



"Considerations on the International Reaction to the 1999 Kosovo Crisis"

Ringelheim, Julie

Abstract

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CONSIDERATIONS ON THE INTERNATIONAL REACTION TO THE 1999 KOSOVO CRISIS (*)

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(*) This article was finished in March 2000. Events subsequent to this date have not been dealt with.

(**) I am grateful to Olivier Corten, Barbara Delcourt, Susan Marks and Ralph Wilde for their precious comments on previous drafts of this article. I also want to thank Marc Weller for the provision of documentation and Philip Alston for his observations on a seminar paper which is part of the present work.

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INTRODUCTION

The 1999 Kosovo crisis epitomises some of the most vivid debates in contemporary international law : how does one protect the fundamental human rights of a population against its own government? How does one react to claims for self-determination by minorities striving to achieve independence? When does a dispute between a government and a sub-state group cease to be an internal affair?

This article proposes to focus on the political aspects of the international response to the crisis. It does not broach the issue of the use of force by the North Atlantic Treaty Organisation (NATO) countries against the Federal Republic of Yugoslavia (FRY). Rather, it endeavours to paint a legal analysis of the positions adopted by the states that reacted to the crisis, the arguments they invoked, and the kind of solution they promoted. The way international law was referred to by the other actors in the conflict, namely the Kosovo Albanians and the Yugoslav/Serbian authorities, will also be considered. The central concern will be to determine, in the light of the Kosovo crisis, whether international law provides any guidelines for the resolution of a conflict between a culturally distinct group within a state, claiming independence or a special status, and a government which responds to such demands with repression.

Two concepts are of central importance within the ambit of this discussion : self-determination of peoples and minority rights. Both of these concepts remain highly controversial (1). It is not proposed to describe in

(1) On self-determination of peoples, see *inter alia*, J. CRAWFORD (ed.), *The Rights of Peoples*, Oxford, Clarendon Press, 1988; C. TOMUSCHAT (ed.), *Modern Law of Self-Determination*, Dordrecht/Boston/London, Martinus Nijhoff, 1993; C. BRÖLMANN, R. LEFEBER and M. ZIECK (eds), *Peoples and Minorities in International Law*, Dordrecht/Boston/London, Martinus Nijhoff, 1993; A. CASSESE, *Self-Determination of Peoples . A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995; H. HANNUM, *Autonomy, Sovereignty and Self-Determination, The Accommodation of Conflicting Rights*, Philadelphia, University of Pennsylvania Press, 1996 (revised edition); T. CHRISTAKIS, *Le droit à l'auto-détermination en dehors des situations de décolonisation*, Paris, La Documentation Française, 1999. On international protection of minorities, see *inter alia*, P. THORNBERRY, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991; I.O. BOKATOLA, *L'Organisation des Nations Unies et la protection des minorités*, Brussels, Bruylant, 1992; J. PACKER and K. MYNTTI (eds), *The Protection of Ethnic and Linguistic Minorities in Europe*, Institute for Human Rights, Abo Akademi University, 1993; A. PHILLIPS and A. ROSAS (eds), *Universal Minority Rights*, Abo Akademi University Institute for Human Rights/Minority Rights Group, Turku/Abo and London, 1995; A. FENET *et al.*, *Le droit et les minorités, Analyses et textes*, Brussels, Bruylant, 1995; S. PIERRÉ-CAPS, *La Multination, l'avenir des minorités en Europe centrale et orientale*, Paris, O. Jacob, 1995; N. ROULAND,

detail the theoretical debates that surround these notions. Only those aspects which cast some light on the Kosovo episode will be touched upon. Indeed, the relationship between the issues of self-determination and minority protection will appear like a leitmotiv at various stages in the discussion.

The region of Kosovo (2) is located in the south of the Republic of Serbia, one of the two constitutive units of the FRY, the other being the Republic of Montenegro. According to the 1991 population census, the province had around 2 million inhabitants (3). Between 80 % and 90 % were ethnic Albanians, while most of the others were Serbs (8-10 %) (4). Kosovo has a powerful symbolic importance in the tradition of both communities. Nicknamed the 'Serbian Jerusalem', it was the heartland of the medieval Serbian kingdom, and the place of the 1389 mythical defeat against the Ottoman Sultan (5). As for Albanians, they claim to be descendants of the Illyrians, who inhabited the land in Antiquity. And in the nineteenth century, the most important events of the Albanian national movement took place in Kosovo (6).

The region was part of the Ottoman Empire until the first Balkan war (1912), when it was invaded by Serbia, independent since 1878. The London conference confirmed the incorporation of Kosovo into Serbia and

S. PIERRÉ-CAPS, J. POUMARÈDE, *Droits des minorités et des peuples autochtones*, Paris, P.U.F., 1996; N. LEVRAT (ed.) *Minorités et Organisation de l'État*, Brussels, Bruylant, 1998.

(2) The name of the region itself is a sensitive issue : the Serbs use the term *Kosovo* or *Metohija*, shortened to *Kosmet*, while the Albanians call it *Kosova*. In the 1946 Constitution of the Federal People's Republic of Yugoslavia, the region was referred to under the name *Kosovo and Metohija*. When, in 1969, from 'autonomous region' (*oblast*), it was promoted to the status of 'autonomous province', its name became simply 'Kosovo'. The 28 September 1990 Serbian Constitution, which deprived the region of its autonomy, restored the name 'Kosovo and Metohija'. See Vojin DIMITRIJEVIĆ, «The 1974 Constitution as a Factor in the Collapse of Yugoslavia or as a Sign of Decaying Totalitarianism», *EUI Working Papers*, Robert Schuman Centre n° 94/9, p. 6, note 6.

(3) H. POULTON, *The Balkans. Minorities and States in conflict*, London, MRG Publications, 1993, p. 57.

(4) *Situation of human rights in the territory of the former Yugoslavia, Special report on minorities*, periodic report submitted by the Special Rapporteur of the Commission on Human Rights, E/CN.4/1997/9, §31. For details about population statistics demography, see *infra*, note 39.

(5) According to Noël Malcolm, historians have shown that Serbs and Albanians were fighting together as allies, maybe even on both sides of the battle. In fact, this was not a fight between two national groups, but rather of Christian lords defending their estate against the Ottoman expansion. The idea that this episode reflects the essence of the 'Serbian identity' is a product of the nineteenth century. See N. MALCOLM, *Kosovo, A Short History*, London, Papermac, 1998, Chapter 4, «The Battle and the Myth», pp. 58-80; C. LUTARD, *Géopolitique de la Serbie-Monténégro*, Brussels, Complexe, 1998, p. 29.

(6) N. MALCOLM, *supra* note 5, p. 217. See more generally A. PAVKOVIC, «Kosovo : A Land of Conflicting Myths», in K. DREZOV, B. GOKAY, D. KOSTOVICOVÁ (eds), *Kosovo, Myths, Conflict and War*, Keele European Research Centre, Southeast Europe Series, 1999, pp. 4-11. The author analyses the way both Serbs and Albanians use myths about their national history to justify their claims to the province. See also M. DOGO, «National Truths and disinformation in Albanian-Kosovar Historiography», in G. DUIJZINGS, D. JANJIC, S. MALIQI (eds), *Kosovo/Kosova, Confrontation or Coexistence*, Peace Research Centre, University of Nijmegen, 1996, pp. 34-45.

when, in 1918, Yugoslavia was founded as the 'Kingdom of Serbs, Croats and Slovenes', Kosovo was regarded as an integral part of Serbia. Under the leadership of Marshall Tito, the People's Republic of Yugoslavia, proclaimed in 1945, was organised as a federal state composed of six republics : Slovenia, Croatia, Montenegro, Macedonia, Bosnia-Herzegovina and Serbia. The latter republic included two autonomous regions : Vojvodina and Kosovo. The new Constitution of 1974 upgraded those two regions to the status of autonomous provinces. While remaining nominally parts of Serbia, their status was in fact very close to that of the six republics (7). By exploiting the resentment of the Serbs in relation to Kosovo, in particular the perception of 'minorisation' *vis-à-vis* the Albanians, Slobodan Milosevic turned himself into a nationalist leader and reached the head of the Serbian Communist League in 1987. In 1989, the Assembly of the Republic of Serbia adopted several amendments to the Serbian Constitution, which considerably reduced the autonomy of Kosovo and Vojvodina. The demotion of the status of the province triggered a wave of protests in Kosovo, which resulted in violent confrontations between Albanian demonstrators and the police. On July 2, Albanian members of the Provincial Assembly, barred from entering the parliament building, gathered outside it and declared Kosovo an « independent and equal constituent unit » within the Yugoslav Federation. In reaction, the Serbian authorities dissolved the provincial assembly and government, thus removing the last elements of Kosovo's autonomy. A state of emergency was declared and the army was sent into the province (8).

At this stage, the objective of the Kosovar Albanian leadership was still to obtain the status of fully-fledged Republic within Yugoslavia, as emerges from the text of the so-called 'Constitutional Declaration of the Republic of Kosovo', adopted in Kaçanik by two thirds of the deputies of the dissolved Assembly of Kosovo (9). However given the general evolution occurring in the rest of Yugoslavia, this position was soon revised. In 1990, the first free multiparty elections held in the republics led to the victory of pro-independence parties in Slovenia and Croatia (10). The two republics proclaimed their independence on June 25, 1991 (11) (followed a few months later by Macedonia and Bosnia-Herzegovina) and hostilities broke

(7) See, *inter alia*, Vojin DIMITRIJEVIC, *supra* note 2, p. 17.

(8) For details about the progressive suppression of Kosovo's autonomy and the Albanian reactions to it, see D. KOSTOVICOVÁ, *Parallel Worlds : Response of Kosovo Albanians to Loss of Autonomy in Serbia, 1986-1996*, Research Paper, Keele European Research Centre, August 1996, pp. 23-30 and C. DICKEHAGE, *Questione nazionale e crisi della Jugoslavia : L'organizzazione politica degli Albanesi del Kosova*, Tesi de Laurea in Storia e Istituzioni dell'Europe Orientale, Università di Bologna, 1997 (unpublished), pp. 85-93.

(9) D. KOSTOVICOVÁ, *supra* note 8, p. 31.

(10) For details about these elections, see S.L. WOODWARD, *Balkan Tragedy, Chaos and Dissolution after the Cold War*, The Brookings Institution, Washington D.C., 1995, pp. 117-126.

(11) *Idem*, p. 146.

out. In this context, Albanian former deputies decided to hold a referendum on the independence of Kosovo which, they claimed, gained 99.87 % approval by 87.01 % of all eligible voters in Kosovo (12). Accordingly, on October 19, 1991, the 'Kosovo Parliament' amended the Kaçanik Constitution and declared 'Kosova' as a 'sovereign and independent State' (13). The Democratic League of Kosovo (LDK) won the majority vote in the clandestine elections organised in May 1992, and its leader, Ibrahim Rugova, became 'President' of the unrecognised 'Republic of Kosova'. He called the Albanian population to peaceful resistance, based on systematic denial of the legitimacy of Serbian authority. The Albanian leadership set up a parallel society, providing most aspects of public services, while Serbian officials launched a policy of 'reserbianisation of Kosovo' (14). Many Albanian public servants resigned from their posts, while the others were dismissed, and they were all replaced by Serbs. Systematic discrimination and numerous human rights violations perpetrated by Serbian police and security services against ethnic Albanians were reported, including arbitrary arrests, torture, harassment and house searches (15).

The LDK continued to preach passive resistance while seeking international support for its cause, assuring the Albanian population that the 'international community' would impose a solution for Kosovo within the framework of a comprehensive peace settlement for the former Yugoslavia. Therefore, that the Kosovo issue was not dealt with in the Dayton Agreement compounded tensions and resulted in the radicalisation of a part of the Albanian population. Support for the moderate factions declined (16). From 1996, the 'Kosovo Liberation Army' (KLA) began small-scale armed attacks (17). The Serbian authorities reacted brutally. The Secretary-General of the United Nations denounced the « killings of civilians [...] the mass displacement of civilian population, the extensive destruction of villages and means of livelihood » by federal and Serbian government forces. He stressed that, « while the victims of the conflict [were] overwhelmingly ethnic Albanians », Serbs also suffered kidnappings and killings

(12) *Keesing's Record of World Events*, 1991, p. 38511 (hereinafter *Keesing's*).

(13) D. KOSTOVICOVÁ, *supra* note 8, p. 31.

(14) M. ROUX, « Le calme trompeur du Kosovo », in J. RUPNIK (ed.), *Les Balkans, paysage après la bataille*, Complexe, Brussels, 1996, pp. 107-122. See also the *Special Report on minorities*, *supra* note 4, § 43 and D. KOSTOVICOVÁ, *supra* note 8, pp. 32-36.

(15) *Special report on minorities*, *supra* note 4, § 39. See also D.L. PHILLIPS, « Comprehensive Peace in the Balkans : the Kosovo Question », in *H.R.Q.*, 1996, vol. 18, p. 821-832 and references cited. D. KOSTOVICOVÁ, *supra* note 8, pp. 49-55.

(16) Note that since 1991, the position of the LDK is also in favour of independence for Kosovo. Its disagreement with the KLA lies in the means to be used to achieve this aim : peaceful resistance or armed action. See T. JUDAH, « The Growing-Pains. The Growth of the Kosovo Liberation Army », in *Kosovo, myths, conflicts and war*, *supra* note 6, pp. 21-25.

(17) The KLA made its first public apparition in November 1997. On the origin and growth of the KLA, see *inter alia* T. JUDAH, *supra* note 16; J. PETTIFER, « The Kosovo Liberation Army — the Myth of Origin », in *Kosovo, myths, conflict and war*, *supra* note 6, pp. 26-30 and M.-F. ALLAIN, « Visages multiples de l'armée de l'ombre », *Le Monde Diplomatique*, April 1998.

by Kosovo Albanian paramilitary units (18). On March 31 1998, the UN Security Council, in Resolution 1160 (1998), condemned « the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the KLA ». However, the fighting between Yugoslav security forces and Albanian armed groups intensified, raising fears of an extension of the tension over the borders. The number of refugees and displaced persons continued to increase (19). On 23 September, in Resolution 1199 (1998), the Security Council affirmed that « the deterioration of the situation in Kosovo constitutes a threat to peace » and called for a cease-fire (20). In October, under the threat of air strikes by NATO, the Yugoslav President Milosevic reached an accord with the US Special Envoy, Richard Holbrooke. He committed himself to withdraw his troops from Kosovo and to allow the creation of a 2,000 strong unarmed verifiers mission by the Organisation for the Security and Co-operation in Europe (OSCE) to oversee compliance with the Security Council Resolution 1199 (1998) (21). However, from the end of December, the violations of the cease-fire multiplied, the acts of violence on both sides increased dramatically, culminating in the massacre of 45 ethnic Albanians in the village of Racak, in January 1999 (22). After renewed threats by NATO, the Yugoslav and Serbian authorities consented to start negotiations at Rambouillet, France, on February 6, with representatives of the Kosovar Albanians (23). The two delegations were

(18) *Report of the UN Secretary-General prepared pursuant to resolutions 1160 (1998) and 1199 (1998) of the Security Council*, 3 October 1998, S/1998/912, §§ 7-10.

(19) *Keesing's*, May 1998, p. 42301; *Report of the UN Secretary-General prepared pursuant to resolution 1160 (1998)*, 4 June 1998, S/1998/470, esp. §§ 18-20; 2 July 1998, S/1998/608, § 13; 5 August 1998, S/1998/712, §§ 11-12; 4 September 1998, S/1998/834.

(20) The qualification of « threat to peace and security in the region » was reiterated in Security Council Resolution 1203 (1998), 24 October 1998.

(21) *Keesing's*, October 1998, p. 42580. This was complemented by an agreement with NATO providing for the establishment of an air verification mission over Kosovo. See the *Report of the UN Secretary-General*, 12 November 1998, S/1998/1068, § 6.

(22) *Report of the UN Secretary-General*, 30 January 1999, S/1999/99, esp. §§ 3-16 and 25-31.

(23) In fact, throughout the year of 1998, the Serbian Government issued several public invitations to negotiate to representatives of all 'national communities' in Kosovo, including the Kosovar Albanian community. However, this invitation was reliant on the condition that the question of the status of Kosovo be discussed only in the framework of the Republic of Serbia. The Kosovar Albanian representatives interpreted this requirement as a precondition and therefore did not attend the offered talks. They made their willingness to enter into dialogue clear, but only with the government of the FRY (as opposed to Serbia), and in the presence of a third party. However, the Serbian Government opposed the participation of an outside representative. (« Report of the European Union on the situation in Kosovo », 21 April 1998, § 2 and 5 and « Information on the situation in Kosovo and on measures taken by the OSCE », 20 April 1998, § 4, *Annex I and II to the Report of the UN Secretary-General*, S/1998/361, 30 April 1998). In addition, the rise of the KLA on the Albanian political scene created new difficulties for the organisation of negotiations, since KLA leaders contested the dominance of the LDK in the negotiating team and demanded to be part of it. « With sharp divisions within the Kosovo Albanian ranks », stated the report of the OSCE in October 1998, « the problem of just who represents them will likely continue and the prospects of a ceasefire called by KLA and the Serbian authorities currently appear remote » (« Information on the situation in Kosovo and measures taken by the OSCE », *Annex to the Report of the Secretary-General*, 3 October 1998, S/1998/912. See also the

required to negotiate an agreement drafted by the 'Contact Group' (24), providing for substantial autonomy for Kosovo within the FRY and supervised by an international military presence (25). Three weeks after the end of the conference, the Albanian delegation decided to sign the draft peace deal, while the Yugoslav/Serbian representatives continued to refuse it. On March 24, NATO began a bombing campaign against the FRY. The Yugoslav President launched a massive offensive in Kosovo against the Albanian population, driving over eight hundred thousand Kosovars out of the country in ten weeks (26). The conflict ended with the acceptance by the Serbian Parliament and President Milosevic, on June 3, of a peace deal providing for the deployment of a military and civil international force in Kosovo, under UN auspices (27). Seven days later, the Security Council adopted Resolution 1244 (1999), authorising « member States and relevant international organisations to establish the international security presence in Kosovo » and entrusted the UN Secretary-General with the organisation of a United Nations Interim Administration Mission in Kosovo (UNMIK). The Yugoslav and Serbian authorities withdrew all their forces from the province, while the NATO countries started the deployment of a security force (KFOR) of 50,000 troops, and the UN began to set up the Interim Administration Mission.

The following analysis of the international reaction to the Kosovo crisis is divided into three sections. Firstly, the legal position of the parties in conflict and the response of the states involved in the crisis are examined. The legal arguments deployed by each side are clearly discernible : Albanian leaders were claiming the status of a *people* entitled to self-determination, and, hence, to independence. Yugoslav authorities responded that they were 'only' a *national minority* and that the issue was an internal affair of the Serbian Republic. As for third-party states, they have insisted from the beginnings of the Yugoslav crisis that Kosovo should be granted an autonomous status. However, they conspicuously avoided reference to self-determination or to minority protection. It is not clear then, whether

preceding reports of the OSCE . *Annex I to the Report of the Secretary-General*, 5 August 1998, § 14, S/1998/712; 21 September 1998, § 7, S/1998/834). Note that an agreement had been signed by the FRY's President, S. Milosevic and the LDK's leader, Dr Rugova in September 1996, on the reintegration in the education system of Albanian students and teachers (C. LUTARD, *supra* note 5, p. 82). But this agreement was never implemented, in part because of the strong hostility of Kosovo Serbs towards it (see, in particular, the *Report of the Secretary-General*, 4 June 1998, S/1998/470, § 44).

(24) The Contact Group was formed in 1994 to co-ordinate the action of a group of states in their search for a solution to the conflict in Bosnia and Herzegovina. It includes representatives of France, Germany, the United Kingdom, the United States, Italy and the Russian Federation (M. ROUX, *Le Kosovo, Dix clés pour comprendre*, Paris, La Découverte, 1999, p. 50, note 1).

(25) *Keesing's*, January 1999, pp. 42805-806.

(26) *Le Monde*, 5 June 1999.

(27) *The Guardian*, 4 June 1999.

autonomy for Kosovo was supported as a matter of *right* or as a necessary *means to end the violence* (I).

This latter question is developed further in the second part. If one tries to find legal grounds for autonomy in international law, it seems that one will inevitably return to the notions of self-determination or minority protection. Yet, in the Kosovo crisis, third-party states did not refer to either of these, but rather to security and humanitarian considerations, when calling on Serbia to grant autonomy to the province. In order to assess whether this attitude could be construed as entailing the acceptance by states that a government could be legally required to grant autonomy to a sub-state community as a means to end an internal conflict, the attitude adopted by the same group of states towards comparable conflicts will be looked at (II).

In any case, autonomy systems can take various forms, depending on the circumstances. Nonetheless, it is submitted that international law conditions the substance of autonomy regimes to a certain extent. Accordingly, the third part of this paper will return to the Kosovo issue, examining the plan negotiated at Rambouillet in the light of international law. Finally, some brief observations about the status of Kosovo resulting from the arrangement implemented after the NATO bombings, will be put forward (III).

Since a substantial part of this work consists of discussion of the positions formulated by the protagonists in the crisis, mainly third-party states, it will be based to a large extent on statements made by state officials or adopted by international organisations. The determination of the legal implications of such documents is not an easy task, for they are usually dependent on a variety of political factors. As a matter of fact, the line between international law and politics is a hazy one. However, a careful review of statements made on different occasions, by different actors, on the same issue, sometimes endowed with a legal value, sometimes not, seems to be the only way to ascertain the evolution of international law in practice and the possible emergence of new customary norms. From another perspective, it also reflects the way international law is used to promote political goals and the way politics influence the shaping of law (28).

(28) On the relationship between law and politics, see, in particular, M. KOSKENNIEMI, *From Apology to Utopia, The Structure of International Legal Argument*, Helsinki Finnish Lawyers Publishing Company, 1989; J. CAILLOSSE, « Droit et politique : vieilles lunes, nouveaux champs », *Droit et Société*, n° 26, 1994, pp. 127-154; B. DELCOURT and O. CORTEN, *Ex-Yougoslavie, Droit international, politique et idéologie*, Brussels, Bruylant, 1998.

I. — THE KOSOVO QUESTION :
BETWEEN SELF-DETERMINATION
AND MINORITY PROTECTION

The first item to be addressed is the categorisation, according to international law, of the Kosovo problem. The legal definition of the Kosovo Albanians was, indeed, a key element in the conflict. This is because, from the initial description chosen (people/minority), different legal consequences ensue (self-determination/individual rights). First, the views of both sides in the conflict, namely the Yugoslav/Serbian authorities and the Kosovo Albanian leadership, will be considered. The clash of arguments between the parties reflects the problematic character of the relationship between the notion of people and that of minority (A). Secondly, the reaction of foreign states to the competing stances of the parties to the conflict will be examined. In particular, the grounds invoked to consider the issue as a matter of international concern, the status allocated to the Kosovo Albanians at international level, and the solution promoted to settle the conflict will be discussed (B).

A. — *A Question of Minority?*

If one tries to define the situation of the Kosovar Albanians according to international law, the notion of minority seems to be the most appropriate. There is no accepted definition of the concept of 'minority' in international law (29). However, the definition proposed by Francesco Capotorti is usually referred to in the doctrine :

« a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language » (30).

These criteria seem to adequately describe the situation of the ethnic Albanians in the FRY. They represent 15-20 % of the population of the country (31). They distinguish themselves by their language (Albanian) and

(29) On the problems raised by the definition of minorities, see, *inter alia*, M. SHAW, « The Definition of Minorities in International Law », *I. Y. H. R.*, 1990, pp. 13-43; F. RIGAUX, « Mission impossible : la définition de la minorité », *Rev. trim. dr. h.*, 1997, pp. 155-175; P. THORNBERRY, *International Law and the Rights of Minorities*, *supra* note 1, pp. 164-172; J. PACKER, « On the Definition of Minorities », in J. PACKER and K. MYNTTI, *supra*, note 1, pp. 23-65; G. KOUBI, « Penser les minorités en droit », in A. FENET *et al.*, *supra* note 1, pp. 251-297; N. ROULAND, S. PIERRÉ-CAPS and J. POUMARÈDE, *supra* note 1, pp. 232-239.

(30) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), 96.

(31) *Special report on minorities*, *supra* note 4, § 31.

religion (roughly 95 % are Muslims and 5 % Catholics) (32), from the Serbian-speaking and Orthodox Christian majority. They do, undoubtedly, wish to preserve their distinct identity.

