

BETWEEN A ROCK AND A HARD PLACE: SOVEREIGNTY AND INTERNATIONAL PROTECTION

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INTRODUCTION

Those who chart the course for a future of the Kosovo region must steer “between a rock and a hard place.” The “rock” is national sovereignty. The “hard place” is protection of minority rights and interests. Those who steer too close to the rock of national sovereignty risk ultimately failing in their mission, because the insistence of minority groups and their protectors for some kind of protection as the price of independence will lead to the failure of the independence effort. Those who steer too close to the “hard place” of abundant protection of minority interests, either through reunification with Serbia or some other outcome, likewise risk failure because that outcome will be rejected by the overwhelming majority of the population of the region. Either failure would lead to a continuation of the present international administration and continued inability to come to grips with the economic and social issues that are key to success.

Any successful resolution must therefore deal with the competing interests of national independence and protection of minority rights in a manner that is satisfactory, although not ideal, to the interests of all interested parties. Almost certainly, such a resolution will require some form of international guarantees. It will occur in the context of negotiations involving a host of other topics, including financial issues, transport rights, debt allocation, responsibilities for social security payments, private property rights, and other matters.

In this Essay, I will examine the relative claims of sovereignty and the protection of minority rights. The substantive standards for the protection of minority rights are already well understood and will be reviewed only briefly, as the procedural aspects are of primary concern. To achieve a Fi-

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nal Status of independence, the proponents of a new Kosova will inevitably need to satisfy the United Nations Security Council of the depth of its protection of those rights. The Security Council can only act with the acquiescence of all five of its permanent members, so the acquiescence of France and Russia is essential.¹ Serbia, as a Slavic country, has special historic and political connections with Russia and longstanding relations with France,² so a set of satisfactory assurances will be a precondition to approval of the ending of the present regime. Those assurances will probably need to take the form of a treaty or agreement with Serbia, and perhaps with other powers, detailing the rights and responsibilities of the respective parties. Other issues must also be regulated in such an agreement as well. A resolution will not involve simply the protection of minority rights. It must address, among others, questions of citizenship, borders and transit rights, the allocation of assets and liabilities of the predecessor government, water and energy rights, and the succession to social security and pension rights. Sovereign independence will not eliminate all of these concerns. To the contrary, it will cause them to come more boldly to the surface.

I. SOVEREIGNTY AND SUBMISSION TO INTERNATIONAL NORMS

The tension between sovereignty and submission to international norms forms the basis of the issue. National sovereignty in its strongest form is the exclusive right of a nation state to make unilateral determinations about matters within its competence and is closely related to the concept of "domestic jurisdiction." National sovereignty finds its ultimate expression in the Charter of the United Nations, which provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . ."³ National sovereignty gives the nation state the authority to make final decisions about a broad range of subjects without any reference to external authority. It gives the national government exclusive voice in international negotiations. Even when international law prescribes a duty or limitation on a state, official communication about any

1. Although U.N. CHARTER art. 27, para. 3 calls for the "concurrence" of all permanent members of the Security Council in any such vote, Security Council practice does not count an abstention as a veto.

2. Among the Western powers, France has been seen as the most sympathetic to the Serbian cause. China might also have concerns about the breakup of a multiethnic state.

3. U.N. CHARTER art. 2, para. 7.

alleged violation of that duty or limitation is properly made only to and through the political organs of that state.

International norms limit the power of the state and constrain the actions that a state may legitimately take, even within its nominal jurisdiction. They are the antithesis to domestic jurisdiction, because the existence of the international norm defeats the notion of domestic jurisdiction. The issue then becomes one of international concern, a legitimate subject of inquiry for all other nations.

At a purely theoretical level, a simple synthesis between these two competing doctrines can be found. A matter ceases to be solely a matter of domestic jurisdiction whenever there is an international norm applicable to it. As a consequence, anything protected by international norms is by its very nature not a matter of domestic jurisdiction. Treaties, among other things, create international norms.

