

Two Faces of Multiculturalism in Present International Law

Vladimir-Djuro Degan*

I. Introduction

With Edward McWhinney I became friends on his initiative. The Basel Session of our Institute of International Law took place between 26 August and 3 September 1991, in a dramatic period for Croatia. After the brutal and unconstitutional suppression of the autonomy of Kosovo and Vojvodina that had happened already in the beginning of 1989, and after the short conflict in Slovenia between 26 June and 7 July 1991, Croatia was then the main target of the brutal attacks by the Yugoslav Federal Army and Serb insurgents. That culminated later on the same year in the siege of Dubrovnik and the fall of Vukovar with the ensuing massacre of the wounded from the City hospital.

My *Confrère* Edward McWhinney was at that time well aware of all these events and he expressed his sympathies to me. For him that was not just a Balkanic war in which the aggressor and his victims could not be distinguished. In addition, he proved knowledgeable of various groups of Yugoslav immigrants in his native Canada. He thus detected among Croats a nostalgic group remaining of the Fascist regime from World War II, and the other one democratic. He told me that among the Serbs there were as many as three groups: one monarchist, another titoist, and the third one moderate democrats.

Hence our friendship deepened in light of McWhinney's special knowledge and interest of what happened in the former Yugoslavia later on. The

* Membre de l'Institut de droit international, Emeritus Professor of the University of Rijeka (Croatia).

conflict continued in Bosnia-Herzegovina in 1992, and it ended in 1999 in Kosovo. He is not a person for quick impression and stereotypes, which he also proved in organizing the excellent Session of our Institute in Vancouver in 2001.

*

At the time I got the invitation to prepare an article for the Essays in honour of my friend Edward McWhinney, I did not feel that I was an expert on Multiculturalism in present International Law. So, I began with research among the contributions on this subject-matter in a broad sense, in the collected papers dedicated to my *confrères* and other colleagues, to which I also contributed albeit on different topics. To this I must add a precious book by our *confrère* François Rigaux: *Guerres et interventions dans le Sud-est européen*, published by Pedone in Paris in 2004. Of course, in this the writings by Samuel Huntington cannot be neglected.

In these materials collected *ad hoc*, I found some precious writings on Multiculturalism from which I myself have learned a lot, along with some simplified allegations which seek to be clarified.

II. The Notion of Culture (Civilization) and Its Different Types

For the purposes of the present analysis “multiculturalism” means various civilizations in the present international community of sovereign States.¹ When we take into account various legal traditions, we connect “cultures” more often than not with different religious teachings and the philosophies based on in particular societies.

Judge C.G. Weeramantry from Sri Lanka made particular efforts in search of the concepts of traditional law in major global traditions, in order to

¹ Hence, Le Petit Robert defines “culture”, *inter alia*, as “Ensemble des aspects intellectuels d’une civilisation: La culture gréco-latine, Culture occidentale, orientale. La culture française”. “Civilization” is: “ensemble de phénomènes sociaux (religieux, moraux, esthétiques, scientifiques, techniques) communs à une grande société ou à un groupe de sociétés. Civilisation chinoise, égyptienne, grecque. Les civilisations pré-colombiennes d’Amérique. Civilisation occidentale...”

further enrich the present public international law. He thus discerns the main features of the following religious and philosophical traditions which should be useful for that purpose: 1. Buddhism; 2. Confucianism; 3. Hinduism; 4. Islam; 5. Judaism; and 6. Christianity.²

From quite a different perspective, Samuel P. Huntington in his book which still incites fervent arguments, enumerates the major contemporary civilizations as follows: (i) Sinic (Chinese); (ii) Japanese; (iii) Hindu; (iv) Islamic; (v) Orthodox; (vi) Western; (vii) Latin American; and (possibly) (viii) African.³ For him, too, religion is a central defining character of civilizations.

