

A Plan for the Future? The Estonian State Integration Programme on National Minorities 2000-2007

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Events surrounding the replacement of a Soviet bronze statue in spring 2007 in Tallinn and subsequent international tensions between the EU and Russia marked a low point in inter-ethnic relations between Russian-speakers in Estonia and ethnic Estonians in recent years. This raises the question of how successful current integration efforts directed towards Russian-speakers have actually been. The paper analyses the development of the Estonian State Integration Programme (SIP) 2000-2007 from its earliest moments in the 1990s to its current form. It is argued that although its theoretical basis is well grounded, the programme does not account for minority integration needs systematically. Instead it follows a unidirectional action-plan, targeting Russian-speakers without a prior needs-assessment at grass-root level and insufficient minority participation during the drafting and implementation period. Furthermore, the paper highlights the influence the legal-restorationist concept maintains on the implementation of the SIP which partly has the effect of re-enforcing inter-ethnic alienation.

Introduction

In April 2007 a Red Army bronze soldier statue in Tallinn's city centre was removed and placed in a cemetery outside to town centre. Two nights of street riots by the Russian-speaking youth in Tallinn followed. The bronze soldier controversy had already existed for some years before its relocation. But the mobilisation of the Russian-speaking community against its removal and the subsequent street battles with police forces were unseen in the recent history of the country and echo events in 1993 when the so-called Alien Crisis hit the country and ethnic tension was tangible. Without a doubt, significant changes have taken place in Estonia between the years 1993 and 2007. The country has made remarkable progress in the transition from foreign occupation to democratisation, economic prosperity and membership of NATO and of the EU. However, the social and ethnic differences between Estonians and the Russian-speaking minority remain unsettled and a potential source for social unrest as events concerning the bronze soldier crisis have shown. Under these circumstances the reactions are all the more surprising as Estonia has implemented a minority integration programme since the year 2000 and international financial support for minority integration has been considerable. Consequently, this paper evaluates the impact of the Estonian State Integration Programme (2000-2007) on minority integration in the country, and asks what part the SIP has played in reducing ethnic divides and social inequalities.

Minority Integration in Estonia: Early Attempts

In the early 1990s Estonians expected Russian-speakers to leave the country, and state planning on minority issues promoted the remigration of Russophones. At that time minority integration was not an official policy goal and thus no systematic integration policy existed. This situation lasted for a number of years until the end of the last decade at which point Estonia started to develop a central

minority integration programme. Main parts of Estonia's minority integration programme have been developed within the country by its academic elite. International involvement was less direct and essentially entailed stressing the need to develop such a strategy. Nonetheless, without EU conditionality and external funding the setting up of minority integration programmes would have been delayed, and would have been much less effectual. From 1996 onwards the Council of Europe (COE) started a programmatic cooperation with Estonian officials with the aim of fostering Estonian integration efforts¹ but Russian-speakers were rarely involved during the drafting process.

In cooperation with the UNDP Estonia developed its first integration programme "Integrating non-Estonians into Estonian Society: Setting the Course" in 1997 under the guidance of Rein Taagepera². However, the programme did not develop directly applicable project proposals but sketched out general objectives and problems. The main concern of the document is to transform an imperialistic non-Estonia mind-set into a national minority (see Section IVa From an imperialist people to national minority). Russian-speakers are generally seen as having "questionable loyalties" and their mass naturalisation would just result in "unpredictability and instability" of the country (Section IVc). The role of the state in the process of minority integration is to "ensure the perpetuity of the Estonian way of life". Furthermore, the document continues by stating that "The Estonian wants to live in an Estonian language environment and therefore understandably wishes to see Estonia-minded policy carried out (...)". This defensive attitude against Estonian culture and language reappears in all subsequent integration strategies.

In 1997 the so-called '*Vera group*' led by the Estonian sociologists Marju Lauristin and Mati Heidmets started a larger research project on non-Estonians and their prospects of integration³. In 1997 the first minister on population and ethnic affairs was appointed. Mrs Andra Veidemann founded a governmental commission which aimed at drafting a first minority integration concept. Lauristin and Heidmets were appointed as members of the commission. Almost without minority representatives they drafted a four page document. The paper was entitled "The Integration of Non-Estonians into Estonian Society" which was adopted by the government on 2nd March 1999.

The title already indicates the direction the programme was meant to follow. Its main goal was the unidirectional integration of Russian-speakers into Estonian society. The protection and development

¹ E. Jurado, "Complying with 'European' Standards of Minority Protection: Estonia's Relations with the European Union, OSCE and Council of Europe", PhD thesis on file at Oxford University (2002), 106.

² See for the following: Government of Estonia, Office of the Minister for Population and Ethnic Affairs, *Integrating Non-Estonians into Estonian Society: Setting the Course*, UNDP, Tallinn, September 15 1997, Available at: <http://web.archive.org/web/20020108070236/www.undp.ee/integrat/eng/>, Accessed 11 March 2008.

³ V. Pettai, "Prospects for Multiethnic Democracy in Europe: Debating Minority Integration in Estonia", in J. Ferrer and M. Iglesias (eds.), *Law, Politics and Morality: European Perspectives I* (Duncker & Humboldt, Berlin, 2003), 53-81, here: 64.

of minority rights, culture and language is not recognised adequately⁴. The paper was followed by an Action Plan for integration developed in 1998/99. The Action Plan mentions multiculturalism as an underlying concept for integration. The Estonian version of multiculturalism and integration is summarised in the following paragraph of the Action Plan:

“A multicultural society can work successfully only if its members possess a sufficient common core. This common core lays the foundation for mutually enriching interaction and a sensing of common interests; it creates a situation where different nations feel secure. It is natural that a large part of this common core will derive from [ethnic] Estonian culture; both the state language as well as the dominant language of societal communication is Estonian; the day-to-day norms as well as behavioral patterns, which have evolved here, must also become part of the common core. Estonia’s minorities will contribute their share to this common core, just as an important part of this commonality will come from the ongoing Europeanization process.”⁵

The Action Plan takes a defensive position against the existing Estonian citizenship and language policy and does not try to foster new approaches to deepen integration and multiculturalism. The already strong emphasis on the state language and Estonian culture gives the document a unidirectional character. The Action Plan ensures Estonian cultural dominance over cultural rights of minorities. A truly multicultural character is hardly visible. It is mostly written from the Estonian perspective. Minority interests formulated by minority members scarcely shine through this document. It continues by stating that:

“Within the context of societal dialogue, all functioning cultures in Estonia are equal. In relations with the state, [ethnic] Estonian culture is in a privileged position. The objective and meaning behind Estonia’s statehood is the protection and development of the [ethnic] Estonian cultural space. As a democratic state, the task of the Estonian state is both to support the development of [ethnic] Estonian culture, as well as to ensure the developmental opportunities of minority cultures. Whereas society may become multicultural, that state is and shall remain Estonian-centered. Estonian nation-statehood is manifested in the state’s responsibility for the preservation and development of the Estonian cultural space within a globalizing, multicultural world.”⁶

The position of the state and its tasks and obligations towards minorities become clearer. The Estonian state sees its primary goal in securing Estonian culture and language. It describes a clear hierarchy. All cultures are equal but the Estonian culture should be given special protection⁷. Furthermore, the document decouples state and society when stating that society is multicultural but

⁴ V. Pettai, "Prospects for Multiethnic Democracy" ..., 68.

⁵ V. Pettai, "Prospects for Multiethnic Democracy" ..., 70.

⁶ V. Pettai, "Prospects for Multiethnic Democracy" ..., 71.

⁷ R. Vetik, *Democratic Multiculturalism: a New Model of National Integration* (Åland Islands Peace Institute, Mariehamn, 2001), 17.

the state remains “Estonian-centred”. This is a rather awkward attempt to limit societal diversity in state institutions. Its exclusionary character is mostly directed against the Russian-speaking minority making up almost one third of the population. However, the importance of cultural diversity and its recognition by the state is far reaching. Will Kymlicka⁸ in his attempt to establish a liberal theory of multicultural citizenship has shown that there is a direct connection between societal cultures and the availability of meaningful choices which cannot be reached by only guaranteeing individual civic rights. The Action Plan picks up a constitutional principle. The Preamble to the Estonian Constitution similarly decrees that the state “shall guarantee the preservation of the Estonian nation, language and culture throughout the ages”⁹, whereby the term language was only recently added in April 2007. Designed in such a way, the Action Plan scarcely addresses minority needs or fosters integration.

Raivo Vetik, another architect of the SIP, justifies the central position Estonian culture and language is given in previous concepts. For him and presumably for many Estonians the small size of the population (only around one million ethnic Estonians live in Estonia), its geographic position, historical experience, and overall vulnerability of Estonian nationality put its long-term survival under pressure¹⁰. Especially in the early years of the restored republic the so-called securitisation of ethnic relations¹¹ in Estonia was limiting the acceptance of minority rights in the Estonian society. After decades of Soviet occupation and with powerful Russia as a neighbour, there was little space and sympathy for minority integration. In the first years transition meant regaining control over state institutions by Estonians replacing a Soviet administration by an ethnic Estonian one. The dominant state ideology was and still is that of a restoration of the pre-Second World War Estonian Republic, thereby excluding all Soviet-time Russian-speaking settlers. The legal restorationist concept representing the founding concept of the Estonian Republic has had far-reaching consequences for minority policies in general and later for integration projects in particular¹². The widespread statelessness of most Russian-speakers especially in the early 1990s has lead some scholars to speak about an *ethnic democracy* only permitting ethnic Estonians the right to vote in national elections, and thus excluding almost one third of its population from basic democratic rights¹³. Therefore all national

⁸ W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995), 82-84.

⁹ President of the Republic of Estonia, *Constitution of the Republic of Estonia*, Available at: <http://www.president.ee/en/estonia/constitution.php>, Accessed 11 March 2008.

¹⁰ R. Vetik, *Democratic Multiculturalism...*, 18.

¹¹ W. Kymlicka, "Multicultural Odysseys Symposium", 6 *Ethnopolitics* (2007), 588.

¹² See J. Reinikainen, "Right Against Right – Membership and Justice in Post-Soviet Estonia", Ph.D. thesis on file at Stockholm University (1999) ; V. Pettai, "Framing the Past as Future: The Power of Legal Restorationism in Estonia", Ph.D. thesis on file at Columbia University (2004).

¹³ S. Smooha, "The Model of Ethnic Democracy", European Centre for Minority Issues, ECMI Working Paper #13, October 2001, 71, 80, available at: http://www.ecmi.de/download/working_paper_13.pdf, Accessed 11 March 2008 ; P. Järve, "Ethnic Democracy and Estonia: Application of Smooha's Model", European Centre for *JEMIE* 7 (2008) 2 © 2008 by European Centre for Minority Issues

laws effecting minority groups directly have been drafted with minimal or non-political participation of minority members. Although Estonian laws were seldom in open breach of international law, a number of national regulations appear restrictive because of the legal restorationist concept. The Law on Cultural Autonomy only allows citizens to set up cultural organisations and administer them independently, non-citizens can neither join nor found political parties, and minority language use for local council meetings or for communication with authorities is only officially accepted if more than half of the population in a municipality belongs to a minority group. Tight language regulations for private business and public employment are enforced at the same time. Most of the mentioned regulations have been past by parliament in the early to mid 1990s. Pettai and Hallik have characterised this phase of Estonian transition as an ‘ethnic control regime’¹⁴. Minority integration efforts during that time wore a clear imprint of Estonian cultural dominance that hardly acknowledged minority culture or language as equally valuable for society and state. The burden of integration laid solely within the minority community which needed to adapt into Estonian culture and language.

The Estonian State Integration Programme 2000-2007

In its annual progress reports from 1998 until 2003 the EU Commission has raised the issue of minority integration several times. Nonetheless, European minority rights law does not strictly formulate state run minority integration programmes. The Framework Convention for the Protection of National Minorities (FCNM) of the COE guarantees equality before the law and non-discrimination in Article 4 which also formulates a soft obligation towards minority integration. It obliges countries “(...) to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority.”¹⁵ It remains open as to which measures are adequate and necessary for promoting equality. Furthermore, the article leaves open the question of whether affirmative action or positive discrimination can be used for promoting equality. Article 4(2) partly takes account of this question when it states that countries “(...) shall take due account of the specific conditions of the persons belonging to national minorities.”¹⁶ Of course international law cannot define clear conditions for promoting equality. This naturally must be connected to living conditions

Minority Issues, ECMI Working Paper #7, July 2000, Available at:
http://www.ecmi.de/download/working_paper_7.pdf, Accessed 11 March 2008.

¹⁴ V. Pettai and K. Hallik, "Understanding processes of ethnic control: segmentation, dependency and co-optation in post-communist Estonia", 8 *Nations and Nationalism* (2002), 505-529.

¹⁵ Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (ETS No. 157), Strasbourg, February 1995, H(1995)010, Available at:
[http://www.coe.int/t/dghl/monitorings/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplnReport_en.pdf](http://www.coe.int/t/dghl/monitorings/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplnReport_en.pdf), Accessed 11 March 2008.

¹⁶ Council of Europe, *Framework Convention ...*

of minority members and a societal discourse on equality. But also political theorists have to acknowledge the lack of a normative theory capable of guiding us through questions of how much or what protection, minority rights should enjoy¹⁷. Defining concrete integration programmes remains a requirement for national and regional governments. International law does not proscribe specific policy measures. Abstract standards as Article 4(2) can only outline a general frame but cannot account for the very different conditions national minority groups are living in. Nevertheless, the soft wording of the mentioned article might prevent states from adopting necessary equality and integration measures since it makes it easy to adopt only superficial equality programmes. The political will for changing deep rooted chasms in society becomes key under such conditions. The discretion for FCNM signatory states is immense, as they carry the weight and responsibility to develop adequate instruments suitable for remedying existing disparities between minority and majority society.

In Estonia the drafting of a new integration concept was made possible after the national conservative party *Pro Patria* under Prime Minister Mart Laar had to form a coalition with the Moderates and Reform Party following the general elections in 1999. Lauristin became chairman of the Moderates party caucus in parliament and initiated the drafting of a new integration programme¹⁸. At the ministerial level Katrin Saks, the minister for population and ethnic affairs, started working on a new integration programme in the same year. Saks reorganised the governmental commission on integration and set up a working group that finally established the SIP which sets guidelines for Estonia's minority integration policy from the year 2000-2007. The working group again was mainly composed of ethnic Estonians and few Russian-speakers. Representatives of the Estonian Federation of Associations of Ethnic Cultural Societies and the Association of Estonian National Minorities were invited as guests. Two Russian delegates later left the working group because of disagreements on the integration policy. The new integration programme now speaks about integration taking place within Estonian society and not integration into Estonian society. Therefore the programme is named "Integration in Estonian Society 2000-2007". The government adopted it on 14 March 2000, the programme states:

“(...) integration in Estonian society means on the one hand the harmonisation of society – the creation and promotion of that which unites all members of society – and on the other hand the opportunity to preserve ethnic differences – the offering to ethnic minorities of opportunities for the preservation of their cultural and ethnic distinctiveness.

¹⁷ A. Patten and W. Kymlicka, "Introduction: Language Rights and Political Theory: Contexts, Issues, and Approaches", in A. Patten and W. Kymlicka (eds.) *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003), 1-51, here: 32-37.

¹⁸ D. Laitin, "Three Models of Integration and the Estonian/Russian Reality", 34 *Journal of Baltic Studies* (2003), 197-222, here: 200-201.

What is of significance here is that integration is a clearly bilateral process - both Estonians and non-Estonians participate equally in the harmonisation of society.”¹⁹

Whereas former integration conceptions defended Estonian culture and language, this document clearly highlights the role of non-Estonian cultures as deserving protection. Preserving ethnic difference is mentioned as a distinct goal. The programme does not rank the aim of harmonising Estonian society over preserving ethnic differences. Interestingly, it speaks only about preservation and of differences and not of further developing minority cultures - which could be interpreted as limiting the scope of the integration programme only to preserving minority cultures²⁰. The programme understands integration as a two-way process needing the active commitment of not only minority members willing and motivated to integrate, learn Estonian, respect Estonian traditions and culture, but also ethnic Estonians welcoming non-Estonians and accepting minority cultures as part of Estonian identity. The state integration programme works with multiculturalism as a conceptual item. The programme indeed is a step forward to a multicultural understanding of democracy. It abandons the idea of a mono-ethnic Estonian nation state and recognises the ethnic and cultural diversity of the state which is an essential element of multicultural democracy²¹. It describes “a multicultural society, which is characterised by the principles of cultural pluralism, a strong common core and the preservation and development of the Estonian cultural domain”²². The notions ‘development’ and ‘preservation’ appear again. This time the term ‘development’ is used in connection with the Estonian cultural domain, which should be developed. The mentioned strong common core refers to Estonian culture as forming and founding culture in Estonia. However, in practice the SIP’s focus is unidirectional rather than multicultural, or promoting differentiated rights for minority groups. Various reasons account for this. First, Estonia is officially a country with only one state language. Estonians have therefore been able to build up a legal protectionist wall for defending and securing the use of Estonian in public matters reflected by the SIP. Second, the knowledge of Estonian among Russian-speakers was or is poor and could thus be identified as a main hurdle for integration. Third, international financial aid heavily supports Estonian language teaching as a priority. The SIP focuses on three main fields of activity.

¹⁹ *State Programme 'Integration in Estonian Society 2000-2007'*, adopted by the Estonian Government on 14 March 2000, 5, Available at: http://www.rahvastikuminister.ee/public/state_programme111.pdf, Accessed 11 March 2008.

²⁰ R. Toivanen, "Das Paradox der Minderheitenrechte in Europa", 45 *SWS-Rundschau* (2005), 185-207.

²¹ P. van den Berghe, "Multicultural democracy: can it work?", 8 *Nations and Nationalism* (2002), 433-439, here: 436.

²² *State Programme...*, 5.

Linguistic-communicative integration, i.e. the re-creation of a common sphere of information and Estonian-language environment in Estonian society under conditions of cultural diversity and mutual tolerance.

Legal-political integration, i.e. the formation of a population loyal to the Estonian State and the reduction of the number of persons lacking Estonian citizenship.

Socio-economic integration, i.e. the achievement of greater competitiveness and social mobility in society regardless of ethnic or linguistic attributes²³.

A strong emphasis is put on linguistic and communicative integration, which means supporting learning Estonian amongst non-Estonians. Drafting the integration programme is mostly a domestic concern and ethnic-Estonian interests, especially in the two earlier versions, have been visible. Nonetheless, in the preliminary pages of the programme one can read two paragraphs on the normative basis for the integration programme. There Estonia emphasises that integration must be “based on internationally recognised standards and Estonia’s constitutional principles, on our current national and social interests, and on the goal of ensuring rapid modernisation of society in the context of accession to the European Union, all while preserving both stability and a commitment to the protection and continued development of Estonian culture”²⁴. With the inclusion of this passage, Estonia was seeking to satisfy external demands for minority protection and at the same time, demonstrate its steadfastness in continuing to defend and protect the Estonian culture first and foremost.

The EU generally welcomed the launch of an integration programme. But the Commission also reminded Estonia that “It is necessary for the Estonian government to continue to devote adequate resources and give proper attention to the implementation of all elements of the integration programme. This includes, in particular, the need to ensure a high level of awareness and involvement in integration process across all sections of the Estonian population.”²⁵. This soft critique points to an often mentioned ‘defect’, and that is its over-focus on Estonian language training. Indeed the linguistic component of the SIP gets the largest share of funding, whilst social and economic integration are practically absent. Table 1 below gives an overview of the SIP’s annual budgets from 2000-2004. The annual budget has risen from 35,229,084 to over 51,000,000 Estonian Kroons in that period. The SIP remains chiefly funded by external donors of which the EU is the most important. Sub-programme I, which primarily aims at increasing Estonian language knowledge among Russian-speakers gets the lion’s share or between 36 to 55 per cent of the total budget. This is in contrast to the

²³ *State Programme...*, 6.

²⁴ *State Programme...*, 4.

²⁵ European Union, Commission of the European Communities, *Regular Report from the Commission on Estonia’s progress towards accession, 2001* (European Union, Brussels, 2001), 23, Available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/ee_en.pdf, Accessed 11 March 2008.

SIP's engagement in Sub-programme II "Education and Culture of Ethnic Minorities". Here Estonia is spending only 1.9 to 7 per cent of the annual budget. The following sub-programme III fostering the teaching of Estonian to adults, which one might assume to be of particular importance to Estonia is almost completely funded by external resources. Together with Sub-programme I, the linguistic component of the SIP consumes between 50.3 to 72 per cent of the annual budget clearly outweighing all other aspects which in the theoretical concept of the SIP enjoy an equal standing. Although the language component is highly important to further integration and for reducing the still high number of stateless persons, the SIP hardly tries to remedy social and

Table 1 Integration Foundation Budgets 2000-2004 in Estonian Kroons

	2004	2003	2002	2001	2000
total budget	51,611,032	59,359,958	38,030,392	38,446,565	35,229,084
total foreign aid	29,502,656	35,130,234	22,146,415	26,089,031	26,457,870
percent of budget	57.2%	59.2%	58.2%	67.9%	75.1%
Sub-programme I	28,440,000	24,681,378	18,374,767	13,147,494	12,743,349
percent of budget	55.1%	41.6%	48.3%	34.2%	36.2%
foreign aid	19,631,169	16,608,851	12,013,612	11,400,892	9,770,509
percent of program	69%	67.3%	65.4%	86.7%	76.7%
Sub-programme II	1,700,000	1,059,639	2,540,789	2,674,716	1,845,286
percent of budget	3.3%	1.9%	6.7%	7%	5.3%
foreign aid	0	454,181	1,213,000	1,802,608	555,200
percent of program	0%	42.9%	47.7%	67.4%	30%
Sub-programme III	7,450,000	7,590,225	6,600,748	6,202,490	12,604,257
percent of budget	14.4%	12.8%	17.4%	16.1%	35.8%
foreign aid	7,450,000	7,074,642	6,345,748	5,929,659	12,432,950
percent of program	100%	93.2%	96.1%	95.6%	98.6%

Sub-programme IV	5,050,000	6,942,607	3,087,474	5,223,554	3,519,207
percent of budget	9.8%	11.7%	8.1%	13.6%	10%
foreign aid	2,224,247	2,093,990	712,075	3,646,659	2,458,604
percent of program	44%	30.2%	23.1%	69.8%	69.9%
Part V	8,790,000	11,370,365	7,486,614	6,151,311	4,516,837
percent of budget	17%	19.2%	19.7%	16%	12%
foreign aid	197,240	8,898,570	1,861,980	3,309,213	1,069,300
percent of program	22.4%	78.3%	24.9%	53.8%	23.7%

Source: Own calculation drawn from the annual budgets for the integration programme 2000-2004.

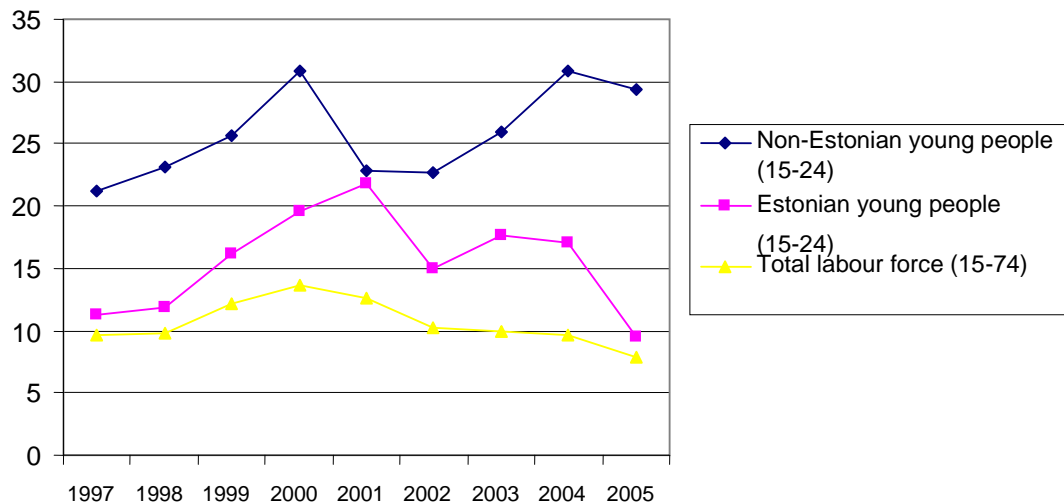
economic gulfs. Sub-programme IV “Social Competence” cannot compensate for the lack of economic or societal integration, which the SIP only scratches at. Paltry funds were earmarked for inter-ethnic projects facilitating ethnic tolerance and understanding. The involvement of ethnic Estonians is minimal and reduced to teaching Estonian. Minority problems and local demands by various different ethnic groups did not find their way into the SIP systematically. Thus, the day to day reality of many people remains untouched.