This elegant solution does not, however, help at a practical level. A determined state can effectively delay or prevent the application of international norms for a substantial period of time. It can do so both by contesting the validity and content of the norm and by denying the international community access to review claims of its violation. This was certainly the case in Kosovo during the 1990s. Despite claims of human rights violations in Kosovo, the former Federal Republic of Yugoslavia ("FRY") regularly prevented, limited, or delayed visits by representatives of international institutions. It rejected representations by outside intervenors on the basis that these matters were within the "domestic jurisdiction" of the FRY. It had the sole authority to grant visas for international officials to enter the territory and had the power to limit their movements once they arrived; this effectively limited the scope of their ability to review the situation. The FRY showed little interest in remedying nearly a decade of discrimination until the possibility of the use of force became almost a certainty. The actions of the United States and the North Atlantic Treaty Organization ("NATO"), stimulated by the violations of human rights in the territory, were initially taken without the approval of the Security Council, which was only subsequently forthcoming.⁴

The standards of international law for the protection of the human rights of national minorities are fairly well established. In the first place, they are found in the principal international instruments protecting human

4. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) was adopted as NATO forces stood poised to enter Kosovo. See Jim Clancy et al., *NATO Set to Enter Kosovo on Saturday*, CNN.COM, June 10, 1999, at <http://www.cnn.com/WORLD/europe/9906/10/kosovo.07/>.

rights, in general: the Universal Declaration of Human Rights;⁵ the Covenant on Civil and Political Rights;⁶ the Covenant on Economic, Social and Cultural Rights;⁷ and the Convention Against All Forms of Racial Discrimination.⁸ They are also found in purely European instruments, such as the European Convention on Human Rights and Fundamental Freedoms.⁹ The basic commitments of the Helsinki Accords, the Final Act of the Conference on Security and Co-operation in Europe (“OSCE”),¹⁰ also provide guidance in this regard. More directly relevant is the relatively new European instrument, the Framework Convention for the Protection of National Minorities.¹¹ Applicable standards are thus easy to find. An agreement on Final Status may well particularize them by detailing their application to specific existing situations.

The more important question will be the *procedures* by which these international protections are implemented. In the first instance, those procedures will be provided by the new nation state itself within its own constitutional structure. It will have the responsibility to protect minorities against governmental and private discrimination. But what if this fails, or is alleged to have failed? What international procedures will be available to review the cases? Who will have the right to present them before international bodies? This is precisely where the international system failed Kosovo in the 1990s. Belgrade’s insistence that all was well stymied the international safeguards. If peace and justice in the region are to be achieved, the international system cannot fail again. There must be both internal institutions within the new country to ensure the protection of human rights and international institutions that will independently confirm and verify that fact. There must also be a system that is perceived by the people of Kosova, by the minority concerned, by Kosova’s neighbors, and

5. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc A/810 (1948).

6. *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*].

7. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *Covenant on Economic Rights*].

8. *International Convention on the Elimination of All Forms of Racial Discrimination*, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter *Convention on Discrimination*].

9. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*]. The *European Convention* has been amended by protocol numerous times, the most recent being Protocol No. 11 to the *Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, May 11, 1994, Europ. T.S. No. 155 [hereinafter *Protocol No. 11*].

10. *Conference on Security and Co-operation in Europe: Final Act*, Aug. 1, 1975, 14 I.L.M. 1292.

11. *Framework Convention for the Protection of National Minorities*, Feb. 1, 1995, Europ. T.S. No. 157 [hereinafter *Framework Convention*].

by the international community to be fair and effective in guaranteeing that protection.

To that end, it is useful first to look briefly at the historical evolution of the international protection of minorities before turning to specific ways of approaching the immediate question.

II. HISTORICAL APPROACHES

Before 1900, the polyglot and multiethnic empires—Ottoman, German, Russian, or Austro-Hungarian—approached rule in a dynastic, rather than a nationalistic, way. Nationalism, the idea that states should be formed around national groupings instead of dynastic families, arose as a serious force only in the latter part of the nineteenth century. It was then that the Albanian League arose in Prizren, and Serbian nationalism also became a powerful force. During World War I, the Allied Powers encouraged such nationalistic sentiments, because they tore at the fabric of the German, Austro-Hungarian, and Ottoman empires that they were fighting.¹²