Depending on the criteria adopted, other authors can provide, for their own purposes, differing classifications of the main civilizations in the present world community. It should be noted that Weeramantry undertakes his research for the sake of a productive synthesis of concepts from various legal and philosophical traditions, in order to enrich the existing rules of general international law. Now that the Cold War has ended, Huntington looks at different civilizations as the main cause of future conflicts at the global level. Of course, in our further analysis we cannot overlook these two aspects of “civilizations” or “cultures”.

III. The Growth of “Multicultural” International Law

As is commonly known, the adjective of the term “civilization” is used in the qualification of one of the main sources of international law. In Article 38(1) of the Statute of the International Court of Justice, among the sources applied by it there are, under sub-paragraph (c), “the general principles of law recognized by civilized nations”.

The existence and the scope of this particular source were, and still are, a matter of doctrinal controversies.⁴ Some authors rejected the existence of this

² Cf., C.G. Weeramantry, Cultural and Ideological Pluralism in Public International Law, in: *Liber Amicorum Judge Shigeru Oda*, Volume 2, The Hague 2002, pp.1491-1520, at pp.1505-1519.

³ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Touchstone Books 1998, pp.44-47.

⁴ See the large review of these disparate opinions: V.D. Degan, *Sources of International Law* (Martinus Nijhoff Publishers), The Hague 1997, pp.14-19.

source simply because of its above-mentioned qualification.⁵ It allegedly divides all the nations or States into “civilized” and “non-civilized”.

Nevertheless, whatever the drafters of this provision and its dubious qualification had in mind in 1920, today, all “nations” are organized in States, and statehood must be accepted as a mark of civilization. That is because law, i.e. the existence of a legal order in a State, also implies civilization.

On the other hand, even some “civilized” States have undergone periods of totalitarian rule in their history, whose legal order and practice could not be qualified as being “recognized by civilized nations”. That was in particular the case with the Nazi Germany whose law and practice were based on “racial” discrimination according to the criteria dictated by its leadership. The same applies to certain so-called “new” principles of Nazi criminal law: that of *nullum crimen sine poena* (that no crime must remain unpunished), and the notorious “sound popular feeling”, applied directly as such by national-socialist judges.⁶

The foregoing qualification from Article 38(1), sub-paragraph (c), of the Court’s Statute should be reasonably interpreted today in the sense that it is the matter of the general principles of law – which are common to advanced legal systems of the world – regardless of the particular form of civilization. In support of this interpretation Article 9 of the Statute of the Hague Court is to be invoked, which provides that the body of elected judges forming the Court should assure as a whole – “the representation of the main forms of civilization and of the principal legal systems of the world”.

The present composition of the International Court of Justice fulfills the above-mentioned requirement. Therefore, as Michel Virally had stated many years ago: “anything which all the judges of the Court are prepared to accept as a ‘general principle of law’ must in fact be ‘recognized by civilized nations’”.⁷

It is, nevertheless, not necessary, as Wolfgang Friedmann stressed, that

⁵ See the strong criticism of this wording as incompatible with the UN Charter and as a legacy of colonialism, by the Lebanese Judge Fouad Ammoun in his separate opinions to two Judgments of the Hague Court: on the North Sea Continental Shelf cases, I.C.J. Reports 1969, pp.132-133; and on The Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970, p.309.

⁶ The Socialist regimes achieved similar objectives distorting some general principles, but not openly denying them.

⁷ Cf., The Sources of International Law, in Max Soerensen (ed.), Manual of Public

the general principles should be found to exist in identical form in every legal system of civilized law. However, as comparativist Gutteridge alleged, its application must not be doing violence to the fundamental concepts of any of those systems.⁸

It is not difficult to identify some other universally applicable general principles of law relating to legal relations between all States, at all times and regardless of the particular form of civilization. When two or more States conclude an agreement with their common intention to carry it out in good faith, the fundamental principle *pacta sunt servanda* is immediately applicable. The 1969 Vienna Convention on the Law of Treaties codifies in detail other general principles of law in this domain. They should be neutral with respect to the variety of civilizations of their States parties. In fact, it is not dissimilar to the principles of formal logic and of mathematical operations.