The dimension of economic disintegration belong ethnic lines should not be underestimated. The hardship of economic transition hit Russian-speakers with more intensity than Estonians because many of them worked in large industrial complexes which did not survive the introduction of market reforms. These complexes were placed in areas mostly inhabited by Russian-speakers like the North-Eastern county of Ida-Virumaa. For 2006 the Estonian Statistical Office announced a national unemployment rate of 5.9 per cent and for Ida-Virumaa of 12.1 per cent²⁶. Thus Russian-speakers living in that part of the country are running a risk of becoming unemployed, which is more than 100 per cent higher than the average throughout Estonia. The Estonian labour survey discloses another alarming disparity between Estonians and non-Estonian youth unemployment. Whereas 9.5 per cent of Estonian young people aged between 15 and 24 years in 2005 were unemployed, this number more than triples in the same age group by ethnic non-Estonians (29.4 per cent) as displayed

²⁶ See *Statistics Estonia*, Available at: <http://www.stat.ee/>, Accessed 11 March 2008.

in table 2. This means that Russian-speaking youth belong to the highest risk group and are far more likely to be unemployed.

Table 2 Estonian youth unemployment by nationality 1997-2005 in per cent



Source: Strategy for the integration of Estonian society 2008-2013; taken from: Estonian labour survey

This situation is further aggravated by a rapidly increasing number of HIV infections. The epidemic spread of HIV/AIDS started in Narva the third biggest city of Estonia at the Estonian/Russian border with a Russian-speaking population of more than 90 per cent. The disease first spread among drug addicts but numbers of infections saw an exponential growth from 2000 on. Until now the reported HIV infection rate in Estonia has been the highest in the World Health Organisation's (WHO) European Region since 2001²⁷. Russian-speaking young males are among the most vulnerable groups. For Estonia the WHO reports an annual opiate use prevalence rate of 1.2 per cent of the adult population which is among the highest world wide. Here again Russian-speaking young males are dominating in this group.

The above data describe a very alarming trend among Estonia's minority population and point to a number of deficiencies and strategic misjudgments about the instruments and direction of minority integration in the SIP. The SIP does not differentiate enough between age, sex and region for tackling those problems that predominately affect minority groups and have a direct effect on inter-ethnic relations in Estonia. The integration programme applies a 'one size fits all' approach. It does not distinguish between the different living conditions of minorities in Estonia. The programme largely disregards a prior socio-economic mapping of minority living conditions in order to evaluate potential useful integration measures. However, there is a growing international consensus that the recognition

²⁷ World Health Organization, Regional Office for Europe, *Sexually transmitted infections/HIV/AIDS, Estonia*, Available at: http://www.euro.who.int/aids/ctryinfo/overview/20060118_13, Accessed 11 March 2008.

of cultural rights and political integration efforts are not sufficient if social and economic disparities are widening and start dominating inter-ethnic relations negatively²⁸. Furthermore, the programme pays little attention to other minorities outside the Russian-speaking community. Different living conditions of Russian-speakers are not recognised. There appear not only significant differences between non-Estonians and Estonians, but also significant differences between Russophones living in Narva where the language environment is predominately Russian or Russian-speakers living in Tartu where around 17 per cent of the population are Russian-speakers and the dominant culture is Estonian. In towns like Narva with more than 90 per cent Russian-speaking population integration is hardly more than learning Estonian in language courses. Contacts with Estonians are rare. In Tartu Russian-speakers will clearly find it harder in everyday life to survive without Estonian language knowledge. Contacts with Estonians are much more likely if not unavoidable, for example, in work life or at university.

There is no doubt that supporting the teaching of Estonian to non-Estonians is an essential part of minority integration, as it is not only a means of reducing the still high number of stateless persons, but also a prerequisite for entry into the labour market, and for communication in general and contacts with Estonians in particular. From that perspective the strong focus on Estonian language learning is warranted. But it should not lead to the neglect of the social and economic dimensions of integration, as did the SIP.

In 2005 a Mid-Term Appraisal Report was compiled by Ernest & Young measuring the overall success of the SIP as regards minority integration²⁹. Its assessment of the SIP is disappointing, rating it only *satisfactory* and further connotes “we must also point out there has generally been a low amount of success in furthering integration in Estonia”³⁰. The SIP’s focus on Estonian language learning has not paid off. In its eight years of existence the SIP failed to make any significant improvement in the language proficiency of non-Estonians. Only 40 per cent of non-Estonians are able to communicate in Estonian. A lack of Estonian language teachers in Ida-Virumaa still complicates language learning. A divided schools system in which Estonians and non-Estonians effectively do not meet or mix very often does not provide enough opportunities for inter-ethnic understanding. It is worth noting that a number of recommendations for furthering success in integration in Estonia are also made in this report.³¹

²⁸ M. Martiniello, "How to combine Integration and Diversities: The challenge of an EU multicultural citizenship", EUMC Discussion Paper (2004), 8 Available at: http://fra.europa.eu/fra/material/pub/discussion/discussion_paper1.pdf, Accessed 11 March 2008.

²⁹ See for the following: M. Rabi *et al.*, *State Integration Programme 'Integration in Estonian Society 2000-2007' Mid-Term Appraisal Report* (Ernst & Young, Tallinn, 2006), Available at: <http://www.meis.ee/book.php?ID=163>, Accessed 11 March 2008.

³⁰ M. Rabi *et al.*, *State Integration Programme...*, 4.

³¹ M. Rabi *et al.*, *State Integration Programme...*, 132-135.

A further issue of central importance in minority integration is adequate participation and involvement of minority groups in matters concerning them. Especially when setting up integration programmes, minority participation during the drafting - but also implementation and evaluation process - is crucial for guaranteeing the over-all success of the programme. The COE, in recent years has underpinned the importance of minority consultation mechanisms by publishing a *Handbook on Minority Consultative Mechanisms* in 2006³². The Handbook lays down the Council's expectations and requirements for minority consultation. As regards the FCNM, a legal basis for consultation can be found in the Explanatory Report to Article 15 of the FCNM. There the Council asks the contracting parties to involve "these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly". The Handbook (para. 43) specifies consultative measures by calling states to engage minority groups in programming through for instance, participation in setting policy targets, assessing needs of minority groups, involving them in funding decisions, taking part in the execution, supervision, the evaluation of minority programmes and reaching out to the wider public with information on minority issues.

The SIP shows substantial shortcomings in almost all of the mentioned categories. Minority participation when drafting the SIP was negligible, a needs assessment procedure is not visible and the execution and evaluation only shows sporadic and unsystematic minority involvement. The consequence of this been that important subject areas like youth unemployment, HIV/AIDS or a regional differentiation of minority needs have not been integrated into the SIP. The fact that most priorities and targets have been developed without substantial minority involvement has led to minority groups tending to adopt negative positions towards integration goals. The low success rate in teaching Estonian may also result from inadequate minority participation or influence when planning and setting out integration priorities. In circumstances in which minority integration goals have been developed without systematic minority consultation, minorities may feel that the ruling ethnic majority is imposing most if not all aspects of integration and develop resistance against policy targets and may even question the legitimacy of the policy-making process. However, securing the successful implementation and acceptance of integration goals and programmes requires a constant consultation process in which minority groups can express their interests and actively take part in programming, execution and evaluating integration programmes. By consulting minority members, state organs grant minorities social recognition, which in itself fosters integration between central state authorities and minority groups. Indeed consulting with minorities can be seen as an independent component of integration.

³² See for the following: Council of Europe, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), *Handbook on Minority Consultative Mechanisms* (Council of Europe, Strasbourg), 20 October 2006, DH-MIN(2006)012, Available at: http://www.coe.int/t/dghl/monitorings/minorities/5_IntergovWork/PDF_DH-MIN_Handbook_MinConMecanisms_en.pdf, Accessed 11 March 2008.

The forms of minority consultation should take due consideration of national circumstances in which minority-majority relations are taking shape. Consultation instruments can take very different forms but should ultimately be related to the specific circumstances that exist within the country³³. Minority participation instruments in Europe vary from co-decision, co-ordination, consultation to self-governance of minorities. The first category refers to obligatory common decision-making in which minority interests are recognised by the state formally. Coordination mechanisms are often inter-ministerial working groups into which minority interests are channelled and which allow a better coordination of minority projects between different state organs. Consultation instruments often engage minority participation through minority consultative councils. In the case of Estonia a Presidential Roundtable on National Minorities has been established. However its working effectiveness has been problematic in the past. Lastly, self-governance grants minorities the highest degree of independence by enabling them to administer projects by themselves but with coordination from central or regional state institutions. In order to enable these consultative mechanisms to work properly, the COE's Handbook recommends a fine-tuning of its sub-structures. Consultation is more effective if its multi-level oriented meaning it does cut across different layers of public administration from central state to regional and local bodies. Specialised consultative mechanisms may be needed in order to allow focussing on particular topics such as unemployment, education, crime etc. And finally mechanisms can address particular groups within the minority population. For Estonia, young unemployed Russian-speakers may qualify as a target group. Target groups can and should also be those groups who have not been recognised by existing consultation instruments. In Estonia one may think about smaller minority groups inside and outside the very heterogeneous group of Russian-speakers. In these respects the SIP seems to be unfocussed. It surely would profit from specification, in geography, issue areas, and target groups.

As we have seen, successful minority integration requires a high degree of minority consultation and involvements. This is particularly true for Estonia because minority political participation in parliament has been very low in recent years, if not non-existent following the national elections in 2003 and 2007. However, this participation presupposes the ability of minority groups to formulate their interests, and their ability and willingness to take part in programming, monitoring and evaluating policy initiatives.

Civil society in Estonia is rather weakly developed. Potentially a stronger civil society commitment of Russian-speakers would constitute an extra channel for societal and political integration. Russian-speakers in Estonia, however, remain mainly passive and until now have not

³³ See M. Weller, *Consultation Arrangements concerning National Minorities*, Council of Europe, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) (Council of Europe, Strasbourg), 24 February 2006, DH-MIN(2005)011 final, Available at: http://www.coe.int/t/dghl/monitorings/minorities/5_IntergovWork/PDF_DH-MIN_MWeller_Consultation_Arrangements_en.pdf, Accessed 11 March 2008.

sought to organise a mass movement for their rights and interests³⁴. Several reasons bear responsibility for this situation. The communist party was prohibited almost immediately after independence and Russian-speakers lost a possible platform to formulate their interests. With the communist party outlawed, its organisational structure as network for further political activities also vanished. Furthermore, non-citizens are not allowed to found or join political parties as the Estonian Constitution writes in Article 48(1). Consequently, the vast majority of Russian-speakers in the direct aftermath of independence could not set up political party structures. Consequently, Russian-speakers faced organisational and legal deficits for organising their interests in the past. Finally, the Russophone community is a heterogeneous community. While Russians form the majority within this group other nationalities and ethnicities also form part of the Russian-speaking community. Soviet-time immigrants came from all over the Soviet Union and thus make up a mixture of ethnicities and cultures. Although Russian political parties exist, they fail to gain the large-scale adherence of their kin. Russian-speakers mostly vote for mainstream Estonian parties or abstain from voting. Widespread statelessness has pushed a substantial number of Russian-speakers to acquire the Russian citizenship (ca. 100,000) these people of course cannot vote in national elections.

Within the Russian speaking community a certain degree of political apathy is visible. So far they have not been able to organise their political interests effectively. The small Russian elite was not successful in building a trustworthy relationship with their peer-group, thus Russian-speakers tend to mistrust their representatives. The political inertia of Russian-speakers turned into activism only during the bronze soldier crisis in spring 2007. One example is the organisation [Night Watch \(Nochnoy Dozor\)](#) which was founded to protect the bronze statue against supposed vandalism and its feared demolition. Minority consultative measures thus face the challenge of the political apathy of large parts of the Russian-speaking community. Integrating consultative measures for minority projects thus need to take into account these circumstances and foster the building of minority and special target groups.

A further subject the SIP acknowledges is that minority integration involves both the minority and majority population. It is indeed a bi-lateral process, as the SIP states³⁵. Without addressing both sides, the teaching of inter-ethnic tolerance, mutual understanding and language learning appears to be almost impossible. The European Union has recognised this when commenting in 2002 on minority integration in Estonia:

“(...) there is a continuing need to ensure the awareness, consultation and involvement of all sections of the Estonian population including civil society organisations actively involved in evolving the integration process, including at local level. In this context, the

³⁴ D.J. Smith, "Russia, Estonia, and the Search for a Stable Ethno-Politics", 29 *Journal of Baltic Studies* (1998), 3-18, here: 9.

³⁵ *State Programme 'Integration in Estonian Society 2000-2007'*, adopted by the Estonian government on 14 March 2000, 5, Available at: http://www.rahvastikuminister.ee/public/state_programme111.pdf, Accessed 11 March 2008.

Estonian authorities should ensure that emphasis is placed on a multicultural model of integration as stated in the aims of the state integration programme.”³⁶

The Commission calls for adequate minority consultation in combination with the participation of “all sections of the Estonian population”. However, the SIP is not fully acknowledging this goal. The number of integration projects involving mutual tolerance building remains too small. Projects which actually engage in this area are unidirectional. While it is highly desirable to organise summer camps for Russian-speaking youngsters in an Estonian language and cultural environment, no equivalent steps have been taken for the Estonian side. A number of suitable projects can be borrowed from experience in other countries. A range of projects is available starting with, mixed kindergarten groups, school partnerships, human rights education, public campaigns, exchange of state personnel in ministries and regional offices etc.

Summary

The first Estonian State Integration Programme “Integration in Estonian Society 2000-2007” terminated last year, which gives reason to evaluate its performance. In order to lower the high number of stateless persons, the SIP has focused extensively on teaching Estonian to Russian-speakers. Although this decision is highly commendable, it should not overrule other important aspects of minority integration. Social and economic rifts such as disproportional high youth unemployment rates among minority members as well as drug addiction and AIDS infection rates, are practically left out of the programme. There is no regional approach visible that takes into account actual minority living conditions which indeed vary significantly across the regions in Estonia. The identification of special needs groups and a fine-grained regional approach to integration seem to be highly desirable for successful integration. Minority participation during project planning and implementation should be extended systematically across regions and for special target groups. Lastly, integration should truly be recognised as a two-way process engaging not only the minority but also the majority population. This goal might be realised by extending mutual tolerance education.

³⁶ European Union, Commission of the European Communities, *Regular Report from the Commission on Estonia's progress towards accession, 2002* (European Union, Brussels, 2002), 32, Available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf, Accessed 11 March 2008.

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Kosovo declaration of Independence and the International Community - an assessment by the Kosovo Monitoring Task Force

Ugo Caruso¹

Abstract

This paper provides an overview of the roles played by international organisations with relation to Kosovo independence in the months prior to the declaration of independence to March 2008, based on data collected by the Kosovo Monitoring Task Force in the frame of the MIRICO project.

Introduction

Created in the frame of the MIRICO project – Human and Minority Rights in the Life-Cycle of Ethnic Conflicts, the Kosovo Monitoring Task Force is composed of academics and professionals who have decided to monitor the process of independence of Kosovo². This essay therefore would like to be considered exemplificative of the possible researches which can be conducted on the basis of the data collected by the Task Force. Data coming from the monitoring activity are publicly available at the Institute for Minority Rights of the European Academy of Bolzano and accessible to all academics interested in researching on the independence of Kosovo and its implications at international level.

The aim of this paper is to give an overview of the roles played by key-organisations, such as the UN, OSCE, European Union, Council of Europe and NATO (indicated in the paper as the International Community) from the months before the Kosovo declaration of independence until March 2008. In this context, mention to major powers (e.g. Russia and Serbia) is merely functional to the description of the role played by International Organisations, and is not to be included in the term International Community used for this paper.

¹ The author would like to thank Claire Gordon, Emma Lantschner, Annemarie Rodt and Gabriel Toggenburg for the research that they conducted. A special thank to Benedikt Harzl from the European Academy of Bolzano for coordinating the Task Force.

² Funded by the European Commission's Framework Programme 6, MIRICO is developing substantial and procedural concepts for the management of diversity in ethnically and culturally diverse states that can help preventing conflict and overcoming its consequences with a view to mainstreaming conflict prevention into the programming of all aspects of EU foreign policy. For further information about the project, please visit <http://www.eurac.edu/Org/Minorities/MIRICO/index.htm>

Conclusions at the end of the paper are thus based on the results coming from the analysis of this specific period of time, and should not be considered as conclusive.

Short historical overview of the administration and governance in Kosovo

Since June 1999, Kosovo has been governed by an interim administration led by the United Nations Mission in Kosovo (UNMIK) established by the UNSC Resolution 1244 (1999). Headed by a Special Representative of the Secretary-General (SRSG), the operational framework of UNMIK has been divided into four pillars: (i) Police and Justice, under the direct leadership of the UN; (ii) Civil Administration (UN); (iii) Democratization and Institution Building (OSCE); (iv) Reconstruction and Economic Development (EU)³.

The military component has been led by NATO-led Kosovo Force (KFOR) on the basis of UNSC Resolution 1244. KFOR was set up as a separate body from UNMIK and, while the necessities of the work required cooperation with UNMIK, it is not controlled by the civilian authority in Kosovo (unlike the situation under the UN administration in East Timor)⁴.

In 2001 the Constitutional Framework for Provision Self-Government in Kosovo was issued by the SRSG created a system known as the "Provisional Institutions of Self-Government" (PISG)⁵. Furthermore, the Kosovo Standards Implementation Plan, put together by UNMIK in 2004, spelt out how to achieve a democratic society, based on the rule of law and effective equality.

The International Community and the Ahtisaari plan

In November 2005, former Finnish President Martti Ahtisaari was appointed special envoy of the UN Secretary-General to prepare a proposal for the future status of Kosovo. The UN-led process followed a set of "guiding principles" agreed upon by the Contact Group countries⁶. No return to the pre-1999

³ The UNHCR left the pillar structure in 2000, while keeping a mission in Kosovo, and was replaced by a second UNMIK pillar responsible for policing and justice.

⁴ From Clive Baldwin, *Minority Rights in Kosovo under International Rule*, (Minority Rights Group International, London, 2006).

⁵ See UNMIK Regulation 2001/9 of 15 May 2001.

⁶ Namely: France, Germany, Italy, the United Kingdom, the United States, and Russia.

situation, no partition of Kosovo and no redrawing of international borders in the region were among the top priorities to take into account in preparing the comprehensive proposal⁷.

After 15 rounds of talks and a final high-level meeting between Belgrade and Pristina in Vienna on 10 March 2007, Mr. Ahtisaari delivered his plan, comprising a four-page Report and the 63-page Comprehensive Proposal for the Kosovo Status Settlement, to the UN Secretary General on 15 March 2007⁸.

Already on 12 March 2007, however, Mr. Ahtisaari declared talks on the future status of the province to be deadlocked⁹. The negotiations were also disturbed by Montenegro's declaration of independence from Serbia, which occurred in June 2006. To the partition of the Federal Republic of Yugoslavia (FRY) Belgrade reacted with a new Constitution. The document was adopted by referendum on 28-29 October 2006 following a campaign that was dominated by the Kosovo issue; the latter considered in the new document an integral part of Serbia.

On 26 March, the UN Secretary-General forwarded the Ahtisaari proposal to the United Nations Security Council, fully supporting Mr. Ahtisaari's recommendation for a supervised independence¹⁰.

The Ahtisaari plan provides the foundations for the creation of an independent state of Kosovo with its own constitution, state symbols, security forces, and the right to become a member of international organisations. Settlement implementation is to be supervised through international bodies. Transition period is planned for a term of 120-days at the end of which, UNMIK's mandate should expire and all legislative and executive powers transferred to Kosovo's governing authorities. International presence in the field will rest in place. In this context, the Plan foresees the establishment of an International Civilian

⁷ See NATO Parliamentary Assembly, Committee Report No. 163 CDS 07 E rev 2, "Kosovo and the Future of Balkan Security", by Vitalino Canas, Annual Session, Reykjavik 2007, § 46.

⁸ See United Nations Security Council, "Comprehensive proposal for the Kosovo Status Settlement, U.N. Doc. S/2007/168/Add.1, 26 March 2007 ; see also Commission of the European Communities, Commission Staff Working Document, "Kosovo under UNSCR 1244 2007 Progress Report", SEC(2007) 1433 in COM(2007)663, Brussels 6 November 2007, 5.

⁹ See UN News Service (2007), "Ban Ki-Moon receives Contact Group report on Kosovo", 7 December. Available at: <http://www.unmikonline.org/news.htm#0712>. Accessed 7 August, 2008.

¹⁰ See Commission of the European Communities, "Kosovo under UNSCR 1244 2007 Progress Report", SEC(2007)1433, cited in footnote 8, 5.

Office (ICO) to be headed by an International Civilian Representative (ICR) - a post occupied by the EU Special Representative¹¹.

Furthermore, Kosovo Serbs would be free to decide their resource allocation priorities, would have the right to benefit from assistance from the Serbian government, and would exercise enhanced powers in the fields of education and healthcare, as well as a monopoly over cultural policy. The Proposal also provides for the creation of protection zones and privileges for the Serbian Orthodox Church. In addition, six new or significantly expanded Kosovo Serb majority municipalities would be set up¹².

The word "independence," however, is never mentioned in the Ahtisaari proposal¹³. Besides this, measures imposed for the protection of the Serb minority go beyond what is normally required by International and European standards. It is of particular interest that for the part of the plan dealing on minority rights Mr. Ahtisaari enjoyed the collaboration of the OSCE High Commissioner on National Minorities¹⁴.

The presentation of Ahtisaari's report opened an intensive phase of debate in the international arena. Although the official endorsement received by Kosovo Albanians, by the European Union and their member states individually and by NATO, Kosovo Serbs rejected the plan¹⁵. Belgrade backed their stand recalling that the only acceptable agreement would be the one reached at the United Nations Security Council¹⁶.

¹¹ See NATO Parliamentary Assembly, Committee Report No. 163 CDS 07 E rev 2, cited in footnote 7, § 51.

¹² See UN News Service (2007), "Ban Ki-Moon receives Contact Group report on Kosovo", 7 December. Available at <http://www.unmikonline.org/news.htm#0712>. Accessed 10 August 2008.

¹³ Reference is in fact given to the "multi-ethnicity" of the Kosovo society; the proposal in fact envisages in its Article 1 Kosovo "multiethnic society, which shall govern itself democratically, and with full respect for the rule of law, through its legislative, executive and judicial institutions." See Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168 Add. 1.

¹⁴ See Virginie Coulloudon (2007), "Integration and diversity. Applying the same formula across the OSCE area" interview of the OSCE HCNM Rolf Ekeus, *OSCE Magazine* Oct-Nov 2007, 17.

¹⁵ The Kosovo Assembly confirmed their endorsement in a vote on 14 March 2007.

¹⁶ See Commission of the European Communities, "Kosovo under UNSCR 1244 2007 Progress Report", SEC(2007)1433, cited in footnote 8, 5.

From Moscow, Russia made clear that until superseded by a new decision, Security Council Resolution 1244 (1999) remains in force¹⁷. Moscow also insisted that Ahtisaari's proposal should not be seen as a ready-made package to impose but as a starting point for a new round of bilateral negotiations¹⁸. Meanwhile, finding a consensus in the Security Council, where each one of the permanent members has a veto right, proved to be impossible¹⁹.

Meanwhile, the International Community (IC) continued to insist on a UNSC resolution based on the Ahtisaari proposal to be the best possible solution for the Kosovo status²⁰.

In August 2007, the stand-still on a new UNSC resolution led the UN Secretary-General to invest a Troika of negotiators, namely Frank Wisner representing the United States, Wolfgang Ischinger representing the European Union (EU), and Alexander Botsan-Kharchenko representing the Russian Federation, with the task of facilitating a further period of negotiations of 120 days²¹. Thus, a second cycle of negotiations started in August 2007, led by a troika of negotiators who was asked to report back to the United Nations on 10 December 2007. The solution satisfied Belgrade, which argued that previous negotiations had failed in part because they had a pre-conceived outcome but was rejected by Pristina. The latter warned that further postponement would only exacerbate impatience among Kosovo's population²².