A. *The Approach Between the Two World Wars: Minority Rights*

At the end of World War I, the victorious leaders were already committed to the recognition of independent states for the national minorities. As a result, Polish, Czechoslovak, and other new republics were created. It was impossible to draw the boundaries of the new states in such a manner that only those of the state's nationality were within its territory, so there were substantial numbers of national minorities "left behind" in some of the newly independent areas. The hopes of some nationalities, including the Kosovar Albanians, were again dashed as their territory was included in the newly created Yugoslavia. In the Versailles Convention, Poland and Czechoslovakia agreed to conclude treaties protecting minority rights with the major powers,¹³ which they did almost immediately.¹⁴ Other new states soon concluded similar instruments (usually modeled on the Polish Treaty) or made declarations to the same effect.¹⁵ These so-called Minorities Trea-

12. JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? 3-4 (1943) ("The longer [World War I] dragged on, the more frequent and lavish were the promises for the future made by each side. These issues became ideological weapons in their struggle.").

13. Treaty of Peace, June 28, 1919, 225 Consol. T.S. 188, arts. 86, 93 [hereinafter Versailles Treaty].

14. Treaty of Poland, Aug. 23, 1919, S. DOC. NO. 82 (1919); Treaty between the Principal Allied and Associated Powers and Czechoslovakia, signed at St. Germain-en-Laye, Sept. 10, 1919, 226 Consol. T.S. 170.

15. These include *Report of the Committee appointed under the Council Resolution of January 28th, 1932, to prepare the Draft Declaration to be made before the Council by the Iraqi Government*

ties were adopted to define the rights of minorities to freedom of religion, equality before the law, the enjoyment of civil and political rights, and certain linguistic and cultural rights.¹⁶ The treaties had common, although not always identical, provisions.¹⁷ They regulated the citizenship and nationality of the minorities in each case and provided for the equality of individuals of the national minority groups. They also provided for certain special rights for the minority groups: the use of their language in private transactions and in courts; adequate facilities for primary education wherever there was a considerable proportion of the minority group; the right to establish religious and welfare organizations of their own; and an equitable proportion of state and municipal expenditures for educational, religious, and welfare purposes.¹⁸

These rights created a problem for the traditional international legal order, which was based solely on the relationship of one state to another. Individuals had no standing in that system. A foreign state could represent its own citizens, but it could not represent the claims of citizens of the state where alleged oppression was taking place or citizens of a third state. Since most of the national minorities became, under the terms of the peace treaties, citizens of the state in which they lived, others could not ordinarily protect them. Who would provide protection for minority rights? The solution was to entrust this function to the Council of the League of Nations (the "Council" or "League").¹⁹ The Council was given the right to intervene to ensure that the Minorities Treaties were observed. Other states, minority groups, and individuals could petition the League to intervene. The Council normally acted through ad hoc committees to investigate particular issues and was fairly active during the nearly two decades of the

upon the Termination of the Mandatory Regime in Iraq, 13 LEAGUE OF NATIONS O.J. 1342 (1932); Convention Concerning the Territory of Memel, signed at Paris, May 8, 1924, 29 L.N.T.S. 85; Minorities in Latvia, 4 LEAGUE OF NATIONS O.J. 933 (1923); Treaty of Peace, signed at Lausanne, July 24, 1923, 27 L.N.T.S. 11; Declaration of Estonia at Geneva, 4 LEAGUE OF NATIONS O.J. 1311 (1923); Convention between Germany and Poland relating to Upper Silesia, signed at Geneva, May 15, 1922, 9 L.N.T.S. 466; Political Agreement, signed at Warsaw, Mar. 17, 1922, 11 L.N.T.S. 167; Protection of Minorities in Lithuania, 3 LEAGUE OF NATIONS O.J. 584 (1922); Agreement between Sweden and Finland regarding the Aaland Islands, placed on record June 27, 1921, 2 LEAGUE OF NATIONS O.J. 701 (1921); Declaration Concerning the Protection of Minorities in Albania, signed at Geneva, Oct. 2, 1921, 9 L.N.T.S. 173; Treaty of Trianon, signed at Hungary, June 4, 1920 6 L.N.T.S. 187, English translation available at <http://www.lib.byu.edu/~rdh/wwi/versa/tri5.htm>; Treaty of Peace signed at Neuilly-sur-Seine (Bulgaria), Nov. 27, 1919, 226 Consol. T.S. 332.

16. For a relatively contemporary evaluation see ROBINSON ET AL., *supra* note 12.

17. *Id.* at 36–38.