Based on the principle of *pacta sunt servanda*, some rules of customary law exist from time immemorial. In the *U.S. Diplomatic and Consular Staff in Tehran* case (Provisional Measures) of 1979, the International Court of Justice declared that:

there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that through history nations of all creeds and cultures have observed reciprocal obligations for that purpose.⁹

In its Judgment, in the same case, of 24 May 1980, the Court reiterated this fact in another context:

The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions ...¹⁰

International Law, London 1968, p. 146.

⁸ Cf., Wolfgang Friedmann, The Uses of "General Principles" in the Development of International Law, *American Journal of International Law* 1963, No. 2, pp. 284-285.

⁹ I.C.J. Reports 1979, p.19, para.38.

¹⁰ I.C.J. Reports 1980, p.25, para.45.

*

It is, however, far from the truth that a few precepts of international law of this scope of validity can regulate all kinds of relations between States. The international community has undergone deep transformations throughout the centuries. It is now faced with new challenges, requiring new legal solutions.

In view of the problems of cultural and ideological pluralism, Judge Weeramantry has divided, with good reason, the evolution of the Law of Nations into its five phases.

(i) The first phase is marked by the teachings of natural law from Aristotle and Cicero to the end of the 18th century. The loose universalist ideas on human being, and later on, on the universal Christian Empire in Europe, had no strong impact on the harsh reality of slavery, serfdom and on the acquisitions by States of indigenous territories based on the title of “discovery”. Nevertheless, at the end of that period there appeared legal instruments of lasting importance which will be discussed separately.

(ii) The second phase was distinguished by legal positivism. The positive international law of that time was conceived to be valid only among “civilized States” of Christian Europe, to which later on the United States and the countries of Latin America were added.¹¹ Another circle formed the so-called “semi-civilized States” which enjoyed only “partial recognition”. According to Franz von Liszt “they are part of the international community to the extent they are bound by treaty to civilized nations”. As for the rest, i.e. “savage humanity” or the “uncivilized”, they were left to the “discretion” of the members of the international community and to their moral sense or feeling (but without any obligation on their part).¹² These rules were not more than a product of the

¹¹ It is true that according to Article 7 of the Paris Peace Treaty of 1856, ending the Crimean War, the Sublime Porta was “admitted to participate in the advantages of the public law and the Concert of Europe”. But that did not change its actual situation until the reforms undertaken by Kemal Atatürk in 1924, by which he created a modern and secular Turkey.

¹² Quoted according to Georges Abi-Saab, *International Law and the International Community: the Long Road to Universality*, in: *Essays in Honour of Wang Tieya*, Martinus Nijhoff, 1993, at p.39.

imperialism of the Western Powers.

(iii) The third phase was marked by the universalization of the international community mostly through the United Nations Organization. That was also the period of the Cold War with the dominance of the two ideologies and its negative consequences. However, the concept of human rights was extended to social, economic and cultural rights.

It should be added here that the struggle between the two blocs of States with their opposed ideologies was mitigated by the Non-aligned Movement. In this Movement, embracing the majority of UN members, including India, Egypt, Burma, Indonesia, Sri Lanka and other States of the Third World, the Yugoslav Federation at the time of its President Tito was very active. It should not be forgotten now that many important international instruments codifying the rules of general international law of lasting importance were adopted with the support and participation of this Movement. Yugoslav lawyers of that time were very active in drafting and adopting these legal rules.¹³

It was a shock for many that with the end of the Cold War that peace-loving and active member of the international community simply collapsed in a series of bloody fratricidal conflicts. This event raises many questions which directly concern the main topic of our discussion here. According to some interpretations, since its establishment in 1918, Yugoslavia was an artificial creation composed of nations belonging to different civilizations. As a consequence, its demise could not be avoided. It is, nevertheless, a fact that in the period of the Cold War Yugoslavia seemed to be so stable and consolidated as a State that almost nobody associated it with the previous Balkanic conflicts. All these questions need a thorough explanation.