Apart from those directly involved in the negotiations, namely Russia, the U.S and the EU, support to the Troika came by NATO and the UN. On 15 October 2007 members of the NATO-Russia Council reiterated their support to the negotiating efforts of the EU-US-Russia Troika and expressed the hope that the new period of engagement between Belgrade and Pristina would lead to an agreement on Kosovo's

¹⁷ See International Crisis Group (ed.) (2006), *Kosovo Status: Difficult Months Ahead* (International Crisis Group, Brussels, 2006).

¹⁸ Since October 2006, Moscow had made increasingly clear that it would not support a settlement imposed on Belgrade, in either the Contact Group or the Security Council.

¹⁹ See NATO Parliamentary Assembly, Committee Report No. 163 CDS 07 E rev 2, cited in footnote 7, § 52.

²⁰ See NATO Parliamentary Assembly and the Centre for the Democratic Control of Armed Forces (DCAF), "Whither Serbia? NATO, the EU and the Future of the Western Balkans?", Seminar Report Doc. 151 Joint 07 E, Annual Meeting 2007, 6.

²¹ In a statement on 1 August 2007, the UN Secretary General welcomed this initiative, as well as the new arrangements agreed to by the Contact Group for pursuing negotiations between the parties.

²² See NATO Parliamentary Assembly, Committee Report No. 163 CDS 07 E rev 2, cited in footnote 7, § 54.

future status²³. Support reiterated by the NATO Secretary General and the NATO Parliamentary Assembly in its Resolution 359. In addition, the final communiqué of the North Atlantic Council (NAC) dated 7 December 2007 further explained KFOR's commitment to remain operative on the basis of UNSC Resolution 1244 (1999), unless the UN Security Council would decide otherwise²⁴.

For the UN, on 15 November 2007, the former SGSR for Kosovo Joachim Rucker remarked his conviction in a positive outcome to the Troika-led negotiations process²⁵.

The Troika's appointment, however, moved the process beyond the UN's framework and away from earlier ideas of reaching an agreement on a new UN Security Council Resolution that would settle Kosovo's status. Although formally not in breach of legal norms, this decision moved the negotiation far from formal UN channels²⁶.

This situation would find its confirmation on 7 December 2007 in the words of Ambassador Marcello Spatafora of Italy, the Security Council President for December. On 7 December 2007 Ambassador Spatafora, asked about upcoming steps replied that "when the time comes we will assess and decide how to go forward on process and on substance." Ambassador Spatafora's words can only add strength to the supposition of a UN confined to play a passive role in the way towards the final settlement of the Kosovo status.

After Ahtisaari and before the Troika process

The NATO 66th Rose Seminar of June 2007 was the occasion for Joachim Rucker, the former UN SRSG in Kosovo to state that UNMIK has achieved all that is possible under the current mandate. Rucker

²³ See NATO-Russia Council (2007), "NATO-Russia Council meets with Kosovo Troika", Press Release, 15 October.

²⁴ See speech by the NATO Secretary General Jaap de Hoop Scheffer at the conference 'Kosovo - Security for All', 30 December 2007. Available at: <http://www.nato.int/docu/speech/2007/s071130a.html>. Accessed 10 August 2008 ; See also NATO Parliament Assembly (2007), Resolution No. 359 on "Encouraging Stability in the Western Balkans", § 13 (f) ; See also NATO Final communiqué Ministerial meeting of the North Atlantic Council held at NATO headquarters", NATO Press Release Doc. PR (2007) 130, Brussels, 7 December 2007, § 2.

²⁵ See UN Daily Press Briefing by the Offices of the Spokesperson for the Secretary-General and the Spokesperson for the General Assembly President, 15 November 2007. Available at: <http://www.org/News/Briefings/docs/2007/db071115.doc.htm>. Accessed 11 August 2008.

²⁶ See Natalie Tocci (2008), "The European Union as a Normative Foreign Policy Actor", Centre for European Policy Studies (CEPS) Working Document No. 281/January, § 6.2.

promptly defined the Ahtisaari plan a proposal with all the right elements for a fair and sustainable solution.

The same June, in the occasion of the 62nd Session of the UN General Assembly, Russia called for a continuation of the negotiating process to find an acceptable solution for both parties. The solution, according to Moscow, should be in fully observance and compliance with the Security Council Resolution 1244. Hasty decisions able to boost separatist feelings were among Russian concerns.

In this scenario, the Parliamentary Assembly of the Council of Europe (PACE) in its Recommendation 1780 (2007) of July 2007 punctually reiterated its availability to play a role in the future Kosovo institutional framework:

At the request of interested partners and international organisations, the Council of Europe's offer of help, in its sphere of competence, will be reiterated, while in due course taking account of the prospects which would be afforded by the adoption of a new legal and institutional framework. The main lines of the assistance on offer correspond on the whole to those mapped out by the Assembly. However, it will not be possible to fill in the details until a final settlement has been approved and in-depth consultations with all parties concerned have taken place, allowing to define the exact nature of the Organisation's contribution. This applies in particular with regard to its involvement in any future international civilian presence.

The same month, the EU in its Multi-Annual Indicative Planning Document for years 2007-2009 for Kosovo made clear its intention to accompany the realisation of requirements in relation to any future status settlement and to support Kosovo to develop into a stable, modern, democratic and multi-ethnic society. *"The authorities of Kosovo will be accompanied by a future international civilian presence that will have corrective, monitoring and mentoring functions,"* were the words used by the EU. In addition, support given to the implementation of the UN Standards for Kosovo was clearly indicated in the planning document.

In this context, a further attempt to strengthen the value of the Ahtisaari plan can be found in the so called "Pocantico Declaration." Held at the Pocantico Conference Centre on 12-14 April 2007, the conference on "Developing a Strategy for Kosovo's First 120 Days" was designed to assist the Kosovo government in developing a sound strategy for governance during the critical first 120 days, as envisaged by the Ahtisaari plan. The conference was chaired by Ambassador Frank Wisner and Ambassador Wolfgang Petritsch. One of the accomplishments of the meeting was the signing of the Pocantico Declaration, in which the Kosovo Unity Team pledged to collaborate and work together in the planning and implementation of significant aspects of the Ahtisaari plan.

Amongst others, the meeting was attended by former US President Bill Clinton, Madeleine Albright, Ben Crampton from the International Civilian Office (ICO) Preparation Team and Ambassador Richard Holbrooke. The meeting saw the participation of Ms. Rosemary Di Carlo, Deputy Assistant Secretary in the Bureau of European and Eurasian Affairs, who will be involved in the scandal raised by the Ljubljana journal *Dnevnik*.

Kosovo Standards implementation and the status process

The time in between the presentation Ahtisaari proposal, March 2007, and the end of the Troika reporting period, December 2008, proved to be very useful to evaluate the implementation of the UN “standard before status” policy.

The importance of such analysis is confirmed by the Recommendation 1822(2008) of the Parliamentary Assembly of the Council of Europe (PACE):

1. [...] Parliamentary Assembly strongly affirms that in no way should the status process shift the attention of the Provisional Institutions of Self-Government (PISG) and the international community from the implementation of the Standards for Kosovo. In fact, putting a renewed and resolute focus on standards is even more necessary to foster trust and facilitate reconciliation in the current climate of political tension, determined by the failure to reach a compromise.

Created as a series of benchmarks to measure the progress achieved by Kosovo's institutions, the “standard before status” policy, though applied since 2001, was formally enounced in December 2003 with the publication of the “Standards for Kosovo”, followed by the “Kosovo Standards Implementation Plan” of March 2004.

However, due to the violence of March 2004 the policy was reviewed and priority was given to those standards reinforcing multi-ethnicity and decentralisation. It became clear that requesting the full implementation of all standards as a prerequisite for talks on the final status of Kosovo would have been unrealistic. The events of March 2004 were also widely interpreted as a failure by the international community to prevent and respond to interethnic violence. Hesitations regarding the issue of standards and how to assess progress towards standards implementation were marks of certain deficiencies in the planning phase and a failure to ensure the continuity of the international effort.

Then in May 2005, UN Special Envoy Kai Eide was assigned to reconsider the implementation of the standards. In his report, dated October 2005, Eide concluded that standards' implementation “...has been uneven.” He characterised organised crime and corruption as “widespread phenomena” and described the Kosovo society as “deeply-divided,” one “which is still recovering from post-conflict trauma.”

A few months later, the European Partnership adopted in January 2006 integrated the content of all eight chapters of the “UN Standards for Kosovo” into its general structure. This resulted in one single legal framework for implementation and monitoring.

In October 2007, Mr. Eide regretted that insufficient emphasis had been put on standards implementation during the status process. As a result, a lot of time had been wasted and the international community was today faced with the consequences of its inaction. Mr. Eide also criticized the international community for not providing “sufficient incentives” for Kosovo Albanians to implement standards that would have made Kosovo politically and economically viable.

In this scenario, what is clear of the “standards before status” is that it has never been accepted by Kosovo leaders as they have never considered the standards their own goals.

Furthermore, it is widely recognised that the uncertainty connected with Kosovo's final status has undermined progresses on the ground. UNMIK introduced the “standards before status” policy, albeit rather late. While such strategy had the potential to add sense of direction to the self-governing institutions and the people, the standards should be perceived as achievable and realistic aims. If too strict and inflexible, they would lack credibility. This has been the case of Kosovo, where the “Kosovo Standards Implementation Plan” outlined the features of a modern and democratic society, a process that could take decades to be completed.

In this situation, it is appropriate to mention what the Slovak political scientist Ms. Katarina Mallok stated about the international negotiations for the solution of the Kosovo status: *“The international community has made a fundamental mistake by allowing a discussion about the status of Kosovo before the country had been stabilised.”*

Status negotiations under the Troika

In reaffirming that the UNSC Resolution 1244 (1999) and the November 2005 guiding principles of the Contact Group would continue to be their operative framework, Troika's negotiators clarified that although the Ahtisaari plan was still on the "table," they would have been prepared to endorse any agreement the parties might be able to reach. In addition the troika had no intention of imposing a solution. The burden was therefore on each party to convince the other side of the merits of its position.

"Our aim in the troika, even if we did not get a solution on Kosovo's status, was to get agreement on the relationship between Serbia and Kosovo, independent of how and when the status questions was resolved," EU Troika negotiator Ischinger clarified on 21 November .

Furthermore, "...any settlement needs to be acceptable to the people of Kosovo, ensure standards implementation with regard to Kosovo's multi-ethnic character and promote the future stability of the region," the Contact Group explained.

The scheduled meeting comprised 10 sessions, six of which consisted to face-to-face dialogue, including a final intensive three-day conference in Baden, Austria, as well as two trips to the region. The Baden Conference marked the end of Troika-sponsored face to face negotiations. As in the opinion of the EU representative Wolfgang Ischinger the session was *"one last opportunity to seek a negotiated settlement."*

Meanwhile, in the November 2007 communication to the Council and the European Parliament, the European Commission stated that the Provisional Institutions for Self-Government (PISG) have fulfilled their core roles in their areas of competence. Going further in reading the communication, the Commission defined relations between Albanian and Serbs in Kosovo as "strained." In addition, on the Kosovo status the Commission affirmed in the communication that:

However, the status issue has continued to dominate Kosovo's politics. Kosovo's political leaders participated in the process of determining Kosovo's status and co-operated with the international community and the EU planning teams in preparations for status implementation in line with the Special Envoy of the UN Secretary General's package.

In the same Communication the EC described the Kosovo status as "unsustainable" and in urgent need to be settled. The EC also portrayed the situation of minority rights as guaranteed by law, but restricted in practice because of security concerns. The EC went further in assessing the reality of specific minorities,

namely Roma, Ashkali and Egyptian: difficult living conditions, large discrimination and lack of comprehensive integration strategy were among the issues of EC's concern.

At the same time, in its progress report on Kosovo, the EC made clear that in its opinion the Kosovo Assembly was lacking qualified staff, particularly on legal and IT issues. According to the EC's report, the Assembly was still dependant on international experts; particularly in the legislative processes and the monitoring of the implementation of laws. Additionally, as from the report, EU integration matters were rarely discussed.

During the negotiations, Pristina restated its preference for Kosovo's supervised independence and reconfirmed the acceptance of the Ahtisaari proposal. Belgrade rejected the Ahtisaari proposal and restated its preference that Kosovo be autonomous within Serbia. As a result, there was no discussion on the Ahtisaari proposal, nor any debate on its possible modification. Therefore, despite Troika's repeated call for fresh ideas and a spirit of compromise, neither side was able to convince the other to accept its preferred outcome.

The situation was summarised by the US Troika negotiator Frank Wisner. “[...] *The Ahtisaari plan was never taken off the table during the Troika talks. The Serbian side rejected it, and the Kosovo side accepted it – Ahtisaari's plan is still there, alive and well,*” Wisner explained.

In this scenario, it is interesting to see how local population felt increasingly frustrated as they did not feel involved in the international talks which were to determine the province's future. “*Many people feel cut off from high-level international negotiations and powerless to influence decisions made by the US, Russia and the EU about Kosovo. There is an urgent need to include the people of Kosovo in decisions about their own future,*” stated Ferdinand Nikolla, director of the Kosovo's Forum for Civic Initiatives (FIQ) in December 2007.

To cite the Troika report: “*After 120 days of intensive negotiations, however, the parties were unable to reach an agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty.*” Although the adverse outcome, “under the Troika's auspices the parties engaged in the most sustained and intense high-level direct dialogue since hostilities ended in Kosovo in 1999. The negotiations created an opportunity to engage in dialogue at the highest levels,” the Troika reported to the UN.

In November, asked if he saw any justification for an extension of talks as suggested by Botsan-Kharchenko, EU envoy Wolfgang Ischinger said: “My answer is ‘No’.” The same conclusion was reached by the US Troika negotiator Frank Wisner: “The conclusion will be pretty self-evident: We did not find a solution.” The US negotiator went further by saying that “The Ahtisaari report deserved to be acted on.”

Meanwhile, in the field, the newspaper “The Sophia Echo” reported NATO and the UN police planning to tighten their control over the predominantly-Serb north of Kosovo: “The action would be aimed at preventing Serb-run areas from joining Serbia, in case Kosovo’s ethnic Albanian-dominated parliament proclaims independence, once the current phase of talks on the UN-administered territory’s status are concluded on December 10.”

Debating the Troika’s report

On December 19, the UN Security Council met to hear from Vojislav Kostunica, the Serbian Prime Minister, and Fatmir Sejdiu, the President of Kosovo. Kostunica insisted that Kosovo should remain part of its territory.

On the contrary, Sejdiu laid out the Kosovars’ demands for quickly gaining independence, a move that would be backed by the US and key European Union members. This attitude was already clear on 4 December when the same Sejdiu said that: “*Any action will take place, in coordination with the EU and the US, and that is going to be very soon.*” A position backed by Prime Minister Thaçi in his interview to the Financial Times: “*The EU is the key. We are for a co-ordinated declaration of independence. For us recognition is as important as the declaration.*” Attitude the latter somehow confirmed by the statement of the EU High Representative Solana who on 11 December 2007 stated that, although Belgrade and Pristina did not reach an agreement during the negotiations under the auspices of the Contact Group, “[...] *this does not mean we cannot continue our search for bilateral agreements between the two sides and the European Union.*”

Coming from the 19 December discussions, British Ambassador John Sauer said that the meeting “underlined just how enormous the gulf is between the two parties, and how the current situation in Kosovo is ‘unsustainable.’”

Reaction from Belgrade arrived soon later, in the resolution voted by the national assembly on 26 December. Raising the stakes in the bid to block independence, the national assembly voted 220 to 14 in

favour of a resolution saying Serbia would not sign any treaty that did not acknowledge its territorial integrity and sovereignty over Kosovo. Focusing on the Stabilisation and Association Agreement (SAA) that Serbia might have signed with the EU, the resolution said “any treaty Serbia signs, including the SAA, must be in keeping with preservation of (its) sovereignty and territorial integrity.” According to the resolution, Serbia would have shelved a decision on NATO membership and would have opposed an EU supervisory mission preparing to take over from the UN in Kosovo unless it won the Security Council approval.

According to the Reuters news agency, the UN did not expect any concrete solutions to come as a result of the meeting on December 19. “The Security Council is divided, it is not capable of deciding, so the message is expected to be that all other actions will transferred to Brussels and the European Union,” an unnamed European diplomat stated.

In this context, the UN Security Council signalled that it would have not been able to resolve the status of Kosovo, the breakaway Serbian province; then the solution would have come from outside the United Nations.

After the UNSC session, European and US representatives announced their intention to assume responsibility for Kosovo’s fate, considering further talks futile. EU members also agreed to send a police mission to the province, though unable to reach agreement over Kosovo’s final status. According to conclusions reached at the Brussels summit of December 2007, the EU agreed on the status quo to be untenable and in need of a solution to be found. EU’s determination to stabilize the Balkans can thus be found in the fact that, despite differences in the matter of recognizing Kosovo independence, all EU members apart from Malta were expected to participate in the EULEX mission.

On the contrary, Moscow was of the opinion that the UN mission can only be replaced via a UN Security Council resolution. On 21 December 2007 Sergei Lavrov officially warned the international community that the Ahtisaari plan should not be perceived as the final decision of the Kosovo status. According to Lavrov, the plan was “initiated as a proposal, which was then submitted for consideration by the sides. They did consider it. One of the sides rejected the plan. And that’s the basis on which to proceed.”

Besides, the permanent mission of the Russian Federation to the United Nations reacted to the end of the Troika process by saying:

[...] By encouraging the separatist aspirations of Pristina, the US and some EU nations openly ignore the useful ideas and suggestions resulting from the talks held between the sides under the aegis of the mediation troika. That in the 120 days of dialogue a final compromise has eluded the parties is being used for absurd claims that the negotiation potential is exhausted.

[...]

But one gets the impression that this is why somebody would like to wreck the dialogue as soon as possible in order to fulfil their promises to the Kosovo separatists.

The Kosovo November Election

While the Troika was still at work, elections in Kosovo took place. Parliamentary elections to the Assembly were held on 17 November 2007 together with the Municipal ones. Results brought to power a coalition of the Democratic Party of Kosovo (PDK) of Hashim Thaçi, and of the Democratic League of Kosovo (LDK) of Kosovo's President Fatmir Sejdiu.

It is important to note the memorandum of understanding signed by the political parties on 5 October 2007 to keep the “Status Question” out of the election. The same point was stressed by Tim Guldemann in his interview dated 14 October 2007 by saying: “Our mission stresses that the upcoming elections have to be considered independent from the status discussions.”

What was particularly demanding was that three elections were held at the same time (Assembly, Municipal and Mayoral) with the introduction of an “open lists” for the Kosovo Assembly and Municipal Assembly elections.

The 2007 elections, as the others held before, were observed by the Council of Europe which in fact opened an election observation mission for the 17 November Assembly and local elections. As from the words of Mr. Giovanni Di Stasi, Head of the Council of Europe Election Observation Mission, aim of the mission was to “send the best possible observers, fully equipped to perform with the highest professional standards their crucial task of observing an election process.”

Furthermore, in his opening address to the short-term observers at a briefing in the ABC Cinema in Pristina on 13 November 2007 Giovanni Di Stasi reminded the group that they were obliged to conduct in seven weeks work that normally would have taken five months. The Mission was defined by the same Di Stasi as “a race against time.”

The overall voter turnout was just above 43%, showing a decrease from past elections. As the Council of Europe Congress of Local and Regional Authorities (CLRAE) stated:

[...] The confirmation of this continuous downward trend, which started in the 2001 elections, reveals dissatisfaction among the population, begetting an appreciable frustration among voters with their regime of governance, due in the main to the lack of improvements expected following the previous four elections. To an extent, this turnout reflects a particular loss of trust due to widespread discontentment with the prevailing socio-economic situation that affects all communities living in Kosovo in their day-to-day life, and the atrophying effect of eight years administration by the United Nations.

In this scenario, Serbia continued to discourage Kosovo Serbs from participating in the provisional institutions of self-government and elections in Kosovo, and exhort them to not to participate in elections to the Kosovo provisional assembly and municipalities.

The low turnout (43%) and the lack of participation by Kosovo Serbs voters were not the only worrying issues. Even if the need for election was known well in advance the call for the elections was very late. In addition, although in theory the electoral system might not be seen complicated, in practice was difficult to handle for an ordinary voter. It resulted in a time-consuming process and in too many cases required that voters with limited abilities asked for assistance to cast their ballot, thus infringing on the secrecy of the ballot. The late call also produced that the OSCE was much more involved than formally envisaged.

Although well organised despite the short notice, in the second round Kosovo Mayoral Elections several shortcoming persisted. In fact the results of the five municipalities with either majorities or significant populations of Kosovo Serbs were annulated due to the low participation of the Kosovo Serbs and the need to ensure fair representation of non-Albanian communities in institutions.

The overall conclusion of the Kosovo elections by the Council of Europe gives the idea of the core problem of the voting system. In stressing the alarming low percentage of the voter turnout, The Council of Europe noted that:

The imposed timeframe for these elections placed an inordinate stress on the logistics of organizing the vote. Adequate and apposite timeframes are a sine qua non in the proper execution of any plausible and democratic electoral contest. In future elections, every effort should be made to ensure that democratic processes are not potentially compromised by truncated preparatory and run-in periods.

“The international community has not met its obligation to contribute to capacity-building in the field of elections,” again the Council of Europe remarked.

The International Community reacted uniformly by welcoming the results of the election and by regretting the boycott of the Kosovo Serbs. In this context, the former UN SGSR for Kosovo Joachim Rucker after having certified election results for the Assembly of Kosovo defined as “unfortunate” the

lack of participation by Kosovo Serbs.” As he pointed out “the focus now must be on finding a way forward for the UN-administered province.”

Meanwhile, the European Union through its Commissioner for Enlargement Olli Rehn recalled the preliminary assessment of the Council of Europe and thus welcomed the peaceful conduct of the election. Besides, Mr. Rehn’s called on Kosovo Serbs to take a more constructive role in Kosovo’s future.

NATO Secretary General welcomed the calm and peaceful conduct of the elections in Kosovo and the assessment of the Council of Europe observers but defined the low turnout of Serbian voters especially disappointed.

Before the Declaration of Independence: Pristina, Belgrade and the IC at the beginning of 2008

January 2008 was ruled by the numerous meeting between Pristina and Brussels. Kosovo Prime Minister Mr. Hashim Thaçi met NATO Secretary General Jaap de Hoop Scheffer and the EU Commissioner for Enlargement Olli Rehn. The latter told Kosovo Primer Hashim Thaçi that the EU would have been resolute to lead the coordination of decision regarding the status of Kosovo.

On 24 January Kosovo Prime Minister, Hashim Thaçi also reiterated that Kosovo would have declared its independence from Serbia soon, but only acting in coordination with the international community. “We are ready for status. We are cooperating very closely with Washington and Brussels, and we will continue this cooperation and our joint efforts,” he said.

In his regular tri-monthly report on the UN mission to Kosovo (UNMIK), the UN Secretary General Ban Ki-moon stated that the status quo was virtually untenable, and that was why “Security Council and the international community’s main priority should be to continue the process of determining Kosovo’s status.” Moreover, Secretary General’s spokeswoman Michele Montas reported that the SG believed that an agreement between Belgrade and Pristina, approved by the UN Security Council, would have constituted the best solution for the future status of the province. “Ban also believes that resolving the Kosovo status outside the UN framework would have serious consequences for the world order,” Montas also added.

For Belgrade, Kosovo's declaration was supplemented by a strong European offer to the Serbs: trade the residual shell of formal sovereignty over Kosovo for the practical chance of a better future in the EU. For instance, at the EU Brussels meeting of December 2007, French President Nicolas Sarkozy came out firmly for independence, saying that a condition for Serbian EU membership was recognition of Kosovo independence. Meanwhile, Dutch media reported that Holland blocking the initiative to accelerate Serbia's EU integration. They quoted the Dutch foreign minister who said that the Stabilization and Association Agreement (SAA) would have not been signed until Ratko Mladic was in The Hague. "I want Mladic in an airplane before I sign the agreement," said Maxim Verhaegen.

At the same meeting, Prime Minister Vojislav Kostunica considered the conclusions of the EU summit in Brussels unacceptable and offensive. What Kostunica found particularly insulting was the idea of a Serbian accelerated EU membership in exchange for the Kosovo province. The Prime Minister also deemed the independence of Kosovo in breach of the UN Charter and UN Security Council Resolution 1244.

In its Resolution 1595 (2008) of January 2008 the Parliamentary Assembly of the Council of Europe (PACE) deeply regretted that a mutually-accepted solution to the status of Kosovo was not found, but said that alternative solutions should have been envisaged to continue talks on the basis of UNSC Resolution 1244 (1999). The same document called the UN Security Council to do everything in its power to reach a compromise able to prevent Kosovo from becoming a "frozen conflict."