It has often been noted that the absence of any definition of the term minority in international law is a major weakness in relation to the ability to protect them, « because it allows states to deny certain groups the status of a minority by denying the qualification as such » (33). In the context of Kosovo, however, precisely the contrary phenomenon can be observed : while the Yugoslav/Serbian authorities regard the Kosovo Albanians as a *minority*, the latter reject this qualification because they claim to constitute a *people* (1). Considering the views of each side can serve to highlight some problematic aspects of the concept of minority, in particular its relationship with the notion of 'people' (2).

1. *The Views of the Parties to the Conflict*

a) *The Position of the Yugoslav and Serbian Authorities*

Statements by Yugoslav and Serbian officials persistently referred to the 'Albanian national minority' or 'Albanian national community'. In fact, the FRY Constitution formally guarantees a high degree of protection for national minorities (34). In a declaration annexed to its constitution, the Republics of Serbia and Montenegro even committed themselves to ensuring « the highest standards of the protection of human rights and the rights of national minorities provided for in international legal instruments and CSCE documents » (35). FRY officials argued that the Kosovo issue was an internal affair of the Serb Republic, and for a long time resisted any international involvement in the settlement of the crisis (36). They also

(32) N. MALCOLM, *supra* note 5, p. 14.

(33) R. WOLFRUM, «The Legal Status of Minorities in South-Eastern Europe», in R. LEFEBER, M. FITZMAURICE and E.W. VIERDAG (eds), *The Changing Political Structure of Europe*, Dordrecht, Martinus Nijhoff, 1991, pp. 131-148, at 131.

(34) See art. 11, 15, 20, and 45 to 50 of the Constitution of Yugoslavia, adopted on the 27 April 1992.

(35) See the 1992 Declaration annexed to the 1992 Constitution. The CSCE (Conference on Security and Co-operation in Europe) was renamed OSCE (Organisation on the Security and Co-operation in Europe) at the Budapest Summit, in 1994 (Declaration of the Budapest Summit, 6 December 1994).

(36) See, for example, the declaration of President Milosevic at his meeting with the Russian Foreign Minister Mr. Primakov (Belgrade, 18 March 1998, *Agence Europe*, n° 7183, 19 March 1998); declaration of President Milosevic at his meeting with American emissary Richard Holbrooke in Belgrade (*Agence Europe*, n° 7219, 11 May 1998); statement by Ratko Markovic, Vice-President of the Government of Serbia, 13 March 1998 (*FRY Press Release*). See also the « European Union report on the situation in Kosovo », 21 April 1998, Annex I to the *Report of the UN Secretary-General prepared pursuant to Security Council Resolution 1160 (1998)*, 30 April 1998, S/1998/361, § 4. Acting on a suggestion by the FRY President, S. Milosevic, the Serbian Government held a referendum on 23 April 1998, asking the population of Serbia whether they agreed with participation of foreign representatives in the solution of the Kosovo crisis (*Report*

insistently repeated that there were minorities or communities other than the Albanians living in Kosovo; not only the Serbian community but also Goranians, Egyptians, Muslim Slavs, Turks and Romanians. Consequently, they sustained that the basis for any solution for Kosovo had to be the «equality of all national communities in Kosovo» (37). It must be noted that the Albanian community, as admitted by Yugoslav officials themselves (38), represents some 90 % of the inhabitants of the province, while the Serbian community is estimated at around 8 %. As for the five remaining groups, although the statistics mentioned vary (39), they logically cannot represent, altogether, much more than 2 % of the province's population. But Yugoslav officials insisted that «all national communities, regardless of their numbers, are mutually equal and therefore, in relations among them there can be no discrimination» (40). Accordingly, the political settlement they favoured, was to be based on «self-government of national communities» as well as «self-government of citizens» in Kosovo (41).

b) *The Position of the Kosovar Albanian Side*

As for the Kosovo Albanian leaders, they stridently refused to be categorised as a 'minority' «The Albanian experience in Yugoslavia of being permanently viewed as a minority and having even the autonomy guaranteed in the 1974 Constitution stripped from them has had profound

of the UN Secretary-General, 4 June 1998, S/1998/470, § 36). However, from September 1998, the US Ambassador to the former Yugoslav Republic of Macedonia and Peace Envoy, Christopher Hill, was able to organise indirect talks between the Belgrade authorities and Kosovo Albanians («Information on the situation in Kosovo and measures taken by the OSCE», *Annex to the Report of the UN Secretary-General*, 3 October 1998, S/1998/912).

(37) See, for example, the FRY statement on the talks of the FRY President, Mr. Slobodan Milosevic, with Dr Ibrahim Rugova and members of his delegation (15 April 1998); FRY Press Release on Talks in Pristina (22 May 1998); «Introductory statement by Mr. Milutinovic, President of the Republic of Serbia at the talks with the representatives of national communities in Kosovo and Metohija» (Pristina, 18 November 1998); *Joint Proposal of the Agreement on the Political Framework of Self-Governance in Kosovo and Metohija* (Belgrade, 20 November 1998); Common statement by the President of the FRY, Slobodan Milosevic and the President of the Russian Federation, Boris Yeltsin, 16 June 1998 (*D.A.I.*, 1 August 1998, n° 15, p. 561, § 1). Note that the principle of «equality of nations and nationalities» was regarded as a key principle in the constitutional system of the former Yugoslavia (B. BAGWELL, «Yugoslav Constitutional Questions Self-Determination and Secession», in *Ga. J.Int. & Comp. L.*, 1991, pp. 489-523, p. 504).

(38) See the website of the Yugoslav Government <<http://www.gov.yu/kosovo>> ('Facts about Kosovo and Metohija').

(39) For details about population statistics demography in Kosovo, see «Qui habite le Kosovo?», extract from *Diagonales Est-Ouest*, n° 52, Lyon, 1999, January-February, reprinted in B. ADAM (ed.), *La Guerre du Kosovo, éclairages et commentaires*, GRIP-Complexe, Brussels, 1999, p. 13. See also S.L. WOODWARD, *supra* note 10, p. 34.

(40) *Joint Proposal of the Agreement on the Political Framework of Self-Governance in Kosovo and Metohija*, (Belgrade, 20 November 1998), Preamble.

(41) See the Yugoslav/Serbian counter-proposal to the Rambouillet plan drafted by the Contact Group (*infra*, section III). Text available on the website of the *Balkan Action Organisation* : <<http://www.balkanaction.org>>.

effects. The notion of once more being regarded as a minority was and remains anathema to Kosovo Albanians » (42). In its 'Constitutional Declaration' (July 2, 1990), the 'Assembly of Kosova' proclaimed that :

« Albanians being the overwhelming majority in Kosova and one of the largest groups of people in Yugoslavia consider themselves to be worthy of a nation as Serbs and others do — and no longer a national minority » (43).

At the time this declaration was adopted, the former Yugoslavia still existed and the Albanian leadership was arguing that an Albanian Republic should be created within it. Their claim to be a 'nation' must be first understood in the light of the Yugoslav context. The constitutional law of the Socialist Federal Republic of Yugoslavia (SFRY) recognised, on the one hand, six constitutive 'peoples' or 'nations' (*narod*) corresponding to the six Republics and, on the other hand, many 'nationalities' (*narodnost*). The distinction rested officially on the fact that only the latter had a kin-state outside Yugoslavia. However, in reality, according to former Yugoslavia's constitutional law experts, the term '*narodnost*' did not have a clear meaning even in Serbo-Croatian and other official Yugoslav languages. « It was introduced in the 1974 Constitution and the official political jargon in the belief that it was less offensive to the minorities, because it did not indicate that they were any way inferior, but only ethnically different from the Yugoslav 'nations' » (44). In spite of these terminological subtleties, since only those groups designated as a 'people' had their own Republic, consideration as a 'nationality' (*narodnost*) was resented by the Albanian community as being an inferior status.

However, on October 19, 1991, the Albanian leaders proclaimed the independence of 'the Republic of Kosova' and have since asserted the Kosovar Albanian position as a 'people' in the sense of international law. They have argued consequently that Kosovar Albanians were entitled to self-determination which implied, in their view, a right to independence. After the Arbitration Commission on Yugoslavia, created by the European Communities (EC), rendered its opinions on the break-up of the former Yugoslavia (45), they also affirmed that the reasoning of the Commission, justifying the independence of the Republics, could be applied to Kosovo. Lastly, they advocated that, given the systematic discrimination and repression suffered by their population under Yugoslav and Serb rule, they

(42) H. POULTON, *Minorities in Southeast Europe : Inclusion and Exclusion*, London, MRG Publication, 1998, pp. 25-26.

(43) 'Constitutional Declaration', Assembly of Kosova, 2 July 1990, § 3.

(44) Milan PAUNOVIC, « Nationalities and Minorities in the Yugoslav Federation and in Serbia », in J. PACKER and K. MYNTTI (eds), *supra* note 1, pp. 145-165, at 149, 150. See also Vojin DIMITRIJEVIC, *supra* note 2, p. 15.

(45) *I.L.M.* 31, 1992, pp. 1494 and s.

should be allowed to secede (46). It will be seen below how foreign states reacted to each of these arguments (47).

2. *Minority/People : Two Sides of the Same Coin?*

The discrepancy between the language of the FRY/Serbian authorities and that of the Kosovar Albanian leaders, reflects some of the difficulties posed by the relation between the notions of 'minority' and 'people'. Whilst, in theory, international law attributes different meanings and implications to each of these notions (a), they remain closely linked in practice. This could be explained by the fact that they are inspired by a common root; the political ideal of 'national emancipation' (b).

a) *The Notions of 'People' and 'Minority' in International Law*

All attempts at definition of minorities in international law rest upon a combination of objective and subjective elements. In order to be regarded as a minority, a group must first distinguish itself from the rest of the population on the basis of 'objective criteria', namely specific national, ethnic, religious or linguistic characteristics. In addition, the members of the group must fulfil a subjective condition, namely sharing a sense of solidarity directed towards preserving the distinctive character of that community (48). It can be observed that this definition of the minority does not seem to depend on any self-perception of having this status by the group concerned. There is no provision, in the case of minorities, similar to that existing with respect to indigenous peoples, which makes « self-identification as indigenous or tribal [...] the fundamental criterion for determining the groups to which the provisions of [the 1989 International Labour Organisation (ILO) Convention n° 169] apply » (49).

Indeed, the existence of a minority is usually considered to be a matter of fact, which is understood as meaning that it does not depend upon a decision by the state (50). On the other hand, it is accepted that belonging

(46) On the Kosovo Albanian positions, see, *inter alia*, H. POULTON, *Minorities in Southeast Europe*, *supra* note 42, p. 26 and Veton SURROI, « Kosova and the Constitutional Solutions », in T. VERENIS and E. KOPOS (eds), *Kosovo Avoiding another Balkan War*, Eliamep University of Athens, 1998, pp. 145-173.

(47) For the arguments based on the Arbitration Commission Opinions, see Part I, Section B, 1 of this article. For that based on a right to secede, see Part III, Section B, 2.

(48) Definitions of the term 'minority' usually add two other conditions : minority members must be nationals of the state and in a non-dominant position. However, these conditions raise controversies. See M. SHAW, *supra* note 29. See also the General Comment of the Human Rights Committee n° 23(50) on article 27 of the International Covenant on Civil and Political Rights (ICCPR) (UN Doc. CCPR/C/21/Rev.1/Add.5, 1994), § 5.

(49) *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, ILO Convention n° 169, 27 June 1989, art. 1, § 2.

(50) P.C.I.J., *Greco-Bulgarian Communities* case, Ser. B., 1930, n° 17. See also the General Comment of the Human Rights Committee on article 27 (*supra* note 48), § 5.2, last sentence.

to a national minority is a matter of individual choice (51). This contention, however, pre-supposes that the minority exists, even whilst leaving its members free to consider themselves part of the group or not. Yet, if all the members of a community do not want to be treated as belonging to a minority, the aggregate sum of these individuals as a group can hardly be deemed as such. However, it does not follow from this that such a group could then qualify as a 'people', in the legal sense of the term, only by virtue of its own choice. As François Rigaux puts it :

« dans un texte juridique, le mot 'peuple' n'est pas purement descriptif, il ne se réfère pas à des attributs que l'entité ainsi qualifiée aurait par elle-même, il s'agit d'une dénomination constitutive : n'est un peuple que la collectivité que l'ordre juridique reconnaît comme telle » (52).

Now, unlike the term minority, in the international legal order, the concept of 'people' entitled to self-determination is not defined on the basis of 'cultural' criteria, but rather by reference to a certain territory; the right to self-determination is vested in the whole population of a colony or an independent state (53). Therefore, with international law as it stands, in order to determine which rights the Kosovar Albanians *as members of a group* are entitled to claim, they must be regarded as a minority.

Nonetheless, the notion of minority, as understood in international law, appears very similar to the notion of people as it is used in political discourse or in everyday language (54). Certainly, the same group can be deemed a minority in the ambit of international law, while considering itself a people in the political sphere (55). The problem is that legal and political discourses interact with each other, and the legal consequences attached to the terms can influence the preference for one or the other concept. The reluctance of Kosovar Albanians to be categorised as a minority can be best understood as the consequence of the different treatment international law (and initially Yugoslav law) accords to each category of group. While the notion of people is associated with the right to self-determina-

(51) Document of Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) (hereinafter OSCE 1990 Copenhagen Document), § 32; Council of Europe *Framework-Convention for the Protection of National Minorities*, § 3.

(52) F. RIGAUX, *supra* note 29, p. 166.

(53) As it will be seen below, this point raises controversies. See the following sub-section *b*) and Part II, Section A, 1.

(54) The complication is compounded by the fact that certain states recognise the existence of different 'peoples' identified by ethnic criteria in their domestic legal order. This was the case of the former Yugoslavia's political system, as seen above. It is also the case of the present constitution of the Russian Federation, which uses a wide range of different terms to designate the various groups living in the country. See N. VITRUK, « The Russian Federation and autonomy : A Preliminary Perspective », in *Local Self-Government, Territorial Integrity and Protection of Minorities, European Commission for Democracy through Law*, Council of Europe Publishing, 1996, pp. 114-150. However, in both cases, constitutional law does not contain any general definition of the 'people', as an abstract category. Rather, the law expressly designates the specific groups that are to be regarded as peoples.

(55) F. RIGAUX, *supra* note 29, p. 166.

tion, which is recognised as a collective right and is directly linked to the exercise of political power, the international protection granted to minorities only deals with individual rights and is concerned, generally speaking, with the cultural sphere (56).

b) *The Origin and Development of Minority Rights and Self-Determination of Peoples*

The difficulty encountered by those who attempt to draw a neat distinction between the concepts of 'people' and 'minority' in the ambit of international law probably results from the fact that they have a common origin; they both stem from the nineteenth century theories of national emancipation and the Nation-State political model (57).

Broadly speaking, the Nation-State model postulates that political boundaries must coincide with the sharing of a common culture (58). The success of this political ideal was such that, by the end of the nineteenth century, the equation 'one Nation-one State' had become self-evident. It was com-

(56) It may also be observed that the term 'minority' has an inherent derogatory connotation. A minority is basically defined as 'something less' Usually, this means a numerical inferiority, but it is often associated with a disadvantaged position in the economic, social or political field. See F. RIGAUD, *supra* note 29, p. 155. In the view of J. Packer the minority position should even be considered as the main element of the definition, rather than the 'ethnic', 'religious', 'linguistic' or 'cultural' criteria (« On the Definition of Minorities », in J. PACKER and K. MINTY (eds), *supra* note 1, p. 57). Moreover, the notion of minority is relative; minorities are always defined by contrast with a certain majority. See A. EIDE, « Minority Protection and World Order », in *Universal Minority Rights*, *supra*, note 1, p. 89. The categorisation of a group as a minority thus depends on the arena that one views. Albanians are a minority at the national level *vis-à-vis* the Serb population but, at the regional level, they become a majority, while the Serbs feel marginalised. This situation raises the well-worn problem of 'sub-minorities', since the minority which finds itself in majority at the regional level, may reproduce dominant attitudes towards smaller groups living in this region.

(57) On the history of minority protection in international law, see, *inter alia*, P. THORNBERRY, *supra* note 1, pp. 25-54; H. HANNUM, *supra* note 1, pp. 50-73; P. THORNBERRY, « Is there a Phoenix in the Ashes? », *Texas Int. L. J.*, 1980, pp. 421-458; J. VERHOEVEN, « Les principales étapes de la protection internationale des minorités », *Rev. trim. dr. h.*, 1997, pp. 177-203; J.J. PREECE, « Minority Rights in Europe : from Westphalia to Helsinki », *Rev. of Int. Studies*, 1997, pp. 75-92.

(58) The notion of 'nation' or 'people' emerged in the context of the American and French Revolutions. This first conception of the people was a territorial one; the people was then described as the collectivity of citizens living in the same State. See E.J. HOBBSAWM, *Nations and Nationalism since 1780, Programme Myth and Reality*, Cambridge, Cambridge University Press, 1990. This territorial conception of the nation could easily fit Western European countries, where the rise of national theories had been preceded by centuries of centralisation of political power in a defined territory. However, once created, the notion could be transposed and adapted to other contexts. See B. ANDERSON, *Imagined Communities. Reflection on the Origin and Spread of Nationalism*, London/New York, Verso, 1996, p. 4. In regions where pre-existing state-centred political organisation was lacking, the linguistic or ethnic criteria became central to the definition of the nation, thus justifying secession by 'national communities' to form their own state. This second tradition is associated with the ideology of nationalism, described by Ernest Gellner as « a political principle which maintains that [...] whatever principles of authority may exist between people depend for their legitimacy on the fact that the members of the group concerned are of the same culture » (E. GELLNER, *Nationalism*, Phoenix, 1997, p. 3).

monly accepted that human groups identified as a 'nation' or a 'people', namely united by a common language, history or descent, should be entitled to form their own state (59). However, the implementation of the model outside its area of emergence, in particular in Central and Eastern Europe, where relations between local communities and central authorities had hitherto been structured on different bases, had profound effects on these societies (60). It necessitated first, the determination, if not the creation, of 'national groups', united by a common language, a shared history and traditions (61), and secondly, the « territorialisation des identités » (62), namely the linking of each group to a specific territory. Nevertheless, the principle according to which each 'nation' or 'people' is entitled to form its own state was never accepted as a legal basis for the organisation of international society (63). It is well-known that frontiers were not drawn exclusively according to the location of 'national' groups (which would have been impossible in practice anyway). Many communities were spread across different states, in particular after the boundary changes effected at the end of the First World War.

Yet, already in the nineteenth century, the Great Powers attempted to counter-balance the contradiction between the dominant political ideal and the reality on the ground. They did this by introducing forms of international protection of minorities in newly created or enlarged states, which culminated in the League of Nations system (64). This is how the notion of 'minority' appeared in international law. Therefore, minorities were conceived as portions of a 'nation' or a 'people', living in the 'wrong' state. In other words, the legal notion of minority derives from an ethnically-based conception of the 'people' (65). This link is reflected by the adjectives commonly associated with the term minority in international documents, namely 'ethnic', 'linguistic', 'religious', and, above all, 'national'. On the other hand, as underlined by Serge Pierré-Caps, the

(59) According to E.J. Hobsbawm, the words 'people' and 'nation' were generally used indiscriminately by nineteenth century theorists (see *supra* note 58, pp. 18-19).

(60) B. BADIE, *La fin des territoires. Essai sur le désordre international et sur l'utilité sociale du respect*, Paris, Fayard, 1995.

(61) According to E.J. Hobsbawm (*supra* note 58), the emergence of 'national identities' in the nineteenth century were, to a large extent, the product of concerted policies developed by states or intellectual elites, in order to enlist popular support for a certain political project. See also E. GELLNER (*supra*, note 58) and A.-M. THIESSE, « La lente invention des identités nationales », in *Le Monde Diplomatique*, June 1999.

(62) B. BADIE, *supra* note 60, p. 120.

(63) M. KOSKENNIEMI, « National Self-Determination Today : Problems of Legal Theory and Practice », *I.C.L.Q.*, 1993, pp. 241-269, at 253.

(64) On the interaction between international law and the political ideology of nationalism in the inter-war period, see N. BERMAN, « A Perilous Ambivalence Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework », *Harvard Int. L. Journ.*, vol. 33, 1992, pp. 353-379 and « 'But the alternative is despair' European Nationalism and the Modernist Renewal of International Law », in *Harvard L. Rev.*, 1993, pp. 1793-1903.

(65) On this point, see the observations of Gérard NOIRIEL, in *La tyrannie du national. Le droit d'asile en Europe (1793-1993)*, Paris, Calmann-Lévy, 1991, pp. 95-100.

inter-war system of minority protection also introduced an important corrective to the Nation-State model, by insinuating a certain dissociation between cultural membership and citizenship. For national groups, it entailed that statehood was not a necessary condition for the enjoyment of their collective identity, while for states, it implied that diverse national communities could coexist within the same frontiers (66).

As for the concept of 'people', in the sense of the beneficiary of the right to self-determination, this entered international law after the Second World War in the context of de-colonisation. The right to self-determination was first recognised as the right to become free from colonial ruling. By virtue of the principle of *uti possidetis*, which postulates the preservation of colonial boundaries at the moment of independence, such right was to be exercised within the framework of the colonial territory. Hence, the people entitled to self-determination included all the population of the colony. To be sure, the right of self-determination has been recognised as the right of *all people* and has been embedded in documents of universal scope, first and foremost the common article 1 of the two 1966 International Covenants. However, this does not imply an endorsement of a conception of the 'people' based on ethnicity. In effect, outside the colonial context, and situations that have been assimilated to this (namely foreign occupation or racist regime), the relevant 'people' is understood as encompassing the whole population of the state (67). Therefore, in all cases, the people is territorially — as opposed to ethnically — defined; it encompasses the entire population of a colony or a state (68).

The significance of the distinction between 'minority' and 'people' in international law, lies in the different legal consequences attached to each

(66) *La Multination, l'avenir des minorités en Europe centrale et orientale*, Paris, O. Jacob, 1995. This is in line with the view expressed by the P.C.I.J. in 1935 : « the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differ from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority » (*Albanian Minority Schools, Advisory Opinion*, P.C.I.J., 1935, Series A/B, n° 64).

(67) For an account of the interpretation of article 1 of the International Covenants by state parties as it emerges from the reports submitted to the Human Rights Committee, see T. CHRISTAKIS, *supra* note 1, pp. 158-162.

(68) M. SHAW, *International Law*, Cambridge, Cambridge University Press, 4th ed., 1997, pp. 177-182; R. HIGGINS, *Problems & Process. International Law and How we use it*, Oxford, Clarendon Press, 1996, pp. 111-128; *Declaration on the Granting of Independence to Colonial Territories and Peoples*, G.A. Resolution 1514 (XV), 14 December 1960; G.A. Resolution 1541 (XV) (1960); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Resolution 2625 (XXV), 1970; common article 1 of the 1966 *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*. For a general analysis of the UN documents and state practice on this issue, see, *inter alia*, T. CHRISTAKIS, *supra* note 1, esp. p. 615; H. HANNUM, « Rethinking Self-Determination », *V.J.I.L.*, vol. 34, n° 1, 1993, pp. 1-69; H. QUANE, « The United Nations and the Evolving Right to Self-Determination », *I.C.L.Q.*, 1998, vol. 47, pp. 537-572; O. CORTEN « Droit des peuples à disposer d'eux-mêmes et *uti possidetis* : deux faces d'une même médaille ? », *R.B.D.I.*, 1998/1, pp. 161-189.

concept. Indeed, despite renewed interest in minority protection since the end of the Cold War, the status of minorities in international law remains limited. Firstly, minorities do not have any legal personality. Rights are conferred upon 'persons belonging to minorities', not upon minorities as such. In other words, the existence of a minority is only a factual pre-condition for the recognition of the individual rights of its members. Secondly, the rights spelled out in relevant international instruments are, broadly speaking, limited to cultural activities (69), with the exception of the right to participate in public affairs (70). By contrast, 'peoples' are entitled to self-determination, defined as the right « to freely determine their political status and freely pursue their economic, social and cultural development » (71). As stressed by Patrick Thornberry :

« there is a qualitative difference between the two categories : the right of self-determination means full rights in the cultural, economic and political spheres. The essence is political control. [...] The rights of minorities are enumerated and finite, and do not include political control » (72).