(iv) The fourth phase according to Weeramantry is still lasting. It is marked with the trend towards globalization in all areas of activity. With the end of the Cold War only one superpower is in the dominant position in world affairs. With the demise of the Soviet Union the ideology of the welfare State is pushed aside in the West. In association with global financial institutions the free trade principle began to enter even such areas as education, health care and public utility services. Globalization, driven by the economic imperative,

¹³ See a review of this contribution, Milan Šahović, *The Former Yugoslav Federation and International Law*, in: *Essays in Honour of Wang Tieya*, Martinus Nijhoff, 1993,

submerged other inputs into international law.

Weeramantry explains one example in this respect. If the principles of environmental protection required one form of action and the principles of free trade required another, the balance tended to tilt in favour of the latter and this trend manifested itself even in decisions of World Trade Organization tribunals. "The dice came to be heavily weighted against all principles and philosophies other than free trade".

However, to believe Weeramantry, this is only a passing phase. It is true that liberal capitalism is in its present form self-destructive. It needs new legal regulations in order to be viable and to subsist.

The author stresses that the globalization has served the important purpose of forcing people all over the world to look inward to their own cultures to see what they contain. According to him, we are today witnessing the emergence of the multicultural approach.

(v) Weeramantry believes that the current situation can be overcome by a thorough research of the potentials of various cultures in order to contribute to the development of public international law. To this end he indicates in his article some features in cultural traditions enumerated above, together with the original Christian teachings. At the same time, he proposes a long list of issues in present international law which should be further developed on this basis.

It appears that the above reformation should principally be accomplished through "the teachings of the most qualified publicists of various nations" under Article 38(1), sub-paragraph (d) of the Statute of the Hague Court. Nevertheless, he stresses the special importance of the "general principles of law recognized by civilized nations" under its sub-paragraph (c).

The initiative by Judge Weeramantry should be welcomed. It seems, nevertheless, highly important from the outset, to couch the precepts of the foregoing teachings in the form of rules *de lege ferenda*.¹⁴ In time, some of them could be transformed into positive rules of customary international law through the practice of States and *communis opinio juris*.

However, nothing precludes even now two or more States belonging to

pp.619-629.

¹⁴ It seems that the idea of the New International Economic Order has failed partly because the related declarations insisted more on the aims to be achieved than on sound legal principles.

the same legal tradition, as for instance Islamic or Buddhist, from appointing an arbitral tribunal among the members of their confidence who are at the same time the most qualified specialists of that law. Such a tribunal could perhaps settle their actual disputes on this basis. These awards, if published, could have an influence on the body of international law comparable to that of other arbitral awards.

IV. The Clash of Civilizations

This is an entirely different aspect of multiculturalism that cannot be neglected at present. Samuel P. Huntington, a political scientist from the United States, published an article in *Foreign Affairs* in 1993 under this title, followed by his book in 1997.¹⁵

His writings were obviously inspired by the conflicts in the former Yugoslavia, especially in Bosnia-Herzegovina where the three factions seemed to be divided along their religious differences. What is more important, his writings preceded the events of 11 September 2001 in the United States. After the trauma they provoked world-wide, it seemed that this author faithfully described the new era in the post-Cold War Global Politics, notably the Islamic terrorism.

