminar has greatly contributed to clarifying concepts and determining objectives.

Final Report

Local self-government, territorial integrity and protection of minorities

Local self-government, territorial integrity and protection of minorities by Mr Giorgio MALINVERNI

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FINAL REPORT

by Mr Giorgio MALINVERNI, Vice-President of the European Commission for Democracy Through Law, Professor, Geneva

Since, following a long interval which began towards the end of the Second World War, the problem of the protection of minorities has again become one of the principal issues in contemporary international relations, what are known as territorial solutions have been advocated in a number of international documents published since the beginning of the 1990s. There is nothing surprising in this: the right to local or autonomous administrations expresses the claims of concentrated minorities in their most complete form.

Thus the 1990 Copenhagen Declaration of the CSCE on the human dimension states that the participating States "note the efforts undertaken to protect and create conditions for the promotion of the ... identity of certain national minorities by establishing, as one of the possible means to achieve these aims, specific local or autonomous administrations corresponding to the specific historical and territorial circumstances of these minorities, in accordance with the policies of the State concerned" (paragraph 35, second subparagraph).

The need to take the interests of minorities into account when the political and administrative sub-divisions of States are distributed, and the desire to ensure that these minorities are given fair representation in Parliament, are also found in certain measures drawn up within the framework of the Council of Europe.

Thus the Proposal for a Convention for the Protection of Minorities drawn up by the European Commission for Democracy through Law provides in Article 14 paragraph 1 that States are to favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them.

Article 14 paragraph 2 provides that, as far as possible, States are to take minorities into account when dividing the national territory into political and administrative sub-divisions, as well as into constituencies.

Without doubt, however, it is the Proposal for an Additional Protocol to the European Convention on Human Rights1 drawn up by the Parliamentary Assembly of the Council of Europe that has put forward the most audacious proposal in this sphere. Article 11 provides that "[i]n the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state".

1 Recommendation 1201 (1993).

It should be pointed out, however, that the documents which have just been mentioned are either declarations with no binding legal force or texts which for the present have remained simple proposals. They form part of what is conventionally known as desirable law.

If we now turn to measures of positive law, that is measures which are already in force or in the process of being brought into force, we see that at present they make no provision for territorial solutions.

At the universal level, Article 7 of the International Covenant on Civil and Political Rights makes no reference to territorial solutions. In the general commentary to Article 27, the Human Rights Committee of the United Nations emphasised that the enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party1.

Nor is there any mention of territorial solutions in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly of the United Nations in December 1992.

At the European regional level, the Framework Convention for the Protection of National Minorities, which is inspired on numerous points by the proposal of the Venice Committee and that of the Parliamentary Assembly, adopts a quite distinct approach to the problem of territorial autonomy. Not only does the Convention deliberately omit all reference to territorial autonomy, it specifically states that any person exercising the rights of minorities is to respect the principles of sovereignty, independence and territorial integrity of States (Article 21).

Article 15 simply guarantees the right to effective participation of persons belonging to minorities in public affairs affecting them. Article 16 is aimed at protecting minorities against measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities. A similar preoccupation is found in Article 7 para. 1(b) of the European Charter for Regional or Minority Languages. However, there is no express reference in either of these texts to local communities. The Framework Convention, in particular, seems to regard participation in public affairs as a question of personal autonomy rather than local autonomy.

The indisputable conclusion must be drawn that as international law now stands, States are under no obligation whatsoever to establish any form of political or administrative decentralisation in favour of minorities. International law cannot force States to adopt a particular State structure. It is to no avail to seek evidence of a practice common to States in regard to territorial autonomy which might form the outline of a customary rule.

Furthermore, States have been very reserved in their attitude with regard to Article 11 of the proposed Protocol of the Parliamentary Assembly of the Council of Europe. Thus the Treaty of 19 March 1995 between Slovakia and Hungary on neighbourly relations and friendly co-operation refers to this Protocol: but when the Slovakian Government ratified the Treaty it also filed an interpretative declaration in which the Government stated that they did not recognise the principle of collective rights for minorities which would permit the creation of autonomous structures on an ethnic basis.