(69) Article 27 of ICCPR reads : « In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language ». The Human Rights Committee, however, has developed a dynamic interpretation of the provision (see Human Rights Committee, General Comment, art. 27, *supra* note 48, § 6). Note that the legal value of most international instruments concerning minorities is weak. Article 27 of ICCPR remains the only universally binding provision. Neither the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of the UN General Assembly (Resolution 47/135, adopted without a vote, 18 December 1992), nor the OSCE 1990 Copenhagen Document, which both contain detailed lists of rights recognised to minority members, are legally binding. The only international treaties dedicated entirely to minority issues are the *Framework-Convention for the Protection of National Minorities*, adopted by the Council of Europe on the 10 November 1994 and entered into force in February 1998, and the *European Charter for Regional or Minority Languages*, adopted by the Council of Europe on the 5 November 1992 and entered into force in March 1998. See, *inter alia*, N. LEVRAT, « Solutions institutionnelles pour sociétés plurielles », in *Minorités et organisation de l'État*, *supra* note 1, pp. 3-90; G. ALFREDSSON and D. TÜRK, « International Mechanisms for the Monitoring and Protection of Minority Rights : their Advantages, Disadvantages and Interrelationships », in A. BLOED, L. LEICHT, M. NOWAK and A. ROSAS (ed.), *Monitoring Human Rights in Europe*, Dordrecht, Martinus Nijhoff, 1993, pp. 169-186; P. THORNBERRY, « The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities », *Universal Minority Rights*, *supra* note 1; F. BENOÎT-ROHMER, « La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales », *E.J.I.L.*, 1995, pp. 573-597; G. GILBERT, « The Council of Europe and Minority Rights », *H.R.Q.*, 1996, pp. 160-189; J. WRIGHT, « The OSCE and the Protection of Minority Rights », *H.R.Q.*, 1996, pp. 190-205; J. WRIGHT, « The Protection of Minority Rights in Europe : From Conference to Implementation », *I.J.H.R.*, 1998, p. 1-31).

(70) The right to participation in public affairs is discussed below, in Part II, section B, 2.

(71) *Declaration on the Granting of Independence to Colonial Territories and Peoples*, G.A. Res. 1514 (XV), 14 December 1960; common article 1 of the two 1966 International Covenants.

(72) P. THORNBERRY, « Is there a Phoenix in the Ashes? », *supra* note 57, p. 454. This does not mean that the presently recognised rights of minority members are meaningless. In a great number of cases, these rights can satisfy the needs and demands of those communities. The activities of the High Commissioner on National Minorities, created by the OSCE in 1992 as an instrument of prevention of conflicts involving minorities, demonstrate in particular the importance of provisions concerning education and political participation. See V. RAMELOT and E. REMACLE, *L'OSCE et les conflits en Europe*, Dossiers du GRIP, 1995, Brussels, pp. 39-69.

Hence, the right to self-determination has furnished the legal justification for the accession to independence of former colonies. This is usually referred to as the *external* aspect of self-determination; namely, the right to choose one's own status without external interference. However, this does not mean that now that the de-colonisation process is almost complete, the right to self-determination has lost all true meaning. As Rosalyn Higgins writes :

« it is not only at the moment of independence from colonial rule that peoples are entitled freely to pursue their economic, social and cultural development. It is a constant entitlement. And that in turn means that they are entitled to choose their government » (73).

Indeed, as highlighted by Théodore Christakis in a thorough study of the right to self-determination outside the colonial context, states increasingly admit that such a right also has an *internal* aspect. In this respect, it entitles the population to have a government reflecting its wishes. In other words, it implies a right to democracy, vested in the entire population of any country (74). On the other hand, states remain reluctant to grant rights to specific internal groups, in the fear of encouraging separatist drives. All international instruments on minorities cautiously restate the principles of territorial integrity and inviolability of frontiers. In this respect, all states have a common interest in limiting the status of minorities in order to protect their territorial integrity. To a certain extent, the FRY could thus feel comfortable in categorising the Albanians as a minority and committing itself to observing the highest standards of protection provided for minorities in international instruments (see the constitutional declaration quoted above). To be sure, many of the recognised rights of members of minorities were violated in the case of Kosovo Albanians (75). However, even if they had been respected, it is far from clear that this would have satisfied their demands for greater political control over the territory of Kosovo.

B. — *International Reactions : Neither Self-Determination, Nor Minority Protection*

As a rule, a dispute between a sub-state group and its government constitutes an internal matter of the state concerned. From an international

(73) See *supra* note 68, p. 120.

(74) T. CHRISTAKIS, *supra* note 1, pp. 332-425. The author arrives at this conclusion on the basis of the analysis of various international conventions, in particular the two 1966 International Covenants. He points out that since the end of the 1980s, a growing majority of states, as it emerges from the reports submitted to the Human Rights Committee, interprets article 1 as laying down an obligation to have a political system allowing the expression of the will of the people. The position of the Human Rights Committee, when examining the reports, has also evolved in this sense. This point has also been stressed by Rosalyn Higgins (*supra* note 68, p. 120).

(75) *Special report on minorities*, *supra* note 4, § 31.

law standpoint, therefore, the first issue of interest in the international reaction to the Kosovo issue, is that of the legal ground on the basis of which third-party states justified their involvement in the crisis (1). Moreover, this legal basis had important implications as regards the legal definition of the issue by international actors and, consequently, the solutions to the conflict which they promoted (2).

1. *International Involvement in the Crisis*

In order to understand the international position on Kosovo, it is necessary to return to the period of the disintegration of the former Yugoslavia. Although Kosovo was a secondary issue on the international agenda, it was at this point that foreign states formulated the basic tenets that would govern their approach (a). Indeed when, given the emergence of the KLA and the escalation of violence, Western states committed themselves actively to the resolution of the conflict in late 1997, their position remained consistent with their initial stance (b).

a) *The Break-up of Yugoslavia — Non Recognition of Kosovo as a State*

The claim for self-determination and independence expressed by the Albanian leadership, did not find much support internationally. While Slovenia, Croatia, Bosnia-Herzegovina and Macedonia were recognised relatively quickly as independent states and admitted to the UN, no state (except for Albania) (76) recognised the self-proclaimed 'State of Kosovo'. In particular, the European Communities (EC) countries ignored the request for recognition as an independent state which Kosovo representatives submitted in December 1991, along with the republics, after holding a referendum (77).

However, as seen above, Kosovo could not claim to have a legal right to independence, either on territorial grounds (as a federal unit), or on ethnic grounds (by virtue of the will of the Albanian ethnic group). Despite the rise of nationalist claims since the end of the Cold War (78) and the consequent revival of the 'secessionist' interpretation of the right to self-determination (79), until the Yugoslav war, the actual practice of states did not

(76) Subsequently, under pressure from Western governments, the Albanian President Sali Berisha abandoned calls for the independence of Kosovo and aligned himself with the demand for autonomy within Yugoslavia. See M. VICKERS, « Tirana's Uneasy Role in the Kosovo Crisis (March 1998 — March 1999) », in *Kosovo, Myths, Conflicts and War*, *supra* note 6, pp. 31-37, at 31.

(77) *Keesing's*, December 1991, p. 38685. See also R. CAPLAN, « International diplomacy and the crisis in Kosovo », *International Affairs*, 1998, n° 74, pp. 745-761, p. 748.

(78) T. FRANCK, « Postmodern Tribalism and the Right to Secession », in *Peoples and Minorities in International Law*, *supra* note 1, pp. 3-27.

(79) M. KOSKENNIEMI, *supra* note 63, pp. 257-260.

appear to support any change in the traditional legal conception of self-determination. The dissolution of the Soviet Union, the separation of Czechoslovakia, or the reunification of Germany, all occurred with the consent of the central authorities, which implies that the right to self-determination was exercised by the whole population of the state (80). By contrast, the former Yugoslav Republics' declarations of independence were opposed by the central authorities of the former Yugoslavia and had therefore to be deemed as acts of secession. Nonetheless, this episode does not seem to imply any admission of a right for ethnic groups to secede (81). Indeed, within the framework of the UN, the republics were recognised as states without any reference to the principle of self-determination but, rather, on the basis of the new factual situation (82). Yet, the position of the European Union (EU) countries in this context was more equivocal. Their statements frequently referred to the right of peoples to self-determination, even before they recognised the independence of the former Yugoslav Republics. This could suggest that they had admitted that sub-state entities were entitled to self-determination (83). However, such conclusion would be in contradiction with the reaction of the EU countries to other recent secessionist conflicts, where they contented themselves with reaffirming the territorial integrity and sovereignty of the state (84).

In addition, the Arbitration Commission on Yugoslavia, established within the EC Conference on Yugoslavia, which provided the European policy of recognition with a legal justification (85), did not explain the independence of the republics on the basis of the right to self-determination.

(80) These events are perfectly consistent with the traditional conception of self-determination; the right of peoples organised in a state to opt for voluntary separation, dissolution or integration with another state falls within the scope of their right to choose their international status. On this point, see H. HANNUM, « Rethinking Self-Determination », *supra* note 68, p. 51 and H. QUANE, *supra* note 68, p. 566.

(81) H. HANNUM, *supra* note 68, p. 53 and H. QUANE, *supra* note 68, p. 570.

(82) A. PELLET, « Quel avenir pour le droit des peuples à disposer d'eux-mêmes? », in *Mélanges Jiménez de Aréchaga*, Montevideo, Fondation de cultura universitaria, 1994, p. 263; O. CORTEN, *supra* note 68, pp. 179-180.

(83) For an analysis of the evolution of the EC/EU statements throughout the Yugoslav conflict, see B. DELCOURT and O. CORTEN, *Ex-Yugoslavie : Droit international, politique et idéologies*, Bruylant, Brussels, 1998, esp. pp. 89 and s. See also M. WELLER, « The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia », *A.J.I.L.*, 1992, pp. 569-607. For a political analysis, see S.L. WOODWARD, *supra* note 10, chap. 7, pp. 199-222.

(84) B. DELCOURT and O. CORTEN, *supra* note 83, pp. 35-36. Note that the new states emerging from the disintegration of the former Yugoslavia were not 'ethnically homogenous' either. Also, the claims for independence expressed by ethnic groups within the former Republics (namely Serbs in Croatia and in Bosnia — were rejected —.

(85) B. DELCOURT and O. CORTEN, *supra* note 83, pp. 135-137; H. QUANE, *supra* note 68, p. 570. For a general analysis of the Arbitration Commission advisory opinions, see M.C.R. CRAVEN, « The European Community Arbitration Commission on Yugoslavia », *B.Y.I.L.*, 1995, pp. 333-413; A. PELLET, « Note sur la Commission d'arbitrage de la conférence européenne pour la paix en Yougoslavie », *A.F.D.I.*, 1991, pp. 329-348 and A. PELLET, « The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples », *E.J.I.L.*, 1992, vol. 3 n° 1, pp. 178-181.

Rather, it first stated that the federal organs had lost all effective authority in most republics (86) and, secondly, asserted that the principle of *uti possidetis* applied to the internal boundaries of a dissolving state (87). This reasoning enabled the Commission to regard the disintegration of Yugoslavia as an instance of dissolution rather than secession, and to conclude that the republics would be the successor entities within the former internal boundaries of the SFRY. However, the Kosovar Albanian leaders argued that the reasoning of the Arbitration Commission could similarly justify the independence of Kosovo. It was, indeed, commonly admitted that, in the 1974 Constitution, « the autonomous provinces were for all practical purposes promoted to the status of fully fledged federal units » (88). Kosovo had « its own Constitution, its own Presidency which represented it in Yugoslavia and abroad, its own Parliament, Government, Constitutional Court, Supreme Court, administrative organs, national bank and other governmental institutions » (89). It was represented in all Federal bodies and had its own delimited borders. Therefore, Kosovo Albanians claimed that the principle of *uti possidetis* should be applied to its borders as well (90). The line drawn between the case of the republics and that of

(86) Advisory Opinions n° 1 and n° 8 (*I.L.M.*, 1992, n° 31, pp. 1494 and s.).

(87) Advisory Opinion n° 2.

(88) V. DIMITRIJEVIC, *supra* note 2, p. 17.

(89) V. SURROI, *supra* note 46, pp. 145-146 and 167.

(90) H. POULTON, *Minorities in Southeast Europe*, *supra* note 42, p. 26; M. WELLER, « The Rambouillet conference on Kosovo », *International Affairs*, 1999, pp. 163-203, p. 215. This illustrates some of the practical difficulties that can arise from the application of the principle of *uti possidetis* to former administrative boundaries. First of all, when different degrees of decentralisation exist in the dissolving state, like the republics and autonomous provinces in the SFRY, debates may arise as to which internal borders must be taken into account. Similarly, in the context of the dissolution of the Soviet Union, « a major question was the future status of the entities within some of the Union Republics which under the Soviet constitution were defined as 'autonomies' but on a lower level in the hierarchy than the Union Republics themselves », such as South Ossetia and Abkhazia in Georgia, Nagorno-Karabakh in Azerbaijan or Crimea in Ukraine (A. EIDE, « Territorial Integrity of States, Minority Protection, and Guarantees for Autonomy Arrangements. Approaches and Roles of the United Nations », in *Local Self-Government, Territorial Integrity and Protection of Minorities, European Commission for Democracy through Law*, Council of Europe Publishing, 1996, p. 289). Moreover, the autonomy of Kosovo was forcibly suppressed shortly before the general break-up of Yugoslavia. This underlines another problem of application of the *uti possidetis* principle; the internal structure of the state can be subject to last minute changes by the central government. Marcelo Kohén holds that « [l]orsque des modifications sont effectuées, que ce soit par les autorités centrales ou locales, par des moyens non prévus par l'ordre juridique interne, celles-ci sont inopposables ». But he adds that « une modification effectuée par l'autorité centrale qui est contestée par l'entité concernée qui devient plus tard indépendante, pourrait laisser la question ouverte. La pratique internationale ne fournit pas d'éléments suffisants pour trancher la question ». (« Le problème des frontières en cas de dissolution et de séparation d'États : quelles alternatives ? », in *R.B.D.I.*, 1998/1, vol. 31, pp. 129-160, pp. 154-156). For a general discussion of the scope and legal value of the *uti possidetis* principle, see *R.B.D.I.*, issue 1998/1, esp. B. DELCOURT, « L'application de l'*uti possidetis* au démembrement de la Yougoslavie : règle coutumière ou impératif politique ? », pp. 70-106; P. KLEIN, « Les glissements sémantiques et fonctionnels de l'*uti possidetis* », pp. 106-128; M. G. KOHEN, *op. cit.*, pp. 129-160 and O. CORTEN « Le droit des peuples à disposer d'eux-mêmes et *uti possidetis* : deux faces d'une même médaille ? », pp. 161-189.

the autonomous provinces may, indeed, appear somewhat artificial, since in the Yugoslav situation the differences were almost all merely formal (91).

A further argument invoked by the Kosovar Albanian leadership was based on the theory of a right to secession as a 'remedy of last resort'. According to a large number of international law scholars, an ethnic group which is totally excluded from the political system and is the victim of systematic egregious violation by state authorities of fundamental human rights, is entitled to secede (92). Nonetheless, assuming that the case of Kosovo Albanians would have fulfilled the criteria, this view was not endorsed by the states, since they refused to recognise the independence of Kosovo (93).

On the other hand, in their efforts to settle the Yugoslav wars, Western states included, from early on, the requirement that Kosovo's autonomy be restored (94). However, in order to obtain the co-operation of the Serbian authorities in the resolution of the Bosnian conflict, they resigned themselves to not insisting on the issue (95). This question was thus left out of the Dayton Agreement (96) and, after the end of the war, the fate of the province seemed to slip from the international agenda (97).

(91) H. HANNUM, « Rethinking Self-Determination », *supra* note 68, p. 38.

(92) For a discussion of this view, see T. CHRISTAKIS, *supra* note 1, pp. 295-315. The author concludes that a right to secession in favor of an ethnic group does indeed exist, but only in extreme cases of massive breaches of basic human rights, when there is no other possible means to remedy to such a situation (*idem*, p. 314). See also *infra*, Part III, Section 3, 2.

(93) C. HILLGRUBER, « The Admission of New States to the International Community », *E.J.I.L.*, pp. 491-509, at 509.

(94) At the beginning of the workings of the Conference on Yugoslavia, the issue of Kosovo was subsumed in the search for a general solution for all significant minorities in Yugoslavia, first and foremost, the Serb minorities in Croatia and Bosnia. The first draft plan presented, in October 1991, by Lord Carrington at the Conference on Yugoslavia in The Hague, provided for « special status » in « areas in which persons belonging to a national or ethnic group form a majority ». As expressly mentioned in the draft, this status was designed to apply in particular to the Serb minority in Croatia (*Report of the Secretary-General Pursuant to § 3 of Security Council Resolution 713 (1991)*, Annex VI, § 2.5). The second draft contained a provision which concerned Kosovo more directly : « [t]he Republics shall apply fully and in good faith the provisions existing prior to 1990 for autonomous provinces » (*idem*, Annex VII, C, § 6).

(95) R. CAPLAN, *supra* note 77, p. 750.

(96) The issue is mentioned only in relation to pre-conditions for the lifting of remaining sanctions against the FRY (*idem*).

(97) Certainly, the EU member states and the US continued to assert that the normalisation of their relations with the FRY would depend, *inter alia*, on the progress made with respect to Kosovo. See the Presidency's Declaration on the recognition of the FRY by the EU member states, 9 April 1996 (*Agence Europe*, n° 6705, 11 April 1996); Presidency Conclusions of the Florence Summit, 23 June 1996 (*Agence Europe*, n° 6755, 23 June 1996); Dublin European Council (13-14 December 1996), Declaration on Former Yugoslavia (*Agence Europe*, n° 6875, 15 December 1996). For the US position, see the statement made by the American Secretary of State Warren Christopher, in visit in Belgrade, 5 February 1996 (*Agence Europe*, n° 6660, 5 February 1996). However, despite the absence of any progress, in April 1997, the EC decided to extend the autonomous trade measures system to the FRY (Decision of the General Affairs Council, Luxembourg, 29 April 1997, *Agence Europe*, n° 6965, 30 April 1997). In February 1998, during a visit in Yugoslavia, R. Gelbard, the US envoy to the Balkans, announced the easing of the sanctions against Serbia and denounced the KLA as a « terrorist organisation ». Albanian

b) *The Escalation of Violence — International Involvement in the Kosovo Question*

At the end of 1997, in response to the emergence of Albanian armed groups in Kosovo, the FRY launched a vast crackdown operation, provoking a flood of refugees into neighbouring countries (98). The escalating violence led to an increasing international reaction from early 1998 (99). Western countries belonging to the Contact Group approved sanctions against Yugoslavia, with Russia dissenting (100). Europe and the US exercised growing pressure on the Belgrade authorities for international participation in the resolution of the conflict (101). In March 1998, the UN Security Council called upon the parties «urgently to enter without preconditions into a meaningful dialogue on political status issues» (102) adding in its next resolution, in September, the requirement of «international involvement» in these negotiations (103).

Yugoslav officials, however, continued to claim that the Kosovo issue was a Serbian affair, to be dealt with internally (104). How then did states and international organisations justify their involvement in the resolution of the crisis? As seen above, they did not endorse Kosovar Albanian claims for self-determination. Nor did they refer to minority protection, despite the frequent assertions in recent years that minority issues should nowadays be considered as «matters of legitimate international concern» (105). Rather, it emerges from official international statements that their commitment to the resolution of the crisis was based on two considerations; the danger it posed to regional stability and, to a lesser extent,

leaders claim that this denunciation prompted in part the Serbian authorities' crackdown in Kosovo (*Keesing's*, February 1998, p. 42085 and March 1998, pp. 42156-157).

(98) See the reports of the UN Secretary-General, in particular, 4 June 1998, S/1998/470; 2 July, S/1998/608; 5 August, S/1998/712; 4 September, S/1998, 834.

(99) In March, the US State Department announced that it was withdrawing the concessions which it had granted to Yugoslavia in February (*Keesing's*, March 1998, p. 39240). R. Gelbard also reiterated a warning issued by the then US President, George Bush, in December 1992 of possible US intervention in Serbia if violence in Kosovo risked igniting a wider regional conflict (*ibidem*).

(100) Contact Group Meeting, statements on Kosovo, London, 9 March 1998, § 7 and § 6; Bonn, 25 March 1998, § 6; Rome, 29 April 1998, § 9. Statements of the Contact Group can be found on the website of the High Representative Office : < <http://www.ohr.int/contact.htm> >. In June, the EU Council adopted a Common Position for a ban on new investments in Serbia (*Agence Europe*, n° 7237, 8 June 1998).

(101) See for instance, the European Council, Conclusions of the Presidency, Cardiff Summit, 16 June 1998, Annex II, Declaration on Kosovo (*Agence Europe*, n° 2094/95, 18 June 1998), § 5. Diplomatic observers from several countries began patrolling in Kosovo in an attempt to promote negotiations between the parties (*Keesing's*, July 1998, p. 42413), while the Contact Group started to draft a peace plan for Kosovo (*Keesing's*, August 1998, pp. 42458-59).

(102) Resolution 1160 (1998), 31 March 1998, § 4.

(103) Resolution 1199 (1998), 23 September 1998, § 3. See also Resolution 1203 (1998), 24 October 1998, § 5. Resolution 1160 (1998) only «notes the readiness of the Contact Group to facilitate such a dialogue» (§ 4).

(104) See *supra* note 23 and 36.

(105) Report of the CSCE Meeting of Experts on National Minorities, Geneva, 1991, II, § 3.

the flagrant violations of basic human rights. « The crisis constitutes a serious threat to regional stability and requires a strong and united international response », stated the EU Member States in June 1998 (106). Similarly, the French President J. Chirac affirmed, in March 1998, « nous ne pouvons accepter l'engrenage d'une guerre civile qui menacerait, de proche en proche, la stabilité de l'ensemble du Sud-Est de l'Europe » (107). In October 1998, the United States' President Bill Clinton declared that « as a result of the unconscionable actions of President Milosevic, we face the danger of violence spreading to neighbouring countries, threatening a wider war in Europe. We face a humanitarian crisis [...] » (108). Also, the Security Council, in Resolution 1199 (1998) (109), expressed its deep concern about « the rapid deterioration in the humanitarian situation throughout Kosovo » and considered that « the deterioration of the situation constitutes a threat to peace and security in the region ».

However, even though third-party states justified their involvement in the conflict on the basis of regional security and violations of individual human rights, their demands went beyond the cessation of violence and included the requirement of a certain political solution.

2. *The International Response to the Crisis*

This section considers more closely the requirements addressed to the FRY by the other states. It examines, firstly, the status conferred upon the

(106) European Council, Conclusions of the Presidency, Cardiff Summit, 16 June 1998, Annex II, declaration on Kosovo (*Agence Europe*, n° 2094/95, 18 June 1998), § 2. See also the EU's common position on restrictive measures, adopted by the European Union Council (Brussels, 20 March 1998, *Agence Europe*, n° 7185, 21 March 1998); Conclusions of the General Affairs Council on the situation in the Balkans, 26 May 1998 (*Agence Europe*, n° 7229, 27 May 1998); EU's common position on the ban on new investments in Serbia, 8 June 1998 (*Agence Europe*, n° 7237, 8 June 1998).

(107) Statement of the French Republic Presidency, Paris, 8 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 314). Decision n° 218 of the OSCE Permanent Council (§ 5) states that the Kosovo crisis exceeds the ambit of FRY's internal affairs because of the violations of human rights norms and because of its regional impact (Vienna, 11 March 1998, *D.A.I.*, n° 9, 1 May 1998, p. 316).

(108) « Remarks by the US President on Kosovo », The White House, Office of the Press Secretary, October 8, 1998. American officials' statements on Kosovo are released on the US State Department website : < <http://www.state.gov/www/regions/eur/Kosovo> >. The reasons for US concern in Kosovo were detailed by Secretary of State Madeleine K. Albright, as follows : « America has a fundamental interest in peace and stability in southern Europe. [...] America has a fundamental interest in preserving Bosnia's progress toward peace [...] which would be seriously jeopardized by renewed violence in nearby Kosovo. [...] Spreading conflict could reignite fighting in neighboring Albania and destabilize fragile Macedonia, [...] affect our NATO allies, Greece and Turkey, [...] flood the region with refugees and create a haven for international terrorists, drug traffickers and criminals. Regional conflict would undermine NATO's credibility as the guarantor of peace and stability in Europe. This would pose a threat that America could not ignore » (Remarks and Q & A Session at the US Institute of Peace, Washington D.C., 4 February 1999, as released by the Office of the Spokesman US Department of State). M.K. Albright's statements can be found on the website of the secretary of state : < <http://secretary.state.gov/www/statements> >.