18. *Id.*

19. See, e.g., Treaty with Poland, *supra* note 14, at art. 12. The subsequent treaties largely copied the Polish agreement.

minorities regime.²⁰ It could also seek advisory opinions from the Permanent Court of International Justice,²¹ which rendered a number of decisions on the subject of minorities.²²

In the case of Danzig, the protections went even farther. This German populated city in the Polish corridor to the sea was established as a “free city.” The Statute of the Free City of Danzig was the basic instrument creating that entity.²³ The League appointed a High Commissioner who was a League representative resident of the territory. He was responsible for approving the Constitution of the Free City and any amendments to it, so he could require the initial constitution to include protections for minority rights and could prevent subsequent amendments from taking place.²⁴ Government of the city was, however, in the hands of elected local officials.²⁵ The High Commissioner was thus unlike the present United Nations Special Representative in Kosovo. He did not administer the government, but rather, was a kind of permanent international presence who could regularly intervene with the Danzig government and could report directly to the Council of the League, thus placing some continuing pressure on the local government to comply with international norms. The Permanent Court of International Justice decided a number of cases calling for the interpretation and application of the Danzig Statute.²⁶

20. In the decade of the 1930s alone, the Council received 585 petitions, of which 338 were treated as receivable. During the same period, 298 examinations of petitions were completed. ROBINSON ET AL., *supra* note 12, at 128.

21. *See, e.g.*, Treaty with Poland, *supra* note 14, at art. 12.

22. *See, e.g.*, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6); Access to German Minority Schools in Upper Silesia, 1931 P.C.I.J. (ser. A/B) No. 40 (May 15); Rights of Minorities in Upper Silesia (Minority Schools), 1928 P.C.I.J. (ser. A) No. 12 (Apr. 26); Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, 1925 P.C.I.J. (ser. B) No. 12 (Nov. 21); Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10 (Feb. 21); German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

23. Versailles Treaty, *supra* note 13, at arts. 100–08.

24. *Id.* at arts. 101, 103.

25. *Id.* at art. 103.

26. *See, e.g.*, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935 P.C.I.J. (ser. A/B) No. 63 (Dec. 4); Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 42 (Feb. 4); Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, 1931 P.C.I.J. (ser. A/B) No. 44 (Dec. 11); Free City of Danzig and International Labour Organization, 1930 P.C.I.J. (ser. B) No. 18 (Aug. 26); Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3); Polish Postal Service in Danzig, 1925 P.C.I.J. (ser. B) No. 11 (May 16).

B. *The General International Approach After World War II: Human Rights*

After World War II, the emphasis shifted. International law focused on protecting the human rights of all persons, not just minorities. Thus, the Universal Declaration of Human Rights²⁷ addresses the protection of all persons and does not mention minorities. It was followed by the two Covenants²⁸ and the various Conventions. The Convention on the Elimination of All Forms of Racial Discrimination,²⁹ of course, addressed the protection of *racial* minorities. The concept of race is broad enough to cover at least some kinds of discrimination against some national minorities. The Conventions on the Rights of Women³⁰ and the Rights of Children³¹ are likewise directed to part of the population, but neither of them directly addresses protection for national minorities, a concept that had very much engaged the international community in the interwar period.

The procedural devices under these conventions made only small inroads on the state sovereignty approach of traditional international law. The emphasis was on compliance, persuading all parties to the respective conventions to observe its requirements, rather than on enforcement in individual cases. Compliance was assured primarily by each state's obligation to make periodic reports on the general state of human rights within its country.³² There were provisions for special rapporteurs and optional clauses and protocols permitting complaints by other states³³ and by individuals,³⁴ but only if the ratifying state separately acceded to these provisions of the agreements. The system did not forget minorities; rather, it treated their protection as part of a more general protection of *all* human beings. The United Nations Human Rights Commission did, however, form a standing Subcommission on Minorities.

27. G.A. Res. 217A(III), *supra* note 5.

28. Covenant on Civil and Political Rights, *supra* note 6; Covenant on Economic Rights, *supra* note 7.

29. Convention on Discrimination, *supra* note 8.

30. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

31. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

32. *See, e.g.*, Covenant on Civil and Political Rights, *supra* note 6, at art. 40.