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1 General comment No. 23(50) of 6 April 1994, Dec. *CCPR/C/21/Rev.1/Add.5, para. 3.2.*

Therefore it is only expressly agreed bilateral commitments or rules of domestic law that can serve as a basis for minorities' claims to be entitled to benefit from special status as regards local autonomy. This is also confirmed by State practice.

I. The legal basis for territorial autonomy

This shows that local autonomy status is often based either on a bilateral treaty or on a rule of domestic law, sometimes at constitutional level, which often serves to define a pre-existing international agreement.

Thus, in the case of the Åland Islands, the Finnish Law of 1922, known as the Guaranty Act, served to complete and define an agreement previously concluded between Sweden and Finland.

Similarly, in the case of Trentino-Alto-Adige, the De Gasperi-Gruber Agreement of 1945 was completed and defined by an Italian Constitutional Law of 1948, which made that region a region with special status. As regards Valle d'Aosta, on the other hand, no international agreement preceded the adoption of a law similar to the one which had been adopted for Trentino-Alto-Adige. Here it was purely reasons of domestic policy that led to special status being conferred on that region, which included a French-speaking minority.

Still on the topic of the legal basis of autonomy status, it is found that where autonomy is conferred on a significant portion of the State's territory, the special status is normally provided for in a text of constitutional value. That is clearly the case for the entities which make up a federal or regional State, but it is often also true of regions which benefit from a special arrangement in a unitary State. Thus the status of the Autonomous Republic of Crimea is based on a special law of 29 April 1992, the adoption of which required the amendment of Article 75 of the Ukrainian Constitution. Similarly, in the case of the Åland Islands, the Finnish constitutional amendments of 1994 provided a firmer basis for the autonomous status of those islands, even though that status had not previously fallen within the scope of ordinary legislation.

Where, on the other hand, autonomy status only affects adjoining parts of the territory - a few towns or villages - practice shows that the legal basis of autonomy is weaker. That is the case, for example, of certain Slovenian towns such as Izola, whose autonomy is apparently based on ordinary laws.

Where it governs the actual structure of the State, the legal basis of the autonomous regions should preferably be set out in the Constitution. Where that is not so the status of these regions is clearly much more precarious.

II. Defining the autonomous territory

Whatever the legal basis of the autonomous status may be (whether a bilateral treaty, the Constitution or an ordinary law), it must precisely define the territory to be covered by the special arrangement.

This point merits particular attention. The numerous attempts in the territory of the former Yugoslavia, especially in Bosnia and Herzegovina, which for the most part ended in failure, illustrate the difficulties inherent in dividing the territory and indeed the risks accompanying such an operation.

The objective of decentralising power by establishing regions with a certain autonomy is normally to enable areas which are ethnically more homogeneous to be self-governing. It is important not to be deceived, however. It is only in exceptional cases that even a small region will be "pure" in the ethnic sense of the word. In most cases it is impossible to avoid pockets of minorities, in fact minorities within the minority. The minority, which has become the majority in a part of the territory, will then have to live together with other ethnic groups.

It is only by doing so that it will be possible to avoid distressing transfers of populations, as happened in the past, or recourse to ethnic purification policies, which are still present in all our memories.

Even in the Åland Islands, which are often quoted as an example, the Swedish-language majority must come to terms with a Finnish-language minority composed of some 5% of the population.

In order that the rights of the minority can be respected in the same way as those of the majority, the majority groups in the autonomous area must show a sense of pluralism and respect for diversity at least equal to that which they are entitled to expect from the majority at State level.

The sub-division of the State territory into autonomous regions must therefore have as its objective to allow a concentrated minority to exercise greater influence on the political, economic and social decisions capable of affecting its members. It must serve to reconcile the State power and citizens by allowing them, to a certain extent, to take their own destiny in their hands. However, it must never give them the impression or the feeling that local administration is their exclusive affair.

Recent history has clearly shown that defining the territory raises particularly delicate problems in the case of the dissolution of Federal States. In the case of the Soviet Union, as well as in the case of Yugoslavia or Czechoslovakia, the newly-created States have the same frontiers as the federal entities had before the federation was dismantled.