(109) 23 September 1998.

Albanian community at international level (a), and secondly, the content and legal justification of international demands (b).

a) *The Yugoslav Ethnic Albanians on the International Scene*

Faced with the competing categorisations used by Yugoslav officials and ethnic Albanian leaders, foreign states and international organisations similarly bypassed the terms 'Albanian minority' and 'Albanian people'. This attitude can be illustrated through the expressions used in UN Security Council resolutions and in Contact Group statements. They addressed the 'Kosovar Albanian community' or the 'Kosovar Albanian leadership', when calling for a dialogue or demanding the end of terrorist acts. However, the solution put forward was described as 'an enhanced status for Kosovo within FRY'. It referred then to the whole territory of Kosovo and not to one particular community (110). In addition, they cautiously underlined that the solution had to take into account « the rights of Kosovo Albanians and all those who live in Kosovo » (111). It was clear then that although the 'Albanian community' was regarded as a party to the conflict, the settlement proposed was purported to concern the entire population of the province, regardless of ethnic differences. A similar terminology appeared in statements issued by other international actors taking a stance on the conflict, such as the EU (112), the OSCE (113), NATO (114) and the G8 countries (115).

(110) Contact Group statements, New York, 24 September 1997; London, 9 March 1998, Security Council Resolutions 1160 (1998), 1199 (1998), 1203 (1998). Source : see *supra* note 100.

(111) Office of the High Representative, Contact Group statement, Moscow, 25 February 1998; London, 9 March 1998; Bonn, 25 March 1998. Source : see *supra* note 100.

(112) See, for instance, Common position on Kosovo, Brussels, 19 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 317); Statement of the British Presidency, acting on behalf of the European Union, on the adoption of a common position on Kosovo, Brussels, 23 March 1998 (*Agence Europe*, n° 7186, 23 March 1998); Cardiff Summit Declaration, Annex II, Declaration on Kosovo, 18 June 1998 (*Agence Europe*, n° 2094/95, 18 June 1998); « European Council Statement on the reasons and aims of European participation in action against the FRY », Berlin, 25 March 1999 (*Agence Europe*, n° 7433, 26 March 1999). See also the conclusions of E.C. General Affairs Council meetings Brussels, 24 February 1998 (*Agence Europe*, n° 7167, 25 February 1998); Brussels, 30 March 1998 (*D.A.I.*, n° 10, 15 May 1998, p. 358); Brussels, 25 May 1998 (*Agence Europe*, n° 7229, 27 May 1998); Luxembourg, 29 June 1998 (*Agence Europe*, n° 7253, 1 July 1998); Brussels, 14 July 1998 (*Agence Europe*, n° 7263, 15 July 1998).

(113) Decision n° 218 of the OSCE Permanent Council, Vienna, 11 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 316); 7th Ministry Council of the OSCE, Oslo, 2-3 December 1998, declaration on Kosovo (*D.A.I.*, n° 3, 1 February 1999, p. 144).

(114) North Atlantic Council Meeting, declaration on the situation in Kosovo, 30 April 1998 (*D.A.I.*, n° 12, 15 June 1998, p. 445); North Atlantic Council Meeting, Luxembourg, 28 May 1998, (*D.A.I.*, n° 14, 15 July 1998, p. 503); North Atlantic Council Meeting, declaration on Kosovo, Brussels, 11 June 1998 (*D.A.I.*, n° 14, 1998, p. 511); North Atlantic Council Meeting, declaration on Kosovo, Brussels, 8 December 1998 (*D.A.I.*, n° 2, 15 January 1999, p. 64).

(115) Conclusions of the Meeting of G8 Foreign Affairs Ministers, London, 9 May 1998 (*D.A.I.*, n° 13, 1 July 1998, p. 471).

In its declaration following the end of the Rambouillet Conference, the Contact Group undertook to work towards achieving « a settlement meeting the legitimate aspirations of all *the people of Kosovo* » (116). However, the French translation, which talks about « *l'ensemble des habitants du Kosovo* » (117), makes it clear that the term 'people' was used without any legal connotation, as a synonym for 'population'. Similarly, the Security Council Resolution 1244 (1999) called for « an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the FRY ». Again, the French version — « *la population du Kosovo* » — confirms that the use of the word 'people' was not supposed to have a legal significance.

b) *The International Demands*

There was a striking consensus among states with regard to the settlement that should be promoted for Kosovo. In line with their initial stance, they continued to reject Kosovar Albanians' claims to statehood. Statements or resolutions issued by the UN (118), the EU (119), the OSCE (120), NATO (121) or the Contact Group, constantly re-affirmed respect for the territorial integrity of the FRY and opposition to the independence of Kosovo. However, they also maintained the demand for the restoration of Kosovo's autonomy. Certain variations in the formulations of this requirement can be observed, progressing through the crisis from a mere 'special status' to 'self-administration' or 'self-government'.

In fact, in its first statement on Kosovo, dated 24 September 1997, the Contact Group did not mention 'autonomy'. It called the parties « to join in a peaceful dialogue » and specified that it did not support either independence or the *status quo* but instead « an enhanced status for Kosovo within the FRY » that « should fully protect the rights of the Albanian pop-

(116) Rambouillet, 23 February 1999, emphasis added. The word 'people' also appeared in an earlier statement of the Contact Group, dated 8 January 1998, when it called upon « the authorities in Belgrade and the leadership of the Kosovar Albanian community [...] to promote [...] a solution [...] in order to ensure a peaceful and prosperous future their people » (Washington D. C., 8 January 1998. Source : see *supra* note 100). Since the term 'people' is used in the singular form, it must be understood as referring to the whole population of the FRY.

(117) Statement reprinted in *Le Monde*, 25 February 1999.

(118) Security Council Resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998 and 1203 (1998) of 24 October 1998.

(119) « The European Union remains firmly opposed to independence » (European Council, Conclusions of the Presidency, Cardiff Summit, 16 June 1998, Annex II, declaration on Kosovo, § 6, *supra* note 106). See also the Conclusions of the General Affairs Council on the situation in Kosovo, Brussels, 30 March 1998, (*D.A.I.*, n° 10, 15 May 1998, p. 358); Luxembourg, 27 April 1998 (*D.A.I.*, n° 12, 15 June 1998, p. 442); Brussels, 25 May 1998 (*D.A.I.*, n° 14, 15 July 1998)

(120) Ministry Council, Oslo, 2-3 December 1998, Declaration on Kosovo (*D.A.I.*, n° 3, 1 February 1999, pp. 144-145).

(121) North Atlantic Council Meeting, Declaration on Kosovo, Luxemburg, 28 May 1998 (*D.A.I.*, n° 14, 15 July 1998, p. 503), Brussels, 8 December 1998 (*D.A.I.*, n° 2, 15 January 1999).

ulation in accordance with OSCE standards and the UN Charter » (122). Similarly, in November, the Foreign Ministers of France and Germany, Hubert Védrine and Klaus Kinkel, in their joint letter to Milosevic, affirmed that a lasting solution had to provide for a « special status » for Kosovo (123). In their statements dated 9 and 25 March 1998, the Contact Group members took a stronger position :

« we support an enhanced status for Kosovo within the FRY which a substantially greater degree of *autonomy* would bring and recognise that this must include meaningful *self-administration* » (124).

This declaration received strong international support; it was backed by the EU (125), but also by the European Conference (126) as well as a group of countries from Southeast Europe (127), and was endorsed by the Security Council in Resolution 1160 (1998) (128). In the following months, the support for Kosovo's autonomy was reiterated many times by the Council of the EU (129), but also by the G8 Foreign Affairs Ministers (130) and, finally, was endorsed by the OSCE (131) and NATO (132). The peace plan proposed at Rambouillet marked a further evolution, for it was aimed at providing 'self-government' for Kosovo (133).

It is important to note that all these statements continued to emphasise the primary necessity of a dialogue between the FRY authorities and the Albanian community. The Security Council, in Resolution 1160 (1998), calling upon the FRY to offer the Kosovar Albanian community « a genuine

(122) New York, 24 September 1997. See also the next Contact Group Statement, Washington D.C., 8 January 1998. (Source : see *supra* note 100).

(123) 19 November 1997 (*D.A.I.*, n° 1, 1 January 1998, p. 36). See also the Ministry Council of the OSCE, Copenhagen, 19 December 1997 (*D.A.I.*, 15 February 1998, n° 4, 133) and the North Atlantic Council declaration on the situation in Kosovo, 30 April 1998, (*D.A.I.* n° 12, 15 June 1998, p. 445) and 28 May 1998 (*DAI*, n° 14, 15 July 1998, p. 503)

(124) London 9 March 1998, § 9 and Bonn. 25 March 1998, § 13 (emphasis added). Source : see *supra* note 100.

(125) Common position on Kosovo, 19 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 316).

(126) Statement of the 26 Heads of States and Governments of the European Conference, London, 12 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 316).

(127) Joint statement of Foreign Affairs ministers of Bulgaria, Greece, FYROM, Romania and Turkey, Sofia, 10 March 1998 (*D.A.I.*, n° 9, 1 May 1998, p. 316).

(128) 31 March 1998, § 5.

(129) See, for instance, the Conclusions of the General Affairs Council, Brussels, 26 May 1998 (*Agence Europe*, n° 7229, 27 May 1998), Luxembourg, 8 June 1998 (*Agence Europe*, n° 7237, 8 June 1998), 29 June, (*Agence Europe*, n° 7253, 1 July 1998), Brussels, 14 July 1998 (*Agence Europe*, n° 7263, 15 July 1998). See also European Council, Conclusions of the Presidency, Cardiff Summit, 16 June 1998, Annex II, declaration on Kosovo (*supra* note 106).

(130) Conclusions of the Meeting of G8 Foreign Affairs Ministers, London, 9 May 1998 (*D.A.I.*, n° 13, 1 July 1998, p. 471).

(131) 7th Ministry Council of the OSCE, Oslo, 2-3 December 1998, Declaration on Kosovo (*D.A.I.*, n° 3, 1 February 1999, pp. 144-145).

(132) North Atlantic Council, Ministry session, Declaration on Kosovo, Brussels, 8 December 1998 (*D.A.I.*, n° 2, 15 January 1999, pp. 65-66).

(133) The draft plan is entitled *Interim Agreement on Peace and Self-Government in Kosovo*. See *infra*, Part III, Section A.

political process » (§ 3), specified that, « without prejudging the outcome of that dialogue », it « expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration » (§ 4). By the same token, the Council of the EU, while reaffirming its support for an enhanced status for Kosovo, stated that « there had to be a valid political process in which the parties themselves could determine a solution without delay to the political status of Kosovo through negotiations » (134). Yet, given the positions of the parties, calling on the authorities to negotiate a political status for Kosovo with the Albanian leadership, was equivalent to requiring them to grant a large degree of autonomy. The FRY was thus required to make certain changes to its internal structure, although it was given the possibility to negotiate these changes with representatives of the population of the region (135). In any case, from January 1999, the parties were expressly required to negotiate on the basis of the peace plan drafted by the Contact Group (136). In effect, when giving the reasons for the air operations in the FRY, the NATO Secretary-General stated, *inter alia* :

« We are taking action following Yugoslavia's refusal of the international community's demands : acceptance of the interim political settlement which has been negotiated at Rambouillet [...] » (137).

However, the legal grounds on the basis of which the FRY was summoned to grant autonomy to Kosovo were somewhat hazy. Third-party states and international organisations constantly insisted on the fact that their primary concern was to end the violence, to prevent a humanitarian catastrophe and to ensure a lasting peace in the region (138). On the other hand, certain statements from American officials acknowledged the *legitimacy* of the aspirations of Kosovo's inhabitants (139). However, the same statements also clearly underlined that the granting of autonomy was

(134) Conclusions of the General Affairs Council on the situation in the Balkans, Brussels, 26 May 1998 (*Agence Europe*, n° 7229, 27 May 1998). See also European Council, Conclusions of the Presidency, Cardiff Summit, 16 June 1998, Annex II, declaration on Kosovo (*supra* note 106).

(135) The French Foreign Affairs Minister, Hubert Védrine, described the objective of the Contact Group as follows : « il s'agit de réunir les conditions permettant une négociation, de part et d'autre, pour aboutir à une solution politique autour d'un statut d'autonomie substantielle » (Contact Group Meeting, Statement of the French Minister of Foreign Affairs, Mr Hubert Védrine, Paris, 15 October 1998, in *D.A.I.*, n° 23, 1 December 1998, p. 890).

(136) Contact Group Statement, London, 29 January 1999. Source : see *supra* note 100.

(137) Statement by NATO Secretary General, 23 March 1999 (*Keesing's*, March 1999, p. 42847). The other demands were : « full observance of limits on the Serb army and special police forces agreed on October 25 and ending of excessive and disproportionate use of force in Kosovo ».

(138) See the declarations quoted above, notes 106 and 108.

(139) See, for instance, Remarks and Q&A Session, M.K. Albright, U.S. Institute of Peace, Washington DC, 4 February 1999 (source : see *supra* note 108). See also the last sentence of the 'Statement by the President on the Massacre of Civilians in Racak' (Washington DC, 16 January 1999, White House, Press Secretary). It is important to stress that these statements always refer to the whole population of the region of Kosovo and not solely to the ethnic Albanians.

necessary for security or humanitarian reasons. On one occasion, the US Secretary of State, M. K. Albright, went so far as to expressly use the word 'right', stating that : « The crisis will not end until Belgrade accepts Kosovo's need for, and *right to*, substantial autonomy » (140). This was, however, an isolated declaration, and even in this sentence, the prior aim seems to be the putting an end to the crisis. Moreover, in another statement made by Mrs Albright on the same day, the reference to a 'right' no longer appeared (141). In conclusion, autonomy for Kosovo was required by third-party states first and foremost as a necessary *means to restore peace and security* in the region, rather than as a recognised *right* of the Kosovar Albanians (142).

The group of states that took an active role in the Kosovo crisis thus remained true to their initial stance; as they involved themselves in the crisis for security and humanitarian reasons, they justified their demands on the grounds that they were necessary in order to obtain a cessation of violence. The Yugoslav authorities were thus required to allow Kosovo autonomy, not as a right, but rather in order to put an end to the turmoil created in the region and, in consequence, the violations of basic human rights. However, territorial autonomy does not constitute, *in abstracto*, a means to protect human rights. Such a regime could be promoted as a solution to the conflict only because the Kosovar Albanians themselves were claiming a particular political status. Therefore, even though their claim for independence was rejected, the political aspirations of the Kosovar Albanians were partially endorsed by foreign states.

The question remains whether this apparently *ad hoc* solution could find any basis in international law. Indeed, normally, international law is neutral with respect to internal conflicts. For sure, as emphasised by Olivier Corten, « la neutralité ne signifie pas le vide juridique » (143). Even in the case of civil wars, international law prescribes respect for fundamental human rights and regulates the means to be used by the belligerents. However, « la neutralité implique de s'abstenir de prendre parti *sur le fond* des revendications » (144). It is true that the UN Security Council had determined that the situation in Kosovo constituted a threat to peace and security in the region (145). Since, once it has made such a determination, the Security Council has a large discretion in the suggestion or imposition

(140) Secretary of State, M.K. Albright, Statement to the North Atlantic Council, Brussels, Belgium, 8 December 1998, as released by the Office of the Spokesman, US Department of State (emphasis added). Source : see *supra* note 108.

(141) Press Conference at NATO Headquarter, Brussels, Belgium, 8 December 1998, as released by the Office of the Spokesman, U.S. Department of State. Source : see *supra* note 108.

(142) On this point, see T. CHRISTAKIS, *supra* note 1, p. 572.

(143) O. CORTEN, *supra* note 68, p. 182.

(144) *Ibidem*.

(145) Resolution 1199 (1998) and 1203 (1998).

of measures aimed at restoring peace and security (146), requiring a country to grant autonomy to end an internal conflict may well appear to be within the framework of its powers (147). Indeed, it has considerably extended the range of its interventions in internal conflicts in recent years (148). However, the demands for autonomy were already formulated by states before the Security Council had made such a determination. Additionally, the latter, generally speaking, played a secondary role in the issue, contenting itself with endorsing the positions of the Contact Group. Yet, autonomy is not an episodic measure, it implies a profound and lasting change in the internal structure of a country. Moreover, if it could be rooted in international law, the solution promoted for Kosovo might become applicable to other comparable conflicts. For all these reasons, it is worth exploring further whether the requirement of autonomy for certain sub-state groups can find a basis in international law.

II. — AUTONOMY, MINORITIES AND SECESSIONIST CONFLICTS IN INTERNATIONAL LAW

Introduction : the Significance of Autonomous Regimes for Minorities

The notion of 'autonomy' is « not a term of art or a concept that has a generally accepted definition in international law » (149), but is generally « understood to refer to independence of action on the internal or domestic level » (150). It differs from independence in that it always implies a limited list of powers, whereas independence implies « the totality of powers without any need for enumeration » (151). Since the words 'territorial autonomy' and 'self-government' are often used indiscriminately, the 1985 *European Charter of local self-government* can provide a useful indication of the legal sense attributed to the latter notion :

(146) M. SHAW, *International Law*, *supra* note 68, pp. 877-879.

(147) T. CHRISTAKIS, *supra* note 1, p. 572.

(148) In particular, the Security Council has considered in certain cases that « free and genuine elections and/or constitution of 'widely representative governments' were a significant measure to solve regional or local conflicts » (J. SALMON, « Internal Aspects of the Right to Self-Determination Towards a Democratic Legitimacy Principle? », in *Modern Law of Self-Determination*, *supra* note 1, pp. 253-282, p. 273 and references cited). See also T. CHRISTAKIS, *supra* note 1, pp. 481-502.

(149) H. HANNUM and R.B. LILICH, « The Concept of Autonomy in International Law », *A.J.I.L.*, 1980, pp. 858-889, p. 858.

(150) *Ibidem*, p. 860.

(151) R. LAPIDOTH, « Some Reflections on Autonomy », in *Mélanges offerts à Paul Reuter*, Paris, Pedone, 1981, pp. 379-389, p. 381. See also the views of Yoram DINSTEIN, « The Degree of Self-Rule of Minorities », in *Peoples and Minorities in International Law*, *supra* note 1, pp. 221-235. On the relation between minority protection and federalism, see N. LEVRAT, « La protection des minorités dans les systèmes fédéraux », *Rev. trim. dr. h.*, n° 30, 1997, pp. 229-271.

« 1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. 2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. [...] » (152).

On the basis of a survey of a large number of autonomy arrangements in the world, Hurst Hannum and Richard Lillich have suggested that a « fully autonomous » territory should include :

- 1) « a locally elected body with some independent legislative power [...] »;
- 2) « a locally chosen chief executive, possibly subject to approval or confirmation by the principal government, which has general responsibility for the administration and execution of local laws or decrees [...] »;
- 3) « an independent local judiciary, some members of which may also be subject to approval or confirmation by the central/principal government, with jurisdiction over purely local matters [...] » (153).

Autonomous systems can also be organised on a personal basis. Regimes of 'personal autonomy' have been recently introduced or reintroduced in favour of minorities, in several Central or Eastern European states, in particular in Hungary (154). However, within the framework of this paper, the focus will be on territorial autonomy, since this was the solution proposed for Kosovo.

When a minority is concentrated in one region of the state, the claim for the right to enjoy its specific cultural identity frequently merges with a demand for more control over general affairs of the region. In such cases, the establishment of decentralised institutions clearly permits the minority group to protect its own language or culture from the risk of state policies of assimilation. Beyond that, it enables the minority to have a greater

(152) *European Charter of Local Self-Government*, 15 October 1985, Council of Europe, European Treaties, ETS n° 122, art. 3.

(153) H. HANNUM and R.B. LILLICH, *supra* note 149, pp. 886-887. See also H. HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* note 1, p. 467.

(154) Broadly speaking, these systems consist of the delegation of certain powers, usually in cultural and educational matters, to institutions managed by representatives of the minority group, with jurisdiction extending to all individuals registered as belonging to the minority. On theories about personal autonomy, see S. PIERRÉ-CAPS, *supra* note 1, Chapter 8, pp. 255-282 and for a more critical viewpoint, T. CHRISTAKIS, *supra* note 1, pp. 535-538. On recent laws on personal or cultural autonomy, see *inter alia*, P. KOVACS, « L'émergence des différentes formes d'autonomie dans la protection des minorités dans certains pays de l'Europe centrale et orientale », in E. DECAUX and A. PELLET (eds.), *Nationalités, Minorités et Successions d'États en Europe de l'Est*, CEDIN-Paris X, Cahiers internationaux, Paris, Montchrestien, 1996, pp. 163-187; B. TSILEVICH, « The situation of ethnic minorities in Latvia », in M. OPALSKI and P. DUTKIEWICS (eds), *Ethnic Minority Rights in Central Eastern Europe*, Canadian Human Rights Foundation, Forum Eastern Europe, Ottawa, 1996, pp. 51-60, at 54; V. PETTAI, « The situation of ethnic minorities in Estonia », in *idem*, pp. 41-50, at 46; S. VAITIEKUS, « The Rights of National Minorities and their Implementation in Lithuania », in *idem*, pp. 61-71, at 68.

influence over political and economic decisions affecting its members (155). Evidently, an autonomous regime entails a loss of power for the central government and may lead to a spiral of demands from local authorities for increasing devolution of powers. As a solution, therefore, the granting of territorial autonomy depends on compromise (156). It has the advantage of being flexible and adaptable in various circumstances. Above all, it makes it possible to « reconcile the right to territorial integrity and political independence of the state with the aspirations of minorities and local populations to determine their own way of life » (157). It has, indeed, been used by many states to respond to the demands of territorially concentrated minorities (158). However, this practice does not, by itself, entail that those states had any *opinio juris* that they were under an international obligation to do so. It is commonly accepted that :

« as international law now stands, states are under no obligation whatsoever to establish any form of political or administrative decentralisation in favour of minorities. International law cannot force states to adopt a particular state structure. It is of no avail to seek evidence of a practice common to states in regard to territorial autonomy which might form the outline of a customary rule » (159).

On the other hand, there is a growing acknowledgement internationally that autonomy can often be an adequate response to the phenomenon of territorial minorities. Elaborating on the Kosovo episode, one could ask whether, in certain circumstances, a government can be required to grant a status of autonomy to a culturally distinct group. This section first examines the existing body of rules to see if any norm of international law supports the hypothesis of the existence or the emergence of a *right to autonomy* for certain sub-state groups (A). In the Kosovo context, the requirement of autonomy was nonetheless primarily justified on the basis of security considerations. In order to determine whether this attitude could reflect a wider acceptance by states of the idea that, in the case of internal conflict, a government can be required to allow a status of autonomy to a rebellious region, *as a means to restore peace and security*, the

(155) A. EIDE, « Territorial Integrity of States, Minority Protection, and Guarantees for Autonomy Arrangements Approaches and Roles of the United Nations », in *Local Self-Government, Territorial Integrity and Protection of Minorities*, Seminar organised in Lausanne, 25-27 April 1996, European Commission for Democracy through Law, Council of Europe Publishing, 1996 (hereinafter *Local Self-Government...*), p. 301.

(156) T. CHRISTAKIS, *supra* note 1, pp. 538-544.

(157) R. LAPIDOTH, *supra* note 151, p. 379.

(158) See, in particular, *Local self-Government...*, *supra*, note 155. In the framework of a study on conflicts involving minorities around the world, Ted Gurr underlines that the allocation of autonomy regimes has permitted the settlement of a significant number of those conflicts. (T.R. GURR, *Minorities at Risk : a Global View of Ethnopolitical Conflicts*, Washington D.C., United States Institute of Peace Press, 1993, pp. 300-305).

(159) G. MALINVERNI, « Local Self-Government, Territorial Integrity and Protection of Minorities — Final Report », in *Local Self-Government...*, *supra* note 155, pp. 313-329, at 316.

reactions of the OSCE Member States towards other internal conflicts comparable to the one in Kosovo will be discussed (B).

A. — *Is there a Right to Autonomy in International Law?*

It emerges from the international law literature dedicated to the issue of autonomy (160), that two grounds could, theoretically, furnish a legal basis for a right to autonomy for certain sub-state groups : the right to self-determination on the one hand (1), minority protection on the other (2) (161).