33. *Id.* at art. 41.

34. Optional Protocol to the International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171.

C. *European Law: A Convention with Enforcement Mechanisms*

In 1950, Europeans took a bigger step forward. By adopting the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”),³⁵ they not only adopted substantive standards, but also a set of procedural mechanisms that gradually transformed international human rights law. The substantive standards are similar to those in the general conventions, but because they are enforceable they tend to be much more detailed, elaborating all of the exceptions to those rights.

Initially, three forms of implementation of the European Convention were foreseen. The weakest involved political action through complaints to the European Commission on Human Rights (“European Commission”) by one state that another had violated the European Convention.³⁶ This, in itself, was a step forward; it removed the “domestic jurisdiction” hurdle for complaints involving a state’s interactions with its own citizens, but this enforcement mechanism was seldom invoked because of political considerations. The second form of implementation involved some states accepting an optional provision that permitted individuals to file such complaints against them.³⁷ The European Commission could conduct an investigation and could also seek a “friendly settlement” of the matter.³⁸ If these informal mechanisms failed, the European Commission could make a report to the Committee of Ministers, which would reach a political resolution of the matter.³⁹ Only if the affected state had accepted the optional jurisdiction of the European Court of Human Rights could the European Commission or another state take a case before that tribunal.⁴⁰

In the early years of the European Convention, the European Commission played the major role. It met in closed session,⁴¹ so the affected state did not need to fear publicity surrounding allegations of human rights violations. The *in camera* proceedings also appear to have facilitated settlements. Cases that could not be resolved in that manner could be forwarded for political or judicial settlement.

Early reluctance to accept immediate disposition claims by a court reflected a number of national concerns, including the protection of the dig-

35. European Convention, *supra* note 9 (1950 version).

36. *Id.* at art. 24.

37. *Id.* at art. 25.

38. *Id.* at art. 28.

39. *Id.* at art. 31.

40. *Id.* at arts. 46, 48.

41. *Id.* at art. 33.

nity of the state and the avoidance of adverse publicity. States were also concerned that the international community, not the individual claimant, should control the presentation of any contested case.⁴² Over a period of several decades, the success of the European human rights system in resolving these questions, however, drew all of the members of the Council of Europe to accept compulsory jurisdiction. From there, it was a short step to abolish the European Commission and allow individuals to file directly with the European Court of Human Rights.⁴³ The abolition of the informal European Commission process and its replacement with a formal judicial process is a further step forward toward the rule of law in these cases, but the European Commission itself was an important part of the path to that success.

Only within the past decade has Europe addressed the question of national minorities. A Council of Europe Framework Convention for the Protection of National Minorities⁴⁴ urges states to take steps to protect the rights of national minorities within their boundaries.⁴⁵ While it does contain some specific obligations, the Framework Convention is phrased in relatively weak language, requiring governments to “take measures”⁴⁶ “where appropriate,”⁴⁷ and “to promote equal opportunities,”⁴⁸ but limiting the responsibility of the state to provide funds to implement its goals.⁴⁹ Enforcement of the Framework Convention is left to a reporting and compliance mechanism.⁵⁰ It is clearly a noble, aspirational treaty, but it provides few concrete, enforceable rights.

D. *The Austro-Italian Exception*

Another development should be mentioned for the sake of completeness. The issue of Austrian minorities in South Tirol has been an irritant to relations between Austria and Italy for many years. In an effort to defuse an otherwise volatile situation, the governments have agreed that the Austrian government may present the claims of Italian citizens who belong to the

42. The cases were all denominated “Commission v. —.” Initially, advocates for the Commission presented them to the European Court of Human Rights, not advocates for the individual affected party, although this practice gradually changed.

43. Protocol No. 11, *supra* note 9, at art. 34 (1994 revision of the European Convention).

44. Framework Convention, *supra* note 11.

45. See generally GAETANO PENTASSUGLIA, MINORITIES IN INTERNATIONAL LAW (2002).

46. Framework Convention, *supra* note 11, at art. 12, para. 1.

47. *Id.*

48. *Id.* at art. 12, para. 3.

49. *Id.* at art. 13, para. 2.

50. *Id.* at arts. 24, 25.