There was scarcely any concern, either when these new States were created or when they were recognised, for the minority problem. In the case of the States which were formerly part of the Soviet Union, the status of certain territories within the former republics raises difficult problems, whether one thinks of South Ossetia or Abkhazia in Georgia or of Nagorno-Karabakh in Azerbaidjan. With the advantage under the Soviet Constitution of autonomous status within the republics themselves, these territories felt better protected than today because they formed part of a larger whole. When the independence of the republics was proclaimed, these territories and their populations suddenly felt that they were in the minority and claimed greater independence. The application of the principle of uti possidetis therefore does not always yield the best results.

Where the territory is divided into autonomous regions it is also necessary to ensure that a certain balance is maintained between the various parts which make up the State. In the case of Federal States in particular, the predominant weight of a federated State may compromise the proper functioning of the whole system. The place occupied by Russia in the Soviet Union and by Serbia in Yugoslavia are probably not unconnected with the eventual failure of these two federations. Even the well-known Swiss system, which is rightly said not to be exportable as

such for immediate use, would not serve as a model for imitation if instead of being divided into 26 cantons its territory only consisted of four cantons corresponding to its linguistic regions.

Furthermore, the geographical definition of an autonomous region cannot be based on exclusively ethnic criteria. It must necessarily also take historical and economic factors into consideration and take account of the requirements connected with both land and sea communications. The long negotiations which have just taken place concerning Bosnia-Herzegovina show that it is practically impossible to disregard these factors.

Lastly, it must be accepted that territorial autonomy is not a panacea. Where in a specific territory the population is much too heterogenous, it serves little purpose. In these cases a system of cultural autonomy may perhaps lead to better results. Here, of course, the Belgian example comes naturally to mind. As we know, the original feature of this system is that it established a federal structure on two levels, composed of, alongside the regions with a territorial basis, the Communities. The two Belgian Communities, French and Flemish, have a very special characteristic: they do not have a purely territorial basis. Naturally, the laws of each community apply in its own language region, but in Brussels the French-speaking and Flemish-speaking legislatures are both competent as regards certain institutions which come under the communities, especially in the sphere of culture and education.

In any event, before any form of territorial autonomy is granted the populations concerned should be consulted. We are familiar with the torrent of Jurassian referenda which, throughout the various consultations, served to give form to the future Canton of Jura by defining its territory. Popular consultations have also taken place elsewhere, for example in the Faroe Islands in 1946.

III. The forms of territorial autonomy

Contemporary practice, as illustrated by the reports presented at this seminar, shows that territorial autonomy can take the most varied forms, ranging from federalism, through regionalism, to special status for certain outlying territories, in particular islands or overseas territories.

It is well known that federalism can offer significant guarantees to minorities where these minorities are concentrated, provided that the frontiers of the federal entities correspond with the line of ethnic division. In fact this is not always the case, even in Switzerland, where, it will be recalled, three Cantons are bilingual and one is trilingual, not to mention religious differences. However, where the federal States and the ethnic groups coincide, federalism does provide an excellent means of protecting minorities, since it ensures that each federal State has genuine independence and some influence on the functioning of the central State. Federalism reconciles two apparently contradictory requirements, namely the desire for union and the desire for separation. This reconciliation is achieved by the application of two well-known principles: the principle of autonomy and the principle of participation. Each federal entity can manage its own affairs relatively independently and make itself heard in the federal organs. This arrangement has considerable advantages for minorities.

Regionalisation is characterised as a technique of decentralisation within a unitary State, which leads to the creation of territorial entities which, while subordinate to the State, are given a certain autonomy in limited spheres.

Like federalism, regionalisation is not necessarily designed to protect minorities. Here, too, however, minorities cannot fail to benefit from the freedom of action enjoyed by local communities, again provided that these minorities are concentrated in a region and are relatively homogeneous.