In Huntington's interpretation of this new world, "local politics is the politics of ethnicity; global politics is the politics of civilizations".¹⁶ "In the post-Cold War world States increasingly define their interests in civilizational terms. They cooperate with and ally themselves with States with similar or common culture and are more often in conflict with countries of different culture."¹⁷

Because for him, too, religion is a central defining character of various civilizations; that would perhaps imply that the greater the religious differences between States, the more probable conflicts seem to be between them than with others.¹⁸ For instance, the Hindu civilization stands very much apart from the

¹⁵ Here is quoted its paper-back edition published by Touchstone Books in 1998. See *supra*, n.3.

¹⁶ Huntington, above n. 3, p.28.

¹⁷ *Ibid.*, p.34.

¹⁸ It is a fact that the era of Communism with its militant atheism, which in the Soviet Union lasted the longest, proved to have no lasting impact on the societies in these

three monotheistic religions of Abraham: Judaism, Christianity and Islam. And unlike various Protestant denominations, the doctrines of the Catholics and the Orthodox are almost the same in religious matters, although they are historically separated into two distinct Churches. On the other hand, the Russian, Serbian, Greek, Bulgarian and Macedonian national churches belong to the same Eastern Orthodox religion. As a consequence, there should not be any important discords between the Macedonian, Serbian, Bulgarian or Greek congregations, and between their respective States. However, all that is far from being true and Huntington does not have in mind the differences and similarities of this nature. In fact, he tries to apply a more sophisticated approach to these problems.

As already stated, this author divides the entire world into seven or eight major civilizations. Parallel to the Sinic, Japanese and Hindu civilizations, Islam forms a civilization in itself, although he recognizes that many distinct cultures or subcivilizations exist within it, including the Arab, Turkic, Persian, and Malay.¹⁹

It is more interesting though, how Huntington divides the Orthodox, Western and Latin American civilizations as separate. The Western civilization encompasses the areas of early European Christendom with Catholicism and Protestantism as its single most important characteristic. Now, it also comprises the United States as the leading power, and other States settled by the Europeans such as Canada, Australia and New Zealand.

The States from Western and Central Europe went through the Reformation and the Counter-Reformation, which was totally absent from Eastern Orthodoxy and largely missing in the Latin American experience.²⁰ Although an offspring of European civilization, Latin America had an authoritarian culture, which Europe had to a much lesser degree and North America not at all.²¹

States. For instance, already in 1991 Russia immediately returned to its Orthodox values and tradition. The same happened in the Catholic Poland, or in the former Central-Asian Soviet Republics with predominant Islamic population. Some of these States remained more secular than others.

¹⁹ Huntington, above n. 3, p.45.

²⁰ Ibid., p.70.

²¹ Ibid., p.46.

As being a politologist, Huntington was wise enough to make a far-reaching reservation in the Preface of his book: “While a civilizational approach may be helpful to understanding global politics in the late twentieth and early twenty-first centuries, this does not mean that it would have been equally helpful in the mid-twenty-first century.”²²

This, however, does not exclude our observation and critical assessment of the views in his book in relation to the time referred to in it. Hence, in its very beginning he described an event in the capital of Bosnia-Herzegovina in the following terms: “On April 18, 1994, two thousand people rallied in Sarajevo waiving the flags of Saudi Arabia and Turkey. By flying these banners, instead of UN, NATO, or American flags, these Sarajevans identified themselves with their fellow Muslims and told the world who were their real and not-so-real friends.”²³

This allegation deserves a broad comment. A city of some 450,000 inhabitants just before the conflict in Bosnia-Herzegovina, Sarajevo endured in its largest part a siege by the Serbian forces. It was longer even than the siege of Leningrad during World War II, with comparable tragic consequences. It lasted exactly between 6 April 1992 and 12 October 1995.²⁴

That siege would never have happened had the UN Security Council not adopted its resolution 713 of 25 September 1991, imposing a general and complete arms embargo on the entire Yugoslavia, under Chapter VII of the UN Charter.²⁵ The Serbian part having unlawfully appropriated most of the arms of the former “Yugoslav People’s Army”, other new States, especially Bosnia-Herzegovina, remained without the means to resist the aggression.