1. *Autonomy as a Form of Self-Determination?*

According to a particular interpretation of the right to self-determination, sub-state groups could be, in certain circumstances, entitled to autonomy (a). However, state practice does not support the view that this interpretation has, indeed, become positive law (b).

a) *Theories*

The right to self-determination is often understood to be synonymous with independence. However, it has always been clear that this is not the case. General Assembly Resolution 2625 (XXV) lays down that this right is susceptible to implementation through :

« the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into *any other political status freely determined by a people* » (162).

Hence, Rosalyn Higgins has stressed that the core meaning of 'self-determination' is not independence but the « free choice of peoples » (163). Also, as explained above, outside the colonial context, the people entitled to self-determination normally encompasses the whole population of an existing state. Particular groups within the state are not entitled to unilaterally decide their political status by virtue of a right to self-determination.

(160) See, *inter alia*, H. HANNUM, *Autonomy, Sovereignty and Self-Determination*, *supra* note 1; *Local Self-Government...*, *supra* note 155; H. HANNUM and R.B. LILLICH, *supra* note 149; R. LAPIDOTH, *supra* note 151; D. SANDERS, « Is Autonomy a Principle of International Law? », in *N.J.I.L.*, 1986, pp. 17-21; H.J. STEINER, « Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities », in *Notre-Dame L.R.*, 1991, pp. 1539-1560.

(161) There are also instances of regional autonomies guaranteed by an international treaty. Among the most famous cases lies the status of Trentino-Alto-Adigio established by the De Gasperi-Gruber Agreement, in 1945 (S. BARTOLE, « The situation in Italy », in *Local self-government...*, *supra* note 155, pp. 51-60). See, more generally, T. CHRISTAKIS, *supra* note 1, pp. 577-584.

(162) *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 1970 (emphasis added).

(163) R. HIGGINS, *supra* note 68, p. 119.

Such territorial notion of the concept of 'people' has been subjected to criticism. Eminent scholars have called for a more 'sociological' definition which would give more weight to self-identification by the group itself. Consequently, they contest the dichotomy between the concepts of 'minorities' and 'peoples', the latter being the exclusive beneficiary of the right to self-determination (164). In the opinion of Ian Brownlie,

« the issue of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same — they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary » (165).

If self-determination means the free choice of peoples, this choice, in the view of these authors, can be limited by other principles (166); foremost the territorial integrity of states, which is an essential condition for international stability (167). Sub-state ethnic groups could qualify as 'peoples' entitled to self-determination, but they should exercise this right within the boundaries of the state. Depending on the circumstances, the right to self-determination could take various forms — personal or territorial autonomy, a federal constitution, or any alternative constitutional framework — depending on the historical, economic or political context of each case (168). In the same line of argument, Martti Koskenniemi holds that :

(164) See, *inter alia*, A. CASSESE, *supra*, note 1; H. HANNUM, « Rethinking Self-Determination », *supra* note 68; C. TOMUSCHAT, « Self-Determination in a post-modern world », in *Modern Law of Self-Determination*, *supra* note 1, pp. 1-20, at 15; I. BROWNLIE, « The Rights of Peoples in Modern International Law », in *The Rights of Peoples*, *supra*, note 1; J. CRAWFORD, « The Rights of Peoples », *idem*, p. 172; A. PELLET, « Quel avenir pour le droit des peuples à disposer d'eux-mêmes ? », in *Le droit international dans un monde en mutation*, Montevideo, 1994, pp. 255-276. *Contra* . R. HIGGINS, *supra* note 68, pp. 119-127 and « Postmodern Tribalism and the Right to Secession », in *Peoples and Minorities in International Law*, *supra*, note 1, pp. 29-30; M. SHAW, « The Definition of Minorities », *supra* note 29, p. 20; P. THORBERRY, « The Democratic or Internal Aspect of Self-Determination », in *Modern Law of Self-Determination*, *supra* note 1, pp. 101-138, at 126, 127.

(165) I. BROWNLIE, *supra* note 164, p. 5.

(166) Mc CORQUODALE, « Self-Determination a Human Rights Approach », *I.C.L.Q.*, 1994, pp. 857-885.

(167) A. PELLET, « Quel avenir pour le droit des peuples à disposer d'eux-mêmes ? », *supra* note 164, pp. 259-260. *Contra* : Olivier Corten holds that the right to self-determination and the principle of territorial integrity, as defined in relevant international instruments, such as Resolution 2625 (XV), are *corollaries* and therefore, one cannot prevail on the other : « [l]e droit à l'autodétermination, supposant une assise matérielle délimitée, entraîne l'obligation de respecter l'intégrité de ce territoire. Il s'agit de corollaires, ce qui exclut toute possibilité de contradictions. C'est en ce sens que l'on peut lire plusieurs instruments, comme la résolution 2625 sur les relations amicales, qui précisent qu'aucun des deux principes ne peut porter atteinte à — et donc prévaloir sur l'autre » (« Droit des peuples à disposer d'eux-mêmes et *uti possidetis* », *supra* note 68, p. 174).

(168) A. CASSESE, *supra* note 1, pp. 351-359. See also F. KIRGIS, « The Degrees of Self-Determination in the United Nations era », *A.J.I.L.*, 1994, p. 306. This view might have been endorsed by the Arbitration Commission on Yugoslavia. Asked about the existence of a right to self-deter-

« to say that self-determination 'applies' is to seek to regulate conflicts by reference to rules and principles that have no intrinsic connection with the law of sovereign equality, with its strong presumption on non-interference and territorial integrity. Self-determination law [...] allows procedural and material guidelines to be devised that seek to regulate conflict in a pragmatic, *ad hoc* fashion [...] » (169).

b) *Practice*

Although a thorough assessment of this contention would be beyond the scope of this article, the view that self-determination could entail a right to autonomy for internal ethnic groups does not seem to find much support among states.

In 1993, the government of Liechtenstein forwarded a proposal to the General Assembly to discuss precisely the « effective realisation of the right of self-determination through autonomy » (170). Liechtenstein's proposal was aimed at developing a « post-colonial » conception of self-determination focused on autonomy for certain communities within the State, rather than on independence (171). It suggested that the General Assembly discuss the different forms, degrees and modalities of implementation of autonomous regimes. Such a discussion, as Liechtenstein saw it, would have led to an international treaty guaranteeing different degrees of autonomy for sub-

mination for the Serbian population in Croatia and Bosnia-Herzegovina, the Commission, in its opinion n° 2, first observes that « in its present state of development, international law does not make clear all the consequences which flow from this principle ». Yet, it adds that by virtue of this right, as enshrined in article 1 of the two 1966 Covenants, every individual is entitled to choose to belong to whatever community he or she wishes. It concludes that the Serb population must be afforded every right accorded to minorities under international law. Although its reasoning is not clear, the Commission seems to consider that self-determination constitutes the foundation of minority rights. See A. PELLET, « The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples », *supra* note 85, p. 179; M. WELLER, « The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia », *supra* note 83, p. 592; A. FENET, « L'Europe et les minorités », in A. FENET *et al.*, *supra* note 1, pp. 126-129. It must be noted that the conclusions of the Commission amount to a reversal of the generally accepted conception of minority rights as individual rights and self-determination as a collective right. Indeed, the Commission designates the « Serbian population » as the collective holder of « minority rights », while it regards self-determination as the right of every « member of the Serbian population ». Compare with the General Comment of the Human Rights Committee on article 27, ICCPR, *supra* note 48.

(169) M. KOSKENNIEMI, *supra* note 63, p. 266. For an analysis of the conceptual paradoxes which form the background of contemporary discussions of the issue of self-determination, see N. BERMAN, « Sovereignty in Abeyance : Self-Determination and International Law », *Wisconsin I.L.J.*, 1988, pp. 51-105.

(170) H. HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* note 1, p. 503, note 1323.

(171) Interestingly, Liechtenstein proposed the use of the term 'community' instead of 'people' or 'minority', in order to avoid the problems raised by the two latter notions. The term 'community' was to be understood in this context as referring to a group distinct from the rest of the population and concentrated in a certain region of the state (T. CHRISTAKIS, *supra* note 1, pp. 546-547).

state communities (172). The vast majority of states represented in the Third Committee of the General Assembly, where this proposal was debated, reacted very negatively to it. In particular, a number of states declared that the granting of autonomy to a sub-state group had to remain part of the reserved domain (173). It was finally decided to postpone consideration of the question by the Assembly, to an undetermined future session (174). In other words, the majority of states refused even to discuss the proposal any further.

The right to autonomy based on self-determination, has been most frequently discussed in relation to indigenous groups (175). While acceding to the demands of those groups to use the term 'indigenous peoples' rather than 'indigenous populations', in the 1989 *ILO Convention*, states have at the same time excluded recognition of a right to self-determination for such groups. The 1989 *ILO Convention n° 169 concerning Indigenous and Tribal Peoples in Independent Countries* specifies, indeed, in article 1, § 4 that : « the use of the term 'people' shall not be construed as having any implications as regards the rights which may attach to the term under international law ». The draft Declaration on the Rights of Indigenous People (176) attempts to reverse this situation. It states that « indigenous peoples have the right to self-determination [...] » (art. 3) and specifies that « as a specific form of exercising their right to self-determination, [they] have the right to autonomy or self-government in matters relating to their internal and local affairs [...] » (art. 31). Théodore Christakis has stressed that, in recent years, a growing number of states have declared themselves in favour of the mentioning of a right for indigenous peoples to self-determination and to autonomy in this declaration, provided that it is formulated more restrictively (177). This might announce an evolution of international law in this respect, but limited to the specific case of indigenous peoples. Such a possibility is facilitated by the fact that the issue of indigenous peoples does not usually raise the fear of secession. In

(172) For more details about this proposal, see T. CHRISTAKIS, *supra* note 1, pp. 545-553. Liechtenstein even presented an informal « draft convention on self-determination through self-administration » (*idem*, p. 548).

(173) *Idem*, pp. 550-552.

(174) *Idem*, pp. 552-553.

(175) On self-determination and autonomy for indigenous peoples, see, *inter alia*, L.A. REHOF, « Human Rights and Self-government for Indigenous Peoples », *Nordic Jour. of Intern. L.*, vol. 61 (1), 1992; M.E. TURPEL, « Indigenous Peoples' Rights of Political Participation and Self-Determination : Recent International Legal Developments and the Continuing Struggle for Recognition », *Cornell Int. L. J.*, 25, 1992, pp. 579-622; E. SPIRY, « From 'Self-Determination' to a Right to 'Self-Development' for Indigenous Groups », *German Yearbook of International Law*, vol. 38, 1995, pp. 129-152; J.J. CORNTASSEL and T.H. PRIMEAU, « Indigenous 'Sovereignty' and International Law : Revised Strategies for Pursuing 'Self-Determination' », *Human Rights Quarterly*, vol. 17, 1995, pp. 343-365.

(176) UN doc.E/CN.4/sub.2/1993,19, annex I.

(177) T. CHRISTAKIS, *supra* note 1, pp. 599-601, and more generally on the issue of autonomy for indigenous peoples, pp. 587-613.

any case, as of February 2000, the aforementioned declaration, which is not designed to be legally binding anyway, has not been adopted by the General Assembly.

The reaction to self-determination claims by Kosovar Albanians reinforce the impression that the vast majority of states are extremely reluctant to acknowledge a right of self-determination for internal groups others than indigenous peoples (178). As seen above, the states involved in the crisis did not use the terms 'Albanian *people*' nor '*self-determination* of Kosovo'. Rather, they spoke about 'self-administration', 'enhanced autonomy' or 'self-government'. This language appears to get very close in meaning to the *idea* of internal self-determination (in the sense of the right to deal with one's own affairs), but the *word* was not used (179). This attitude was probably motivated by the feeling that the term 'self-determination' remains too powerfully associated with the idea of independence, so that the recognition of a right to self-determination could be interpreted by sub-state groups as a right to secede. Indeed, the declarations of the Kosovar Albanian leaders indicate that they understood self-determination in this way. Therefore, rather than trying to weaken the term's established associations, states chose to use different terms.

As regards the final status of Kosovo, it is true that the Rambouillet plan, discussed below, provides that :

« three years after the entry into force of this Agreement, an international meeting should be convened to determine a mechanism for a final settlement for Kosovo, *on the basis of the will of the people*, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act » (180).

The words 'will of the people' could at first sight be interpreted as entailing external self-determination. However, it only appears as one of several elements to be taken into account, rather than as the main element to be balanced with other factors. Furthermore, it is not clear *which* people's will is to be taken into account; the 'people of Kosovo' would be the most likely, but it could also be the people of Serbia or of the entire FRY. Nor is it mentioned what mechanism is to be used to determine the will of the people; a referendum seems most appropriate, but this is not expressly

(178) Note that the distinction between 'minorities' and 'indigenous peoples' raises controversies. On this point, see T. CHRISTAKIS, *supra* note 1, pp. 588-590.

(179) M.K. Albright also affirmed that the goal of the Contact Group draft political settlement was « to help the people of Kosovo to get control over their own affairs now, while giving them and Belgrade the opportunity to revisit the final status of the province in the future » (statement to the North Atlantic Council, Brussels, Belgium, December 8, 1998, emphasis added. Source : see *supra* note 108). Such expression does not appear in Contact Group statements, nor in EU statements.

(180) Interim Agreement on Peace and Self-Government in Kosovo, Chapter 8, I, 3 (emphasis added). The text of the Rambouillet plan is available on the website of the *Balkan Action Organisation* : < <http://www.balkanaction.org> > (see *infra*, Part III, Section 1).

provided for (181). Additionally, the Helsinki Final Act, referred to in the plan, includes the rule of self-determination *as well as* the principles of inviolability of frontiers and territorial integrity of states.

The ambivalence of the term 'self-determination' renders its use delicate. It embodies both the notions of the right of peoples to be free from foreign domination or intervention ('external' self-determination) and their right to deal with their own affairs ('internal' self-determination). By contrast, 'self-administration', or 'self-government', express only the second idea. In terms of political desirability, it is far from clear that the adoption of an ethnic definition of 'people' would have the effect of appeasing conflicts involving minorities. It is submitted that the equilibrium between the different meanings of the right to self-determination, can be best ensured by maintaining a single definition of the holder of this right. Indeed, each of the two possible conceptions of 'people', the territorial one and the ethnic one, tips the seesaw of the notion of self-determination in another direction. The ethnic definition of 'people' puts the emphasis on the essential characteristics specific to a certain human group which distinguish it from all other groups. Therefore, it is first and foremost associated with the notion of self-determination as the right to separate from others and to define one's own status. Conversely, the territorial notion of the people is based on an objective, material element, external to the group itself — the territory. It can be better developed as an inclusive concept because the distinction between members and non-members of the group is not an issue. It leaves room for the unfolding of relations between all the different communities living in the territory, and the building of a common political culture (182). The emphasis can be put on *the way* the population could deal with its own affairs, rather than on *who* could take part in this process. Opening international law to the ethnic definition of people, in order to bring it into line with popular conceptions, may not only confuse the situation, but also hamper the strengthening of self-determination in its democratic sense (183). On the other hand, a truly democratic understanding of the notion of 'people' must take into account the cultural heterogeneity of every population. As Patrick Thornberry puts it :

« a less majoritarian, more differentiated, participatory and communitarian meaning of 'people' carries opportunities and few risks if the participation is genuine and not simply asserted. A mature concept of peoples respects and incorporates diversity and takes strength from it » (184).

(181) M. Weller asserts that « the delegation of Kosovo obtained certain assurances that this formula actually established a legal right to hold a referendum of the people of Kosovo » (« The Rambouillet Conference on Kosovo », *supra* note 90, p. 197).

(182) Compare with S. PIERRE-CAPS, *supra* note 1, and B. BADIE, *supra* note 60, pp. 47-48.

(183) P. THORNBERRY, « The Democratic or Internal Aspect of Self-Determination », in *Modern Law of Self-Determination*, *supra* note 1, pp. 126-128.

(184) P. THORNBERRY, *idem*, p. 128.

2. *Autonomy as a Means to Ensure Minority Protection*

Recently, there has been increasing acknowledgement internationally, that political autonomy could be an adequate response to the phenomenon of territorial minorities. However, most states have opposed formal recognition of a right to autonomy for minorities (a). Nevertheless, autonomy can serve as a means to implement a whole set of rights, in particular, the right to participate in public affairs (b).

a) *Absence of a Right to Autonomy for Minorities*

In the UN as well as in the OSCE and the Council of Europe, all attempts to introduce a right to dispose of regional institutions in a document concerning minorities, have failed. In the UN, before the adoption of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* by the General Assembly in 1992 (185), some proposals in this vein were submitted (186). However, member states refused to go further than acknowledging minority members « the right to participate effectively in decisions on the national and, where appropriate, regional level, concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation » (187).

Similarly, at the European level, the majority of states strongly opposed all proposals tending towards the recognition of an obligation to granting autonomy to territorially concentrated minorities. In the 1990 Copenhagen Declaration, the OSCE Participating States limited themselves to *noting* « the efforts undertaken to establish appropriate local or autonomous administrations corresponding to the specific historical and territories circumstances », as one possible means « to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities » (188). The Council of Europe, which undertook to translate OSCE commitments concerning minorities into legal norms, was also offered the opportunity to acknowledge a right in this respect. Its Parliamentary Assembly submitted a proposal of *additional protocol to the*

(185) Resolution 47/135 adopted, without a vote, on 18 December 1992. Note that this is not a legally binding instrument.

(186) T. CHRISTAKIS, *supra* note 1, pp. 559-560.

(187) Art. 2, § 3.

(188) See also the Report of the CSCE Meeting of Experts on National Minorities in Geneva, 1991, IV, § 7. On the proposals submitted at the 1990 Copenhagen Summit, concerning the establishment of autonomous institutions for territorially concentrated minorities, see T. CHRISTAKIS, *supra* note 1, pp. 561-563.

European Convention on Human Rights on the Rights of National Minorities (189). Article 11 of this proposal stipulated that :

« in the regions where they are in a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state » (190).

The application of this provision was not supposed to be stringent. It did not necessarily require territorial autonomy; it could also be fulfilled by personal or cultural autonomy, or a 'special status' (191). It was made dependent on various factors, such as the historical or territorial situation and the legislation of the state. Nevertheless, the provision was deemed unacceptable by the member states of the Council of Europe. The additional protocol proposed was rejected, article 11 being one of the main reasons (192), and the document thus remains only a draft, without any binding force. Yet, the Parliamentary Assembly considers itself bound by Recommendation 1201 (1993) which includes the draft additional protocol. In particular, it requires from states wishing to be admitted to the Council of Europe, to commit themselves to incorporating the principles set forth in this Recommendation in their legal systems (193), before it will give a favourable opinion to their admission (194). The Assembly has also specified, when establishing a system of monitoring the honouring of mem-

(189) Recommendation 1201 (1993). Text and explanatory memorandum in *H.R.L.J.*, vol. 14, 1993, pp. 144-146.

(190) The draft Convention for the Protection of Minorities proposed by the 'European Commission for Democracy through Law' (a consultative body of experts created in the framework of the Council of Europe, also called the 'Venice Commission') also proposed the drawing of a link between minority protection and local self-government. Article 14 § 2 of this proposal reads as follows : « as far as possible, States are to take minorities into account when dividing the national territory into political and administrative sub-divisions, as well as into constituencies ». This proposal has been published in *The Protection of Minorities*, European Commission for democracy through law, Council of Europe edition (1994). See the comments of G. MALINVERNÌ, « The draft Convention for the Protection of Minorities. The Proposal of the European Commission for Democracy through Law », *H.R.L.J.*, vol. 12, n° 6-7, 1991, pp. 265-269, especially p. 266.

(191) N. LEVRAT, « Solutions institutionnelles pour sociétés plurielles », *supra* note 1, p. 75.

(192) C. TABAJDI and P. KOVACS, « La Recommandation 1201, mythe ou réalité? », in *Perspectives d'intégration des pays d'Europe centrale et orientale aux institutions de l'Europe occidentale*, Paris, Montchrestien, 1998, pp. 67-75, at 68-69.

(193) Opinion n° 190 on the application by Ukraine for membership of the Council of Europe, 26 September 1995, § 12 (*H.R.L.J.*, vol. 16, 1995, pp. 373-375); Opinion n° 191 on the application by the former Yugoslav Republic of Macedonia, 27 September 1995, § 9, vii and § 10, iv (*idem*, pp. 372-373); Opinion n° 193 on the Russian Federation's request for membership of the Council of Europe, 25 January 1996, § 10, iv (*H.R.L.J.*, vol. 16, 1996, pp. 185-187).

(194) Faced with an influx of applications to membership from Eastern and Central European countries after the fall of the Berlin wall, the Council of Europe has reformed its procedure of admission, ensuring a greater control of national legislation of state candidates. The Parliamentary Assembly plays a major role in this procedure. See P. BODEAU, « L'intégration démocratique des pays de l'Europe centrale et orientale », in *Perspective d'intégration...*, *supra* note 192, pp. 135-167 and J.-F. FLAUSS, « Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe », *E.J.I.L.*, 1994, pp. 401-422.

ber state's obligations, that countries which are already members of the organisation should also comply with this recommendation (195). In addition, the recommendation has been used as an instrument of reference in bilateral agreements on good neighbourliness concluded by Central and Eastern Europe countries (196). However, these treaties have revealed that article 11 remains highly controversial. Indeed, the Slovak and the Romanian governments, which have both concluded bilateral treaties of this sort with Hungary, expressly specified that they did not recognise that minorities enjoyed any collective rights prescribing the creation of ethnically-based autonomous structures (197).

By contrast with the proposed additional protocol, the *Framework-Convention for the Protection of National Minorities* adopted by the Council of Europe in November 1994, confines itself to encouraging state parties to « create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular, those affecting them » (art. 15). However, some provisions do take into account the phenomenon of 'territorial minorities' (198). The Convention provides that, « in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers », the Parties shall endeavour to promote, when requested to do so, « the use of the minority language in relations between those persons and the administrative authorities » (art. 10 (2)). They should also

(195) Parliamentary Assembly of the Council of Europe, Order n° 508 (1995), « Honouring of obligations and commitments by member states of the Council of Europe », § 7, adopted on 26 April 1995 (*H.R.L.J.*, 1996, vol.17, n° 3-6, p. 217). H. KLEBES concludes that Recommendation 1201 survives in a legal « grey zone » (« The Council of Europe's Framework Convention for the Protection of National Minorities », *H.R.L.J.*, 1995, pp. 92-98, at 97, note 25).

(196) Slovak-Hungarian Treaty on Good-Neighbourliness and Friendly Co-operation, Paris, 19 March 1995, art. 15, 4 (b) (*D.A.I.*, n° 11, 1 June 1995, p. 329); Romanian-Hungarian Treaty on Understanding, Co-operation and Good Neighbourhood, Timisoara, 16 September 1996, Annexe, § 3 (*D.A.I.*, n° 23, 1 December 1996, p. 947); Romanian-Ukrainian Treaty on Good-Neighbourliness and Friendly Co-operation, Constanza, 2 June 1997, art. 13, § 1 (*D.A.I.*, n° 19, 1 October 1997, p. 691).

(197) The 1996 Hungary-Romania Treaty contains an express reservation to this effect. The Slovak Government introduced an interpretative declaration when ratifying the treaty (J. WRIGHT, « The Protection of Minority Rights in Europe From Conference to Implementation », *I.J.H.R.*, 1998, pp. 1-31, p. 23). The 'Venice Commission', asked by the Parliamentary Assembly to give a legal opinion on Article 11, offered a restrictive interpretation, stressing that international law cannot oblige states to establish decentralised institutions in favour of minorities (T. CHRISTAKIS, *supra* note 1, pp. 569-571).

(198) The *European Charter for Regional and Minority Languages* also bears a marked territorial dimension. Alain Fenet notes that « [l]a protection s'exerce explicitement ou implicitement dans un cadre territorial restreint, celui avec lequel la minorité entretient un rapport historique et dans lequel elle maintient une présence démographique » (« L'Europe et les minorités », in A. FENET et al., *supra* note 1, p. 149). F. Albanese even holds that « if we look carefully at the European Charter for Regional or Minority Languages as a whole and certain provisions [Articles 10 (2), 11 (3) and 14 (2)] of the Framework Convention, we can see that the concept of local self-government underlies the protection measures proposed » (« Which International Guarantees for Local Self-Government? Council of Europe Work », in *Local self-Government...*, *supra* note 155, pp. 304-312, at 309).

endeavour « to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications » (art. 11 (3)) and « to ensure, as far as possible [...] adequate opportunities for being taught the minority language or for receiving instruction in this language » (art. 14 (2)). In Malcolm Shaw's view, it is possible to conclude that « there can be a territorial dimension to relevant minority rights within the territorial framework of independent states » (199).