German-speaking minority, thus waiving Italy's "domestic jurisdiction" exception.⁵¹

E. *Postconflict Situations*

Another set of protections for minority rights can be found in various postconflict constitutional and international arrangements. In some ways, these may be instructive for Kosovo; in other ways, they provide cautionary tales.

One such international device is found in the 1960 constitution of Cyprus. It created a Supreme Constitutional Court consisting of a Greek Cypriot, a Turkish Cypriot, and a President of the Court, who could not be a Cypriot, a Greek, or a Turk.⁵² The neutral President was appointed by agreement of the Greek Cypriot President of the Republic and the Turkish Cypriot Vice President.⁵³ The system apparently functioned until the entire structure of shared government collapsed in 1974.

Bosnia-Herzegovina followed a similar track. Its Constitutional Court consists of two members of each of the three local ethnic communities, plus three foreign members appointed by the President of the European Court of Human Rights.⁵⁴ An appended Human Rights Agreement also provides for human rights chambers consisting of representatives of each of the ethnic groups, presided over by an external chairman.⁵⁵

III. WHAT COURSE FOR FINAL STATUS?

The resolution of Final Status, and the concessions necessary in that respect, will be difficult. The ultimate status will fall between two polar extremes. One extreme is the reunion of Kosovo and Serbia in some kind of federation or confederation with confirmation of the sovereignty of the resulting entity. The other extreme is an independent and sovereign Kosova with no special regimes to protect minorities. Either of those options would

51. The agreement of September 5, 1946, between Austria and Italy is confirmed by article 10 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, between the Allied Powers and Italy, and is published as Annex IV of that treaty. 49 U.N.T.S. 3, 11, 69–70.

52. CYPRUS CONST. art. 133, *reprinted in* 5 STANLEY KYRIAKIDES, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CYPRUS (Albert P. Blaustein & Gisbert H. Flanz eds. 1972). The President also could not be British. *Id.*

53. *Id.*

54. BOSNIA-HERZEGOVINA CONST., art. VI, sec. 1. The Constitution of Bosnia-Herzegovina can be found as an Annex to the Dayton Peace Accord. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4, Dec. 14, 1995, 35 I.L.M. 75, 117 [hereinafter Dayton Peace Accord]. For further discussion of the provisions of that constitution, see Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COMMENT. 145 (1996).

55. Dayton Peace Accord, *supra* note 54, at Annex 6, art. VII.

leave substantial minorities within the territory of a sovereign state. In the first case, these would be Kosovar Albanians in a new Yugoslavia; in the second case, it would be Serbs in a new Kosova. In their stark forms, neither of these options would appear acceptable to the affected minority groups or to the international community. In order for an alternative to be acceptable, there must be adequate substantive and institutional protection for minority rights. But minority rights are not the only issues that must be resolved if a new Kosova is to emerge. Other questions will need to be addressed as well.

The substantive rights to be protected are complex. One can begin with the rights listed in the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁶ Indeed, it may be preferable simply to adopt the terms of that convention instead of attempting to formulate yet another text. It may be that the general rights covered by the European Convention will be sufficient to protect the ordinary civil and political rights of individual members of the minority.

The protection of rights particular to national minorities presents a special problem. The Framework Convention for the Protection of National Minorities also provides another basis from which to proceed, but it is largely aspirational. It calls upon states to take measures to achieve certain objectives, but it does not create the kind of clear and immediately applicable standards that are present in the older European Convention.⁵⁷ If one intends to make the document directly enforceable, modifications that take into consideration the specific issues that have long divided Kosovar Albanians and Serbs will be needed.

First, there is the issue of protecting the various Serbian and Orthodox monuments and shrines within the territory. Security and operation of those sites will be an issue, as well as access to them.

Second, there are concerns over the economic and social rights of the individuals of the minority group. In a postsocialist economy like that of the region, much of the economic activity is still in the hands of publicly controlled or publicly influenced institutions, including housing, employment, and other activities. Decision making about these topics involves substantial elements of discretion on the part of public administrators. It may be necessary to adopt measures that will assure equality of opportunity in these areas, rules that call for nondiscrimination and affirmative action with regard to the economic and social aspects of life. This might be akin to

56. Protocol No. 11, *supra* note 9, at arts. 1–18.

57. Framework Convention, *supra* note 11, at art. 12, para. 1.

the proportionality requirements of the Minorities Treaties of the 1920s and 1930s.