In certain countries, however, regionalism is motivated by the desire to ensure a certain protection for minorities. Thus in Italy Articles 5 and 6 of the Constitution establish a definite link between regionalisation and the legal situation of linguistic minorities. As we know, these form three distinct regions with a special status and a more marked degree of autonomy than the ordinary regions (Trentino-Alto-Adige, Valle d'Aosta and Friuli-Venezia Giulia).

The wish to respond to the expectations and claims of minorities is even more evident in the case of Spanish regionalism.

Article 2 of the Spanish Constitution, which recognises the right to autonomy of the nationalities and regions, is designed to meet the aspirations of the parts of the Spanish people who have their own identity, such as Basques, Catalans or Galicians.

The United Kingdom also takes account of the various communities of which it is composed, since it accepts the existence of distinct legal orders in certain parts of the country, such as Wales, Scotland, Northern Ireland or the Channel Islands.

Lastly, autonomy status may be found within States which are otherwise unitary and centralised. This applies in particular to certain islands. Thus the Danish Constitution confers autonomous status on the Faroe Islands and Greenland. In France, Corsica is recognised as a territorial community endowed with special powers, particularly in the sphere of culture, education and training. The same applies to the Overseas Departments and Territories. Lastly, there is no need to emphasise the case, often quoted as an example, of the Åland Islands, which enjoy a substantial degree of autonomy while being an integral part of the Finnish State.

Federalism, regionalisation, special status recognised to certain territories, in particular islands: these appear to be the models of territorial autonomy offered today by the practice of States. That does not mean, however, that these models are interchangeable or that it does not matter which of them is chosen.

The federal option generally satisfies requirements which as a rule have nothing to do with the desire to protect minorities. Rather, it is historical considerations that are most often determinant. In Europe neither German federalism nor Austrian federalism is aimed at protecting minority groups, nor is that a major function of Swiss federalism. On the other hand, the case of Belgium is different. The very recent choice in favour of federalism in that country is clearly motivated by the desire to allow different linguistic and cultural groups to co-exist.

The aim pursued by regionalisation and by conferring the status of special autonomy is much more clearly to protect minorities.

The variety of functions devolved on these models is conveyed by the difference in status of the territorial communities of which they are composed compared with the central State. Federal symmetry is contrasted with regional asymmetry. A federal system is generally symmetrical. The entities which make up a federal State are as a rule placed on an equal footing and given the

same powers. The same does not apply to regional States, which are characterised by their asymmetry: in those countries special powers are conferred on certain regions only.

IV. The techniques of territorial autonomy

Whether the choice is federalism, regionalisation or special status, the techniques of territorial autonomy will naturally vary according to the facts peculiar to each particular situation.

Thus in Spain the difference between the three "historical nationalities", Catalonia, the Basque Country and Galicia, and the other regions is found more at the level of the procedure whereby autonomy was acquired than at the level of the content of the rights.

The three historical nationalities were given the maximum level of powers at the outset, when they were created. As for the other regions, on the other hand, that same ceiling of autonomy can only be obtained progressively and gradually. It is therefore possible to speak, in the case of Spain, of a genuine procedure for the construction of autonomy. At present the regions other than the three historical nationalities only potentially have the powers that the historical nationalities already have.

In Italy, too, the arrangements for territorial autonomy vary from one region to another. In the case of Trentino-Alto-Adige the Italian constitutional draftsman made use of an original technique. That region is divided into two provinces, Trento and Bolzano. They have a noticeably higher degree of autonomy than that enjoyed by other Italian provinces, which in fact makes them more like regions with special status. These two provinces thus have an organisation and functions which are completely different from those of ordinary provinces. Dividing the region into two provinces with very extensive autonomy made it possible to take account of the fact that the majority of the German-speaking population lives in the province of Bolzano and also to give a wide degree of autonomy to the inhabitants of the Province of Trento.

This technique was not employed in the case of Valle d'Aosta, however, where autonomy status seems to pursue a different objective, being aimed at promoting the co-existence of the two linguistic groups rather than protecting their traditional characteristics, as in Trentino-Alto-Adige.