Indeed, the aforementioned provisions apply only in the territory where persons belonging to the minority represent a substantial part of the population. When this proportion is very high, e.g. 80 % of the population, these special measures will concern most of the population in the relevant area. In such a case, the emphasis can shift from the population to the territory; for almost the whole region, in important fields — namely the language of the administration and education — will be entitled to different treatment from the rest of the country. For administrative reasons, there is a strong case in favour of the delegation of certain powers to the regional level. Added to this, the obligation to create conditions necessary for effective public participation (art. 15) does not only concern 'cultural life', but also social and economic life. When a minority is concentrated in a certain region, all that concerns the region affects them in particular. In similar circumstances therefore, the establishment of a form of autonomy or local self-government is a particularly appropriate means to actualise participation in public affairs.

b) *The Right to Effective Participation in Public Affairs*

Obviously, the developments just described only concern states which are parties to the Framework-Convention. However, the right of minority members to participate in public affairs is spelled out in other international documents, such as the 1992 General Assembly Declaration and the 1990 Copenhagen Document. As stressed by Nicolas Levrat, in order to be effective, and not merely formal, this right will usually require the establishment of specific institutional arrangements (200). Indeed, the Special Rapporteur for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Asbjorn Eide, has recommended among other options designed to guarantee the effective political participation of persons belonging to minorities, « decentralised or local forms of government or autonomous arrangements on a territorial and democratic basis, including consultative, legislative and executive bodies chosen

(199) M. SHAW, « Peoples, Territorialism and Boundaries », *E.J.I.L.*, 1997, pp. 478-507, at 486.

(200) « Solutions institutionnelles pour sociétés plurielles », *supra* note 1, p. 74.

through free and periodic elections without discrimination » (201). The OSCE Copenhagen Document also acknowledges that local or autonomous administrations constitute « one of the possible means » to promote the right of persons belonging to national minorities, to effectively participate in public affairs (art. 35) (202).

Certainly, neither the General Assembly declaration, nor the OSCE instruments constitute legally binding documents. However, given its extensive membership, the principles adopted by OSCE members reflect a broad international consensus. These standards have, moreover, become a major reference point on the international scene, in the same vein as the UN Charter (203). In addition, the right of minority members to take part in public affairs can be viewed as a special application of the general right to political participation, which is firmly established in human rights instruments of universal scope (204). « Among other goals », notes Henry Steiner, « autonomy schemes achieve particular, distinctive forms of political participation for ethnic minorities » (205). From this perspective, minority protection can also be linked to the right to self-determination in its internal, democratic sense. While such a right is vested in the population of the country as a whole, the actualisation of this right could assume different forms in order to match the specific situation and aspirations of the various components of the population.

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Autonomy can thus be seen as a means to implement a host of internationally recognised rights belonging to minority members, in particular the right to participate in public affairs. As Hurst Hannum suggests, autonomy is not an end in itself, « it is a political tool to ensure that other rights and

(201) *Special Report on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, submitted by Special Rapporteur A. Eide to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Add. 4, Recommendations, § 17 (d), (e) (UN Doc. E/CN.4/Sub.2/1993/34/Add.4, 11 August 1993).

(202) The Document also commits Participating States to ensure, *inter alia*, that persons belonging to national minorities « have adequate opportunities for instruction of their mother or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities [...] » (art. 34).

(203) See the observation of A. Bloed, « Monitoring the CSCE Human Dimension : in Search of its Effectiveness », A. BLOED, L. LEICHT, M. NOWAK and A. ROSAS (eds), *Monitoring Human Rights in Europe*, Dordrecht, Martinus Nijhoff, 1993, pp. 45-97, at 51-52. For instance, in the Kosovo crisis the Security Council itself affirmed that the solution « should be in accordance with OSCE standards [...] and the Charter of the United Nations » (Resolution 1160 (1999)).

(204) *Universal Declaration of Human Rights*, article 21 (G.A. Res. 217A (III), UN Doc. A/810 (1948)) and *International Covenant on Civil and Political Rights*, article 25. On this point, see H.J. STEINER, « Political Participation as a Human Right », *Harvard H.R.Y.*, vol. 1, 1988, pp. 77-132 and J. SALMON, *supra* note 147.

(205) « Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities », *supra* note 160, p. 1546.

needs are appropriately addressed » (206). Nevertheless, it is clear that with international law as it stands, minorities do not have a proper right to autonomy. The vast majority of states are not prepared to depart from the traditional individual approach to international protection of minorities. Territorial autonomy thus remains one of several possible ways to address the phenomenon of minorities and is always subject to adaptations according to the circumstances.

On a different note, one must admit that autonomy solutions for minorities are not free from ambiguity. They might, indeed, contradict the general aim of minority protection, understood as that of integrating the minority within the country in which it lives, while respecting its difference (207). As Henry Steiner puts it :

« autonomy arrangements may institute a counter-ideal of not simply preserving but also locking into place the historical differences among groups. [...] Formal legal barriers reinforce the natural tendencies of a group's members to look inward and assume only a particular identity, rather than to experience the tension between the particular and a more diffuse or broader identity as a citizen or human being » (208).

Moreover, a minority which finds itself in the majority at the regional level, is susceptible to reproduce dominant or oppressive attitudes towards smaller groups living in the same region. Further, it has rightly been observed that « the geographical definition of an autonomous region cannot be based on exclusively ethnic criteria. It must necessarily also take historical and economic factors into consideration » (209).

Yet, in certain circumstances, autonomy can appear to be the most appropriate means to implement international minority protection. The case of Kosovo could be a good illustration of the factors creating such circumstances; the demographic situation (a minority concentrated in a defined territory, where it represents more than 80 % of the population), the legal precedent (the region used to enjoy a far-reaching autonomy) and historical or political aspects (tensions between the predominant population of the province and the central authorities of the State). Therefore, it can be argued that, in such a context, foreign states are entitled to support the granting of autonomous status to a particular group within an independent state, as a means of implementing the internationally recognised rights of persons belonging to minorities, even before the situation degenerates into armed conflict. Such support would be all the more justified when these persons are excluded from the political system and are victims of human rights violations

(206) *Autonomy, Sovereignty and Self-Determination*, *supra* note 1, p. 474.

(207) S. PIERRE-CAPS, *supra* note 1.

(208) « Ideals and Counter-Ideals... », *supra* note 160, pp. 1552 and 1554.

(209) G. MALINVERNI, « Local Self-Government... », in *Local Self-Government...*, *supra* note 155, p. 319.

However, as seen earlier, third-party states did not refer to minority protection when expressing support for the autonomy of Kosovo. This attitude may suggest that they did not consider minority protection as sufficient grounds for it, but also that they might not have been keen on establishing a precedent suggesting that minorities do have a right to autonomy. Moreover, although they backed autonomy for Kosovo from early on in the crisis, it is only when the conflict escalated towards a civil war that Western states engaged themselves actively in the issue. One may ask, therefore, whether this attitude could reflect the acceptance of a general principle allowing third-party states or certain international organisations, when a strife between a government and an ethnic group takes a violent turn, to urge the government concerned to make changes to its internal structure, in order to restore peace and security. The assessment of such a hypothesis requires the consideration of international reactions in relation to other ethno-political conflicts.

B. — *International Reactions towards
Secessionist Conflicts in the OSCE Area*

The survey of international reactions towards secessionist conflicts will be confined to the OSCE area, in order to clearly delimit the geographic area of enquiry and to focus on the states which have committed themselves (politically at least) to respecting the important standards regarding minorities mentioned above (210). Such conflicts are characterised by a strife between a government and a national or ethnic group which is claiming independence or a special political status. Two categories of cases can be discerned. In relation to the conflicts affecting the Republics of Georgia, Moldova and Azerbaijan, OSCE participating states have supported the allocation of autonomy to the separatist region. However, the political context of these conflicts differ in important respects from that of the Kosovo crisis (1). By contrast, international reactions to the Chechen conflict in the Russian Federation, and the Kurdish question in Turkey, are much more moderate. Nevertheless, such reactions include a call for a vague 'political solution' (2).

1. *Autonomy as a Means to Resolve Secessionist Conflicts*

Georgia, Moldova and Azerbaijan are all torn by secessionist conflicts (211). Within the Soviet Union, excepting the Dnestr region (or

(210) As of March 2000, the OSCE has 55 members · the 15 EU members, the 12 CIS members, the 3 Baltic States, Albania, Andorra, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, the Holy See, Hungary, Iceland, Liechtenstein, Malta, Monaco, Norway, Poland, Romania, San Marino, the Slovak Republic, Slovenia, Switzerland, the FYROM, Turkey, as well as Canada and the USA. Yugoslavia was suspended on 8 July 1992.

(211) On the background to these conflicts and the action of the UN and the OSCE, see V.-Y. GHEBALI, *L'OSCE dans l'Europe post-communiste, 1990-1996. Vers une identité pan-*

Transnistria) in Moldova, all the other separatist entities enjoyed some form of autonomous status within the republics (212). Shortly after the Soviet republics became independent in December 1991, these entities proclaimed their own independence. The ethnic specificity of the population of those regions was invoked by separatist leaders as an argument to justify secession (213). All relevant OSCE declarations (214) and UN Security Council resolutions (215) strongly reaffirm the sovereignty and territorial integrity of Georgia, Moldova and Azerbaijan. At the same time, these documents also make some recommendations concerning the settlement of those conflicts.

As regards the Abkhaz conflict in Georgia, the Security Council designated, in October 1993, the situation as a « threat to the maintenance

européenne. Brussels, Bruylant, 1996; B. COPPIETERS (ed.), *Contested Borders in the Caucasus*, Brussels, VUB University Press, 1996 (available on Internet : < <http://poli.vub.ac.be/publi/ContBorders/eng/> >). On the conflict in Upper-Karabakh, see V. RAMELOT and E. REMACLE, *L'OSCE et les conflits en Europe*, Brussels, GRIP, 1995, pp. 113-133; John J. MARESCA, « Resolving the Conflict over Nagorno-Karabakh. Lost Opportunities for International Conflict Resolution », in C.A. CROCKER and F.O. HAMPSON with P. AALL (eds), *Managing Global Chaos. Sources of and Responses to International Conflict*, Washington D.C., U.S. Institute of Peace Press, 1996, pp. 253-273. On the Abkhaz conflict : B. COPPIETERS, G. NODIA, Y. ANCHABADZE (eds), *Georgians and Abkhazians, the search for a peace settlement*, Bundesinstitut für ostwissenschaftliche und internationale Studien Sonderveröffentlichung, October 1998.

(212) Abkhazia was an 'autonomous republic' within Georgia while South Ossetia and Upper-Karabakh were 'autonomous regions' (*oblast*) — which allowed them cultural autonomy — in Georgia and Azerbaijan respectively.

(213) The Upper-Karabakh has a dominantly Armenian population (around 80 %), South Ossetia has a large majority of Ossetians (around 70 %) and the Dnestr region has a slight majority of Russian inhabitants (53 % of the population). The case of Abkhazia is different. The Abkhaz population represented only 17 % of the population in the region before the conflict but were dominant in the local parliament. In spite of the expulsion of a large number of Georgians from the region during the conflict, the Abkhazs still do not constitute a majority of the reduced population that remains. See the *Report of the Secretary-General concerning the situation in Abkhazia, Georgia*, 3 March 1994, S/1994/253, § 28. According to Ghia Nodia, the conflicts in South Ossetia, Abkhazia, Nagorno-Karabakh and Transnistria arose due to the fact that the « newly independent states contained disputed territories, which were claimed by different ethnic communities as 'theirs', more than from « the alleged mistreatment of minorities by the majority ». However, « [m]istreatment of or discrimination against minorities were used by the advocates of secessionism in order to mobilize their own communities or to gain recognition for their cause from the international community » (« Political Turmoil in Georgia and the Ethnic Policies of Zviad Gamsakhurdia », in *Contested Borders in the Caucasus*, *supra* note 211).

(214) CSCE Rome Summit, Decisions on regional issues, December 1993 (*D.A.I.*, n° 3, 1 February 1994, pp. 47-48); Budapest Summit Declaration, December 1994, II (*D.A.I.*, n° 3, 1995, 1 February 1995, pp. 92-94); Lisbon Summit Declaration, December 1996 (*D.A.I.*, n° 4, 15 February 1997, p. 150), Copenhagen Summit, 19 December 1997 (*D.A.I.*, 1998, n° 4, pp. 132-135, p. 135). See also Istanbul Summit Declaration, November 1999 (SUM.DOC/2/99). See also the Joint statement of the U.S. President B. Clinton and the President of Georgia, E. Shevardnadze, Washington, 7 March 1994 (*D.A.I.*, n° 10, 15 May 1994, pp. 231-232); the position of the French Government in « Pratique française du droit international », *A.F.D.I.*, 1992, p. 1116, 1993, p. 1017, 1994, p. 1026, 1997, p. 928; and the position of the UK Government in « UK Materials on International Law, 1997 », *B.Y.I.L.*, 1997, p. 516.

(215) The Security Council has adopted resolution on the Abkhaz conflict in Georgia : Res. 876 (1993), 896 (1994), 906 (1994), 937 (1994), 977 (1995), 993 (1995), 1036 (1996), 1077 (1996), 1096 (1997), 1124 (1997), 1225 (1999), 1255 (1999); and on the Upper-Karabakh conflict in Azerbaijan : Res. 822 (1993), 853 (1993), 874 (1993) and 884 (1993).

of international peace and security » (216). From 1994 onwards, it has repeatedly urged « the parties to resume the negotiations [...] and to achieve substantive progress towards a political settlement, including *on the political status of Abkhazia*, respecting fully the sovereignty and territorial integrity of the Republic of Georgia » (217). It has expressed its support for the efforts of the Secretary-General, in co-operation with the OSCE representatives, to carry forward the peace process. The peace plan that was submitted to the parties in April 1994 proposed the creation of a « Union State, within the borders of the former Georgian Soviet Socialist Republic ». Outside the enumerated areas of joint competence, Abkhazia would have enjoyed the full measure of state power (218). The Abkhaz side, however, has declined to sign any document that would include recognition of Georgia's territorial integrity (219). Similarly, with respect to the conflict in South Ossetia, also affecting Georgia, the OSCE mission has recommended the establishment of the highest possible degree of political autonomy. The Georgian government has accepted the principle of granting a status of political autonomy to the region, but the leaders of South Ossetia continue to demand recognition of their independence (220).

In the case of Upper-Karabakh (or Nagorno-Karabakh), the predominantly Armenian region in Azerbaijan, the OSCE members (with the exception of the Republic of Armenia) formally endorsed the basic principles for a settlement of the conflict recommended by the President of the 'Minsk Group' (221). These principles include the respect for the territorial integrity of Armenia and Azerbaijan; the legal status of Nagorno-Karabakh to be defined in an agreement based on self-determination, providing Nagorno-Karabakh with *autonomy to the highest degree possible within Azerbaijan* and finally, the guaranteed security for Nagorno-Karabakh and its whole population (222). As for the Security Council, it

(216) Resolution 876 (1993), 19 October 1993, Preamble, § 6.

(217) Resolution 906 (1994), 25 March 1994, § 4, emphasis added. Compare with Resolution 896 (1994), 31 January 1994, § 5. On the reaction of the Security Council and the OSCE to the Abkhaz conflict, see O. PAYE and E. REMACLE, « UN and CSCE Policies in Transcaucasia », in *Contested Borders in the Caucasus*, *supra* note 211; T. CHRISTAKIS, *supra* note 1, pp. 215-218.

(218) *Report of the Secretary-General Concerning the Situation in Abkhazia, Georgia*, 3 May 1994, S/1994/529, Annex II, § 3 (4).

(219) *Report of the Secretary-General*, 3 May 1994, S/1994/529, § 15.

(220) V.-Y. GHEBALI, *supra* note 211, pp. 276-277 and 607-608. At the OSCE Istanbul Summit (November 1999), Participating States have stressed « the need for solving the conflicts with regard to the Tskhinvali regions/South Ossetia and Abkhazia, Georgia, particularly by defining the *political status* of these regions within Georgia », SUM.DOC/2/99, § 15, emphasis added. Compare with earlier statements on the South Ossetia conflict, in particular the Rome Summit Declaration (1993), Budapest Summit Declaration (1994), Copenhagen Summit Declaration (1997).

(221) The 'Minsk Group' is an informal body, composed of diplomats from several Participating States, created by the OSCE to run the negotiation process in this conflict.

(222) Declaration of the Chairman in Office of the OSCE, Lisbon Summit, 2 December 1996, Final declaration, Annex I (*D.A.I.*, n° 4, 15 February 1997, p. 150). See also the statement of the UK Government spokesman, in « UK Materials on International Law », *B.Y.I.L.*, 1997, pp. 516-

stated in its first resolution on the issue that the situation endangered 'peace and security in the region' and urged the parties concerned to resume negotiations within the framework of the peace process of the Minsk Group of the CSCE (223). However, both parties have rejected the plan proposed by the OSCE mediator (224).

By the same token, the OSCE participating states endorsed, at the 1993 Rome Summit, the plan drafted by the OSCE mission in Moldova, which envisaged a *high degree of autonomy* for the secessionist region of Transnistria (225). However, this plan had been previously accepted by the Republic of Moldova itself. Accordingly, its new Constitution of 1994 established a special autonomous status for the Dnestr region (226). Nonetheless, the separatist leaders still want recognition of the independence of Transnistria (227).

It can be observed that, in all these cases, the OSCE members did not content themselves with reasserting the territorial integrity of the State. They also called the parties to negotiate a *special status* for the secessionist region. Additionally, all the peace proposals put forward by international mediators, whose efforts are encouraged by the OSCE and the Security Council, point toward allocating a large autonomy for the rebellious regions. One can thus conclude that these two institutions consider themselves entitled to support solutions of autonomy — even though they imply a restructuring of the country — when it is aimed at settling a civil war (228). This denotes an evolution towards a more extensive interpretation of the scope of their action in the resolution of internal conflicts.

Yet, one must be cautious when drawing conclusions from this brief survey. In fact, the promotion of a special status in the contexts of Georgia, Moldova and Azerbaijan appears primarily designed to reconcile the control the separatists managed to acquire on the contested territory, with the will to preserve the territorial integrity of states. The political context of these cases thus differs in important respects from the Kosovo crisis. Indeed, in

517 and of the French Minister of Foreign Affairs, « Pratique française du droit international », *A.F.D.I.*, 1997, p. 928 and *D.A.I.*, n° 2, 15 January 1996.

(223) Resolution 822 (1993), 30 April 1993, Preamble and § 2. On the reaction of the Security Council to the Upper-Karabakh conflict, see O. PAYE and E. REMACLE, *supra* note 211.

(224) The Armenian side deemed it unsatisfactory while Azeri authorities considered it too far-reaching. See V.-Y. GHEBALI, *supra* note 211, pp. 605-606. Another plan, presented in May 1997 was rejected by the leaders of Nagorno-Karabakh, because it merely advocated autonomy and discounted achievement of independence (*Keesing's*, May 1997, p. 41710 and p. 41835). See also CSCE Summit, Rome, 1 December 1993, § 26, decisions on regional issues (*D.A.I.*, n° 3, 1 February 1994, p. 48).

(225) *Keesing's*, February 1994, p. 39876.

(226) *Keesing's*, July 1994, p. 40110. On the 1994 Moldova's Constitution, see A. BARBANEAGRA, « The situation in Moldova », in *Local Self-Government...*, *supra*, note 155, pp. 187-188.

(227) V.-Y. GHEBALI, *supra* note 211, p. 294. The parties have concluded a 'Memorandum of understanding on normalising relations between Moldova and the Dnestr region' (Moscow, 8 May 1997, *Keesing's*, May 1997, p. 41660). Text in *D.A.I.*, n° 17, 1 September 1997, p. 628.

(228) T. CHRISTAKIS, *supra* note 1, p. 572.

the three aforementioned republics, the secessionist leaders are in a position of force *vis-à-vis* the state, while the Kosovar Albanians did not succeed in supplanting the FRY's authority in the province. Georgia and Moldova have both offered a far-reaching status of autonomy to, respectively, Abkhazia (229) and South Ossetia (230), and the Dnestr region (231). These offers have, however, been rebuffed by the separatist leaders. Furthermore, Moldova, Georgia and Azerbaijan have all accepted, if not requested, the involvement of the OSCE or the UN in the resolution of their conflict. By contrast, the FRY was more than reluctant to allow any international participation in the settlement of the Kosovo issue (232).

2. *An Obligation to Negotiate?*

The international reactions towards the Chechen conflict in the Russian Federation and the Kurdish question in Turkey, are much more moderate than towards the conflicts affecting the three former Soviet Republics. The UN Security Council has not taken any resolution on these two issues, while the OSCE has made certain statements on the Chechen conflict, but has ignored the Kurdish problem.

In January 1995, reacting to the offensive against the separatist Chechen Republic launched by the Russian Federation in late 1994 (233), the OSCE Permanent Council adopted a resolution demanding the cessation of hostilities and the opening of negotiations in order to achieve a political settlement to the crisis, respecting the territorial integrity of the Russian Federation and its Constitution (234). The EU member states expressed a similar position (235).

(229) *Report of the UN Secretary-General*, 29 October 1998, S/1998/1012, § 8. See also the statement of the Georgian President at the United Nations, dated 9 March 1994 (*D.A.I.*, n° 9, 1 May 1994).

(230) V.-Y. GHEBALI, *supra* note 211, p. 276.

(231) A. BARBANEAGRA, «The situation in Moldova», in *Local Self-Government...*, *supra* note 155, pp. 187-188.

(232) See note 23 and 36. The OSCE had established long-term missions in Kosovo, Sandjak and Voivodina, but the FRY's authorities did not renew their authorisation to these missions after July 1993. The OSCE repeatedly asked for the return of these missions (Rome Summit Declaration, 1 December 1993, *D.A.I.*, n° 3, 1 February 1994, p. 47; Summary of the President, Budapest Summit, 8 December 1995, *D.A.I.*, n° 4, 15 February 1996, p. 150; Lisbon Summit Declaration, 2 December 1996, § 19, *D.A.I.*, n° 4, 15 February 1997, p. 148). The Contact Group also called for the FRY to allow the return of the OSCE missions (London 9 March 1998, § 6; Rome 29 April 1998, § 6(b); Bonn, 8 July 1998, § 13).

(233) The Chechen conflict also dates back to the break-up of the Soviet Union. In 1992, Chechnya — autonomous Republic within Russia — refused to sign the Federation Treaty, as it claimed independence (*Keating's*, 1992, p. 38826). See V.-Y. GHEBALI, *supra* note 211, pp. 312-323 and 612-613; T. GAZZINI, «Considerations on the conflict in Chechnya», *H.R.L.J.*, 1996, pp. 93-105.

(234) It also specified that the issue was not an internal affair, due to the violations of OSCE principles (Vienna January 12, *D.A.I.*, n° 6, 15 March 1995, § 3 and 4). Given the new military campaign launched in September 1999 by the Russian government, the OSCE Participating

As for the Kurdish population, concentrated in the Southeast of Turkey, it never enjoyed any formal autonomous regime in Turkey. The 'Kurdish question' dates back to the beginning of the Turkish State. Until 1990, the Turkish authorities refused to acknowledge even the existence of the Kurds as a distinct population, and the public use of the Kurdish language was prohibited. The Kurds have been the victim of discriminations and numerous violations of human rights. In particular, in 1991-1992, the terrorist campaigns led by the Kurdish Workers' Party (PKK) pursuing independence, triggered bombings and violent reprisals from the Turkish authorities (236). The reaction of the EU countries consisted of reaffirming the territorial integrity of Turkey, condemning terrorism, and demanding the respect of human rights and the rule of law. However, they have also invited Turkey to seek a *political solution* to the Kurdish problem (237). The most recent statements seem to give more weight to the demands of the Kurds; for instance, the Council President Joschka Fischer, speaking on the behalf of the Fifteen, declared that « the Turkish Government should be encouraged to seek a political solution to this problem and to recognise the legitimate cultural rights of the Kurds » (238).

States have reiterated their call for a « political solution », at the Istanbul Summit, in November 1999 (Istanbul Summit declaration, SUM.DOC/2/99, § 23).