Support to a continuation of talks came from SP Senator Tiny Kox, Chair of the United European Left (GUE) in the PACE. "[...] if Kosovo can declare itself independent unilaterally, other regions will want to follow the example, with potentially serious consequences. By committing itself to supporting further negotiations, however difficult these may be, the Council of Europe is demonstrating wisdom at what is an important moment, when a number of European Union member states and the US are determined to proceed with haste, seldom a good idea in international politics" Senator Kox stated.

According to the Council of Europe, the UN Security Council should have overcome existing differences by imposing a solution, but it was incapable of achieving a unanimous position. CoE's attitude, however, was all in the words of Lluís Maria de Puig, President of the Council of Europe Parliamentary Assembly, who stated that:

“Whatever its status, Kosovo should be an area which is safe for all those who live in it regardless of their ethnic origin, and in which the values of democracy, tolerance and multiculturalism are shared by its population and institutions.”

On 16 February, the EU decided to launch the EU Rule of Law mission in Kosovo (EULEX KOSOVO). Objective of EULEX KOSOVO is to support the Kosovo authorities by monitoring, mentoring and advising on all areas related to the rule of law, in particular in the police, judiciary, customs and correctional services. The key priorities of the mission are to address immediate concerns regarding protection of minority communities, corruption and the fight against organised crime. Yves de Kermabon has been appointed Head of Mission of EULEX KOSOVO.

In parallel with this Joint Action, Mr. Pieter Feith was appointed as European Union Special Representative (EUSR). His mandate based on the policy objectives of the EU in Kosovo, included tasks such as to play a leading role in strengthening stability in the region and in implementing a settlement defining Kosovo’s future status. Furthermore, he would provide local political guidance to the Head of the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO). In conclusion, the EU Council anticipated that the powers and authorities of the future International Civilian Representative would be vested in the same person as the EUSR.

However, in his January report, the Secretary-General noting the EU growing commitment and its readiness of the European Union to play an enhanced role in Kosovo anyhow expressed his belief that a negotiated solution, to be endorsed by the Security Council, would have represented the best way forward. He also felt that any failure to resolve Kosovo’s future status within the framework of the UN would have serious repercussion within the UN system.

The Serbian Election of January 2008

In this scenario, the presidential elections, the first since the Montenegro’s declaration of independence, were held in Serbia on 20 January 2008. However, in the first round of elections none of the candidates secured an absolute majority of the votes cast. Therefore, a run-off election took place on 3 February 2008 between Tomislav Nikolic of the SRS and Boris Tadic of the DS. The latter was elected president of Serbia with 51.61 percent of the votes cast.

The Kosovo issues did not dominate the scene during the presidential campaign. Differences between the candidates about the independence of Kosovo were not that great – both of them were in fact against an

independent Kosovo. Therefore, Tadic's victory meant that a majority of Serbia's citizens decided to reduce the costs of losing Kosovo, by not giving up on the European future for Serbia.

The only point where they explicitly and clearly diverged was in their stance towards the EU. It turns out that was the EU's future rather than the Kosovo past which decided the electoral result. Opinion polls in Serbia have consistently recorded a high level of popular support for EU integration. A government-sponsored poll found that 71% of those polled said that if Europe were to recognise Kosovo, the diplomatic fight for Kosovo ought to be carried on without severing relations with the EU. However, the EU insisted on the separation of Serbia's European integration and the Kosovo issue, while using the very integration process as a carrot for Kosovo's independence.

Unfortunately, the attraction of EU membership in Serbia, long seen as the magnet which would facilitate the acceptance of an unpopular decision on Kosovo, was waning.

Even if the SAA were to be signed, parliamentary ratification is very likely to become entangled with the Kosovo issue, in particular with how Serbia should treat the question of the EU's planned mission.

The OSCE Chairman-in-Office, Finnish Foreign Minister Ilkka Kanerva congratulated President Tadic and underscored the OSCE's readiness to continue to support Serbia's reform processes. Congratulations came together with the optimistic prospect for a continuation of the OSCE Mission in Kosovo.”

Kosovo declaration of Independence: reaction of the key-players

The Kosovo Declaration of Independence arrived on Sunday 17 February 2008. Read by its Prime Minister Mr. Hashim Thaçi in an Assembly of Kosovo convened in an extraordinary meeting, the declaration begins presenting Kosovo as an independent and sovereign state in “full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his comprehensive Proposal.”

In the declaration of independence, authorities in Pristina committed themselves to implementing the Ahtisaari plan, although this document was not approved by the UN Security Council and had therefore no binding value. This is of utmost importance because according to the Ahtisaari plan, at the end of the transition period of 120 days, all responsibilities should be transferred to Kosovo's institutions and the mandate of UNMIK terminated. This is bound to create difficulties, as there is so far no plan to terminate UNMIK's deployment in Kosovo.

International reaction to Pristina's declaration of independence arrived immediately. While Thaçi was reading the declaration, ten ministers from the Serbian government went, with television crews, to Kosovo, both the north and the enclaves. Meanwhile Kostunica stated:

As of today, we must show greater concern and solidarity with our people in Kosovo-Metohija. Ministries have been directed to work and provide considerably better living conditions, help create new jobs and launch investments in the province. The state of Serbia will take greatest possible care about its each and every citizen in Kosovo-Metohija.

Soon after the Kosovo declaration of independence, Serbian Foreign Minister Vuk Jeremic, in his intervention to the Permanent Council of the OSCE, called the UN SRSG to use his reserved powers, as from the CFPS, by proclaiming the illegitimacy of Kosovo declaring the independence not in conformity with resolution 1244. In addition, Serbian Foreign Minister made clear that KFOR's capacity to operate in the field would be conditioned to the neutrality of its status.

The EU did not manage to reach agreement on a joint recognition by all its members, because of the reservations of a number of member states (notably Romania, Slovakia, Spain, and Cyprus). However, the Council welcomed the continued presence of the international community based on UNSC Resolution 1244 and took notes that "its Members States would decide, in accordance with national practice and international law, on their relations with Kosovo." In conclusion, the Council reaffirmed its conviction of Kosovo as a *sui generis* case.

In this context, the President of the European Parliament Mr. Hans-Gert Pöttering opened the February plenary session by saying that Kosovo's declaration of independence reflects the "will of the people." Besides, Mr. Pöttering expressed his firm conviction in considering the case of Kosovo not a precedent: "The situation in Kosovo is unique; it is a special case which cannot be compared with others." In addition, the President welcomed the Council's decision to send a police and administrative mission to Kosovo to help with a smooth transition in the region.

On 20 February 2008, Tiny Kox, President of the Group of the Unified European Left at the Council of Europe and Francis Wurtz, President of the European United Left/Nordic Green Left Group in the European Parliament did not advocate a status quo and called for the continuation of talks "which would allow an honourable exit from the current dramatic impasse."

On the military presence after the declaration, NATO reaffirmed KFOR's intention to remain in Kosovo on the basis of UNSCR 1244. On this point, Lieutenant General Xavier de Marnhac, KFOR Commander,

confirmed:

“In this time of uncertainty following Kosovo's Declaration of Independence, one thing is certain. KFOR's mission remains unchanged. We will continue to provide a safe and secure environment for all the people of Kosovo regardless of ethnicity or location. KFOR will execute this mission with impartiality and in a determined manner. As always, KFOR will not tolerate any acts of provocation or violence. It is of utmost importance that KFOR remain impartial and not interfere with the very delicate political process that is ongoing. We must all take care not to be seen as participating in social events either supporting or renouncing Kosovo's Independence.”

The NATO Secretary General also remarked on the importance of the neutrality of KFOR status in the field:

“All parties should recognize that KFOR will continue to fulfil its responsibility for a safe and secure environment throughout the territory of Kosovo, in accordance with UNSCR 1244, unless the Security Council decides otherwise. KFOR will continue to provide security for all citizens of Kosovo, majority and minority alike, in an impartial manner, just as before.”

On 18 February 2008, the NATO North Atlantic Council (NAC) further reaffirmed the validity of UNSCR 1244 and clarified that “...as agreed by Foreign Ministers in December 2007, unless the UN Security Council decides otherwise NATO's responsibility and capability to ensure a safe and secure environment in Kosovo remain unchanged. KFOR will continue to execute this mandate in an impartial manner in accordance with its Operational Plan.”

For the UN, Secretary General Ban Ki-Moon in bringing the declaration to the attention of the Security Council, ensured that pending the guidance of the Council UNMIK would have continued to consider the UNSC Resolution 1244(1999) the legal framework for its mandate.

Meanwhile, the OSCE guaranteed that the situation in Kosovo was going to be discussed by the 56 OSCE participating States, but each of them would have addressed Kosovo's declaration of independence in their national capacity.”

After the Independence

To confirm the constant danger of instability, after the declaration of independence a number of serious incidents took place. On 17 and 21 February 2008, demonstrators in Belgrade attacked several foreign embassies, drawing harsh international criticism of Belgrade's incapacity or unwillingness to prevent these incidents. Before and after 17 February, grenade and Molotov cocktail attacks were directed at UN and EU facilities and vehicles in northern Kosovo. On 19 February, two customs and border posts at

Brnjak and Jarinje were attacked and burned down. Other attacks followed on 21 and 25 February against border police at the Merdare and Mutivode posts.

On 3 March, Serbian Railways staff attempted to take control of a section of Kosovo's railway network in the municipality of Zeeman in northern Kosovo. Finally, on 17 March, UNMIK police and KFOR had to intervene to break the occupation of the district court in north Mitrovica by former employees demanding that they be returned to their jobs. This intervention provoked a reaction from local groups of Serbs, who mobilized to free some of the detainees. Allegedly using women and children in the front lines, they blocked the street, and attacked police forces and troops with small arms, grenades, and Molotov cocktails. Reports indicated some 100 foreigners and 80 Serbs wounded, and one Ukrainian UNMIK policeman deadly injured.

The 17 March UNMIK/KFOR operation appeared to have been more an ad hoc reaction to provocation than part of a carefully choreographed plan. Legitimate questions have arisen as to whether its timing, tactics and potential consequences were fully considered in advance. In addition, the ICO already faced problems. It abandoned its satellite office in north Mitrovica due to security problems and relocated the personnel to south Mitrovica.

At the International level, EU High Representative Javier Solana, Swedish Foreign Minister Carl Bildt and NATO Secretary General Jaap de Hoop Scheffer were the only senior officials to visit Kosovo in the first month of independence. On 28 February in Vienna, several EU member states and the U.S. took the lead to establish an International Steering Group to supervise Kosovo independence. The International Steering Group, formed by twenty-two countries and not including Russia, is a shadow of the structure called for under the Ahtisaari plan and it is composed entirely of countries that support Kosovo's independence.

Furthermore, the situation was made more complicated by Russia's continued firm support of Serbia and efforts to discourage recognitions and resistance to UNMIK downsizing. While the Serbian strategy was to divide Kosovo, the IC did not have a clearly defined and coordinated response. Moreover, Belgrade instructed Kosovo Serbs to refuse contact with the new EU missions by insisting that the only international presences with which it would cooperate were those mandated under Security Council Resolution 1244 of 1999, namely UNMIK and NATO.

Kosovo's independence has split the international community. The Ahtisaari plan, the ICO and the EULEX mission lack UN Security Council backing due mainly to Russian opposition. Therefore, Secretary-General Ban Ki-moon stated on 18 February that: "It is my intention to act in an effective, realistic and concrete manner. In doing so, pending Security Council guidance, I might have to adjust to developments and changes on the ground". But in the face of strong opposition from Russia, which also held the presidency of the Security Council in March, to any Ahtisaari-like transition, he did not extend a public invitation to the EU missions.

These difficulties were further confirmed by UN Secretary-General Ban Ki-moon's spokesperson, Brendan Varma, reportedly stated to the BBC: "At this point the UN mission has not entered the transition period. We are still on the ground, as we have been since 1999. UNMIK will perform the duties entrusted to it with Resolution 1244, until [the] UN Security Council [has] decided otherwise....We would, of course, welcome agreement on this problem, but the Council is at the moment deeply divided. The Secretary-General's position is that our mission will continue in Kosovo until the Council tells them to stop."

On 11 March, UN and EU officials met in New York to search for a cooperation formula; some concrete ideas were discussed, but no final plan was agreed.

As for the OSCE, the future of the Kosovo mission, which is supposed to provide much of the ICO's field presence, has been put into doubt by Serbia and Russia, which are keeping it on a renewable monthly mandate while pressuring it to be "status neutral."

The EU position so far: an assessment

Following the recommendations made in the Ahtisaari proposal, the EU had started preparations for the deployment of two separate missions: an International Civilian Office, which, according to the Ahtisaari proposal, is meant to take over the leadership of the international presence in Kosovo from UNMIK; and an ESDP rule of law mission. The Council approved the deployment of these two missions on 4 February 2008, and the Council statement of 18 February places these two missions under the aegis of resolution 1244. Supporters of this approach cited paragraph 10 of the resolution 1244, which "authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo". Moreover, the EU contends that 1244 did not predetermine the outcome of final status talks.

Confirming the above interpretation of UNSC Resolution 1244, the EU was of the opinion that “*acting to implement the final status outcome in such a situation is more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.*” In addition, Solana, in an interview to the Belgrade weekly *NIN*, declared that the decision of the EU to send its mission to Kosovo could have not be qualified as a violation of international law, although UN Security Council Resolution 1244 did not mention such a possibility.

Furthermore, the European Union officially endorsed the Ahtisaari plan. However, some of its member states - Slovakia, Greece, Cyprus, Romania and Spain - are known to be cautious, due to traditional ties with Belgrade or fears of potential repercussions of Kosovo's independence in their domestic affairs. Thus, many of these countries found it difficult to recognise the independence of Kosovo in the absence of endorsement by the UNSC.

Co-operation among the International Organisations in Kosovo

The lack of proper co-operation within the IC is evident and can produce unexpected and negative effects in the next future. This is confirmed by the fact that the building of EU's mandate in Kosovo; this has not been paralleled by a progressive withdrawal of UNMIK. The absence of consensus within the UN Security Council has prevented this, and the UN Secretary General has so far refused to take any unilateral decision regarding UNMIK's mandate. Because of this uneasy situation, it remains unclear how the coexistence of these two presences will develop in the future. It is also unclear how these two organizations will interact with the new Kosovo institutions.

Another issue of concern about the future of the UNSC Res. 1244 is whether the resolution, which put an end to the conflict in 1999 and organized the international administration of Kosovo, remains valid and continues to provide a legal basis for the international presence in Kosovo. In his report dated 28 March, the UN Secretary General recognized that "the evolving reality in Kosovo is likely to have significant operational implications for UNMIK. Pending Security Council guidance, there might be a need for UNMIK to adjust its operational deployment to developments and changes on the ground in a manner consistent with the operational framework established under Resolution 1244 (1999)." However, co-operation has been hampered by the Russian influence in the Security Council. Moreover, holding the Security Council presidency in March, Russia is maintaining pressure on the Secretary-General to keep UNMIK well budgeted and staffed, and to resist UNMIK-EULEX transition.

But without consensus on Ahtisaari, there is no consensus on UNMIK's fate. The UN Secretariat is reluctant to allow the mission to start relinquishing powers to the Kosovo government and EU missions. UNMIK will remain for now, and Pristina and Belgrade are each already challenging it. Pristina is in fact determined to prevent UNMIK from assuming any residual post-transition role. "From June it has no job to do here.... We will tolerate them longer only if the EU needs them for a few more weeks" is a common refrain.

The coalition of Kosovo's supporters does not want to force the pace of transition, and the 120-day period looks increasingly empty of content, with no specific benchmarks or agreed-upon timelines. UNMIK will not disappear as assumed under the Ahtisaari plan, and Kosovo may find itself with multiple international presences working towards different goals.

The poor cooperation between the European Union Planning Team (EUPT) and UNMIK is one example of this situation. EUPT has been inwardly focused, on its own mechanisms, and its concern to present a new face and not be tutored has created a legacy of poor communication with UNMIK Police. They have not shared reports, EUPT chose not to co-locate staff, and the two leaderships did not even meet during the weeks just before and after independence.

Concerning the co-operation between the EU and NATO, already in 2006, as explained by the international Crisis Group, the two organisations were working together, agreeing at the staff level on technical arrangements working out details covering four areas: border management, military support to police operations, response to civil disturbances, and information/intelligence exchange. At that time, NATO further insisted that its continued military presence in Kosovo would be independent of the ICR and that there would be no UNTAES-like unification of civil and military commands in a single official.

Two years after, the issue has not gain from talks initiated in 2006. For instance, before the independence communication between NATO and the EU was good in the field but dysfunctional at the political level, according to officials and experts. A top diplomat at NATO said there was "enormous frustration" on both sides that NATO and EU policymakers were not talking to one another even though they shared the same security goals in Kosovo. On the ground, however, co-operation were going smoothly, with a variety of agreements and joint procedures signed and ready to be signed as soon as the EU would receive its mandate for Kosovo.

Today, however, the cooperation between NATO and the EU is problematic. Blockages due to well-known political issues have prevented the EU mission from using NATO assets on the ground.

“Autonomy” is the key-feature for the OSCE too. On this issue, on 14 October 2007 Ambassador Tim Guldemann, Head of the OSCE Mission in Kosovo, stated: “If the EU Mission is deployed and replaces the UN Mission, the OSCE Mission would become an independent mission, if all OSCE participating states agree to maintain the OSCE presence.” However, though its field presence is assumed to continue by the EU planning for Kosovo, the future of the OSCE mission in Kosovo is still uncertain, as its continued presence on the ground is subject to monthly reviews.

In order to solve these problems, the IC should agree on a common, comprehensive strategy for Kosovo. Furthermore, more flexibility is needed to allow cooperation to be improved. An agreement to differ but work together would be suitable.

Conclusions

The analysis conducted reveals an International Community which is still lacking a common strategy. The different levels of involvement in the process of independence of Kosovo fractioned the capability of the IC to equally react to changes coming from the field. The analysis thus reveals an international community divided between political and operative means.

On the Troika, the process contributed in bolstering the position of those who were in support of the independence of Kosovo. Conducted by negotiators far from being defined as “impartial”, the process ended in maintaining the Ahtisaari plan as the only plausible solution for Kosovo. A plan, however, rejected by one of the parties and not supported by the UN.

In this scenario, it is hard to conceive the transition of authority from UNMIK to the EU-led ICO without UN Security Council support. In case of persistent disagreements in the UN Security Council, both legality and legitimacy of the new mission will be seriously questioned.

As for the future of the country, Pristina will surely seek to secure the democratic legitimacy of the new institutions. In this regard, recent events are not very encouraging. The low rate of participation in the November 2007 elections to the Assembly of Kosovo indicates either dissatisfaction or certain apathy among Kosovo voters. None of these are welcome signs for the authorities.

In addition, the prospect of EU and NATO enlargement were indeed clearly the most important and efficient lever. Although EU officials publicly insisted that the issues of Kosovo and EU integration were

separate and there were no conditionality between the resolution of Kosovo's status and the EU integration process, the issue of EU enlargement was undeniably an element of the Kosovo equation. However, whereas some EU and NATO members have made it clear that they would recognise an independent Kosovo with or without UNSC resolution, others are much more reluctant. In the absence of a co-ordinated decision the process of integration of Serbia and Kosovo into Euro-Atlantic institutions would also be put on hold indefinitely.

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Making an Even Number Odd: Deadlock-Avoiding in a Reunified Cyprus Supreme Court

Tim Potier

Abstract

Substantive talks to re-unify the island of Cyprus re-commenced in September 2008. Sadly, the gulf between the two communities remains wide. The rejected ‘Annan Plan’ proposed a (federal) Supreme Court that would have included three non-Cypriot (deadlock-breaking) judges. This should not be preferred. However, to dispel any fears concerning the likely consequences of their absence, it is the purpose of this article to outline how any reunified Cyprus Supreme Court can rely on absolute political equality (alone), whilst still remaining functional and free from potential deadlock. The various procedures devised confirm that an even number can be made into an odd.

I. INTRODUCTION

THE reunification of Cyprus still eludes. The most recently completed process¹ culminated in a referendum, on 24 April 2004, in which the Turkish Cypriots voted (convincingly) in favour of the so-called ‘Annan Plan’, while the Greek Cypriots voted (even more convincingly) against². In the end, if the island *is* ever to be reunified, both sides will have to make significant compromises. Yet, as this author has recently demonstrated in a recently published book covering many of the most highly disputed matters, variation from the rejected Plan often need not affect / disadvantage either side³.

Cyprus – like Sri Lanka, Georgia and Moldova (to cite a few other similarly troubled societies) – is a country where any constitutional settlement would be only the start of what would be a long and difficult road to reconciliation. Success cannot and ‘should not’ be guaranteed; occasionally states *do* fail; the responsibility to avoid this happening must lie with the local population. One avoidable reflection of this, in the rejected Plan, was the inclusion of foreign (non-Cypriot) judges on the Supreme Court. Its progeny is clear and understood: the ad hoc tribunal system in international law. Still, attempts to ‘internationalise’ local problems should be avoided. In respect of the Supreme Court of the United Cyprus Republic, this was not done.

II. ANNAN PLAN (FINAL VERSION): PROVISIONS

¹ Commenced (under UN auspices) on 14 January 2002.

² The Turkish Cypriots voted 64.91% ‘yes’, 35.09% ‘no’; the Greek Cypriots, 75.83% ‘no’, 24.17% ‘yes’.

³ Tim Potier, *A Functional Cyprus Settlement: the Constitutional Dimension* (Verlag Franz Philipp Rutzen, Mainz und Ruhpolding, 2007).

The Supreme Court shall uphold the Constitution of the United Cyprus Republic (“the supreme law of the land”⁴) and ensure its full respect⁵ by other federal organs and the constituent states⁶.

The Supreme Court shall be composed of 15 judges⁷. Six judges shall hail from each constituent state, plus three judges who are not citizens of the United Cyprus Republic⁸. The judges from the constituent states shall be citizens of the United Cyprus Republic⁹. The three judges who are not to be citizens of the United Cyprus Republic shall not be subjects or citizens of “the Hellenic Republic or the Republic of Turkey or of the United Kingdom of Great Britain and Northern Ireland”¹⁰. Despite the inclusion of the non-Cypriot judges, political equality, guaranteeing effective participation for both communities, being a central requirement in any settlement on the island, is maintained¹¹.

The Court shall have its own Registry¹². There shall be a Registrar, who shall not be a citizen of the United Cyprus Republic, and two Deputy Registrars who shall not hail from the same constituent state¹³.

The Supreme Court shall assume its functions upon entry into force of the Foundation Agreement¹⁴, and evolve in its operation during a transitional period¹⁵. It shall come to sit

⁴ Article 3(1) of the Constitution (Annex I, at Part II) provides: “(1) This Constitution, having been democratically adopted by the Greek Cypriots and the Turkish Cypriots through their separately expressed common will, is the supreme law of the land and is binding on all federal authorities and the constituent states. Any act by the federal government or either constituent state in contravention of this Constitution shall be null and void”. See also: Main Articles, Article 2(3) (third and final sentence). “... [T]hrough their separately expressed common will...”: that is, via the “separate simultaneous referenda” (see: Annex IX, Article 1(1)).

⁵ Main Articles, Article 6(1).

⁶ Annex I, Part II, Article 3(3).

⁷ “The judges of the Supreme Court shall be appointed from amongst lawyers of high professional and moral standing” (Federal Law on Administration of Justice (Annex III, Attachment 26, Law 1), Part II, Section 3(4)). They “... shall not hold any other public office in the Federal Government or in either constituent state” (*Ibid*, Section 3(5)).

⁸ Federal Law on Administration of Justice (Annex III, Attachment 26, Law 1), Part II, Section 3(1). Article 6(2) of the Main Articles states: “(2) It shall comprise an equal number of judges from each constituent state, and three non-Cypriot judges until otherwise provided by law”. The first sentence of Article 36(1) of the UCR Constitution (at Part V) provides: “(1) The Supreme Court of Cyprus shall count an equal number of judges from each constituent state among its members...” Concerning the phrase “... until otherwise provided by law”, in Article 6(2) (of the Main Articles), Section 3(8) of the Administration of Justice Law provides: “(8) In terms of Section 2 of Article 6 of the Foundation Agreement, the composition of the Court, as provided in subsection (1) above, may be altered by a Federal Law”.

⁹ *Ibid*, Section 3(2).