Third, antidiscrimination provisions prohibiting private as well as public discrimination are needed. A government must not only refrain from discrimination itself; it must also legislate to prohibit private discrimination based on minority status, as well.

These minority protections are not the only issues that must be resolved in the Final Status negotiations. Other issues will predominate. These will include such topics as the confirmation (or alteration) of boundaries; the protection of property of displaced persons; a "right to return," but also possibly some right to emigrate to the country of national origin; a regulation of citizenship rights; transit rights; allocation of the remaining debt and assets of the former Yugoslavia; division of the former railways' assets; and other topics. Resolution of these issues as part of a larger package should relieve any concerns about Kosova yielding its sovereignty, because the arrangements can then be seen as part of a global settlement that ensures independence. Each of these topics also has elements that, if not properly regulated by agreement, can lead to disputes.

After establishing the substantive rights to be protected, the second step is to establish the necessary procedural institutions to protect the rights thus guaranteed. How does one both guarantee the sovereignty and independence of the new state and at the same time protect the rights of the minority? Because of the high levels of distrust between the parties, some mixture of constitutional and international guarantees is necessary to achieve agreement among the parties essential to accomplishing Final Status. What forms can those procedural institutions take?

A. *Constitutional Guarantees*

The first option is to create guarantees within the nation state itself. Realization of such is dependent upon effective implementation by the authorities and judiciary of the state in question. Such guarantees are addressed first to the political leaders and citizens of the state in question, and second to the courts or tribunals that will enforce them. Domestic constitutional guarantees will not be seen by the minority group involved as effective unless mechanisms are built in to ensure the neutrality of the ultimate adjudicators of those rights and the ability to enforce their decisions. One should remember that the Yugoslav judiciary did little to protect the rights of Kosovar Albanians in the 1990s even though there were many constitutional protections in the old Yugoslav constitution. Thus, the Serbian minority will be reluctant to rely upon the neutrality of a new Kosovan

judiciary. The question here is not whether there would be actual prejudice, but whether the minority can be persuaded to believe that there is no prejudice. The creation of a constitutional court with a broad spectrum of judges, possibly including international judges without ethnic affiliation, may be one step in this direction.

A purely constitutional solution, however, leaves a number of questions unanswered. How will these constitutional protections be implemented? What will happen if they are not implemented? Given the high levels of distrust between the ethnic groups, answers to these questions are also needed. Constitutional guarantees by themselves will be an important part of any solution, but they can hardly provide an entirely sufficient solution.

B. Bilateral Solutions

Another approach in the case of an independent Kosova is to replicate the types of agreements between Austria and Italy, in which Serbia would have the right to represent the interests of persons of Serbian descent in Kosova, even though they had acquired Kosovan citizenship. This could take the form of a resident representative of Serbia with special responsibility for intervening with local authorities to protect minority rights guaranteed in the Final Status agreement. Since it would be provided by an international agreement, it would be a voluntary act and consistent with national sovereignty. While a solution of this kind is superficially attractive and might also be part of Final Status, it also has its own problematic elements. How effective would a spokesperson from Belgrade be in Prishtina, or vice versa? Given the present levels of rhetoric, such an approach might exacerbate, rather than resolve, ongoing conflicts.

C. Broad Multilateral Solutions

Another approach is to ratify and apply the European Convention. This would provide aggrieved individuals or groups direct access to the European Court of Human Rights at Strasbourg and thus a truly impartial forum in which to air grievances and to obtain remedies. This may provide a satisfactory ultimate solution to the issue. Kosova would join all other European states in subjecting itself to the common European standard. Subjecting itself to the same constraints and procedures as Germany or France can hardly be thought of as a challenge to its independence and sovereignty.

In the immediate future, however, this would hardly be an adequate remedy. Resort to the Strasbourg system is slow and requires exhaustion of local remedies. In the present context some claims may require more rapid resolution than a judicial solution can provide. The Strasbourg Court would have jurisdiction only to apply the rules of the European Convention, not the other protections that will almost certainly be necessary as part of a transition. Enforcement of the Framework Convention for the Protection of National Minorities is beyond its jurisdiction. The Strasbourg Court is already overburdened with cases; the addition of another postconflict situation might further reduce its timeliness and effectiveness. The Strasbourg Court cannot effectively address social concerns, nor can it really focus on a series of incidents of daily life that may add up to a cause for further conflagration. It is limited to the resolution of specific cases about specific incidents. Given the apparently high levels of antipathy, some form of reconciliation process will be necessary on a broad range of issues.