The Belgian solution has the original feature of giving way to two concurrent and, as it were, superimposed federated structures, the Communities and the Regions, which only partially coincide at the territorial level. The Belgian system therefore expresses the desire to guarantee double autonomy. The region is supposed to ensure autonomy in the political, economic and social sphere and the Community to do so in the cultural sphere.

It should be pointed out, without going into details, that differentiated autonomies also exist in other countries, for example in the Russian Federation, which is composed of republics, territories, regions and districts, each of which is given a distinct level of autonomy.

The very recent Constitution of Bosnia and Herzegovina provides a particularly interesting and original model: a federation was conceived within a larger Federation. Appendix 4 to the Dayton Agreement provides that the Republic of Bosnia and Herzegovina is to be composed of two entities, the Federation of Bosnia and Herzegovina and the Serbian Republic.

Clearly the arrangements for and techniques of territorial autonomy can take the most varied forms. The examples presented during this seminar constitute a striking illustration.

V. The content of territorial autonomy

In order to satisfy the requirements and needs of minorities, autonomy must have a certain content and a certain density.

There is no need here to go back over the well-known systems of power-sharing in federal States: powers exclusive to the central State or the federated entities, concurrent or parallel powers.

The regions' autonomy is sometimes strictly limited to the domestic sphere, while the State reserves to itself the monopoly of powers in international relations. In other cases, on the other hand, the autonomous regions are given a certain international capacity. That is the position of the Swiss Cantons, and also, under the terms of the Dayton Agreement, of the entities which make up Bosnia and Herzegovina.

In this very sensitive area, the recent example of the negotiations between Finland and the European Union provides an illustration of the desire to take account of that region enjoying special status, the Åland Islands.

During those negotiations Finland asked that special measures be taken to preserve their autonomy It proposed that derogation clauses should be inserted in the Community Treaties and a special protocol adopted. It is not certain that without these precautions the Åland Islands would have agreed to join the European Union. These derogations concerned, in particular, the right to vote in the islands, land law and tax legislation.

Eventually it was the inhabitants themselves who, in a referendum held on 20 November 1994, decided on the islands' entry into the Union. The result of the vote was favourable to accession. Although it was only of a consultative nature, the referendum was decisive. Had the result been negative, it is probable that the islands would have remained outside the European Union. They would then have been in a situation comparable with that of the Faroe Islands and Greenland, which are not part of the Union, although Denmark, of which they are an integral part, has been a member since 1973. The relations between these islands and the European Union are governed by special bilateral treaties.

Moreover, one of the Annexes to the Maastricht Treaty took account of the special situation of Greenland and the Faroe Islands. It provides that cooperation between the members of the Union in foreign policy must not deprive Denmark of the right to act alone, where it considers it necessary, in order to protect the interests of those islands.

Where autonomous regions are denied the right to establish direct contacts with other States, their interests may be protected according to extremely varied techniques. Thus the Faroe Islands can exert a certain influence on Denmark's foreign policy and protect their interests: the Danish Ministry of Foreign Affairs includes a special adviser for matters concerning the Faroe Islands. The islands are also represented in Danish embassies abroad by attachés and in the delegations which take part in negotiations or international conferences.

Above all, however, as we have seen, treaties concluded by Denmark may be inapplicable in the territory of the islands if the regional parliament refuses to incorporate them in the islands' legislation. A treaty may therefore bind Denmark without affecting the islands.

In certain cases autonomy goes as far as recognising the inhabitants of the region as having dual nationality, that of the State and that of the region in question. That is the case in Switzerland and also in the Åland Islands. Citizenship of the islands is recognised only for Finnish nationals whose domicile is in their territory. Furthermore, only persons with regional nationality may be domiciled in the islands.

The same applies to the Faroe Islands. The passports of the inhabitants of the islands state that in addition to Danish citizenship they also have regional nationality. The islands also have their own flag and their own banknotes, although these are produced by the national bank of Denmark.

If autonomy is to have a real scope, the State must obviously grant the region wide independence in fiscal and financial matters. Without such independence there is no real autonomy.