¹⁰ *Ibid*, Section 3(3).

¹¹ Enunciated, most directly, in paragraph (iii) of the Preamble to the Main Articles: “Acknowledging each other’s distinct identity and integrity and that our relationship is not one of majority and minority but of political equality where neither side may claim authority or jurisdiction over the other”. See also: Main Articles, Article 2(1)(a); Annex I, Part I, Article 1(4).

¹² Federal Law on Administration of Justice (Annex III, Attachment 26, Law 1), Part IV, Section 24(1).

¹³ *Ibid*, Section 24(2). “(3) The Registrar and Deputy Registrars shall be persons of good moral character and conduct and shall have such legal qualifications and experience of practice as the Court may consider appropriate for their offices” (Section 24(3)).

¹⁴ Main Articles, Article 7(4).

(either) as a Constitutional Court or as a Court of Primary Federal Jurisdiction¹⁶. However, only those who shall serve as members of the Constitutional Court shall assume their functions immediately upon entry into force of the Foundation Agreement¹⁷. That is, the three non-Cypriot judges and three judges hailing from each constituent state¹⁸. The remaining six judges shall serve on the Court of Primary Federal Jurisdiction¹⁹ and, under the rejected Plan, were to have been "... appointed by the Presidential Council in the course of the month of July 2004..."²⁰ Until then, the 'other' (Constitutional Court) judges of the Supreme Court were to have exercised the functions attributed to the Court of Primary Federal Jurisdiction²¹.

The nine initial judges and the registrars of the Supreme Court are to be those Cypriots and non-Cypriots informed by the Secretary-General (of the United Nations) prior to the entry into force of the Foundation Agreement of their prospective appointment²².

The Court may divide itself into Chambers. Should it so decide²³, there shall be a "grand chamber of the Court" comprising all 15 members of the Court²⁴. The Chambers of the Constitutional Court shall be: the Grand Constitutional Chamber (comprising all members of the Constitutional Court) and the first, second and third constitutional chambers. Each of these (latter) three Chambers shall comprise three judges, one from each constituent state, and one judge who is not a citizen of the United Cyprus Republic²⁵. The Chambers of the Court of Primary Federal Jurisdiction shall be: the Grand Chamber of Primary Federal Jurisdiction (comprising all members of the Court of Primary Federal Jurisdiction) and the first, second

¹⁵ See: Main Articles, Article 7(1).

¹⁶ First sentence of Article 36(7) of the UCR Constitution (at Part V).

¹⁷ Annex I, Part VII, Article 45(2).

¹⁸ Federal Law on Administration of Justice, Part II, Section 3(6). The three Registrars were, also, to have assumed their functions "... immediately upon entry into force of the Foundation Agreement..." (Annex I, Part VII, Article 45(3))

¹⁹ Administration of Justice Law, Section 3(7) (first sentence).

²⁰ See: Annex I, Part VII, Article 45(4); and Federal Law on Administration of Justice, Part II, Section 3(7).

²¹ Annex I, Part VII, Article 45(4) (second and final sentence). Article 36(7) of the Constitution (at Part V) provides: "(7) The Supreme Court of Cyprus shall sit as a Constitutional Court or as a Court of Primary Federal Jurisdiction. Judges shall be appointed to serve either on the Constitutional Court or the Court of Primary Federal Jurisdiction. The law shall regulate the number of judges serving in each court, the attribution of competence to each court, the division of the two courts into chambers, and any right of appeal within either court or from the Court of Primary Federal Jurisdiction to the Constitutional Court".

²² Further to the eighth and final measure contained in Appendix F ("Measures to be taken during April 2004"), "... the parties..." (that is, the leader of the Greek Cypriot community and the leader of the Turkish Cypriot community) shall ("... agree on and take the following measures, in close cooperation with the Secretary-General or his representative, and shall accept any indispensable suggestions of the Secretary-General or his representative where foreseen in this list"): "Provide to the Secretary-General no later than two days after successful referenda the names of the... Cypriot members of the Supreme Court, and otherwise accept any indispensable suggestions of the Secretary-General or his representative". The Foundation Agreement could not have entered into force during this period ("... no later than two days after successful referenda...").

²³ Federal Law on Administration of Justice, Part III, Section 20(1).

²⁴ *Ibid*, Section 20(2).

²⁵ *Ibid*, Section 20(3).

and third primary chambers (each comprising two judges, one hailing from each constituent state). The President of the Court may, “at his discretion”, assign one of the non-Cypriot judges to sit in a particular case of the Grand Chamber of Primary Federal Jurisdiction²⁶.

The Supreme Court shall strive to reach its decisions by consensus and issue joint judgments of the Court²⁷. In the event that a consensus cannot be reached, the Cypriot judges may, by a majority, take the decision of the Court²⁸. Further to Section 23(3) of the federal law:

“(3) In the event of there being no decision by consensus and no majority among the Cypriot Judges, those Judges who are not citizens of the United Cyprus Republic, acting together and speaking with one voice, shall participate in the decision of the Court”²⁹.

III. NON-CYPRIOT JUDGES

For any society to succeed, it must have (/ at least feel that it has) ownership of its Constitution and system; the absence of this leads to disharmony, disagreement and, invariably, conflict. Perhaps, although it is painful for some to admit it, the path to and outcome of the establishment of the 1960 Republic is an all-too obvious testament to this fact³⁰.

A society’s ownership of its Constitution and system does not guarantee success. It may be that the society itself is so divided, beyond the mere confines of its law, that nothing can make it function. However, at least with ‘ownership’ (even though this may never truly operate in a vacuum) comes responsibility, including for any failure. It is this that the international community should allow, when / where it occurs, and compel those responsible to (first) find a solution. This is one area where the ‘Annan Plan’ fails. Fearing (ultimate) deadlock in the Supreme Court (for example), the non-Cypriot judges are installed and, as and when necessary, would be called upon to intervene. This cannot be a solution, for not only would their condition negate that responsibility, but their appointment and every occasion they would be required to decide would be reduced to / become a cause of / for rumour,

²⁶ *Ibid*, Section 20(4).

²⁷ *Ibid*, Section 23(1); and, Annex I, Part V, Article 36(8) (first sentence).

²⁸ *Ibid*, Section 23(2).

²⁹ Reflecting the need to reach a ‘majority’, as prescribed in Section 23(2) and (3), the second sentence of Article 36(8) of the UCR Constitution provides: “(8)... However, all decision of the Supreme Court may be taken by simple majority as specified by law”. The non-Cypriot judges, “acting together and speaking with one voice”, in effect, realising that majority in an otherwise (among the Cypriot judges) deadlocked Court.

³⁰ For example, the leaders of the Greek and Turkish Cypriot communities did not attend the Zürich Conference (6-11 February 1959; prior to the London Conference, 11-16 February 1959), where agreement was reached on a future Cyprus Republic between the governments of Greece and Turkey; nor were the Cypriot people consulted prior to the establishment of the Republic of Cyprus on 16 August 1960.

speculation, mistrust, division and failure. What an unedifying spectacle for one of the most honoured professions.

The non-Cypriot component on the Supreme Court should be removed. The Court should be composed (only) of an equal number of persons hailing from each constituent state. Such does, of course, raise fears about the consequences of deadlock should consensus fail and the judges from each constituent state split 50:50. It is the purpose of this article to explain how this can be avoided.

IV. 'AN AMENDED COURT'

Rather than 15 judges (including 3 non-Cypriot judges), the Supreme Court should be composed of 24 judges, 12 hailing from each constituent state. The entire Court should be in place upon entry into force of the Foundation Agreement. There should be no transitional Court³¹.

It shall continue to sit, either, as a Constitutional Court or as a Court of Primary Federal Jurisdiction. An equal number of Cypriot judges (with the non-Cypriot judges now absent) would, also, continue to serve on the two courts³², except that the numbers should be doubled from 6 (each) to 12. Judges would (still) be appointed to serve either on the Constitutional Court or the Court of Primary Federal Jurisdiction³³.

The Court *should* be divided into Chambers³⁴. The Grand Constitutional Chamber (comprising all members of the Constitutional Court) and the Grand Chamber of Primary Federal Jurisdiction (comprising all members of the Court of Primary Federal Jurisdiction) would remain. However, rather than three additional chambers each, the Constitutional Court

³¹ This is reflected in Article 45 of the UCR Constitution (at Part VII): "(1) Upon entry into force of the Foundation Agreement, the judges... of the Supreme Court shall be those Cypriots and non-Cypriots informed by the Secretary-General prior to the entry into force of the Foundation Agreement of their prospective appointment pursuant to the Comprehensive Settlement. (2) The judges of the Supreme Court, who shall serve as members of the Constitutional Court, shall assume their functions immediately upon entry into force of the Foundation Agreement and shall remain in office for 36 calendar months, unless the federal Parliament decides with special majority to extend their terms... (4) The judges who shall serve on the Court of Primary Federal Jurisdiction shall be appointed by the Presidential Council in the course of the month of July 2004. Until then, the other judges of the Supreme Court shall exercise the functions attributed to the Court of Primary Federal Jurisdiction".

³² That is, the Constitutional Court and Court of Primary Federal Jurisdiction.

³³ The second sentence of Article 36(7) of the UCR Constitution provides (at Part V): "... Judges shall be appointed to serve either on the Constitutional Court or the Court of Primary Federal Jurisdiction..." See also: Section 3(6) and (7) of the Federal Law on Administration of Justice (at Part II).

³⁴ Section 20(1) of the Federal Law on Administration of Justice (at Part III) states: "(1) The Court may divide itself into Chambers in accordance with Section 7 of Article 36 of the Constitution and, should it so decide, it shall, subject to the power of the Court otherwise to organise its work, sit in the Chambers indicated in subsection (2), each of which Chambers shall deal with such matters and cases as the Court may by Rules or Practice Directions direct". The federal law does not indicate by what means 'it should so decide'. "... [S]it in the Chambers indicated in subsection (2)..." is incorrect. "[S]ubsection (2)" merely confirms the existence of a "... grand chamber of the Court..." The Chambers of the Supreme Court are "indicated" in subsections (2), (3) and (4). The relevant part of "Section 7 of Article 36" merely provides: "(7)... The law shall regulate... the division of the two courts into chambers..."

and Court of Primary Federal Jurisdiction should be further served by two. The first and second constitutional chambers and the first and second primary chambers would each comprise six judges (three hailing from each constituent state). The “original members” of the Court should be separated into their (respective) Chamber by lot. Any (subsequent /) newly appointed judge, following the death, retirement, dismissal or permanent incapacity of an existing judge would serve in the Chamber of the judge who has been replaced³⁵. However, in the spirit of the partial periodic renewal of the Court, every three years, the membership in the Chambers would be re-cast, again by lot (and affect all new cases during any forthcoming three-year ‘term’)³⁶. Such would avoid any Chamber / appointment becoming politicised.

The jurisdiction exercisable by the Court³⁷ is provisionally assigned (/ distributed) between the Chambers under Annex I of the Federal Law³⁸. The jurisdiction of the Grand Constitutional Chamber³⁹ and the Grand Chamber of Primary Federal Jurisdiction⁴⁰ would

³⁵ Such newly-appointed judge should, also, take the place of any judge who had been sitting in any ongoing case (/ prior to any suspension, whilst any misconduct is being considered by the Judiciary Board). The ‘filling of a vacancy’ during consideration of a case is addressed, only, in Annex III (titled: “The Default Provision and Deadlock-Resolution Procedural Rules”), Rule 21 of the Federal Law. It states: “(1) In the event of the death of any of the Judges or of their being prevented by ill-health or otherwise from taking part in the proceedings, the Presidential Council or Transitional Federal Government, as the case may be, shall fill any vacancy so caused by an appointment made in accordance with Law and in the case of a temporary absence or incapacity the arrangements provided in section 17 [actually Section 12] of the Law shall apply. (2) The proceedings shall continue notwithstanding that such a vacancy as aforesaid shall not be filled, and, if it shall be filled, the proceedings prior to such vacancy shall not be reopened or recapitulated”.

³⁶ See: Part II, Section 8(3).

³⁷ “[L]isted as Chapters of the Schedule”: opening part of Annex I (titled: “The Provisional Assignment of Jurisdiction to Chambers Rules”) of the Federal Law.

³⁸ Section 20(1) and (6) (at Part III) state: “(1) The Court may divide itself into Chambers in accordance with Section 7 of Article 36 of the Constitution and, should it so decide, it shall, subject to the power of the Court otherwise to organise its work, sit in the Chambers indicated in subsection (2) [incorrect reference], each of which Chambers shall deal with such matters and cases as the Court may by Rules or Practice Directions direct... (6) Pending the making of Rules under paragraphs (1) and (3) [reference only to paragraph (1) should be made here] above, the jurisdictions listed in the Chapters set out in Schedule shall be allocated to Chambers subject to the approval of the Court. Such allocations in the “Provisional Allocation of Jurisdictions to Chambers Rules” shall be deemed to have been made under the preceding paragraphs of this section and may at any time be varied, repealed or substituted by Rules or Practice Directions made thereunder”.

³⁹ Described in Annex I (of the federal law) as: “Chapter 1. Disputes between the constituent states or between any of them and the Federal Government. 2. Exclusive jurisdiction regarding validity of Laws and precedents of Constitutional Laws. 3. Appeals regarding interpretation or an alleged violation of the Foundation Agreement, the Constitution, a Constitutional Law, or a treaty binding the United Cyprus Republic. 5. Jurisdiction to take an ad interim decision in respect of a deadlock arising in any of the institutions of the Federal Government. 7. Review of decisions of the Aliens Appeals Court in citizenship matters. 8. Review of decisions of the Aliens Appeals Court in aliens matters. 9. Carryover of the previous Federal budget. 10. Disputes resulting from application of the Agreement on European Union Affairs. 11. Territorial Arrangements – demarcation of boundaries and access roads. 15. Impeachment and immunities. 21. References to the Court of Justice of the European Community as regards all questions falling within the scope of the chapters enumerated above”. Chapter 3 is incorrectly described here (in fact everywhere), under the Third Constitutional Chamber (see footnote 45), as well as in the Schedule and Article 36(4) of the UCR Constitution. The title of Chapter 3, in the Schedule, is: “Appeals regarding interpretation of or an alleged violation of the Foundation Agreement, the Constitution, Federal Laws (including federal administrative decisions) and Treaties binding upon

remain unaltered. The jurisdiction of the (two) 'first and second' primary chambers would remain unaltered, as the jurisdiction of the three primary chambers, in the current law, is identical⁴¹. The same, however, is not the case with the three (current) constitutional chambers. To effect three into two, the jurisdiction resting with the third constitutional chamber would be separated between the first⁴² and second⁴³ constitutional chamber. Chapter 21 rests (identically) with both the first and second constitutional chamber 'already'; Chapters 16 and 20⁴⁴ would be transferred to the first constitutional chamber; and, the stated

the United Cyprus Republic". Paragraph (1) of Chapter 3 states: "The Court shall be the appeals court in all disputes on matters which involve the interpretation or any alleged violation of the Foundation Agreement, the Constitution of the United Cyprus Republic, Federal Laws, (including federal administrative decisions) and treaties binding upon the United Cyprus Republic, including the European Convention on Human Rights and its applicable Protocols". Article 36(4) of the UCR Constitution (at Part V) provides: "(4) The Supreme Court shall be the appeals court in all other disputes on matters which involve the interpretation or an alleged violation of the Foundation Agreement, this Constitution, federal laws (including federal administrative decisions), or treaties binding upon the United Cyprus Republic". An Observation to Article 36(4) adds: "Observation: this includes the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols in force for Cyprus". Chapter 3, as described under the Grand Constitutional Chamber, is correct to include "[a]ppeals regarding... a Constitutional Law..." – the necessary inclusion of "a Constitutional Law" is incorrectly missing elsewhere. However, under the Grand Constitutional Chamber, Chapter 3 is 'still' incorrectly described as it fails, in light of paragraph (1) of Chapter 3, to include (after "a Constitutional Law") "Federal Laws[,] (including federal administrative decisions)".

⁴⁰ Described in Annex I as: "Chapter 19. Admiralty jurisdiction – International Navigation, Territorial Waters and Continental Shelf. Appeals from a lower Chambers [sic]. 21. References to the Court of Justice of the European Community when sitting as an appellate or review tribunal. [new paragraph] This Chamber has jurisdiction to hear appeals from any decision of a Chamber exercising primary criminal jurisdiction. [new paragraph] This Chamber has jurisdiction to hear appeals on interlocutory matters decided by two or three judges".

⁴¹ Described (respectively) in Annex I as: "4. Primary jurisdiction over violations of Federal Laws where provided by Federal legislation. 19. Admiralty jurisdiction – International Navigation, Territorial Waters and Continental Shelf. 22. Jurisdiction to issue orders. [new paragraph] Directions, interlocutory proceedings and orders".

⁴² The jurisdiction assigned to the First Constitutional Chamber under the current law is described in Annex I as: "Chapter 2. Exclusive jurisdiction regarding validity of Laws and precedents of Constitutional Laws. 3. Appeals regarding interpretation or an alleged violation of the Foundation Agreement, the Constitution, a Constitutional Law, or a treaty binding the United Cyprus Republic. 17. Treaties concluded prior to entry into force of the Foundation Agreement. 21. References to the Court of Justice of the European Community as regards all questions falling within the scope of the chapters enumerated above".

⁴³ The jurisdiction assigned to the Second Constitutional Chamber under the current law is described in Annex I as: "Chapter 6. Power to issue injunctions on entry to or residence in a constituent state. 7. Review of decision[s] of the Aliens Appeals Court in citizenship matters. 8. Review of decisions of the Aliens Appeals Court in aliens matters. 12. Establishment of the Property Court. 13. Removal of members of the Property Board. 15. [should read 14.] Period of operation of the Property Board. 19. [should read 18.] State-owned property. 21. References to the Court of Justice of the European Community as regards all questions falling within the scope of the chapters enumerated above".

⁴⁴ Described in Annex I as: "[Chapter] 16. Electoral Court. 20. Jurisdiction conferred by Constitutional Law, Co-operation Agreements and Federal Laws".

competence of the third constitutional chamber in respect of Chapter 3⁴⁵ would be transferred to the second constitutional chamber.

Each chamber of the Supreme Court should be divided into sections and groups.

The two constitutional chambers and two primary chambers should each be divided into two sections (A and B). Any such section would comprise three judges (two hailing from one constituent state, one the other). Similarly, the Grand Constitutional Chamber and the Grand Chamber of Primary Federal Jurisdiction should each be divided into two sections (A and B). Any such section would comprise six judges (four hailing from one constituent state, two the other). The “original members” of the Court should be, further, separated into their (respective) sections (two for each) by lot. Any (subsequent /) newly appointed judge, following the death, retirement, dismissal or permanent incapacity of an existing judge would serve in the sections of the judge who has been replaced. The re-casting of chambers, every three years, would affect the membership of all sections, to be drawn by lot, also (again, affecting all new cases during the forthcoming three-year term).

Judges should, also, be divided into groups of two. Such pairs (including the two the President of the Supreme Court would be a member of) should be determined on the basis of, first (and taking precedence), the total time served on the Court and, second, to guarantee separation, by age⁴⁶. Each pair should consist of one judge hailing from each constituent state. Consequently, determination of the ‘judge’ for each group should be effected by constituent state. The two constitutional chambers and two primary chambers should each consist of three groups (A to C). The Grand Constitutional Chamber and the Grand Chamber of Primary Federal Jurisdiction should each consist of six groups (A to F). The ‘most senior’ group (for that Chamber) should be ‘Pair A’, the ‘least senior’ either ‘Pair C’ or ‘Pair F’ (depending). In most cases, a judge would have a different pair for each of the two groups to which he/she was a member. The re-casting of chambers would, for any new period, quite likely affect the (relevant) group a judge was a member of.

There should continue to be a grand chamber of the Court comprising (now) all (24) members of the Court⁴⁷. The grand chamber of the Court, the plenary formation and manifestation of the Supreme Court, would not hear cases, but make Rules of Court for

⁴⁵ Described (for the Third Constitutional Chamber, compare with its description for the Grand Constitutional Chamber) in Annex I as: “[Chapter] 3. Appeals regarding interpretation of an alleged violation of a Federal Law (including Federal administrative decisions)”.

⁴⁶ This is broadly consonant with Section 6(1) of the federal law (at Part II): “(1) The President of the Supreme Court shall be considered the most senior judge of the Court. Among the other judges, seniority shall be determined firstly by time served in office and by age in case of equal time served. [new paragraph] Provided that the seniority of the first judges of the Court shall be determined by reference to their age, subject to seniority being accorded to the President of the Court in terms of this subsection”.

⁴⁷ Federal Law on Administration of Justice, Part III, Section 20(2).

regulating its practice and procedure⁴⁸. The quorum for making such Rules should be 18 (judges), a decision for any such Rule requiring separate majorities from the participating judges hailing from each constituent state. The latter condition, quorum having been satisfied, would avoid the possibility of any outcome depending, alone, on ‘those’ that were in attendance.

The current federal law provides for the election of a President of the Supreme Court. The President⁴⁹ shall be elected by the judges of the Court (“from among their number”) for a renewable period of three years⁵⁰. Although this is not provided in the federal law, such election should be the first act of the Court after the entry into force of the Foundation Agreement. However, the President should be further assisted by a First Deputy President and two Deputy Presidents, also elected (the next acts; if not done, also, at the same meeting) by the judges of the Court. Within the ‘Presidency’ of the Court, two judges should hail from each constituent state: the President should not hail from the same constituent state as the First Deputy President, the President should only be allowed to serve a maximum two (three year) terms (that is, six years; therefore, renewable only once) and successive Presidents (by person, not term) should not hail from the same constituent state. The President and First Deputy President should be judges who will or do serve on the Constitutional Court; the two Deputy Presidents should be judges who will or do serve on the Court of Primary Federal Jurisdiction. The election of the ‘Presidency of the Court’ should be undertaken by the “grand Chamber of the Court”. During any “temporary absence or incapacity” of the President, the Deputy President hailing from the same constituent state as the President shall be Acting President⁵¹.

V. ‘COMPROMISE PROCEDURE’

Potential failure in the Court is ‘averted’ by the intervention of the non-Cypriot judges⁵², following failure to secure (even) a majority. Some aspects of the jurisdiction of the Court shall (as seen and explained below) require a ‘singular’ determination / view / opinion

⁴⁸ Section 34(1) of the federal law (at Part V) provides: “(1) The Court shall decide on the organisation of its work and make Rules of Court for regulating the practice and procedure of the Court in the exercise of the jurisdiction conferred upon it by the Constitution and by this Law”.

⁴⁹ To repeat: “(1) The President of the Supreme Court shall be considered the most senior judge of the Court...” (*Ibid*, Part II, Section 6(1), first sentence)

⁵⁰ *Ibid*, Section 5.

⁵¹ The federal law currently provides that in the case of the President’s “temporary absence or incapacity”, “... the other judges shall elect an Acting President to act in his place...” (*Ibid*, Section 12(1)(b))

⁵² No answer, however, is given (in the federal law) to the question what happens if the President of the Court (“at his discretion”) has not assigned one of the non-Cypriot judges to sit in a case of the Grand Chamber of Primary Federal Jurisdiction and the chamber has divided 50:50. Further, it would appear that the three primary chambers may not have a non-Cypriot judge assigned to any given case. Yet, what if the two judges (in the relevant chamber) are divided? Again, no answer is given.

(positive or negative). However, other aspects (of the Court's jurisdiction) may be amenable to individual / considered fashioning or design, whether in the macro or micro. In this regard, therefore, the decided judgment may be(/come) the product of some form of compromise, although compromise (here) need not have one meaning / face only. Such procedure shall apply to four Chapters and part of two others.

The Court shall have exclusive jurisdiction (Chapter 1) over disputes between the constituent states, between one or both constituent states and the federal government and between organs of the federal Government⁵³. Such recourse may be made by any of the Presidents of the federal Government and of the constituent states (and, during the transitional period, also by the Co-Presidents of the federal Government⁵⁴); either chamber of the federal Parliament; either or both of the constituent states' legislatures; or any other organ or authority of the federal Government and of the constituent states, if involved in such dispute⁵⁵.

The Court shall be the appeals court (Chapter 3, part) in all disputes on matters which involve the interpretation of the Foundation Agreement, the Constitution of the United Cyprus Republic, federal laws (including federal administrative decisions) and treaties binding upon the United Cyprus Republic, including the European Convention on Human Rights and its Additional Protocols in force for Cyprus⁵⁶.