(235) Declaration by the Presidency on behalf of the EU concerning Chechnya, Brussels, 17 January 1995 (*D.A.I.*, n° 5, 1 March 1995); Declaration of the EU Presidency, 3 April 1995 (*Agence Europe*, n° 6454, 3 April 1995); Declaration of the Irish Presidency of the EU (*Agence Europe*, n° 6789, 12 August 1996); European Union statement (*Agence Europe* n° 6797, 26 August 1996). See also the declaration of the French Foreign Affairs Minister (*A.F.D.I.*, 1996, p. 1038) and of UK officials (*B.Y.I.L.*, 1996, pp. 720 and 761). Note, however, the response of the Government spokesman in the House of Lords to a question raising the issue of the right to self-determination in relation to Chechnya : « In international law, the right of self-determination is recognised and specifically in international covenants [...] which the United Kingdom has ratified. However, the exercise of the right must also take into account questions such as what constitutes a separate people and respect of the principle [of] territorial integrity of the unitary state. In the case of Chechnya no country has recognised President Dudayev's unilateral declaration of independence, but we have repeatedly called on the Russians to work for a *political solution* which would allow the Chechen people to express their identity within the framework of the Russian federation » (*B.Y.I.L.*, 1995, p. 621, emphasis added).

(236) H. HANNUM, *Autonomy, Sovereignty and Self-Determination*, *supra* note 1, pp. 178-202 and 484-485.

(237) Declaration of the European Presidency on Customs Union with Turkey, Tuesday, 14 February 1995 (*Agence Europe*, n° 1924, 28 February 1995); EC-Turkey Association Council (*Agence Europe*, n° 6968, 5 May 1997); Declaration of the EU Presidency on behalf of the European Union (*Agence Europe*, n° 6978, 22 May 1997).

(238) *Agence Europe*, n° 7461, 8 May 1999. See also the General Affairs Council meeting, 8 December 1998 (*Agence Europe*, n° 7359, 9 December 1998). On a recent occasion, the German Secretary of State Ludger Volmer reportedly even declared : « The Kurds are entitled to their cultural identity and a *certain autonomy*, and Turkey has the right to territorial integrity » (Brussels, 24 February 1999, *Agence Europe*, n° 7412, 25 February 1999, emphasis added). Some analysts have also discerned a change in the US government's stance towards the fate of Kurds in Turkey. American officials have recently called for the respect of human rights, including cultural and linguistic rights (*The Economist*, 27 November 1999). During a visit in Turkey in August 1999, the US Assistant Secretary of State for democracy, human rights and labour has, indeed, declared that the Kurds should be allowed cultural and linguistic rights (*Keasing's*, August 1999, p. 43111).

Nonetheless, neither in the case of the Kurds in Turkey, nor in the case of Chechnya, did EU or OSCE official statements refer to a 'special status' or 'autonomy'. The moderation of the language used in these latter cases, in comparison with that observed in the cases of conflicts affecting Georgia, Moldova and Azerbaijan, seems to result from the difference of political context. Indeed, the Russian Federation and the Republic of Turkey are much more reluctant to allow international involvement in the Chechen conflict and the Kurdish problem respectively. Moreover, the situation of the Kurds in Turkey differ from all the other cases, because they neither enjoyed formal autonomy nor succeeded in establishing control over a certain territory. Against this background, the attitude of the OSCE member states in the Kosovo crisis proves to be exceptional : they required the FRY's government to grant autonomy, notwithstanding the failure of the Kosovar Albanians to impose their authority on the province, and the refusal of the Yugoslav authorities to accept international involvement in the issue.

On the other hand, even in relation to the issues of Chechnya and the Kurds, states went further than reasserting the territorial integrity and condemning the violation of human rights ; they called for negotiations and the search for a *political solution* to the conflict. This appears to be the true common element of the international positions in all cases mentioned hitherto. In the Kosovo crisis too, foreign states primarily insisted that Yugoslavia had to offer a real political *dialogue* to the representatives of the Albanian community. Similarly, with respect to Georgia, Moldova and Azerbaijan, OSCE participating states have first and foremost urged the parties to negotiate. They admitted that the peace plans they promoted were only proposals and that the settlement had to be agreed by the parties themselves (239). These repeated calls for a political settlement in different contexts, despite their rhetorical character, suggest that OSCE members increasingly consider that a state affected by an internal conflict is under an obligation to endeavour to settle the problem peacefully, through political accommodation.

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To sum up, international law as it stands today does not enshrine a right to autonomy for minorities. However, states admit that in case of internal conflict, the Security Council, but also regional organisations for the peaceful settlement of conflicts, such as the OSCE, are entitled to support the establishment of a form of autonomy, as a means of restoring peace and

(239) See, for example, the statement by Chirac, Clinton and Yeltsin on Upper-Karabakh, when presenting the plan drafted by the Minsk Group (Denver, 20 June 1997, *D.A.I.*, n° 15. 1 August 1997, p. 524).

stability in the region. Yet, as the reactions towards the Chechen conflict and the Kurdish question in Turkey suggest, it seems that such support presupposes that the state concerned has previously accepted the involvement of international organisations in the settlement of the conflict. Indeed, the case of Kosovo appears to be the only conflict in the OSCE area in which foreign states have demanded the central government to establish a special status for a certain region within its national territory, in spite of the resistance of that government towards the participation of international representatives to the resolution of the issue. It remains to be seen whether such a stance will be reiterated in other conflicts in the future.

From a political standpoint, it is important to emphasise that a 'special status' designed to end a secessionist conflict would respond to different imperatives than an autonomy stemming from the rights of persons belonging to minorities. In the former case, the primary aim of the autonomous status is to restore peace and stability. In order to obtain the consent of the separatists, such status must take into account the degree of control they have achieved over the contested territory. Consequently, such settlement will be focused on one particular group, while other minorities in the same country, in a weaker position, risk being neglected. This may also raise concerns about the fate of sub-minorities living in the region. Moreover, linking autonomy to conflict resolution, rather than to minority protection, may have disturbing political implications. It could encourage minorities to resort to force, if it is the only way to obtain international support for their political aspirations, when the state refuses to negotiate with them.

However, some additional legal conclusions can be drawn from the developments examined in this section. The international reactions in all the conflicts mentioned above demonstrate a clear consensus among states that, in case of separatist conflicts, both parties can be required to negotiate in order to settle the dispute peacefully. Of course, states have the right to defend their territorial integrity and, if necessary, to use force for this purpose. Nonetheless, the use of force within internal borders is already limited by international obligations (240). Moreover, in the case of conflict between a government and an ethnic minority, a possible obliga-

(240) Even in the case of civil emergency, police and military forces conducting security missions must respect the fundamental human rights of the population. This obligation stems from international human rights treaties, but has been developed and specified in the *Code of conduct on politico-military aspects of security* adopted by OSCE participating states at the Budapest Summit in 1994. This only politically-binding document (art. 39) stipulates in particular that, if recourse to force cannot be avoided, it must be commensurate with the needs for enforcement (VIII, art. 36). It also prohibits the use of armed forces to limit the peaceful and lawful exercise of civil rights by persons, or to deprive them of their national, religious, cultural, linguistic or ethnic identity (VIII, art. 37). Obviously, if the situation degenerates into internal conflict, the relevant humanitarian norms apply. See E. DAVID, *Principes de droit des conflits armés*, Brussels, Bruylant, 1994, pp. 337-345.

tion to negotiate could be linked to the right of minority members to participate in public affairs. Indeed, such a right entails that persons belonging to a minority should be able to organise themselves politically, in order to express their collective aspirations. They should have adequate opportunities to take part in the political process of the country and, if there is sufficient consensus among them, to negotiate the legal status of the group. If this right is ignored by the government concerned, other states are entitled to require the government to respect it. They do not have to wait until the strife between the government and the group becomes violent and threatens international stability to take a stand; calling a government to act in conformity with the internationally recognised rights of persons belonging to minorities would not be an interference in internal affairs. It seems possible to add, as submitted in the first part of this section, that foreign states could also express support for a form of autonomy when, given the circumstances, such a regime appears to be the most appropriate way to implement a whole set of rights for persons belonging to minorities. Yet, such support can only be subsidiary to the primary requirement of a negotiation between the government concerned and minority representatives.

In any case, autonomy remains a variable concept. The content and limits of such a regime always depend on the circumstances and on the negotiations between the parties concerned. It is submitted, however, that international law also provides certain guidelines concerning the shaping of an autonomous status within a state. The analysis of the peace plan negotiated in Rambouillet can furnish a basis for the discussion of this contention.

III. — THE POLITICAL WAY OUT OF THE CONFLICT : NEITHER MERE AUTONOMY, NOR FULL INDEPENDENCE

From October 1998, Western diplomats made several attempts to convince the parties to the conflict to agree on a plan of autonomy for Kosovo (241). The draft of the Rambouillet plan was prepared by the Contact Group and modified throughout the conference, in an attempt to accommodate demands from both sides. Although the final text was only signed by the Albanian representatives, it was already the result of a compromise between the Albanian and the Yugoslav/Serbian positions (242). An examination of the discrepancies between the latter plan and the Yugoslav/Serb counter-proposal, can illustrate to what extent international

(241) M. WELLER, « The Rambouillet Conference on Kosovo », *supra* note 90, pp. 218-221. Note that Marc Weller was a legal advisor of the Kosovo Albanian delegation in Rambouillet.

(242) The text of the plan, and the Serbian counter-proposal, can be found on the website of the *Balkan Action* organisation : < <http://www.balkanaction.org> >.

law may condition the shaping of an autonomous status (A). On the other hand, the functioning of an autonomy normally requires co-operation between the autonomous institutions and the central authorities. The arrangement finally reached after the NATO military action however, purports to implement a form of autonomy without the participation of the central government. As a result, the present status of Kosovo according to international law remains highly ambiguous (B).

A. — *The Rambouillet Plan*

The plan submitted to the delegations at Rambouillet proposed the establishment of new autonomous institutions in Kosovo (1), which had to be guaranteed by a NATO military presence (2).

1. *Political Aspects* (243)

The new constitution proposed for Kosovo in the *Interim Agreement for Peace and Self-Government in Kosovo*, states in its Preamble that its basic purpose is « to ensure respect for human rights and the equality of all citizens and national communities » and « to establish institutions of democratic self-government in Kosovo, grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate » (244). The draft plan provides for the establishment of a locally elected assembly, a government, a president, and an independent local judiciary, including a Constitutional and a Supreme Court. The Kosovo organs would be granted extensive political, security, economic, and social responsibilities, including the power to conduct foreign relations within its areas of responsibility (245). The province would be represented in Federal and Serbian institutions. On the other hand, the FRY authorities would have competence in Kosovo over the areas traditionally reserved to central authorities (monetary policy, defense, foreign policy, customs services, etc.) (246). They would be precluded from modifying the Constitution of Kosovo, set forth in the Agreement, or the laws adopted by the Kosovo Assembly (247). The autonomy provided for Kosovo is thus very extensive and amounts in effect to the status of a federal unit (248).

(243) See the Chapter 1 of the Agreement — 'Constitution'.

(244) Chapter 1, Preamble, § 2.

(245) Chapter 1, art. I, § 6 (c).

(246) Chapter 1, art. I, § 3.

(247) Chapter 1, art. II, § 5.

(248) See O. CORTEN, « Tous les moyens diplomatiques avaient-ils réellement été épuisés ? L'échec du 'plan de Rambouillet' », in B. ADAM (ed.), *La guerre du Kosovo, éclairages et commentaires*, Bruxelles, GRIP-Complexe, 1999 pp. 32-42. According to Olivier Corten, the powers conferred by the Rambouillet plan to Kosovo were wider than the powers of the Republics of Mon-

But the peculiarity of the political arrangement proposed at Rambouillet lies in the special importance given to the communes and the national communities. The commune, defined as the « basic territorial unit of local self-government », would have responsibility, in addition to the specific matters enumerated, for all areas within Kosovo's authority not expressly assigned elsewhere (249). Moreover, the draft agreement attaches considerable emphasis to national communities, treated as one basic element of the political system envisaged. The Preamble of the Constitution states that « the institutions of Kosovo should fairly represent the national communities in Kosovo, and foster the exercise of their rights and those of their members » (250). The plan includes provisions to ensure special representation of national communities in the assembly (251), the government (252), and the communal institutions (253), as well as in the Constitutional and Supreme Courts (254). Furthermore, each national community would be entitled to set up its own institutions in order to administer its own affairs (255). Interestingly, the draft agreement also proposes the establishment of a type of personal jurisdiction in favour of Serbia; citizens and national communities would have the right to call upon appropriate institutions of the Republic of Serbia for certain purposes, such as school curricula or social benefits programmes, with the exception of police and security matters (256).

Compared to this plan, the Yugoslav/Serbian counter-proposal reduces the powers of the Kosovo institutions, cancelling in particular all elements tending to give the region the status of a federal entity (257). In addition, it accentuates further the influence of national communities in the political system. This is particularly striking if one examines the way the organisation of the assembly is envisaged in each document. The Yugoslav/Serbian proposal stipulates that, among 130 seats, all national communities, namely Albanians, Serbs, Turks, Romanies, Egyptians, Goranies and

tenegro and Serbia. In his view, the plan was incompatible with the 1992 Yugoslav Constitution. It must be noted, however, that many features of the autonomy provided for in the plan were similar to the status Kosovo enjoyed under the 1974 *Constitution of the Autonomous Province of Kosovo*, in the former Yugoslavia.

(249) Chapter 1, Art. VIII, § 5. This feature recalls the 'cantonal' system established by the Dayton Agreement for the Bosno-Croatian federation, which led to the creation of ethnically homogenous or dominated cantons (H. POULTON, *Minorities in Southeast Europe*, *supra* note 42, p. 24; J. MARKO, «The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina», *Local self-Government...*, *supra* note 155, pp. 189-212).

(250) § 3.

(251) Chapter 1, Art. II, § 1.

(252) Chapter 1, Art. IV, § 1(a).

(253) Chapter 1, Art. VIII, § 3.

(254) Chapter 1, Art. V, § 5 and § 9.

(255) Chapter 1, Art. VII.

(256) Chapter 1, Art. 1, § 7.

(257) Serbian Counter-Proposal, Chapter 1, Art. 1, § 1 (source see *supra* note 242). Kosmet is the Serbian term for Kosovo (see *supra* note 2).

Muslim Slavs, should be represented by at least five deputies each. In other words, the five latter communities, which amount altogether to around 2 % of the Kosovo's population (258), would be represented by approximately 20 % of the members of the assembly. The Rambouillet final draft retains the principle of special representation for national minorities, but adds a double-threshold system. Eighty members would be directly elected by the citizens, while among the 40 remaining seats, 10 would be proportionally divided among communities whose members constitute between 0.5 % and 5 % of the Kosovo population, and 30 seats would be divided equally among the communities corresponding to more than 5 % of the Kosovo population, presumably the Serbian and the Albanian national communities (259). Moreover, the Yugoslav/Serbian plan proposes to confer upon every group of deputies elected by a national minority, the power to veto the 'regulations' of the assembly when it deems that it contradicts its 'vital national interest'. Again, the Rambouillet final draft retains the mechanism but attempts to restrict its scope; the 'vital national interest' veto would be provided only to representatives of the national communities corresponding to more than 5 % of the population, and be subject to additional conditions and to a more elaborate procedure of mediation (260).

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This brief picture of the political settlement proposed at Rambouillet suggests an attempt to conciliate a far-reaching autonomy with particular devices based on 'ethnic' factors. Is it possible to comment on this plan from an international law perspective? As a rule, international law leaves states the discretion over the organisation of their internal structure (261). However, this discretion has been limited by the development of international human rights law. Once again, two concepts emerge as particularly important in this context; self-determination in its internal, democratic sense and minority rights (262).

(258) See *supra* note 39.

(259) Chapter 1, Art. II, § 1.

(260) Chapter 1, Art. II, §§ 7-8.

(261) See the *Western Sahara* case, *Advisory Opinion*, ICJ Reports, 1975, § 94 and *Military and Paramilitary Activities in Nicaragua*, ICJ Reports, 1986, § 258.

(262) Of course, the Rambouillet agreement does not purport to be based on 'self-determination', but rather on 'self-government'. However, there is no reason why those principles, that a state is required to respect at a national level should cease to apply at a regional level to the autonomous institutions of the region. Yet, the applicability of international rules on minority protection to 'regional minorities' is contested (see *Ballantyne, Davidson and McIntyre v. Canada*, Communication n° 359/1989 and 385/1989, Report of the Human Rights Committee, 31 March 1993, GAOR, 48th Sess., Suppl. n° 40). Nonetheless, it is a well-known phenomenon that, when a region is endowed with a large autonomy, a group which finds itself in the minority at the regional level, although it is not in this situation at the national level, may be the victim of policy of assimilation or discrimination. Therefore, the *ratio juris* of minority rights suggests that such a protection should also apply at the regional level, to 'sub-minorities'. See A. EIDE,

The UN General Assembly Resolution 2625 (XXV), indeed, suggests that the principle of self-determination requires states to possess a « government representing the whole people belonging to the territory without distinction as to race, creed or colour » (263). It is true that « such a requirement does not imply that the only government that can be deemed 'representative' is one that explicitly recognises all of the various ethnic, religious, linguistic, and other communities within a state » (264). However, combined with the right of minority members to recognition of their identity and their right to participate in public affairs, this provision could be construed as entailing a positive obligation to have a constitution granting, in accordance with the specificity of each country, the representation of all the components of the population (265). Indeed, adjustments to the political system to frame and enhance co-operation between the different segments of the population in heterogeneous societies, have become increasingly common. These forms of political system have been theorised as instances of 'consociational democracy' Arend Lijphart, the most prominent analyst of this model, has stressed that these systems are characterised by « deviations from pure majority rule », like mutual veto or concurrent majority mechanisms (266). The problem is that those devices, if taken too far, can subvert democracy itself. According to Lijphart's theory, they are aimed at allowing the political participation of « all *significant segments* of the plural society » (267). In Kosovo, the imbalance between the different communities is such that granting very small community groups (some representing around 0,5 % of the population) something that amounts to the power of co-decision, would entail a distortion in the representation of the population, diluting the voice of the majority and risking paralysis of the functioning of the institutions. In fact, the spirit of the Yugoslav/Serbian counter-proposal goes further than accommodating the majority rule. It tends to replace democratic legitimacy, based on fair representation of the population as a whole, with an 'ethnic'

« Territorial Integrity of States, Minority Protection and Guarantees for Autonomy Arrangements », in *Local Self-Government...*, *supra* note 155, p. 301. Indeed, the Rambouillet draft states that « Kosovo shall govern itself democratically » (Chapter 1, Art. I, § 1) and that « national communities and their members shall have additional rights [...] in accordance with international standards [...] » (Chapter 1, Art. VII, § 1).

(263) § 7.

(264) H. HANNUM, « Rethinking Self-Determination », *supra* note 1, p. 17.

(265) A. EIDE, « Territorial Integrity of States, Minority Protection and Guarantees for Autonomy Arrangements », in *Local Self-Government...*, *supra* note 155, pp. 294-300. This is close to the view expressed by Ian Brownlie on self-determination : he maintains that this concept has a « core of reasonable certainty » which consists in « the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives » (« The Rights of Peoples in Modern International Law », in *The Rights of Peoples*, *supra* note 1, p. 5).

(266) *Democracy in Plural Societies, A Comparative Exploration*, New Haven, Yale University Press, 1977, p. 36.

(267) *Idem*, p. 25, emphasis added.

legitimacy which rests on the representation of each ethnic group, rather than individuals. A system which makes 'ethnicity' the central and primary organising principle of the state structure would appear to contradict the provision of the Resolution 2625 (XXV). In effect, the general principle of fair representation of the population without distinction would not just be tempered by some mechanisms designed to promote the political participation of substantial non-dominant groups, but actually overruled.

The arrangement discussed at Rambouillet mirrors many of the features of the political system within the former Yugoslavia. Such imbalance between the representation of citizens as individuals and as members of national communities, was precisely described by political analysts as one of the major defects of this system. In this view, the institutions of the former Yugoslavia were so entirely shaped according to divisions among national communities, that they did not permit the development of a common political culture transcending those distinctions (268). Significantly, citizens were not directly represented in the federal structures; they had their interests represented, if at all, only by the republic in which they lived (269). More generally, the former Yugoslav regime did not guarantee individual political and civil rights, which could have counter-balanced the extensive collective rights recognised in relation to national communities. This point has been emphasised by Catherine Lutard :

« Dans la Yougoslavie de Tito, la seule façon de se distinguer, de s'affirmer face au pouvoir central était de défendre des droits collectifs, ceux de son peuple, de sa nationalité. Seul ce type de droits était pris en compte par le système, au détriment des droits individuels, qui auraient impliqué une véritable démocratisation du système » (270).

The Rambouillet draft agreement attempts to redress these problems. It provides for a direct representation of citizens in addition to representation of national minorities. It also provides for the protection of internationally recognised individual rights and freedoms. In particular, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its Protocols would become directly applicable in the province (271). Those rights and freedoms would have priority over all other laws (272). However,

(268) S.L. Woodward emphasises that « [d]ecentralisation by the early 1970s had led to so much de facto independence that political life was primarily centred in the republics » (S.L. WOODWARD, *supra* note 10, p. 40).

(269) *Idem*, p. 85. In addition, the republics had the power to block any decision in the federal institutions. Indeed, « [t]he system of federal decisionmaking by consensus and veto had no procedure for resolving differences between truly incompatible projects » (*idem*, p. 84).

(270) C. LUTARD, *supra* note 5, pp. 44-45.

(271) Art. VI, § 2. Other internationally recognised human rights instruments would have to be enacted into law by the Kosovo Assembly, in order to become applicable in the province (*ibidem*).

(272) The plan also stipulates that any amendments to the Constitution diminishing those rights would be precluded (Art. X).

at the time of the Rambouillet conference the political situation in Kosovo was such that there were strong reasons to believe that the proposed political system would not have functioned without very special guarantees.

2. *Implementation System : the International Military Presence*

The primary distinguishing feature of a 'consociational democracy', Lijphart argues, lies in « elite cooperation » (273). « Consociational democracy entails the co-operation by segmental leaders in spite of the deep cleavages separating the segments. This requires that the leaders feel at least some commitment to the maintenance of the unity of the country as well as a commitment to democratic practices » (274). These elements were precisely lacking in the case of Kosovo. On the one hand, Yugoslav and Serbian authorities had not shown much « commitment to democratic practices ». On the other, the Albanian leadership saw autonomy as an intermediate arrangement; their final objective remained independence (275). In such a context, there were good reasons to be sceptical about the chances of a political arrangement — even if one had been concluded — being implemented. Therefore, the Contact Group always insisted that the settlement should be guaranteed by an international military force. The Rambouillet plan thus provided for the withdrawal of Yugoslav and Serbian forces (except for 1500 border guards), and their replacement by an international security force, to be constituted by NATO, as well as a police corps to be established under the auspices of the OSCE. The plan also provided for the demilitarisation of Albanian irregular forces.

The international presence appeared as the key element of the settlement promoted at Rambouillet. It made it possible to combine the different objectives pursued by the third-party states involved in the issue; stopping the turmoil in the region, protecting the Albanian community but also barring the independence of Kosovo and keeping the province, at least temporarily, within the FRY. Yet, combined with an institutional organisation which considerably restricted the powers of the Federal and Serbian authorities in Kosovo, it amounted in practice to a suspension of FRY's sovereignty over Kosovo. However, precisely by virtue of its sovereignty, Yugoslavia was entitled to refuse to conclude such an agreement and to oppose the presence of an international armed force that had not been established by a Security Council resolution. Having failed to impose a

(273) A. LIJPHART, *supra* note 266, p. 1.

(274) *Idem*, p. 53.

(275) See, for instance, the declaration of Dr. Rugova, Belgrade, 11 March 1998 (*Agence Europe*, n° 7178, 12 March 1998) and of Dr. Fehmi Agani, member of the LDK, at the meeting with European Parliament's Subcommittee on Human Rights and the EP Delegation on relations with Southeast Europe (Brussels, 10 November 1998, *Agence Europe*, n° 7341, 13 November 1998).

solution by diplomatic pressure backed by the threat of air strikes, NATO member states decided to carry out their threat and to unbolt by force Yugoslavia's sovereignty over Kosovo (276).

B. — *Kosovo Under International Protection*

The NATO bombing campaign ended with the acceptance by the Yugoslav authorities, on June 3 1999, of a peace deal providing for the deployment of an international military and civil presence in Kosovo under UN auspices. The framework of the mandate of international agents has been set forth by the Security Council Resolution 1244 (1999), adopted under Chapter VII (1). However, this resolution leaves open the question of Kosovo's legal status (2).