Whether autonomy is limited to the traditional spheres of culture, education, town and country planning etc., or whether it is wider, to the extent of including certain powers in the international sphere, it is of course essential that the legislation of the autonomous region should be completely consistent with the legislation of the State. By a resolution which it adopted on 22 September 1994 the Ukrainian Parliament had to remind the Crimean Parliament of its obligation to bring the Constitution and laws of that autonomous region into line with the Ukrainian legal order. Faced with the obstinacy of the Crimean authorities, the Ukrainian Parliament eventually had to enact a Law on 17 March 1995 repealing all Crimean legislation, including the Constitution.

VI. Links between the autonomous region and the State

In order to ensure that the minorities residing therein are genuinely protected, the autonomous regions must be duly represented at the level of the central State. Here, too, the techniques are extremely varied.

The inhabitants of the Faroe Islands elect two deputies to the Danish Parliament. In Switzerland the Cantons, both large and small, are represented on an equal footing in one of the two Chambers of Parliament: the linguistic minorities are also represented in the Federal Council and the Federal Court. In Belgium, the French-speaking population's fear of being turned into a minority by the Flemish led to the adoption of new rules. Thus the Council of Ministers and the Court of Arbitration must include an equal number of French-speaking and Dutch-speaking ministers and judges. A special majority is required for the adoption of many laws: in addition to the overall majority of two thirds in both Chambers, an absolute majority of the votes in each language group is required. A great number of laws may also be the subject of a special procedure referred to as the "alarm bell". In each of the two assemblies three-quarters of the members of a linguistic group may pass a motion declaring that a bill threatens to cause serious damage to relations between the Communities (Article 54 of the Constitution). The procedure is then suspended. All these provisions are in fact aimed at protecting the French-speaking minority.

The same observation may be made for Canada: with a quarter of the members of the Senate and three out of nine judges in the Supreme Court, Quebec is almost over-represented and given special protection.

VII. The problem of international guarantees of territorial autonomy

The second part of this seminar was devoted to the difficult problem of international guarantees of local autonomy.

A well-known precedent exists in that regard, that of the Åland Islands. It will be recalled that the dispute between Sweden and Finland concerning the islands had been resolved before the organs of the League of Nations, which granted the islands to Finland.

When the League of Nations settled the issue it also provided an international guarantee. Section 6 of the Guaranty Act of 1922 provided that the authorities of the islands could send to the competent organs of the League of Nations communications concerning the effective implementation of autonomy status. These complaints were to be passed on to the Council, which, depending on the case, could obtain an opinion from the Permanent Court of International Justice.

This precedent has remained isolated, however. To date, the United Nations has given no similar commitment. There are scarcely any examples of autonomy status negotiated at international level within the framework of the United Nations. While it is true that certain territorial arrangements, such as those concerning Greenland and Puerto Rico, were achieved to the entire satisfaction of the United Nations Organisation, which saw therein the consecration of the right of self-determination, no international guarantee of territorial autonomy was provided for in either of these cases.

The only examples where the United Nations has given a commitment along those lines are those of the protected zones in Croatia. These are special cases, however, since the autonomy of these zones is a temporary autonomy. The reasons for the United Nations' attitude are manifold.

First, the United Nations Charter does not mention in any of its provisions any right for parts of State territories to be given a special status of autonomy. Each State's choice of constitution falls within its exclusive powers and does not come within the scope of activity of the United Nations Organisation. Under contemporary international law all States are equal and sovereign, irrespective of what political régime they have given themselves.

Up to now the United Nations has always placed greater emphasis on the territorial integrity of States. This principle, consistently repeated in innumerable resolutions, was again recalled by the recent Vienna Conference on Human Rights in June 1993.

Furthermore, it is clear that the United Nations can offer international guarantees of territorial autonomy only within the framework conferred by its Charter, namely the maintenance of peace. However, the concept of maintaining peace within the meaning of Chapter VII of the Charter has been interpreted so widely in recent years in regard to other actions of the United Nations that it is possible to ask whether it might be applied in cases where failure to observe an autonomy status which has proved difficult to negotiate might constitute a source of dispute. This may be a new operative field for United Nations activity.