The Court shall ('also') have exclusive jurisdiction (Chapter 5) to take an ad interim decision, should there arise a deadlock in one of the institutions of the federal Government preventing the taking of a decision without which the federal government or its institutions could not properly function, or the absence of which would result in a substantial default on the obligations of the United Cyprus Republic as a member of the European Union. A member of the Presidential Council, the President or (a) Vice-President of either Chamber of Parliament, or the Attorney-General or Deputy Attorney-General may apply to the Court to make such ad interim decision (the Court "always exercising appropriate restraint")⁵⁷. Any

⁵³ Annex I (UCR Constitution), Part V, Article 36(2); Federal Law on Administration of Justice, Schedule, Chapter 1, paragraph (1).

⁵⁴ The executive organ, under the Annan Plan, is the Presidential Council. However, during a brief transitional period, until the (first elected) federal Parliament has elected the Presidential Council, "the office of the Head of State shall be vested in the Co-Presidency" (Annex I, Part VII, Article 40(1)). Further to Article 40(2) of the UCR Constitution: "(2) The Co-Presidents shall be the persons whose names are communicated to the Secretary-General of the United Nations no later than two days after successful referenda or, in the absence of such communication, the head of government of the relevant constituent state".

⁵⁵ Chapter 1 (of the Schedule), paragraph (2).

⁵⁶ Annex I, Part V, Article 36(4) (including Note (22)); Federal Law on Administration of Justice, Schedule, Chapter 3, paragraph (1).

⁵⁷ Chapter 5, paragraph 1.

decision of the Court shall remain in force until such time as a decision on the matter is taken by the institution in question⁵⁸.

The financial year shall begin on 1 January and end on 31 December of each year⁵⁹. If the federal Parliament is unable to approve a Budget before the beginning of the fiscal year, the Budget of the previous year, adjusted by inflation minus 1%, shall be carried on to the next fiscal year, unless the Supreme Court of Cyprus, “in the exercise of its deadlock-resolving power”, decides otherwise⁶⁰. The Supreme Court, under Chapter 9 (and, also, Article 36(6) of the UCR Constitution), is empowered to make “ad interim provision” other than the carryover stipulated⁶¹.

The Court shall, in defined circumstances, have the power to decide on the precise demarcation on the ground of the boundaries of the constituent states (Chapter 11, paragraph (1)). The boundaries of the constituent states are depicted in maps attached to the Constitution⁶². These are described in detail in Attachment 1 of Annex VI (Annex VI is titled: “Territorial Arrangements”)⁶³. Any inconsistency between the maps and the geographical coordinates listed in the tables contained in Attachment 1 (of Annex VI) shall be decided by the Boundary Committee⁶⁴. However, where the Committee is unable to reach consensus, the inconsistency shall be settled by the Supreme Court⁶⁵.

Public property, other than federal property or municipal property, is the property of the constituent state in which it is located⁶⁶. The Co-Presidents and the heads of government of the constituent states shall agree (Chapter 18) on the list of federal property no later than three months after entry into force of the Foundation Agreement. Should they fail to agree, the Supreme Court shall decide on this list based on representations by all interested parties⁶⁷.

⁵⁸ Annex I, Part V, Article 36(6); and Chapter 5, paragraph 2.

⁵⁹ Federal Law on the Budget (Annex III, Attachment 8), Part IX, Section 45.

⁶⁰ *Ibid*, Part I, Section 8, first paragraph.

⁶¹ Again, as *per* Article 36(6) (of the UCR Constitution, second sentence), “... [i]n so acting, the Supreme Court shall exercise appropriate restraint”. According to the second paragraph of Section 8 of the Federal Law on the Budget, if, at any time, the federal Parliament approves the Budget for the fiscal year in question – whether the Supreme Court has made any ad interim provision or not – “... such approved Budget shall be deemed to be in force as from the 1 of January of that year, but without prejudice to anything previously done by virtue of this section...”

⁶² Annex I, Attachment 1.

⁶³ Attachment 1 of Annex VI is titled: “Detailed Description of the Course of the Boundary Between the Constituent States”.

⁶⁴ Further to Article 1(2) of Annex VI: “(2) There shall be a Boundary Committee comprising three representatives of each constituent state and at least one non-Cypriot. The Committee shall be appointed upon entry into force of the Foundation Agreement, and shall demarcate the boundary on the ground”.

⁶⁵ Annex VI, Article 1(3) (final sentence).

⁶⁶ Annex I, Part VII, Article 51(1).

⁶⁷ Article 51(2) of the UCR Constitution concludes: “(2)... Such properties shall be considered as federal properties from the date of entry into force of the Foundation Agreement unless otherwise decided”.

A dispute between, interpretation of, decision, provision, demarcation and location need not result in the determination (only) of one of two possible outcomes. Rather, the outcome can be without such constraint. *An* outcome, though, whatever its form, shall remain necessary, but this will be ‘eased’ by the opportunity to secure a compromise, which can be as ‘singular’ or not as is conceived.

The ‘Compromise Procedure’ would operate as follows:

Such type of case before the Grand Constitutional Chamber / Grand Chamber of Primary Federal Jurisdiction, first / second constitutional chamber, first / second primary chamber would be heard by all the judges of the relevant chamber. The case would also be heard by two judges from the other (‘partner’) chamber of the Court. Thus, for example, if a case was being heard by the second constitutional chamber, the two judges would be members of the first constitutional chamber. These (two, one hailing from each constituent state) would be drawn by lot (see below). Alternatively, if a case was being heard by the Grand Constitutional Chamber, the two judges would be members of the Grand Chamber of Primary Federal Jurisdiction. Immediately after the drawing of these two judges, and again by lot, a judge (/ further judge, for a case being heard by one of the Grand Chambers) may / may not be drawn (see below) from the other Court (here, from these examples, the Court of Primary Federal Jurisdiction), the identity of the drawn / earlier drawn judge, though, remaining ‘sealed’.

The drawing of the two judges (from the ‘partner’ chamber) would be governed by a different procedure to that of the judge from the other Court / further judge (for cases heard by one of the Grand Chambers). With the former, for any sequence, two judges would be drawn no more than twice (or five times, ‘in the case’ of the Grand Chambers). With the latter, for any sequence, the judge / further judge would be drawn no more than six times. Again with the latter, for cases heard by one of the Grand Chambers, in the event that the drawn / earlier drawn judge is one of the two judges, a new judge will be drawn (being revealed) and again (also being revealed) if that judge is the other of the two judges. Where this occurs (but only when this occurs), any sequence may extend beyond six (separate) draws. Of course, each sequence for each chamber (other than for an appeal from a Chamber to the Grand Chamber under Chapter 3, see below) would be separate from the sequences of any other chamber.

As provided for in the Foundation Agreement, the Court (here the six / twelve judges of the relevant chamber) would strive to reach its decision by consensus and issue a joint judgment. Likewise, failing such consensus, a decision may be taken by simple majority. It is ‘only’ where the chamber were evenly divided (of course, minus the non-Cypriot judges) that the procedure would be radically different.

Following the failure to reach a decision by simple majority, each of the (six / twelve) judges of the chamber would issue a separate judgment. The two judges from the ‘partner’

chamber (having heard the case also) would consider these judgments and attempt, between themselves, to arrive at a compromise judgment. This compromise judgment may (/ also) include / represent their own opinion on the case. In the event that the two, themselves, are unable to agree on a compromise judgment, they will each be required (separately) to select (from the most preferred to the least preferred) their preferred judgment from the (six / twelve) individual judgments issued by the judges of the ‘relevant chamber’. At the exact same time, the six / twelve judges from the chamber shall each be required to select their most preferred judgment issued by one of the (three / six) judges hailing from the other constituent state (see below). The most preferred judgment (of each of the two judges from the ‘other’ chamber) should be given a rank of ‘1’, through to the least preferred a rank of ‘6’ / ‘12’. The (two) judges would exchange their selection and, together, add up the total ‘score’. The judgment with the lowest score would be considered the given judgment for that case.

Consider the following example:

The judges of the ‘relevant chamber’ hailing from the Greek Cypriot State have (respectively) issued judgments A, B and C (/ G, H and I, also); the judges hailing from the Turkish Cypriot State judgments D, E and F (/ J, K and L, also).

The (two) judges ranked these judgments in the following order:

<u>Greek Cypriot State judge</u>		<u>Turkish Cypriot State judge</u>	
(1) B	(1) B	(1) E	(1) E
(2) A	(2) A	(2) F	(2) F
(3) C	(3) C	(3) D	(3) D
(4) F(4) H		(4) B	(4) J
(5) D	(5) G	(5) A	(5) L
(6) E	(6) I	(6) C	(6) K
	(7) F		(7) B
	(8) D		(8) A
	(9) E		(9) C
	(10) L		(10) I
	(11) J		(11) H
	(12) K		(12) G

The scores for each of the (six / twelve) judgments would be: (i) (six) (A) 7; (B) 5; (C) 9; (D) 8; (E) 7; (F) 6; and, (ii) (twelve) (A) 10; (B) 8; (C) 12; (D) 11; (E) 10; (F) 9; (G) 17; (H) 15; (I) 16; (J) 15; (K) 18; (L) 15.

The judgment with the lowest score, from these examples, would, in both instances, be judgment (B), which would be the given judgment for that case.

Of course, two or more judgments may tie.

Consider the following example:

<u>Greek Cypriot State judge</u>		<u>Turkish Cypriot State judge</u>	
(1) B	(1) B	(1) E	(1) E
(2) C	(2) C	(2) F	(2) F
(3) A	(3) G	(3) A	(3) A

(4) F(4) H		(4) D	(4) J
(5) D	(5) A	(5) B	(5) L
(6) E	(6) I	(6) C	(6) K
	(7) E		(7) D
	(8) D		(8) B
	(9) F		(9) C
	(10) L		(10) I
	(11) J		(11) H
	(12) K		(12) G

The scores here would be: (i) (six) (A) 6; (B) 6; (C) 8; (D) 9; (E) 7; (F) 6; and, (ii) (twelve) (A) 8; (B) 9; (C) 11; (D) 15; (E) 8; (F) 11; (G) 15; (H) 15; (I) 16; (J) 15; (K) 18; (L) 15.

In these examples, (six) three judgments (A, B and F) would tie with a score of ‘6’ and (twelve) two judgments (A and E) would tie with a score of ‘8’.

In such an event, and from the above examples, the most preferred judgment (from among, only, the tied judgments) by a judge from the other constituent state should be examined in order to determine the given judgment.

Here: (i) (six) (Judgment A) got a score of ‘3’, (Judgment B) ‘5’, and (Judgment F) ‘4’; and, (ii) (twelve) (Judgment A) got a score of ‘3’, and (Judgment E) got a score of ‘7’. Out of this, in both instances (again), the given judgment for the case would be judgment (A).

However, even by adding this (next) stage, the tie may still remain knotted.

Consider this example:

<u>Greek Cypriot State judge</u>		<u>Turkish Cypriot State judge</u>	
(1) B	(1) B	(1) E	(1) E
(2) A	(2) A	(2) F	(2) F
(3) C	(3) C	(3) D	(3) D
(4) F(4) H		(4) A	(4) J
(5) D	(5) G	(5) B	(5) L
(6) E	(6) I	(6) C	(6) K
	(7) F		(7) A
	(8) D		(8) B
	(9) E		(9) C
	(10) L		(10) I
	(11) J		(11) H
	(12) K		(12) G

Here, three judgments, in both instances, (A, B and F) would tie with a score of ‘6’ / ‘9’, but application of ‘the most preferred judgment (from among, only, the tied judgments) by a judge from the other constituent state’ would yield the following outcome: (Judgment A) with a score of ‘4’ / ‘7’; (Judgment B) ‘5’ / ‘8’; and (Judgment F) ‘4’ / ‘7’.

Judgment (B), with a score of ‘5’ / ‘8’, would withdraw, but judgments (A) and (F) would remain tied.

In these examples: (i) (six) judgments (C), (D) and (E) have (respectively) the following scores: 9, 8 and 7; and, (ii) (twelve) judgments (C), (D), (E), (G), (H), (I), (J), (K) and (L) have (again respectively) 12, 11, 10, 17, 15, 16, 15, 18 and 15. The next stage would be to

determine which of the tied judgments was preferred more by the justice (from the other chamber) hailing from the constituent state whose state did not issue the least preferred judgment. Here, the least preferred judgment is (six) (C) / (twelve) (K), issued by a judge hailing from the (six) Greek Cypriot State / (twelve) Turkish Cypriot State. Therefore, the tied judgment (A) or (F) preferred more by the other judge would be judgment (six) (F) / (twelve) (A) – (i) (six) (F), from that justice (Turkish Cypriot State), being ranked second, (A) fourth; and (ii) (twelve) (A), from that justice (Greek Cypriot State), being ranked second, (F) seventh.

However, what happens if there is no least preferred judgment.

Consider these two examples:

<u>Greek Cypriot State judge</u>		<u>Turkish Cypriot State judge</u>	
(1) B	(1) B	(1) E	(1) E
(2) A	(2) A	(2) F	(2) F
(3) C	(3) C	(3) D	(3) D
(4) F(4) H		(4) A	(4) J
(5) E	(5) I	(5) B	(5) L
(6) D	(6) G	(6) C	(6) K
	(7) F		(7) A
	(8) E		(8) B
	(9) D		(9) C
	(10) L		(10) I
	(11) J		(11) H
	(12) K		(12) G

The scores here would be: (i) (six) (A) 6; (B) 6; (C) 9; (D) 9; (E) 6; (F) 6; and (ii) (twelve) (A) 9; (B) 9; (C) 12; (D) 12; (E) 9; (F) 9; (G) 18; (H) 15; (I) 15; (J) 15; (K) 18; (L) 15.

Now there is a ‘four-way’ tie, in both instances, between judgments (A), (B), (E) and (F).

To repeat the above-stated procedure:

(i) ‘the most preferred judgment (from among, only, the tied judgments) by a judge from the other constituent state’ would yield the following outcome: (Judgment A) with a score of ‘4’ / ‘7’; (Judgment B) ‘5’ / ‘8’; (Judgment E) ‘5’ / ‘8’; and (Judgment F) ‘4’ / ‘7’.

In both examples, judgments (B) and (E) would withdraw, but judgments (A) and (F) would remain tied.

(ii) ‘which of the tied judgments was preferred more by the justice (from the other chamber) hailing from the constituent state whose state did not issue the least preferred judgment’?

In these examples, there is no ‘least preferred judgment’, as: (i) (six) judgments (C) and (D) have both ‘tied’ with a score of ‘9’; and (ii) (twelve) judgments (G) and (K) have both tied with a score of ‘18’.

What next?

(iii) which of the (still) tied judgments ((A) or (F)) was most preferred by the six / twelve judges from the chamber (each of these having selected their most preferred judgment issued by one of the – three / six – judges hailing from the other constituent state)?

If (six) one / (twelve) two of the (Greek Cypriot State) judges ((six) A to C or (twelve) A to C and G to I) ‘most preferred’ judgment (F), but (six) two / (twelve) four of the (Turkish Cypriot State) judges ((six) D to F or (twelve) D to F and J to L) ‘most preferred’ judgment (A), then, in both instances, the given judgment for the case would be judgment (A). However, even this stage may yield a tie if the number were the same: whether (six) 0, 1, 2, or 3 or (twelve) 0, 1, 2, 3, 4, 5, or 6. If such occurred, the court would proceed to the final, determining stage:

(iv) the identity of the ‘drawn / earlier drawn’ judge from the other Court (/ further judge, for a case being heard by one of the Grand Chambers) would be revealed. This judge would be provided with a copy of the transcript of the proceedings and the remaining tied judgments. Having read and considered all relevant (for this judge) documents, the judge shall be required to indicate the preferred (remaining tied) judgment; from the current example, of course, either judgment (A) or (F). This preferred judgment would be rendered the given judgment for the case.

Via this procedure, a judgment for such cases could be arrived at, neither at the expense of the judges from one of the constituent states, nor having demanded the intervention of non-Cypriot judges. The determination(/s) / view(/s) or opinion(/s) of the ‘two judges’ and ‘judge from the other Court / further judge’ may have not been required. Consensus may have been reached from the outset or a majority secured (/ a compromise judgment arrived at / preferred judgment identified). On the other hand, compromise should come before individual preference; a final and individual preference only as last resort. It should not, despite the above examples, be assumed that the preferred judgment(/s) would always (in effect) be anticipated / separated into blocks of two. The least preferred may have to be ‘penalised’.

More limited sequences for both draws reinforces the minimising (to the maximum) of anticipated outcomes. Of course, the ‘judge from the other Court / further judge’ (‘remaining sealed’) may not have been called upon to decide in the (by Chamber / Grand Chamber, under this procedure) previous case: hence ‘earlier drawn’.

A case requiring interpretation of the “Foundation Agreement, the Constitution, [a Constitutional Law,] Federal Laws (including federal administrative decisions) and Treaties binding upon the United Cyprus Republic”, as *per* Chapter 3, may be appealed against. Paragraph (2) provides:

“(2) Any party to judicial proceedings involving a dispute in respect of any of the matters referred to in paragraph (1) of this Chapter may appeal any judgment given in such

proceedings at first instance, where such judgment is that of a Chamber, other than Grand Chamber, of the Court, or that of a court of a constituent state.

“Provided that where the involvement of such matters only becomes apparent for the first time in appellate proceedings, whether in the courts of a constituent state or in a Chamber of the Court, other than the Grand Chamber, an appeal shall lie and shall be heard by the Grand Chamber”.

Any appeal (regarding interpretation) from a Chamber under Chapter 3⁶⁸, when heard by the Grand Chamber, would not be considered by the whole Court (that is, all 12 judges), but only the 4 (remaining) judges who did not sit in the case in the Chamber. Before commencement of proceedings, a ‘judge’ from the other Court will be drawn (by lot, but not revealed) if the Chamber had relied on the (drawn / earlier drawn) judge from the other Court. The applicable sequence would be that of the Chamber (not the Grand Chamber); the appeal being annexed to the Chamber, the Grand Chamber not being seized of the case in the customary manner.

The 4 judges would attempt to reach a consensus, followed by a majority decision. If this failed, the drawn / earlier drawn judge from the other Court would be revealed and required (having read and considered all relevant documents of the Chamber and the ‘Grand Chamber’) to make the decision.

VI. ‘SECTION MINORITY PROCEDURE’

Each Chamber of the Court shall contain two sections. Any case shall, of course, be heard by all the judges of the relevant Chamber. However, under two defined procedures – ‘Section Minority’ and ‘Section Majority’ (for the latter, see below) – it may be left for the justices of the designated section to decide, in the event of the Chamber failing to reach a consensus or a majority (‘first majority’). The significance of this is that each section would possess a majority of judges hailing from one of the constituent states.

The ‘Section Minority Procedure’, when invoked, requires the decision to be made by the section containing a majority of judges from the ‘other’ constituent state, to the constituent state that is ‘more concerned / will be more affected’ by the judgment. The procedure should apply to five chapters.

The Court shall have jurisdiction to review⁶⁹ decisions of the Immigration, Asylum and Citizenship Appeal Tribunal⁷⁰ rendered on appeal against decisions of the Citizenship Board⁷¹

⁶⁸ Of course, reflected in the proviso to paragraph (2), the matter may be heard by the Grand Chamber (leapfrogging the Chamber) directly from appellate proceedings of a constituent state court.

⁶⁹ By way of judicial review (Federal Law on Aliens and Immigration (Annex III, Attachment 5, Law 1), Part XI, Section 152(6)).

⁷⁰ Described, in paragraph (1) of both Chapters 7 and 8 of the Schedule to the Federal Law on Administration of Justice, as the “Aliens Appeal Court”.

or Aliens Board⁷² upon the application of an aggrieved person (Chapters 7 and 8⁷³ respectively)⁷⁴.

Here, the ‘other’ (constituent state) should be the one other than the constituent state with which the ‘applicant’ would acquire internal constituent state citizenship status, in the event that the application were successful (in respect of ‘first instance’ decisions of the Citizenship Board) or the constituent state other than where the ‘applicant’ resides / has most recently resided (in respect of ‘first instance’ decisions of the Aliens Board).

The Court may remove any member of the (Cyprus) Property Board (Chapter 13) upon the application of the federal Government or of either of the constituent states in case of misconduct or grave breach of the said member’s duties⁷⁵.

Here, the ‘other’ (constituent state) shall be the one other than the constituent state from which the member of the Property Board hails.

The federal Parliament may refer⁷⁶ to the Supreme Court allegations of impeachment (Chapter 15) regarding the members of the Presidential Council and of organs of the independent institutions⁷⁷, and independent officers⁷⁸, for grave violations of their duties or

⁷¹ Established by Section 11(1) of the Federal Law to Provide for the Citizenship of the United Cyprus Republic and for Matters Connected Therewith or Incidental Thereto (Annex III, Attachment 4, at Part V).

⁷² Established by Section 135(1) of the Federal Law on Aliens and Immigration (at Part X).

⁷³ Jurisdiction lies with the Second Constitutional Chamber. However, further to paragraphs (2) of Chapters 7 and 8, proceedings may be referred to the Grand Constitutional Chamber. Paragraph (2) of Chapter 7 provides: “(2) In exceptional cases, involving serious issues of general importance, proceedings in terms of paragraph 1 may, upon the request of any of the Attorneys-General of the United Cyprus Republic or of the constituent states, be referred to the Grand Constitutional Chamber, and such independent officers shall be heard by the Court”. Paragraph (2) of Chapter 8 is identical other than in the third clause, which provides: “... the matter may...”

⁷⁴ The “Appeal Tribunal” shall have jurisdiction to hear appeals against decisions, acts or omissions of the Aliens Board when implementing the Federal Laws on Aliens and Immigration (Annex III, Attachment 5, Law 1), on International Protection (*Ibid*, Law 2), on the Freedom of Movement of EU Citizens and the Members of their Families (*Ibid*, Law 3), and of any Regulations issued under these; and decisions, acts or omissions of the Citizenship Board when implementing the “Federal Law on United Cyprus Republic Citizenship” (Annex III, Attachment 4). The “Appeal Tribunal” shall also have jurisdiction to hear actions brought before it for human rights violations by the Aliens Board, the Citizenship Board or immigration officers when implementing the three federal laws comprising Attachment 5 (of Annex III). Federal Law on Aliens and Immigration, Part XI, Section 152(1).

⁷⁵ See also: Annex VII, Attachment 2, Article 2(10) (second sentence). The final sentence of Chapter 13 states: “... The decision of the Court is not subject to appeal, if taken by more than three judges”. Cases under Chapter 13 would (normally) be heard by the Second Constitutional Chamber (having only three judges). The composition of the Chambers of the Supreme Court are, however, only ‘indicative’.

⁷⁶ Following a preliminary investigation by a Special Committee, and approval of the Committee’s report by special majority of the Senate (Federal Law on Administration of Justice, Schedule, Chapter 15, paragraph (2)). See also: Federal Law on Impeachment, Annex III, Attachment 28, Section 5.

⁷⁷ Article 32(4) of the UCR Constitution (at Part V) begins: “(4) The organs of the Central Bank shall be the Governor and the Deputy-Governor, the Board of Directors and the Monetary Policy Committee...” The members of the Board of Directors and Monetary Policy Committee (besides the Governor and Deputy Governor: see, Article 32(4)(b) and (c)) shall ‘also’ be liable to impeachment.

serious crimes⁷⁹. Upon such allegations being made, the Court shall have jurisdiction to lift the immunity of any such (high) federal officials of the United Cyprus Republic⁸⁰.

Here, the ‘other’ (constituent state) shall be the one other than the constituent state from which the person subject to the “allegations of impeachment” hails.

Any individual or political party who has a legitimate interest to challenge an alleged violation of the Federal Law on the Election of Members of Parliament (Senate and the Chamber of Deputies)⁸¹ may file a complaint with the Electoral Precinct Commission or the Federal Election Commission⁸². The Electoral Precinct Commission⁸³ shall have first instance competence in all matters related to the decisions and workings of the polling station and the presiding officer⁸⁴. Decisions of the Electoral Precinct Commission may be appealed to the Federal Election Commission⁸⁵. The Federal Election Commission shall have first instance competence in all matters related to the election of candidates and any other matter which is “not of the express competence of the Electoral Precinct Commissions”⁸⁶. The Supreme Court shall sit as an Electoral Court (Chapter 16). All decisions of the Federal Election Commission may be appealed to the Electoral Court, no later than fifteen days from the communication of the Federal Election Commission decision to the person concerned or his advocate⁸⁷.