1. *The Security Council Resolution 1244 (1999)*

The most salient difference between the Rambouillet text and the plan accepted by the Serbian authorities after the NATO bombing, lies in the major role the latter attributes to the UN. This plan, indeed, provides that the administration of Kosovo will not be directly transferred to local institutions, but rather will be exercised, for an indeterminate time, by the United Nations (277). Moreover, the international security force constituted by NATO (KFOR), as well as the international civil agents, are to be deployed under the authority of the UN, for an initial period of 12 months, to continue until the Security Council decides otherwise.

Firstly, Resolution 1244 (1999) entrusts the UN Secretary-General with the organisation of a *United Nations Interim Administration Mission in Kosovo* (UNMIK). The overall function of UNMIK is to « provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo » (§ 10). The Special Representative of the UN Secretary-General for Kosovo, Bernard

(276) As stated in the introduction, this article does not consider the issue of the use of force by NATO countries against Yugoslavia. On this issue, see, *inter alia*, B. SIMMA, « NATO, the UN and the Use of Force : Legal Aspects », in *E.J.I.L.*, vol. 10, 1999, n° 1. In favour of the emergence of a right to humanitarian intervention, see A. CASSESE, « *Ex iniuria ius oritur* : Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community ? », *ibidem*. For a range of different views on the NATO intervention, see *A.J.I.L.*, 1999, vol. 93, n° 4, pp. 824-863, with the contributions of Ch.M. CHINKIN, J.I. CHARNEY, R.A. FALK, T.M. FRANCK, L. HENKIN, W.M. REISMAN and R. WEDGWOOD.

(277) *Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, Art. I (Text of the agreement in *Keesing's*, June 1999, pp. 43008-10). In the Rambouillet draft agreement, the Security Council was only invited to adopt a resolution « endorsing and adopting the arrangements set forth in this Chapter, including the establishment of a multinational military implementation force in Kosovo » (*Interim Agreement for Peace and Self-Government in Kosovo*, Chapter VII, Art. I, § 1 (a)).

Kouchner, has « overall authority to manage the Mission and co-ordinate the activities of all United Nations agencies and other international organisations operating as part of UNMIK » (278).

Secondly, the Security Council « authorises Member States and relevant international organisations to establish the international security presence in Kosovo [...] with all necessary means to fulfil its responsibilities » (§ 7). The role of the KFOR, as described in Resolution 1244 (1999), consists in establishing « a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered » (§ 9). Confirming the military agreement between the NATO allies and Yugoslav authorities, Resolution 1244 (1999) provides that the KFOR is allowed to take such actions as required, including the use of necessary force in self-defence, « to ensure compliance with this agreement » and « to contribute to a secure environment » (279). In accordance with § 3 of Resolution 1244 (1999), the FRY has withdrawn all its military, police and paramilitary forces from Kosovo, while an international force has been deployed. The KFOR has reached an arrangement with the KLA (UCK in Albanian) on June 21, 1999, providing for its demilitarisation (280).

The present situation in Kosovo raises many issues that cannot be developed in the framework of this article. Accordingly, the final section concludes with a few observations on the role of the international administration in Kosovo and on its action during its first months of operation. In particular, it seeks to highlight the tension between the official international stance, according to which Kosovo remains part of Yugoslavia until its final status is decided, and the legal as well as factual evolution on the ground.

2. *The Present Status of Kosovo : a New Form of 'Internationalised Territory' or the Path to Independence?*

It can first be noted that the policy of Western states which, rather than recognising the self-proclaimed 'State of Kosovo', preferred to intervene militarily to force the President Milosevic to accept their plan, seems to

(278) The UN Secretary-General has divided the various responsibilities of the Mission into four major components, each of which has been assigned to a different international agency : the UN runs the Interim civil administration ; the OSCE is tasked with the institution-building function (democratisation and governance, the conduct of elections, human rights monitoring and police training) ; the United Nations High Commissioner for Refugees (UNHCR) monitors the safe return of all refugees and displaced persons and the provision of humanitarian relief aid ; and the European Union leads the reconstruction (*Report of the Secretary-General Pursuant to § 10 of Security Council Resolution 1244 (1999)*, 12 June 1999 S/1999/672 ; 12 July 1999, S/1999/779 and 16 September 1999, S/1999/987).

(279) *Military Technical Agreement*, *supra* note 277, I, § 4 (b).

(280) Text in *Keesing's*, June 1999, pp. 43015-17.

imply their rejection of a right to secede, even in extreme cases. Traditionally, secession is considered in international law as neither permitted, nor prohibited, but rather as a mere question of fact (281). However, many scholars have argued in favour of a right to secede as « a remedy of last resort; if a State machinery turns itself into an apparatus of terror which persecutes specific groups of the population, those groups cannot be held obligated to remain loyally under the jurisdiction of that State » (282). The reasoning is based on the idea that when a specific group becomes the target of flagrant violations of basic human rights, they should be allowed to escape the authority of the oppressing state. In a world where every parcel of territory is under the jurisdiction of a state (with the exception of the Antarctica), subtracting a population from the control of a sovereign normally implies the creation of a new state. One could argue about whether the situation in Kosovo met the conditions set for the application of this theory. However, the important point is that, whilst claiming that the scale of human rights violations was intolerable, Western states did not support independence for Kosovo. Rather, they decided to displace by force the exercise of sovereignty over the province by the FRY.

Certainly, Resolution 1244 (1999) reaffirms the « commitment of all Member States to the sovereignty and territorial integrity of the FRY » and their position in favour of « substantial autonomy and meaningful self-administration for Kosovo ». Yet, according to the UN Secretary General's interpretation of Resolution 1244 (1999), « [a]ll legislative and executive powers, including the administration of the judiciary will [...] be vested in UNMIK » (283). The Secretary-General's Special Representative is entitled to issue legislative acts in the form of regulations, which « will remain in force until repealed by UNMIK or suspended by rules issued by the Kosovo Transitional Authority once it is established » (284). The *international presence* thus guarantees the suspension of the authority of the FRY, but also hinders its replacement by an alternative sovereignty for, *until the Kosovo's final status is determined*, the *ultimate* civilian authority will be

(281) If secession proves effective, and if the new entity fulfils the general criteria for statehood, it can be recognised by other states. See M. SHAW, *International Law*, *supra* note 68, p. 157 and p. 355; R. HIGGINS, *supra* note 68, p. 125. For a thorough discussion of the issue of secession in international law, see T. CHRISTAKIS, *supra* note 1, pp. 35-322.

(282) C. TOMUSCHAT, *supra* note 164, pp. 9-11. See also D. MURSWIEK, « The Issue of a Right to Secession — Reconsidered », in *Modern Law of Self-Determination*, *supra* note 1, pp. 21-39; A. CASSESE, *supra* note 1, pp. 359-360 and pp. 119-120; Hurst HANNUM, *Autonomy, Sovereignty and Self-Determination*, *supra* note 1, p. 504; T. CHRISTAKIS, *supra* note 1, pp. 295-315.

(283) *Report of the UN Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 12 July 1999, S/1999/779, § 35. See also UNMIK Regulation n° 1999/1, 25 July 1999, *On the authority of the Interim Administration in Kosovo*, Section 1, § 1. All the regulations can be found on the UNMIK's website : < <http://www.un.org/peace/kosovo/pages/kosovo1.htm> >.

(284) *Report of the UN Secretary-General on the UNMIK*, 12 July 1999, § 41 and UNMIK Regulation n° 1999/1, Section 4.

exercised by UN appointed agents, *and not by independent local representatives.*

Placing a territory under international protection or administration is not without precedent in history. On the contrary, James Crawford has pointed out that « a persistent form of organisation of territories disputed between States on strategic or ethnic or other grounds has been the establishment of autonomous entities under a form of international protection, supervision or guarantees » (285). However, the UN administration in Kosovo is designed to be only provisional. Resolution 1244 (1999) entrusts the international civil mission with the responsibility to facilitate « a political process designed to determine the future political status of Kosovo, taking into account the Rambouillet accords » (286). It foresees that in a final stage, the authority should be transferred, under the supervision of UNMIK, « from Kosovo's provisional institutions to institutions established under a political settlement » (287). However, it does not provide any further precision as to the modalities and the time of the negotiations of this final settlement. Manifestly, the crucial question of Kosovo's final status was left purposely indeterminate, in order to allow international administrators the necessary time to rebuild the political structure of the province on a democratic and multi-ethnic bases, in the hope that in a few years time, nationalist passions would have calmed down so that compromises would be possible.

Nevertheless, the international presence did not suspend the battle over the future status of Kosovo. In effect, the action of the UN administration itself is creating a new legal and factual reality that will have an important impact at the moment of the final decision. Certainly, the international agents « maintain open channels of communication with the authorities of the Federal Republic of Yugoslavia » (288). Resolution 1244 (1999) also allows the return of an agreed number of Yugoslav and Serbian personnel to perform certain functions (liaison with the international agents, clearing minefields, maintaining a presence at Serb patrimonial sites and at key bor-

(285) J. CRAWFORD, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, p. 160. Several systems of 'internationalised territories' were imagined at the end of the first World War, such as the regime of the Memel Territory, the Free City of Danzig or the Saar Territory. The latter, in particular, was directly governed by the League of Nations, from 1920 to 1935 (*idem*, pp. 160-169). See also H. HANNUM, *supra* note 1, pp. 375-406. James Crawford makes it clear that although « such entities have been referred to generically as 'internationalised territories' [...] there appears to be no legal — as distinct from political — concept of 'internationalised territory' — in fact the cases discussed vary considerably in nature and extent ». This concept must be distinguished from the notion of protectorates which « involves a consensual transaction [...] whereby the dependent entity surrenders to the protecting State or States at least the conduct of its foreign relations, and in other cases responsibility for such relations together with various rights of internal intervention, without being annexed by or formally incorporated into the territory of the latter » (J. CRAWFORD, *op. cit.*, p. 187).

(286) § 11 (e).

(287) § 11 (f).

(288) *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, S/2000/177, § 16.

der crossings). Accordingly, Belgrade's government has established a Committee for Co-operation with UNMIK in Pristina, the President of which has regular meetings with senior representatives of UNMIK, KFOR and other international agencies in Kosovo (289). However, Belgrade is precluded from exercising any significant power in Kosovo. In practice, the province is now ruled separately from the rest of the FRY. UNMIK has started to set up institutions aimed at involving the local population in the management of all aspects of life in Kosovo. New structures have been established at various levels. Firstly the *Kosovo Transitional Council (KTC)* (290), followed a few months later by the *Interim Administrative Council (IAC)* and the *Joint Interim Administrative Structure (JIA)* (291). UNMIK has also begun to prepare actively the organisation of municipal elections, to be held in the course of the year 2000 (292). The population of Kosovo will thereby get used to managing their own institutions, under the supervision of the UN, but without any interference from Belgrade (293).

Furthermore, the UN administration must face strong pressure from the majority Albanian population to reinforce the *de facto* separation from the FRY, by breaking off all legal links with the FRY. Despite the UNMIK regulation n° 1 promulgating that the laws in force prior to 24 March 1999 shall continue to apply in Kosovo «insofar as they do not conflict with internationally recognized human rights standards or with regulations issued by the Special Representative» (294), Kosovar judges and prosecutors have refused to apply Yugoslav and Serbian laws posterior to

(289) *Ibidem*. Within the framework of the Military-Technical Agreement, KFOR has also created a Joint Implementation Commission, which liaises with the FRY's armed forces and the KLA (*Report of the Secretary-General on the UNMIK*, 16 September 1999, § 25).

(290) *Report of the UN Secretary-General on the UNMIK*, 16 September 1999, S/1999/987, §§ 2 and 3.

(291) *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 3. The composition, procedures and powers of those structures have been set forth by UNMIK Regulation n° 2000/1, 14 January 2000, *On the Kosovo Joint Interim Administrative Structure*. The IAC is entitled to make recommendations to the Special Representative for amendments to the applicable law and for new regulations (UNMIK Regulation n° 2000/1, Section 3, § 3.1). The JIA has been divided into administrative departments covering all aspects of public affairs, each of which is co-directed by an international and a local co-head (see the indicative list of departments, Annex to UNMIK Regulation n° 2000/1). Note that, under the agreement on the formation of the JIAS, all parallel structures of executive, legislative or judicial nature, were required to be dissolved. Accordingly, the LDK President, Dr Rugova, declared that all these structures had ceased to exist on 31 January (*Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 12). The parallel administrative bodies have been integrated into the JIAS (*idem*, § 13).

(292) UNMIK Regulation n° 2000/1, 14 January 2000, Section 8: *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 10 and § 138.

(293) «State in embryo», *The Economist*, 27 November 1999, pp. 36-37.

(294) *Report of the UN Secretary-General on the UNMIK*, 12 July 1999, § 36; UNMIK Regulation n° 1999/1, 25 July 1999, Section 3. A group of experts from the Council of Europe has been tasked to review the major bodies of law applicable in Kosovo and to make recommendations to bring the laws into line with international human rights standards (*Reports of Secretary-General*, 16 September 1999, § 33).

1989 (295). Eventually, a new regulation was passed stipulating that the law applicable in Kosovo shall be, apart from the regulation promulgated by the Special Representatives, the one in force in Kosovo on 22 March 1989 (296), and the drafting of a new penal code for Kosovo was decided (297). By the same token, a regulation dated 2 September 1999 stipulates that, unless proven otherwise, any transaction passed in Kosovo « shall be deemed to exist with regard to any foreign currency that is widely accepted in the territory of Kosovo » (298), namely the Deutsche Mark. In the words of Joly Dixon, the UN Deputy Special Representative in charge of economic reconstruction in Kosovo, this regulation « legally recognized the Mark as the commonly used currency in Kosovo ». (299)

The official stance that Kosovo is still part of the FRY thus increasingly appears to be a fiction. However, the most disturbing feature of the present situation in the province, is the inability of KFOR and UNMIK to ensure respect for fundamental human rights of vulnerable communities. The UN's project of rebuilding a pluri-ethnic society is thwarted by a wave of violence against all minority groups. Non-Albanian, primarily Serbs and Roma, have been targets for continued discrimination, harassment, intimidation, attacks and killings (300). Acts of violence also affect « moderate Albanians and those who are openly critical of the current violent environment » (301). Consequently, tens of thousands of Serbs, but also thousands of Roma have fled Kosovo. The Secretary-General noted in July 1999 that « the increasing number of incidents committed by Kosovo Albanians against Kosovo Serbs [...] have prompted departures. This process has now slowed down, but such cities as Prizren and Pec are practi-

(295) OSCE Mission in Kosovo, 2d report of the Legal System Monitoring Section, *Development of the Kosovo Judicial System, 10 June through 15 December 1999*. Available on the OSCE website : < <http://www.osce.org/kosovo> >.

(296) UNMIK Regulation n° 1999/24, 12 December 1999, *On the law applicable in Kosovo*, Section 1, § 1. The Regulation provides that Yugoslav or Serbian laws posterior to this date, but anterior to the 10 June 1999, are applicable only when the subject matter or situation is not covered by the law in force in 1989 or, in criminal proceedings, when they are more favourable to the defendant (Section 1, § 2 and 4). UNMIK Regulation n° 1999/25 repeals Section 3 of UNMIK Regulation n° 1999/1 of 25 July 1999.

(297) *Le Monde*, 15 December 1999.

(298) Regulation n° 1999/4, 2 September 1999, *On the currency permitted to be used in Kosovo*, Section 1.

(299) *Kosovo News*, 3 September 1999 (UNMIK's website, see note 283). The UNMIK itself has decided to use the DM in its books and accounts as well as for the payments of civil servants (*ibidem*).

(300) *Reports of the UN Secretary-General on the UNMIK*, 12 July 1999, § 120; 16 September 1999, §§ 4, 10 and 46; 3 March 2000, §§ 49-56. See also the joint UNHCR/OSCE *assessments of the situation of ethnic minorities in Kosovo*, released on the OSCE's website (see *supra* note 295) and the Human Rights Watch's Report, *Abuses against Serbs and Roma in the New Kosovo*, August 1999, Volume 11, n° 10(D), available on Internet : < www.hrw.org/reports/1999/kosov2 >.

(301) *3d UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo*, 3 November 1999, § 1 (source : see *supra* note 295); *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 60.

cally deserted by Kosovo Serbs, and the towns of Mitrovica and Orahovac are divided along ethnic lines » (302). This situation is aggravated by the absence of a functioning impartial and independent judicial system (303). Judges and prosecutors themselves have been the victim of threats, intimidation and even violent attacks in the course of their duties which, according to the Secretary-General, « has impacted strongly on their ability to remain independent and has resulted in an inadequate response to the needs of justice » (304).

Undoubtedly, efforts are being deployed by UNMIK to address these problems. In particular, it endeavours to encourage the members of minority groups to participate in the new institutions. These efforts seem to have been successful in the case of the new local police service (KPS) developed by the UNMIK and the OSCE, for it integrates a relatively substantial number of Serbs and member of other minorities (305). By contrast, despite the fact that the UNMIK Regulation organising the *Kosovo Joint Interim Administrative Structure* stipulates that « all communities of Kosovo shall be involved in the provisional administrative management » (306), as at early March 2000, the Special Representative has not managed to secure the participation of Kosovo Serb representatives in the administrative structures (307). Additionally, the number of minority members appointed as judges and prosecutors remains poor (308).

(302) *Reports of the UN Secretary-General on the UNMIK*, 12 July 1999, § 5. The *4th UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo* (source : see *supra*, note 295), covering November 1999 through January 2000, concludes that although « serious crime rates have decreased from level recorded in the previous minority reports, they remain unacceptably high and indicate that ethnically motivated crime continues on a regular basis across the province ». Similarly, the UN Secretary-General considers that « despite broad downward trends, the level and nature of violence in Kosovo, especially against vulnerable minorities, remains unacceptable » (*Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 152).

(303) *4th UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo*, § 16.

(304) *Report of the UN Secretary-General on UNMIK*, 3 March 2000, § 109. See also the OSCE Legal System Monitoring Section's Report on the Development of the Kosovo Judicial System (*supra* note 295). The latter report also deplores the lack of multi-ethnic participation to the judiciary.

(305) *4th UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo*, § 10. According to the Secretary-General, the « Kosovo Protection Service is one of the few multi-ethnic institutions operating in Kosovo » (*Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 45).

(306) UNMIK Regulation n° 2000/1, 14 January 2000, *On the Kosovo Joint Interim Administrative Structure*, Section 1 (d). One seat of the Interim Administrative Council has been reserved for a member of the Kosovo Serb minority and four of the 19 Administrative Departments are to be co-headed by members of the minority communities.

(307) *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 7. On the measures taken to improve the security of minorities, see *idem*, § 57-59 and *UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo*, 3 November 1999, § 33. The Special Representative has also adopted a regulation under which speech which incites national, racial, religious or ethnic hatred, discord or intolerance will be treated as a criminal offence. See UNMIK Regulation n° 2000/4, 1 February 2000, *On the prohibition against inciting to national, racial, religious or ethnic hatred, discord or intolerance*.

(308) *Report of the UN Secretary-General on the UNMIK*, 3 March 2000, § 108.

However, the major difficulty of the international administration, seems to be the lack of co-operation from states. « UNMIK continues to struggle to get a few thousand international police, and has a limited budget to meet widespread costs of administering the province, or to properly repair basic infrastructure » (309). As at 1 March 2000, only half of the authorised number of international police officers had been deployed (310). In consequence, UNMIK does not have sufficient police forces to ensure the security of minority groups. It also sorely lacks the financial resources necessary for achieving its numerous essential tasks. The situation in Kosovo is still volatile. Nothing is definitive. However, the risk is great that, without more determinate support from foreign states, the UN administration will not be able to impede the continuing of 'ethnicisation des territoires' (311) which has been at work since the beginning of the Yugoslav conflict. This would be a failure from the perspective of minority rights as well as the right to self-determination properly understood, which both postulate that persons belonging to different communities can live in the same territory and share a common citizenship.

CONCLUSION

The international reactions towards the Kosovo question demonstrates that so long as the situation does not threaten regional stability, states will remain reluctant to support a special political status for an ethnic group in another state, even if members of that group are victims of discrimination and human rights violations. Fearful of encouraging the independence claims of Kosovar Albanian, foreign states waited until the conflict reached an extreme degree of violence, before they involved themselves meaningfully in the search for a settlement. However, the tardy response allowed for an escalation of violence that strengthened the influence of the most radical movements, leaving little room for compromise.

Autonomy for Kosovo appears to have been promoted more as a measure to restore stability in the region than as a recognised right of the Kosovar population. This is consistent with a more general trend, at least among OSCE Member States, towards the acceptance that, in case of separatist conflicts, the UN Security Council and a regional organisation such as the OSCE are entitled to require the government concerned to grant some form of regional autonomy as a means to restore peace and security. Yet, the

(309) 4th UNHCR/OSCE Report on the situation of ethnic minorities in Kosovo, executive summary.

(310) Report of the UN Secretary-General on the UNMIK, 3 March 2000, § 37. The Secretary-General has appealed « to all Member States to provide UNMIK, as a matter of urgency, with the necessary number of UNMIK police officers, special police units, international judges and prosecutors, as well as penal experts » (*idem.*, § 154).

(311) B. BADIE, *supra* note 60, p. 196.

overall picture of states' positions towards separatist conflicts in the OSCE area suggests that such stance is normally conditioned to the initial acceptance by the state concerned of an international participation in the resolution of the conflict. The case of Kosovo is the only instance, among those examined, in which the government concerned was required by foreign states to implement autonomy despite its resistance to such international involvement. Nevertheless, in all these cases, there was a notable consensus among states that a government facing an internal conflict involving a minority can be required to endeavour to settle it through negotiations. This consensus can be construed as entailing the emergence of a customary norm, according to which states would be under an obligation to settle internal conflicts by peaceful means. Such an obligation would enable a link to be drawn between the security perspective and concern for human rights. An obligation to resolve conflicts involving minorities through negotiations can, indeed, be associated with the right of minority members to participate in public affairs, especially those affecting them. Moreover, it relates to the right of peoples to internal self-determination, for such a right entitles the population of the state to a political system allowing all of its components to express their wishes, and thus to settle potential disputes with the government through political accommodation, rather than by recourse to force.

It follows that foreign states do not have to wait until the situation degenerates into armed conflict; they are entitled at any moment to condemn a government which excludes a particular group from the political system, and to require it to ensure that every community be able to take part effectively in the running of public affairs. Moreover, they can urge a government to respect all the internationally recognised rights of persons belonging to national or ethnic, linguistic or religious minorities. If the dialogue is refused and particularly, if the claims of the minority are met with violations of human rights, foreign states could go further and support more specific solutions to implement those rights. It is clear, though, that international minority protection does not include a right to autonomy. An overwhelming majority of states strongly refuse to be bound by an obligation in this respect. Nonetheless, international norms pertaining to minorities do take into account, to a certain extent, the specific situation of territorially concentrated minorities. Therefore, territorial autonomy could be supported, in certain circumstances, as a particularly appropriate means of implementing the rights of persons belonging to minorities.

On a different note, the Kosovo episode illustrates the persistent tension between the democratic and the nationalist interpretations of the concepts of minority rights and self-determination. This tension reflects the ambiguity of the ideology of 'national emancipation' itself, from which these concepts stem. Minority rights and self-determination can both be invoked to legitimise political projects pointing in totally opposite direc-

tions : on the one hand, a democratic society which recognises and integrates cultural differences, on the other, the confinement of individuals into isolated communities. It is submitted that the cause of human rights and international peace would be better served by consolidating and developing the presently accepted legal definition of these concepts, rather than by adopting an ethnic definition of the 'people', or establishing a general right to territorial autonomy for minorities. Indeed, self-determination of peoples in its internal, democratic dimension, needs to be reinforced, while the core idea of minority rights — the possibility of distinguishing cultural identity from citizenship — retains all its importance today. However, each concept can influence and balance the other. Both would gain from a constructive and dynamic interaction between themselves. While the territorial conception of 'people' is a unifying principle, which encompasses all the different groups living in the state, the notion of minority underlines the diversity of such populations. Conversely, the notion of people tempers the risk of isolation of communities, by fostering relationships, exchanges and solidarity among individuals and groups living in the same state. It enhances the unfolding of multiple identities. On the other hand, minorities often transcend the frontiers of the state and may create a link with the people of other states. Evidently, divisions and conflicts between groups will not disappear. Internal self-determination does provide, however a framework for an institutional dialogue, which may lead to constitutional changes designed to accommodate the aspirations of the different communities within the state.

March 2000