The general human rights institutions can be useful contributors to the decision making in this area but may not be agile enough to provide the necessary decisive action at critical times. Thus, while they are essential elements of any final status, they may not provide a sufficient institutional framework to prevent further conflagration.

D. Focused Solutions

An additional option is to institute some form of neutral commission or commissioner to intervene on behalf of the rights of the minorities within the territory. One can think of two historical models for this option: the League of Nations High Commissioner for Danzig and the Commission that existed under the European Convention in its original form.

The powers of the High Commissioner for Danzig were discussed above.⁵⁸ He or she would not have power to govern the territory, but rather a special kind of international personality to represent the interests of the minorities to the state in which they were located. He or she could receive grievances either from the other state or from affected individuals. The commissioner could conduct an independent investigation and then intervene with the state in question to assure compliance with the expected standard. The commissioner would be enforcing the concerns of the international community in assuring that the terms of the Final Status agreement were fully applied. If the commissioner could not achieve needed responses from the government, those concerns might be brought to the attention of

58. *See supra* notes 23–26 and accompanying text.

his or her appointing authority, whether European institutions or the United Nations, which could apply appropriate international remedies. If the selection of this representative was part of a Final Status agreement, the commissioner might have jurisdiction on both sides of the border, to protect both the Serbian minority in Kosova and the Kosovar minority in Serbia.

Implementing this particular solution would require careful elaboration of the scope of authority of the commissioner. If he or she were given too many powers, such a plan would run the risk of impairing national sovereignty. If given too few, the representative would run the risk of being ineffective. But the clear desire of the people of the territory to become part of an evolving European economy may give even the persuasive views of such a neutral representative substantial influence.

A variation on this theme is to institute a system akin to the original model of the Commission and Court under the 1950 version of the European Convention, with its optional article for individual complaints. Under that system, the other state or any individual could complain to the European Commission about violations of protected rights. The European Commission would conduct an independent investigation of the complaint, but could do so initially on a confidential basis, thus avoiding the possibility of publicity surrounding the case and escalating the matter to an entirely inappropriate magnitude. It could seek to find a satisfactory resolution of the matter without adversary proceedings. If such a commission is created in a Final Status agreement, it could seek to achieve an amicable and satisfactory settlement. Only if such resolution provides impossible would it initiate a formal suit before a pre-established international tribunal, whose decision would be binding.

The selection of the commissioner (or commissioners) under both of these plans would be critical to their success. In the latter version, the selection of the ultimate arbitral tribunal would also be vital. The appointing authority might be the United Nations, or it could be one of the European institutions, the Council of Europe, the OSCE, or even the European Union. Indeed, if the commission were a plural-member body, members could be appointed by and report to multiple institutions. Funding for the activities of the commission might also come from international sources.

Such a commission would be no more of an invasion of the sovereign independence of a new Kosova than the similar commission was of the sovereign independence of the members of the Council of Europe in the early years of the European Convention. It would certainly be a step forward from the current status with administration by a United Nations Special Representative.

CONCLUSION

What I have suggested here is the next step in a process. It is a process that would bring an end to an international administration while maintaining a set of institutions that would assure the realization of the standards of a state's international commitments and the standards of general international law.

The world of today is not the world of the nineteenth century. In the nineteenth century, communications were by post and occasionally by telegraph, transportation was by train or horse cart, and a small state could effectively seal itself off from others. Today, communications are by direct dial telephone and Internet, transportation is by jet plane, and a small state must be part of an international community. Sovereignty today is not the sovereignty of the nineteenth century. While a state can be autonomous and independent, it must conform to a much broader body of international law that is applicable to all states. The route between the "rock" of sovereignty and the "hard place" of international administration is down the middle of the channel, accepting national sovereignty, but also accepting an international dispute resolution mechanism that is accessible not only to other states but also to the affected individuals. Outmoded views of national sovereignty should not stand in the way of progress.