The Electoral Court shall have jurisdiction, inter alia, to entertain petitions regarding the improper conduct of elections by officials, the legal qualifications of the successful candidates, the commission of electoral offences or the deeming of votes to be void⁸⁸. The election as a whole, or the election of any candidate, may be declared to be void. Equally, the petitioner may be entitled to a declaration that a candidate was duly elected and ought to have been returned or for a recounting of the votes⁸⁹.

The Supreme Court shall, also, sit as an Electoral Court in respect of local elections⁹⁰ and elections to the European Parliament⁹¹.

⁷⁸ That is, besides (the members of/) the organs of the Central Bank, the Attorney-General and the Deputy Attorney-General and the Auditor-General and the Deputy Auditor-General (Annex I, Part V, Article 33(1)).

⁷⁹ Annex I, Part V, Article 24(4).

⁸⁰ Federal Law on Administration of Justice, Schedule, Chapter 15, paragraph (1). See also: Federal Law on Federal Government Immunities and Exemptions, Annex III, Attachment 21, Section 4.

⁸¹ Annex III, Attachment 20, Law 2.

⁸² *Ibid*, Part IX, Section 69(1).

⁸³ There are two Electoral Precinct Commissions (/ precincts), one for each constituent state.

⁸⁴ *Ibid*, Section 70(1).

⁸⁵ *Ibid*, Section 71(1).

⁸⁶ *Ibid*, Section 71(2).

⁸⁷ *Ibid*, Section 72(1).

⁸⁸ Federal Law on Administration of Justice, Schedule, Chapter 16, paragraph (1).

⁸⁹ Federal Law on the Election of Members of Parliament (Senate and Chamber of Deputies) (Annex III, Attachment 20, Law 2), Part IX, Section 72(2).

⁹⁰ Federal Law on Administration of Justice, Schedule, Chapter 16, paragraph (2).

⁹¹ *Ibid*, paragraph (4).

‘Here’, the ‘other’ (constituent state) shall be the one other than the constituent state where the (challenged) conduct has occurred.

For the aggrieved applicant, member / person accused or conduct concerned, the decision may, finally, rest with that ‘other’ (personified by the relevant section). Such will guarantee that a decision can be reached and will give (but no more than that) the judges hailing from the constituent state ‘less concerned / (will be) less affected’ (by the judgment) the opportunity to make the decisive impact⁹².

VII. ‘SECTION MAJORITY PROCEDURE’

The section(/s) facility may, also, be employed under a further Chapter, and part of one other. However, under this procedure, the members of the section(/s) that may come to rule on the case shall be the one(/s) where judges hailing from the applicant constituent state are in the majority.

A constituent state may apply to the Supreme Court for an injunction (Chapter 6) barring a person who does not hold its internal constituent state citizenship status from entering or residing in that constituent state. The Court shall grant the injunction if the relevant person has been, or is, actively engaged in acts of violence or incitement to violence and the presence of the person in the constituent state would be a danger to public safety or public order⁹³.

The Court may issue an injunction restricting civilian traffic (remaining part of Chapter 11, see above) “on direct connecting roads between the main part of a constituent state and a non-contiguous part, as well as on direct connecting roads through a non-contiguous part of a constituent state”⁹⁴. An application for such an injunction may be made by the Attorney-General of a constituent state where the relevant road lies (hence: “between”), or by both Attorneys-General, if the road lies in both constituent states (“between... as well as”).

In the event of neither consensus nor majority being reached, a ‘second majority’ may (again) determine the outcome. Naturally, this would place the applicant constituent state, from the outset, in a potential advantage. However, this ought not to occasion concern in light of the narrow and (no doubt) pressing circumstances.

It should be noted that (Chapter 11) where an application is made by “both Attorneys-General”, both sections should preside, with any decision (requiring a ‘second majority’), for each Attorney-General, being made separately by the section with the ‘majority’ for that Attorney-General.

⁹² Although it should not be assumed that these judges would hold (always) either a uniform or ‘the expected’ position.

⁹³ See also: Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights (Annex II, Attachment 3), Section 6.

⁹⁴ See also: Annex VI, Article 2(1).

VIII. 'GROUP PROCEDURE'

As already demonstrated by those Chapters 'subject' to the 'Section Minority' and 'Section Majority Procedure[s]', some decisions require a 'simple', limited and defined (be it positive or negative⁹⁵) conclusion. However, on occasions there may be no constituent state that is 'more concerned / (will be) more affected' and, therefore, no justification (respectively) for externalisation / internalisation. This condition touches two Chapters of the Schedule, and part of one other.

The Supreme Court shall have exclusive jurisdiction to determine (Chapter 2), at the request of any authority of the federal Government or any authority of the constituent states, the validity of any federal or constituent state law under the UCR Constitution and/or to determine any question that may arise from the precedence of Constitutional Laws⁹⁶. Upon request of constituent state courts or other federal or constituent state authorities it may do so in the form of a binding opinion⁹⁷. A party to judicial proceedings, further, before any court, whether of the United Cyprus Republic or of a constituent state, and whether at first instance or on appeal, may, at any stage of such proceedings, raise – "(a) any question relating to the validity of any Federal Law or of any constituent state law; (b) any question that may arise from the precedence of Constitutional Laws, including constituent state agreements in terms of Section 2 of Article 16 of the Constitution⁹⁸; and (c) any question relating to compatibility of a Law, act or measure by the Federal Government or a constituent state government, with a law, act or measure of the European Union applicable to the United Cyprus Republic, which law, act or measure is material for the determination of any matter at issue in such proceedings"⁹⁹. Where relevant, the Court¹⁰⁰ shall transmit its decision to any court by which

⁹⁵ Whether "in whole or in part", also, in the context of judicial review. Note its effects in Chapter 4 (below).

⁹⁶ Annex I, Part V, Article 36(3) (first sentence); Federal Law on Administration of Justice, Schedule, Chapter 2, paragraphs (1) and (2).

⁹⁷ Annex I, Part V, Article 36(3) (second sentence); Federal Law on Administration of Justice, Schedule, Chapter 2, paragraph (3).

⁹⁸ Article 16(2) of the UCR Constitution (at Part IV) provides: "(2) The constituent states may conclude agreements with each other or with the federal government. Such agreements may create common organisations and institutions on matters within the competence of the parties. Such agreements shall have the same legal standing as Constitutional Laws, provided they have been approved by the federal Parliament and both constituent state legislatures". The reference to Article 16(2) in paragraph (4)(b) of Chapter 2 is necessitated by the matter of "precedence". Cooperation Agreements concluded between the constituent states alone would only have the "... same legal standing as Constitutional Laws, provided they have been approved by the federal Parliament and both constituent state legislatures".

⁹⁹ Federal Law on Administration of Justice, Schedule, Chapter 2, paragraph (4).

¹⁰⁰ Paragraphs (7) and (8) of Chapter 2 provide: "(7) Where the matter or question involves a serious issue of general importance, it shall be heard by Grand [sic.] Constitutional Chamber. (8) In cases other than those referred to in paragraph (7), subject to the Court's power to organise its work, such matters or questions shall be determined by the First Constitutional Chamber".

such matters and questions have been reserved and any decision of the Court shall be binding on such court and on any of the parties to the proceedings¹⁰¹.

Any person aggrieved by any decision or act declared by the Court to be null and void¹⁰², or aggrieved by any omission declared by the judgment of the Court as being an omission, shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings for the recovery of damages, or for the grant of another remedy, and shall recover just and equitable damages to be assessed by the Court, or shall be granted such other just and equitable remedy as the Court is empowered to grant¹⁰³.

The Court shall be the appeals court (Chapter 3, part) in all disputes on matters which involve any alleged violation of the Foundation Agreement, the Constitution of the United Cyprus Republic, federal laws (including federal administrative decisions) and treaties binding upon the United Cyprus Republic, including the European Convention on Human Rights and its Additional Protocols in force for Cyprus¹⁰⁴.

During the first two years after entry into force of the Foundation Agreement (Chapter 17)¹⁰⁵, a constituent state may object to a particular treaty having been listed in Annex V of the Foundation Agreement¹⁰⁶, or any reservation or declaration related to such treaty, on grounds of incompatibility with the Foundation Agreement¹⁰⁷. Such objection shall be addressed to the Council of Ministers¹⁰⁸ or the Presidential Council¹⁰⁹. Upon receipt of such

¹⁰¹ *Ibid*, paragraph (6) (second sentence).

¹⁰² Article 2(3) of the Main Articles of the Foundation Agreement states: “(3) The federal government and the constituent states shall fully respect and not infringe upon the powers and functions of each other. There shall be no hierarchy between federal and constituent state laws. Any act in contravention of the Constitution shall be null and void”.

¹⁰³ Federal Law on Administration of Justice, Schedule, Chapter 2, paragraph (9).

¹⁰⁴ Annex I, Part V, Article 36(4) (including Note (22)); Federal Law on Administration of Justice, Schedule, Chapter 3, paragraph (1). Paragraphs (2) and (3) of Chapter 3 provide: “(2) Any party to judicial proceedings involving a dispute in respect of any of the matters referred to in paragraph (1) of this Chapter may appeal any judgment given in such proceedings at first instance, where such judgment is that of a Chamber, other than Grand Chamber, of the Court, or that of a court of a constituent state. [new paragraph] Provided that, where the involvement of such matters only becomes apparent for the first time in appellate proceedings, whether in the courts of a constituent state or in a Chamber of the Court, other than the Grand Chamber, an appeal shall lie and shall be heard by the Grand Chamber. (3) The Federal Attorney-General and the Attorneys-General of either of the constituent states may intervene as *amicus curiae* in any appeal under paragraph (2)”.

¹⁰⁵ Subject to the duty of the Court to decide on objections with which it has been seized before the expiry of the two-year period (Chapter 17, paragraph (2)).

¹⁰⁶ Annex V: “List of International Treaties and Instruments Binding on the United Cyprus Republic”.

¹⁰⁷ The term “Foundation Agreement” includes obligations arising out of membership of the European Union (Observation to Article 48(1) of the UCR Constitution).

¹⁰⁸ Further to Article 41(1) and (2) of the UCR Constitution (at Part VII): “(1) Until such time as the newly elected federal Parliament shall have elected a Presidential Council, the Council of Ministers shall act as the Government of the United Cyprus Republic. (2) Upon entry into force of the Foundation Agreement, the members of the Council of Ministers shall be those persons whose names were communicated to the Secretary-General of the United Nations no later than two days after successful referenda”.

objection, the Council of Ministers or the Presidential Council shall within two weeks decide on the compatibility of the treaty with the Foundation Agreement. If they cannot reach a decision within that time, they shall immediately refer the matter to the Supreme Court which shall decide without delay¹¹⁰.

Matters bearing upon validity, precedence, violation and compatibility may not yield multiple outcomes ('also'), but neither the one ('constituent state') nor the other should be given an 'opportunity' to determine. In such an event, if the relevant Chamber is unable to reach a consensus, the justices should divide into their pairs (/ groups) with the aim of arriving at a consensus position within their respective group. Only groups that have reached consensus shall have their position considered: the majority position providing the outcome. In the event of a tie between either position, the most senior group to have reached consensus shall decide. Only in those instances where no group (of the Chamber) has managed to reach consensus shall the outcome be determined by the judge drawn by lot ('at the commencement of proceedings') from the 'partner' Chamber or (for the Grand Chambers) the other Court.

The judge drawn by lot shall not be revealed until the moment arrives (in the given case) where the position of that judge is required in order for an outcome to be secured. Once again, that judge may be an earlier drawn judge if the previous case heard under this procedure (by / type of Chamber) had not required the 'intervention' of the 'partner / other' judge. As with the 'Compromise Procedure', drawing by lot should be governed by sequences (here, again, separate from any other sequence), a draw being conducted either four times or ten times (for the Grand Chambers) for each sequence.

'Similar' (to the final possible stage of the 'Compromise Procedure'), the (drawn) judge would be provided with a copy of the transcript of the proceedings; and, having read and considered all relevant documents, required to issue a decision.

This would be the only procedure of the Court where a failure to reach consensus would not be followed by an attempt to establish a majority (opinion). Any individualised position (*by opinion*) would only prejudice the possibility of arriving at consensus within a group or render any arrived at consensus (within a group) liable to the accusation that it was the product of some kind of pressure.

Seniority should decide in the event of a tie. Employment of the 'partner / other' judge, in the context of this procedure, ought again, as with the 'Compromise Procedure' and the judge from the other Court / further judge, be highly residual. 'Likewise', no sequence should risk 'concluding' with a 'predetermined' outcome.

¹⁰⁹ Annex I, Part VII, Article 48(1). Paragraph (1) of Chapter 17 incorrectly refers to "... the Co-Presidents or the Council of Ministers..." It should read: "... the Presidential Council or the Council of Ministers..."

¹¹⁰ Annex I, Part VII, Article 48(2); Federal Law on Administration of Justice, Schedule, Chapter 17, paragraph (1).

IX. '50:50 PROCEDURE'

A 'split decision' may, on occasions, provide a determination. This can be reflected in three of the current Chapters, and in part of one other.

Ten years after entry into force of the Foundation Agreement, the Property Board shall be wound up¹¹¹. The Court may (Chapter 14), upon application by the Property Board, or by the executive heads of the constituent states acting by consensus, extend the period of operation of a specific section of the Property Board for one year at a time in order to enable completion of a specific function and may order the retention by that section or sections of specified assets to enable the continuation of work. Notwithstanding any such limited extension of operation of a particular section or sections, the Property Board shall be considered to be wound up unless the Court orders otherwise¹¹².

A Property Court shall be established (Chapter 12) with power to conduct final judicial review (only) of decisions of the Claims Panel (of the Property Board)¹¹³. The Property Court shall continue in operation until such time as the Supreme Court may decide to assume its functions¹¹⁴.

Where a question is raised before the Court, it may, if it considers that a decision on such question is necessary to enable it to give judgment, request the Court of Justice (of the European Union) to give a preliminary ruling thereon (Chapter 21)¹¹⁵. Where any such

¹¹¹ "(2) The Governing Council may decide, by majority of five to two and subject to the approval of the heads of government of the constituent states acting by consensus, to wind itself up on a date earlier than ten years after commencement of its operations, provided that its work has been completed or appropriate provision has been made for transfer to a competent body of any outstanding functions or matters" (Annex VII, Attachment 2, Article 8(2)).

¹¹² Annex VII, Attachment 2, Article 8(3); and, Federal Law on Administration of Justice, Schedule, Chapter 14, paragraph (1). Concerning the winding-up of the Property Board, Article 8(5) of Attachment 2 of Annex VII: "(5) Prior to its winding-up, the Property Board shall make arrangements for the completion of any tasks or functions assigned to it under these provisions, including any claims or disputes which are pending or which may arise in future. For this purpose, it may refer or request the Supreme Court to assign specified claims or cases to other competent bodies or courts or to a section of the Property Board, which will continue in operation by order of the Supreme Court. The obligation to ensure or make arrangements for completion of any tasks or functions under these provisions shall also apply to any section of the Property Board which continues in operation for any extended period". See also: Administration of Justice Law, Schedule, Chapter 14, paragraph (2).

¹¹³ Annex VII, Part IV, Article 22(1). Further to Article 22(3) and (4) (judicial review only): "(3) Decisions of the Claims Panel shall not be subject to appeal or challenge in any constituent state court or otherwise, except by way of judicial review by the Property Court in accordance with the law and these provisions. (4) Decisions of the Property Court shall not be subject to further review or appeal to the Supreme Court". Regarding Article 22(4), see also: Federal Law on Administration of Justice, Schedule, Chapter 12, paragraph (3).

¹¹⁴ Federal Law on Administration of Justice, Schedule, Chapter 12, paragraph (4).

¹¹⁵ Article 234 of the Treaty (minus the final paragraph, see below) states: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB [European Central Bank]; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. [new paragraph] Where such a question is raised before any court or

question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice¹¹⁶.

Upon a recourse under Chapter 1¹¹⁷ (of the Schedule to the federal law), the Court may order that the operation of the law, or decision, or act, as the case may be, which is the subject matter of the recourse shall be suspended until the determination of the recourse¹¹⁸.

The ‘winding-up’ (to section/s) or “otherwise” of the Property Board; the assumption of the functions of the Property Court; request of a preliminary ruling / referral (including by the Supreme Court) to the European Court of Justice; and, order for suspension of the law, decision or act need not be subject to the securing of a majority (at the very least) amongst the judges presiding in the given case. In any of these instances, a ‘split decision’ (that is, 50:50) should be regarded as a positive decision on the matter: for example, to “extend the period of operation of a specific section of the Property Board for one year”.

X. ‘LAW / AGREEMENT SPECIFIED PROCEDURE’

For three Chapters, the relevant Constitutional Law / Cooperation Agreement / federal law shall specify, for any instance, the procedure to be applied in the Court.

First, the Court shall have the power (Chapter 10), in terms of Article 12 of the Cooperation Agreement on European Union Relations, to decide any dispute resulting from the application of such Agreement¹¹⁹. For instance, proceedings brought under Article 5(6) of the Agreement would be governed by the ‘Compromise Procedure’¹²⁰. Second, (Chapter 19) admiralty jurisdiction¹²¹. For instance, proceedings brought under Section 3(3)(b) of the Federal Law on Admiralty Jurisdiction would be considered by the Court in accordance with

tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. [new paragraph] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice”. For text of the Treaty, see: http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

¹¹⁶ The final paragraph of Article 234 quoted verbatim. Paragraph (2) of Chapter 21 reflects this final paragraph by stating: “(2) Where any such question is raised before the Court and there is no judicial remedy under national law, the Court shall bring the matter before the Court of Justice”.

¹¹⁷ Chapter 1 is titled: “Disputes between the constituent states or between one or both constituent states and the Federal Government (Article 36.2)”.

¹¹⁸ “... [A]nd any such order shall be forthwith published in the Gazette” (Chapter 1, paragraph (5)).

¹¹⁹ Federal Law on Administration of Justice, Schedule, Chapter 10, paragraph (1). Article 12 of the Cooperation Agreement (Annex IV, Attachment 2) provides: “Any dispute resulting from the application of this Agreement shall be decided by the Supreme Court of Cyprus”.

¹²⁰ That is, the failure of the Coordination Group (established under Article 5(1) of the Agreement) to reach a decision and the referral of the matter (to the Court) by any of its members. Note: paragraph (2) of Chapter 10 (of the Schedule) incorrectly describes Article 5(6) as ‘Article 5(5)’ (“... paragraphs 5 and 13 of Article 5...”).

¹²¹ See also: Federal Law on Administration of Justice, Schedule, Chapter 4, paragraph (2)(d).

the ‘Group Procedure’¹²². Third, (Chapter 20) in accordance with the relevant provisions of any Constitutional Law or Cooperation Agreement. For instance, the Court would be required to rule on disputes under Section 5(2) of the Constitutional Law on the Strength and Equipment of the Constituent State Police Forces in accordance (also) with the ‘Group Procedure’¹²³. On the other hand, it may not always be possible / practicable to have determined ‘in advance’ (for every conceivable recourse, under the Agreement / Law) the procedure to be employed. Returning, as an example, to Article 12 of the Cooperation Agreement on European Union Relations, ‘a dispute’ may not have its procedure specified¹²⁴. In such an event, the procedure should be determined, in advance of any proceedings, by the Presidency of the Court by majority. Quorum should be two members (of the Presidency). Where any member is absent (from the relevant meeting), the decision should be made by unanimity. Failing these: by the President / Acting President.

XI. ‘CHAPTER 4: VARYING PROCEDURES’

The Court shall have primary jurisdiction over violations of federal law¹²⁵ where provided by federal legislation (Chapter 4)¹²⁶. The relevant sub-paragraphs / paragraphs of the Chapter shall specify the procedure to be followed.

Primary jurisdiction shall include:

(a) First instance judicial review of decisions, acts or omissions of any federal organ, authority or person exercising any administrative authority contrary to any of the provisions

¹²² Section 3(3)(b) of the Federal Law (Annex III, Attachment 11, Law 20) provides that the Court has jurisdiction to hear any proceedings concerning: “(3)(b) any action to enforce a claim for damages loss of life or personal injury arising out of – (i) a collision between ships; or (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more ships; or (iii) non-compliance, on the part of one or more of two or more ships, with any collision regulations in force for the time being”.

¹²³ Section 5(2) of the Constitutional Law (Annex II, Attachment 2, Law 1) states: “(2) No weapons shall be purchased by any constituent state for the needs of its police force unless the following procedure is followed: (a) Before purchasing any such weapons, the government of the constituent state concerned shall notify the Presidential Council and the government of the other constituent state of the type and number of weapons to be purchased. (b) The Purchase of the weapons shall be considered as having been authorised if no objections are raised, in writing, by the Presidential Council or by the government of the other constituent state within one month from the notification referred to in paragraph (a) above. (c) If objections are raised as provided in paragraph (b), the member of the Presidential Council and the members of the governments of the constituent states, having responsibility in respect of police matters, shall hold consultations and may, within two months from the date on which the objections were raised, resolve the matter by consensus. If consensus is not achieved within the said time limit, the Presidential Council or the government of a constituent state may refer the matter to the Supreme Court of Cyprus, which shall decide whether the envisaged purchase of weapons complies with the provisions of the Constitution and of this Law”. Section 5(1) provides: “(1) Constituent state police forces may only carry weapons appropriate for normal civilian police duties”. The keyword in Section 5(2) is “complies”.

¹²⁴ Article 12 begins: “Any dispute resulting from the application of this Agreement...” It does not, for example, refer (*inter alia*) to Article 5(6).

¹²⁵ Including Regulations and Orders under federal laws.

¹²⁶ Annex I, Part V, Article 36(5); Federal Law on Administration of Justice, Schedule, Chapter 4, paragraph (1).

of the (UCR) Constitution, any Constitutional Law or federal law, or made in excess or abuse of the power vested¹²⁷. Recourse to the Court may be made by a person whose existing legitimate interest is adversely and directly affected by such decision or act or omission¹²⁸. Upon such a recourse the Court may, by its decision – (i) confirm, either in whole or in part, such decision or act or omission; or (ii) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or (iii) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed¹²⁹.

This should be governed by the ‘Group Procedure’.

(b) Civil actions, other than actions under paragraph (9) of Chapter 2 (see above), in respect of violations of a federal law for which damages, injunction, declaratory judgment or any other relief is ordinarily granted by a court exercising jurisdiction, provided that such jurisdiction is conferred upon the Court by the federal law in question¹³⁰.

This should be governed by the ‘Law / Agreement Specified Procedure’.

(c) Criminal jurisdiction over offences against federal laws reserved for the Court by federal jurisdiction¹³¹.

This should be governed by the ‘Group Procedure’.

¹²⁷ Federal Law on Administration of Justice, Schedule, Chapter 4, paragraphs (2)(a) and (8) (opening paragraph).

¹²⁸ *Ibid*, paragraph (8)(a). In this regard, further to Section 31(2) of the federal law (at Part V): “(2) When a recourse, made in terms of Section 5 of Article 36 of the Constitution (primary jurisdiction) and paragraph (8) of Chapter 4 of Schedule [sic.], appears to be *prima facie* frivolous, the Court or a Chamber may, after hearing arguments by or on behalf of the parties concerned, unanimously dismiss such recourse without a public hearing, if satisfied that the recourse is in fact frivolous”.

¹²⁹ *Ibid*, paragraph (8)(c). Paragraph (8) concludes (at sub-paragraph (d)) with: “(d) Any decision given under sub-paragraph (c) of this paragraph shall be binding on all courts, organs and authorities of the United Cyprus Republic and shall be given effect to and acted upon by the organ, authority or person concerned”.

¹³⁰ *Ibid*, paragraph (2)(b). Note: paragraph 2(b) excepts “actions under section 11 of Chapter 2”. This is incorrect, Chapter 2 concludes at paragraph [/ section] (9). Thus, it should read: ‘... actions under paragraph [/ section] 9 of Chapter 2...’ Concerning a federal law conferring such jurisdiction upon the Court: judgment, for example, may be awarded against an employer for an accident or occupational disease falling upon an employee; the adjudged sum being payable by the insurer to the person/s in whose favour the judgment has been given (Federal Law on Compulsory Insurance of Employers against their Liability in the Case of Accidents towards Employees (Annex III, Attachment 32, Law 3), Sections 2 (definition of “judgment”) and 9(1)).