Nor, up to now, has the problem of international guarantees of local autonomy been a central issue for the OSCE or the Council of Europe. Neither the European Charter of Local Self-Government nor the proposal for a European Charter of Regional Self-Government contains any reference to minorities, although some principles of the Charter on Local Self-Government may apply to concentrated minorities.

Conclusion

For the protection of minorities, local or regional autonomy within the framework of sovereign and independent States and respecting their territorial integrity constitutes an intermediate solution which makes it possible to avoid both the enforced assimilation of minority groups and the secession of part of the territory of the State. The minority group will find its own territorial basis and representative institutions, enabling it to take part in public affairs within the autonomous area. In that regard the European Charter of Local Self-Government provides some useful indications.

While autonomy may make a very useful contribution, it is not a panacea and does not by a long way enable the problems which arise to be resolved in every case.

Where they are present, certain conditions are particularly favourable to the creation of an autonomous region. In the case of the Åland Islands, for example, Finland had considerable experience of local autonomy, having itself been for several years a Grand Duchy of the Russian Empire with a considerable degree of autonomy. Furthermore, the islands had already been demilitarised for a long time.

The experiences in several countries are positive when taken as a whole: that is so in Italy, or in Spain. Spain introduced a very significant decentralisation of power and the process was completed without major conflict. The Autonomous Communities now form part of the institutional reality of the country.

States and minority groups should recognise that autonomous status, far from being definitive, is always negotiable. Experience has shown that it can be extended or reduced. If a climate of confidence is established between the entities concerned, the autonomous regions may in time accept a higher degree of integration in the State. On the other hand, autonomy may even be increased if the central State realises that such an arrangement does not pose a threat to its own sovereignty or to its security or to the existence of other minority groups.

Lastly, it is appropriate to clear up the misunderstandings which still remain about the concept of autonomy. Autonomy is not synonymous with independence. According to Article 3 of the European Charter of Local Self-Government, self-government is "the right and the ability of local authorities, within the limit of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".

However, the law and the institutions have limits. More than the rules on the sharing of powers or the representation of minorities within the central State, it is the acceptance by the population as a whole of the plurinational, plurilinguistic and pluricultural reality of a country that will enable several communities to co-exist peacefully within the same State. Accepting different cultures, and acknowledging that their existence constitutes a source of mutual enrichment, and respecting the various languages, are the conditions of the co-existence of different groups in the same territory.

Above all, diversity must be accepted by civil society. The law can only serve to sanction that acceptance. In other words, decentralisation must be effected in a spirit of tolerance, democracy and respect for human rights, and it must be borne in mind that ignoring the minority reality may lead to conflict.

The need to preserve their identity is just as strong within minorities as in the States in which they are incorporated. The concept of a mononational State must therefore give way to political entities based on tolerance, pluralism and diversity. States should accept that all cultures form part of man's common heritage and contribute to the diversified character of political societies, and that the recognition of certain rights to minorities makes it possible to establish more harmonious relations with them, to the advantage of all parties and of peace.

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The subject of minorities today mobilises specialists in constitutional and international law in Europe. The recent, sometimes bloody, conflicts bear witness to the importance of the question and to the necessity to grant appropriate rights to minorities.

This publication shows that local self-government, far from endangering a State's territorial integrity, reinforces it by reducing tensions. First of all it reproduces national reports relative to self-government statutes benefitting minorities, both in certain Western countries (Belgium, Canada, Denmark, Spain, Finland, Italy, Switzerland) as well as in Central and Eastern Europe (Bosnia and Herzegovina, Hungary, Moldova, Russia, Slovenia, Ukraine). The work of international organisations (Council of Europe, United Nations, OSCE) is also studied, with a view to the international protection of minorties, in particular by means of autonomous rule.

The European Commission for Democracy through Law (Venice Commission) is a consultative body on questions of constitutional law, created within the Council of Europe. It is made up of independent lawyers from member states of the Council of Europe, as well as from non-member states. Almost fifty states participate in the work of the Commission.

The Commission launched its UniDem (University for Democracy) programme of seminars and conferences with the aim of contributing to the democratic conscience of future generations of lawyers and political scientists.