¹³¹ *Ibid*, paragraph 2(c). Article 15(2) of the UCR Constitution provides (at Part IV): “(2) The constituent states shall have primary criminal jurisdiction over offences against federal laws, unless such jurisdiction is reserved for the Supreme Court of Cyprus by federal legislation”. Concerning a federal law conferring such jurisdiction upon the Court: criminal responsibility, for example, arising from Section 21 of the Federal Law on Insider Dealing, Market Manipulation (Market Abuse) and Related Issues (Annex III, Attachment 31, Law 1), at Part V. Every criminal case before the Supreme Court (first instance and appeal) shall be heard before the relevant / appropriate Chamber / judges, and not by a single judge (see: Sections 89, 91 (at Part III) and 111 (at Part V), Federal Law on Criminal Procedure (Annex III, Attachment 26, Law 3)). Only (the) necessary pre-trial matters may be considered by a single judge of a Chamber.

(d) Further: (i) the Court may try any offence in accordance with arrangements made, under paragraph (13) of Appendix O to the Treaty of Establishment¹³² regarding offences committed in whole or in part within the Sovereign Base Areas where both the complainant and the accused person are citizens of the United Cyprus Republic¹³³; and, (ii) offences in respect of which the laws of the United Cyprus Republic are applicable under a Treaty or Convention binding on the United Cyprus Republic, and creates an offence triable by Courts of the United Cyprus Republic¹³⁴.

Again, these should be governed by the ‘Group Procedure’.

Any court direction, civil law remedy or order¹³⁵ (being the consequence, rather than the basis for the action), or criminal law punishment or order, should be determined, under the ‘Group Procedure’ – (and possibly, therefore, if necessary) by the most senior group responsible for determining the outcome of the case or (where no group reaches consensus) by the ‘partner / other’ judge.

Any civil law remedy or order (being the basis for the action), and reflecting ‘the other part’ of Chapter 22, shall also be governed by the ‘Group Procedure’. Under Chapter 22:

“The Court, in the exercise of its jurisdiction, may issue orders of habeas corpus, mandamus, certiorari, prohibition and quo warranto against federal organs authorities of officials [sic.]”.

XII. APPEALS

¹³² With the Government of the United Kingdom of Great Britain and Northern Ireland.

¹³³ Chapter 4, paragraph (4). Paragraph (13) of Appendix O provides: “Arrangements will also be made to enable certain criminal proceedings in which both the complainant and accused are Cypriots to be tried by the Courts of the Republic”. For text of Appendix O: http://www.sba.mod.uk/web_pages/appdx-o.htm

¹³⁴ Chapter 4, paragraph (5). For example, (Part II of) the Federal Law on Drug Trafficking (Annex III, Attachment 27, Law 2), Section 44(2)(a), in respect of Article 3(1) of the United Nations Convention against the Illicit Trafficking of Drugs and Psychotropic Substances (1988).

¹³⁵ The Court may issue interim orders and any other order which is ancillary to any proceedings within its jurisdiction (Section 21, Federal Law on Administration of Justice, at Part III). Rule 14 of Annex II (titled: “General Rules of Practice of the Supreme Court”) provides: “(1) The Court, may, at any stage of the proceedings, either ex proprio motu or on the application of any party, make a provisional order, not disposing of the case on its merits, if the justice of the case so requires. (2) A provisional order made under this rule may, either on the ground of urgency or of other special circumstances, be made without notice and upon such terms as may be deemed appropriate in the circumstances: [new paragraph] Provided that all parties affected by an order made under this rule shall be served forthwith with notice thereof so as to enable them to object to it and upon such an objection the Court, after hearing arguments by or on behalf of the parties concerned, may either discharge, vary or confirm such order under such terms as it may deem fit”. Rule 8(2) of Annex III (titled: “The Default Provision and Deadlock-Resolution Procedural Rules), concerning Chapter 5, provides: “(2) If it appears to the Court that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court may make an order accordingly and may direct such question of law to be raised for the opinion of the Court either by special case stated or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed”.

Any appeal from a Chamber to Grand Chamber under Chapters 3 (“violation of...”, ‘Group Procedure’), 4¹³⁶, 13 and 19, as well as on an order for a preliminary ruling of the European Court of Justice (under Chapter 21(1))¹³⁷ and on interlocutory matters¹³⁸ shall be heard (by the relevant ‘Grand Chamber’) only by the 6 judges of the Court (from the other Chamber) not to have sat in the case at first instance. Any such appeal must be considered with an original eye.

XIII. REGISTRY

The Registrar need not be a non-Cypriot. The Registry¹³⁹ should be composed of (four persons) a Registrar, First Deputy Registrar and two Deputy Registrars (two hailing from each constituent state). The Registrar and First Deputy Registrar should not hail from the same constituent state. Besides their normal duties¹⁴⁰, each Registrar should be assigned to at

¹³⁶ Annex I of the Federal Law on Administration of Justice, under Grand Chamber of Primary Federal Jurisdiction, incorrectly states: “This Chamber has jurisdiction to hear appeals from any decision of a Chamber exercising primary criminal jurisdiction”. Chapter 4 (over which all three primary chambers of the Court of Primary Federal Jurisdiction have competence) is titled: “Primary jurisdiction over violations of Federal Laws where provided by Federal legislation”. This primary jurisdiction, however, includes “first instance judicial review” (Chapter 4, paragraph 1(2)(a)) and “[c]ivil actions... conferred upon the Court by the Federal Law in question” (*Ibid*, paragraph 1(2)(b)). These are ‘reflected’ in Section 22 of the federal law and Article 36(5) of the UCR Constitution. Section 22 (at Part III) states: “An appeal shall lie from any decision of the Court exercising its primary jurisdiction under Section 5 of Article 36 of the Constitution in accordance with the provisions of any relevant Law, to a Chamber designated by the Court as being appropriate to hear such appeal”. Article 36(5) (at Part V) states: “(5) The Supreme Court shall have primary jurisdiction over violations of federal law where provided by federal legislation”. Thus, for “first instance judicial review” and “[c]ivil actions”, the right to appeal in respect of these should be reflected, also, in Annex I, which, under Grand Chamber of Primary Federal Jurisdiction, should be amended to read: “[Chapter] 4. Appeals from a Chamber having exercised primary jurisdiction over violations of Federal Laws where provided by Federal legislation”.

¹³⁷ Rules 5 and 6 of Annex IV (titled: “The References to the European Court of Justice Rules”) provide: “5. When an order has been made, the Registrar shall send a copy thereof to the Registrar of the European Court; but in the case of an order made by the Constitutional or Primary Chambers, he shall not do so, unless the Court otherwise orders, until the time for appealing against the order has expired or, if an appeal is entered within that time, until the appeal has been determined or otherwise disposed of. 6. An order made by a Constitutional or Primary Chamber shall be deemed to be a final decision, and accordingly an appeal against it shall lie to the relevant Grand Chamber without leave; but the period within which a notice of appeal must be served shall be 14 days”.

¹³⁸ This should be noted, in Annex I, under both the Grand Constitutional Chamber and the Grand Chamber of Primary Federal Jurisdiction, rather than just (as currently) under the latter.

¹³⁹ Section 24(1) of the federal law (at Part IV) provides: “(1) The Court shall have its own Registry and shall, if it divides itself into Chambers in terms of Section 7 of Article 36 of the Constitution, have registries for each Chamber”.

¹⁴⁰ These are, ‘respectively’, listed in Section 25 (titled: “Duties of the Registrar and the Deputy Registrars”): “(1) Subject to any Rules of Court or to any orders made thereunder by the Court, the Registrar shall issue all summonses, warrants, precepts and writs of execution, shall register all orders and judgments, shall keep records of all proceedings of the Court, shall have the custody and keep an account of all fees and fines payable or paid into Court and of all moneys paid into or out of Court, shall enter an account of all such fees, fines and moneys as and when received, in a book belonging to the Court, to be kept by the Registrar for that purpose, shall from time to time, at such times as shall be required by the Regulations of the Accountant-General, or as may be directed by the Court, submit accounts to be audited and settled by the Auditor-General and shall, subject to any such Regulations or directions, pay into the office of the Accountant-General the amount of fines and fees in his custody. (2) Subject to any Rules of Court or order made thereunder by the Court, the Registrar, and any Deputy

least one chamber of the Court¹⁴¹: the Registrar, the Grand Constitutional Chamber; the First Deputy Registrar, the Grand Chamber of Primary Federal Jurisdiction; one of the Deputy Registrars, the first and second constitutional chamber; the other, the first and second primary chamber. The Deputy Registrar assigned to the first and second constitutional chamber should not hail from the same constituent state as the Registrar. Like the judges of the Court, the Registrars should serve for seven year renewable terms, although the same person should not serve more than two successive terms (during any single period¹⁴²) as Registrar. In the event of the temporary absence or incapacity of any Registrar, the other Registrar hailing from the same constituent state shall ‘deputise’ as Acting Registrar¹⁴³. There should be no ‘transitional Registry’¹⁴⁴.

XIV. FINAL WORD

Any legal draftsman should be obliged to consider the worst-case-scenario. Undoubtedly, removing the foreign judges from the Court risks deadlock, but this article has proved that with the employment (into the system) of a little patience and ingenuity the Court could still remain highly functional. Hopefully, the members of the Court would commonly refrain from being partisan, therefore making such type of provisions sit oddly, but this may not always be the case. At such times, mechanisms are required to avert crisis. This is where the means of making an even number into an odd becomes so useful. It has been proved that it can be done and, most crucial of all, at no one’s expense.

Registrar, shall be Taxing Master for the Chamber to which he belongs, and shall tax all bills of costs in accordance with the scale of fees for the time being in force, subject to review of such taxation by the Court, [new paragraph] Provided that the Court may direct that taxation of costs in any case shall in the first instance take place before the Court itself. (3) The Registrar, or a Deputy Registrar, as the case may be, shall have the duty by himself or by his officers to receive writs and processes of the Court, and to execute the same and to make returns thereto: [new paragraph] Provided that the Registrar shall not be liable to be sued for any act or omission of any messenger, bailiff, or other person in the execution of any process which shall have been done or may have occurred either through disobedience or neglect of orders or instructions given by him, or which may have been done or occurred without his authority”.

¹⁴¹ Section 24(5) provides: “(5) If the Court is divided into Chambers, the Registrar and each of the Deputy Registrars shall each be assigned one of the Chambers. They shall hold the above offices alternately for such period as the Court may decide”. “[T]he above offices” here can only mean their attachment to any relevant Chamber/s.

¹⁴² Thus, any person may serve more than two terms as Registrar.

¹⁴³ With the Grand Constitutional Chamber being assigned to the Registrar and with Chapter 5 cases being heard only before this Chamber, the definition for “Registrar” in Rule 2(2) of Annex III (of the federal law) and Rule 5(2) (from the same Annex) should be deleted. The definition states: ““Registrar” means the Registrar of the Court and includes Deputy Registrars”. Rule 5(2) provides: “(2) Any jurisdiction conferred by these Rules on the Registrar shall be exercisable by him or by a Deputy Registrar”.

¹⁴⁴ Article 45(3) of the UCR Constitution (at Part VII) states: “(3) The Registrar, who shall be a non-Cypriot, and two Deputy Registrars of the Supreme Court shall assume their functions immediately upon entry into force of the Foundation Agreement. They will remain in office for 36 calendar months, when they shall be replaced in accordance with the law”.

Biographical Note

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Majority or Minority Languages? For a new discourse on languages

Aureli Argemí

Enough of discriminatory terminology

There are majority languages and there are minority languages. This distinction between the two types of language is not only made as if there was evidence to support it, but also as if it was an acceptable and accepted one; at least for a part of the many people who represent civil service institutions and the media.

To begin with, it is taken for granted in this division that majority languages are the ones most widely spoken whilst the minority ones are least so. The truth, however, often dispels this assumption. It all depends on the parameters employed. For instance, there are those who claim that Catalan is a minority language in the Spanish state, where Spanish is precisely the majority language spoken. But within the autonomous community of Catalonia, Catalan is the majority language spoken, where it is so as the mother tongue, accompanied by Spanish, which, in this same community, the citizens who speak it are in the minority.

This perspective of the reality leads one to immediately believe that this division and the corresponding terminology bear a certain political content, that it is not neutral. A further example will illustrate my previous statements: the people living in Catalonia - where Catalan, after much upheaval, has been granted status as the official language besides exist as the mother tongue - are people who have the simultaneous right and obligation to understand Spanish as well, the official language of Spain. In other words, from the institutional perspective, if from no other, Catalan speakers, whether they wish to or not, must be bilingual: the subjects of a State in which Spanish is the predominant language of the majority, and members of an autonomous community or autonomous communities where a language is spoken which, within the entire set of communities constituting this State, becomes peripheral and minority. In this sense, Catalan has had to endure the constant pressure from another language, deemed a majority one, being actively used beside it in its territory (a situation which has not been experienced in Spanish territory; Spanish is not shadowed by another language).

We could expand the debate and create any number of combinations on the meaning of the terms “majority” and “minority” in the case of languages. We will always come to the same conclusion: the concepts “majority language” and “minority language” have very little to do

with what they appear to mean. Moreover: they are distinctions in which, even if there is nothing else, discrimination, which goes against the fundamental principles of the Universal Declaration of Human Rights, is always a feature of the condition of minority language. The division of the languages harbors strong ideas and the excuse to consider them without respecting the right to equality in the framework for human rights.

This is the reason why, as if it was common in a democracy, majority languages are considered to be treated in legal and political spheres as languages which ensure the equality of the inhabitants in certain territories defined by state borders; a set of borders which thus determine the meaning and the scope of linguistic equality and in their capacity as borders place limitations on the citizens. From the perspective of those who speak minority languages, the majority languages are presented to them as the predominant ones whilst their own language continues to be dominated, to say the least, because they are not allowed to develop like the majority ones are. Therefore, the terminology employed for these linguistic circumstances comes to be a reflection of how some people, who think their language is superior, behave towards others who, from a linguistic perspective, are to settle for being subordinate subjects.

These classifications have many consequences. I will highlight a few which I believe to be particularly important: in many parts of Europe the classification of languages is directly proportionate to the political situation and the laws in and under which the speakers are living. For instance, the Slovenian language is treated, within the Republic of Slovenia, with all the necessary requirements so that it remains well protected from any discrimination; or rather, to all effects, it is considered as the majority language. The same language becomes a minority one on the side of the border, in Italy, since it is situated in a country in which Italian is the language of the majority. The rights of the Slovenian speaker thus cease to govern. The greater acceptance is of the fact that, during the 20th century, many Slovenian speakers, due to the wars and peace treaties which have modified the borders, have had to transcend from an age of total recognition of their tongue to one full of restrictions or simply over which there has been a constant guardian.

This form of schizophrenia may be even more apparent in European institutions. In effect, the European Union (EU) presents itself to the world as an international organization which wishes to stand out because of its decision to develop the union of its member states on the basis of respecting and promoting diversity between them (both culturally and linguistically, in particular). The EU does not try, therefore, to bring about the conditions for unity between the member states with the implementation of homogenous concepts. However, in the linguistic sphere the implementation of this fundamental principle is part of a policy that, to some extent,

lacks coherency. EU institutions practice a doctrine which conveys no message that languages are to be considered either majority or minority (sometimes described as “regional languages”), in line with the policies established by its member states which most of the time are subjected to homogenous ideas regarding the languages. Just about all of the different recommendations and statements by the EU Parliament in favor of linguistic pluralism and the protection of languages under the threat of dying out take this direction and fall into the same trap, as well as the “European Charter for Regional or Minority Languages” from the Council of Europe. In spite of these stances taken, there are sentences which declare it to be a principle that all languages are to be respected equally because those who speak them are equally dignified.

In conclusion to this section, it would appear that there is no way to discover the key or the secret to leaving the cul-de-sac into which linguistic policies justifying such discriminatory terminology as “majority language” and “minority languages” lead us. In all cases, it is necessary to open up new pathways and see if, by way of other terms, we can reflect more accurately the equality between languages which is the right of all human beings.

In Search of Fairer Terms

The efforts to open up new pathways in the directions stipulated have multiplied in the last few years. I think one of the most important, most extensive and most coherent ones was that by the people who drew up the Universal Declaration of Linguistic Rights, passed in Barcelona on the 6th June, 1996 (www.linguistic-declaration.org). This is a document which was produced by several people from around the world, experts in languages, linguistic policy and linguistic rights, and presented at the University of Barcelona following a lengthy combined effort of two years and made possible by the co-employment of new communication technology.

This text materialized from the belief that the language problem, the treatment and the consideration of languages is not a product of how we see languages, but our views on the speakers and their rights; that is, the aforementioned Declaration was drawn up based on the notion that the linguistic rights of all must be the basis for the implementation of any fair policy which invokes linguistic equality. Or, to put it another way, if no policy can guarantee the full exercise of one’s linguistic rights, then it cannot be democratic. So what must take priority then is the means by which we can combine the complexity of language in the world with the rights to language of each and every one of us and of the language communities with which different people identify themselves. The languages must be sure to be treated equally, in harmony with

the principle that their speakers, their subjects, enjoy exactly the same rights.

One of the obvious consequences of this position adopted in favor of the preference of linguistic rights is that the definition of these rights, on which the terminology to express them must be founded and justified, cannot be subjected to the political status or status in administration that languages today are, nor to criteria which depend upon the speaker's name or status. For this reason, the aforementioned Declaration, in proclaiming equal linguistic rights for all, fully emphasizes the lack of a clear relationship between the division of languages into "majority" and "minority," and also into "official" and "unofficial" and into "national," "regional" and "local"...Divisions which, no matter how true they remain to the facts, are flawed because of the ever-present discriminatory elements against languages they bear. In all cases, to the authors of the Declaration these divisions are employed politically as justification for the need to place restrictions, if not impose practices, on linguistic rights, and they are seeds for the development of clashes between languages, no matter how true it is that the territories in which the languages are spoken may differ and function differently.

Another important feature of the Declaration is its adoption of a position in favor of the inseparable interdependence between the collective and individual dimensions of linguistic equal rights. To express this another way, the linguistic rights of the individual can only be exercised on the principal that all languages generate interaction between people who, together, constitute a specific language community; a community which is the very heart of their identity. Moreover, the Declaration states that exercise of linguistic rights can only be justly effective if the collective rights of all language communities are mutually respected and also, should it be the case, those of language groups (the latter understood to be so under Article 1.5 of the Declaration as "any group of persons sharing the same language which is established in the territorial groups of human beings who speak the same language within the territorial space of another language community but which does not possess historical antecedents equivalent to those of that community").

In all of this it is clear that the state borders which normally determine the classification of the languages have been surpassed by an alternative way of viewing linguistic spaces: if, on one hand, the connection between the individual and collective rights of people and language communities has nothing to do with the changing State borders, then on the other hand, those State borders themselves cannot shape individual and collective rights.

Consequently, in light of the prioritization of linguistic rights, the manner in which the political and legal requirements are created so that all languages, with no exceptions, can fully

develop within their linguistic territories must be reconsidered. Here is where the Declaration shows us the need to situate beforehand, or re-situate, the languages in their own space; it is a more apparent need at a time when the globalization of the world is transcending state borders more and more each day, along with the spheres and references these encompass.

The Declaration draws our attention to a set of criteria which must serve as a means of ensuring respect for and exercise of the linguistic rights of all. Here are the most important ones (followed by some comments):

The first criterion is based on the fundamental principal that any language bears the speaker's identity and is an expression of it, a definitive element of their own individual and collective identity. In order to respect this principle fairly, there must be a guarantee that all the speakers of any language may express themselves in it and develop, without any obstruction or restriction, in their own land. For example, Frisian must have all the necessary entitlements so that those who speak it as their native tongue have all the facilities and enjoy all the security to use it from day to day, until it becomes the language required to live in Frisia. No other language is to clip the wings of the Frisian one, nor is any law or linguistic policy to allow other languages to become as important as or more so than Frisian itself in its own territory.

Following this example, once the linguistic rights of the Frisian people have been respected, we cannot overlook the fact that, due to a set of circumstances, certain languages have acquired functions which penetrate Frisian-speaking territory: Dutch and German co-exist in this territory and have become modes of communication within Frisia and abroad, and they establish and broaden economic and cultural co-operation...with the surrounding areas. Even though, German and Dutch undeniably have more international standing than Frisian as languages, are more widely spoken and have a much higher number of speakers, they cannot be used to substitute Frisian or, from the perspective of identity, be imposed upon the space which belongs to Frisian speakers. In other words, these languages must not have to exist in an oppressive manner, nor encourage a system of institutionalized bilingualism within Frisian-speaking territory, as it is at the moment. (Everyone knows, or it can easily be proven, that bilingualism, sooner or later, ends up with the more dominant language overpowering the weaker one; in this case, German or Dutch over Frisian). From the perspective of defense of and respect for the linguistic rights of the Frisians, in their linguistic territory, Dutch and German must always be languages which are to be used merely for certain practical functions only, on the basis that they do not become the mother tongue of the Frisians. (To overcome the ideological impact behind the institutionalized bilingualism – a way to prolong the majority-minority languages issue- the Frisians must be educated in the sense that they must learn to

speak more than two languages).

These approaches are even more applicable to the linguistic territories which are far from Frisia, but which, on economic grounds especially, have acquired ever-essential worldwide communication functions. By this I mean English, primarily. However, English is not to be taken by the Frisians as the language of the future. It simply must be a considerably free language in its functions, becoming, for the moment, at least highly essential in the context of globalization.

On the other hand, the phenomenon of globalization is generating immigration on a massive scale from the Third World to the First World. Each one of these immigrants, who comes with their own native language, is turning the linguistic spaces of the First World into multilingual ones. (This makes pure bilingualism virtually a thing of the past). The existence of this multilingualism calls for the practice of new policies and ways to deal with the issue of language, in a context in which, however, the observation of linguistic rights must still be the principle of a democratic co-existence. Admittedly, the linguistic rights of the immigrants, who are far away from their own language communities, cannot be manipulated so that speaking the language of their new community can slow down or become an obstacle to their inclusion in society. On the contrary, these languages must be one of the most recognized channels for making the participation of our new residents in society possible. To avoid misunderstandings, newcomers must be suggested to accept that the identity of the community, of the language community, in which they establish themselves, takes priority over the idea that languages are judged on their pragmatic value. For example, Catalan is the language of social non-exclusion for newcomers to Catalan-speaking territories and no other language, such as Spanish or French, in spite of the larger number of functions than Catalan they perform. The new residents must have the facilities, language ones naturally, for them to one day, if they do so wish, to become Catalan, like the rest of the people who belong to a nation in which Catalan is the native tongue.

The Declaration aids a better understanding of linguistic rights, the abidance by them as a guideline for peaceful co-existence and the consideration of languages not as a sphere for disagreement and conflict, but as a factor in a respectful united diversity. It is undoubtedly difficult to implement a coherent linguistic policy with all of the fundamental principles I have just cited. There is a need for drastic changes to a mentality which is dominant around the world and which is highly reluctant to accept the exercise of linguistic rights. Unfortunately, the issue of linguistic rights is still one to be resolved. For this reason, I believe it is as necessary to explain the more we understand about linguistic rights, the better we can acknowledge them and

the more we can preserve the dignity and the equality of all people and of all populations.

I bring this piece to a close by coming back to what I wrote at the beginning: the most widespread terminology about languages (if they are majority or minority, regional or national, etc) deprives us of understanding in depth the nature of the issue of language today, in a world which is not focusing on identity in language but on the powers which they seek in linguistic homogenization, a way for their interests and a single line of thought to triumph. New terms must be created which expand on what languages are and what they mean in relation to the speakers of them and to the fact that linguistic diversity is one of the riches of humanity.

I propose, at least where Europe, and more specifically the European Union, is concerned that the question of language is approached from the perspective that all European languages are equal and necessary in order to form and respect all the pieces which make up what we know as Europe: a mosaic of different pieces which, together, constitute Europe itself and outline that the EU wants to act on the terms of a progressive and co-operative democracy between the various countries of Europe. The EU has already proclaimed, in constitutional language, its desire to be a diverse organization of people, language and cultures. It is only possible to accomplish this if full respect is shown for every aspect of human rights, amongst which are those of language. It is therefore the responsibility of all the EU member states to tailor their policies on language to the basic principles of the EU (union in diversity) and to discuss the fact that, with the consequences that changing the established order and dispensing with the classification of languages into majority, minority and other discriminative terms would envisage, all of the languages in Europe become equal in the end.

In a borderless Europe, in line with what the EU aspires to be, languages must be considered without the application of adjectives, just simply as European languages, and the policies that can make this happen must ensure that it continues to remain this way with everybody respecting linguistic spheres, the functions of the languages and, ultimately, promoting respect for the rights of our fellow men and co-existence in diversity. It is the task of new technology, in all circumstances, to accommodate these approaches.

Biographical Note

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