During that long period of the siege, the civilians of that unfortunate city were daily exposed to artilleries and snipers shelling from the surrounding mountains, regardless of their civilizational affiliation. About 11,000 inhabitants were killed, among them 2,500 children. A special target of artillery was the City Maternity Hospital, which was soon razed to the ground. Even the funeral services for the victims were fired upon by snipers at city cemeteries, which

²² Ibid., p.14.

²³ Ibid., p.19.

²⁴ Leningrad was encircled by the German Army between August 1941 and January 1944.

²⁵ See the text, *International Legal Materials* 1992, No. 6, pp. 1433-1434.

caused new civilian casualties.

With the majority of Bosnian Moslems, in that besieged part of the city lived about 30,000 Croats, 15,000 Serbs, and several hundred remaining Jews.²⁶ Almost all windows were shattered and the city was cut from the electric power and water supply for the longest period of time. All its inhabitants suffered harsh winters in 1992, 1993 and 1994. In addition, Sarajevo was cut from the rest of the world. The only connection was through a tunnel dug under the airport runway.

The UNPROFOR in Bosnia-Herzegovina was authorized by a series of the UN Security Council resolutions mainly to secure humanitarian relief. It could not use force except in self-defence. Being a peace-keeping mission, it was obliged to strict neutrality and tried to enjoy the confidence of all the conflicting parties. Apart from its duty to observe the situation, it did not even try to prevent or punish war crimes, including those atrocities daily committed against civilians in the besieged Sarajevo.²⁷

Hence, the residents of Sarajevo, regardless of their religion or civilizational affiliation, did not have any reason until August 1995 to waive the flags of the UN, NATO or the United States, as expected by Samuel Huntington.²⁸ If, instead, some of them waived the flags of Saudi Arabia and Turkey, that was an act of despair, that even this author has no moral right to reproach.

I met some Serbs from Sarajevo, my former colleagues, who represented the Government of Bosnia-Herzegovina at international conferences abroad. I remember among them Professor Mihajlo Trifković in Geneva and Brussels.

²⁶ The formerly quite numerous Jewish Community of Sarajevo was mostly annihilated during World War II. Many of these who survived moved to Israel after that War.

²⁷ See a critical review of these UN Security Council resolutions and their actual effects, Malcolm N. Shaw, *International Law*, Fourth Edition, Cambridge University Press 1997, pp.868-872.

²⁸ Only after the massacre committed in Srebrenica in July 1995 and the Serb mortar attack on a Sarajevo market in 28 August, U.S. air-planes destroyed, within two weeks, communication centers, air defence and ammunition dumps of the Army of the Republic of Srpska. Previously, in a joint offensive by Croatian and Bosnian forces, roughly 15 percent of the territory was liberated. The cease-fire agreement reached after that was the first one respected by the Serbian side. Soon after that intervention, the siege of Sarajevo was lifted forever.

During his short stays there the most precious thing for him was to have a bath in his hotel room. I admired him for his courage and perseverance to return to the hell of Sarajevo time and again.

For sure, these Serbs did not recognize their national leaders in Slobodan Milošević, Radovan Karadžić and Ratko Mladić, but, like the rest of us, saw them as the war criminals that they really were.

In fact, the conflicts in Croatia and, especially, Bosnia-Herzegovina, were not the best examples of the clash of civilizations Samuel Huntington had in mind. More than that they looked like assaults by rural population and their leaders against cities, which could otherwise be called “*urbicide*”. This applies, for instance, to the damaging of the dome of the Šibenik renaissance cathedral or the demolition of the Old City of Dubrovnik by the Yugoslav Army, and to the destruction of the old historical bridge in Mostar by the Croatian forces. These conflicts were very much like the *Taiiping* Rebellion in China between 1850 and 1865.

Huntington thus quite arbitrarily imagined the main causes of the clash of civilizations at the present time, and then tried to find evidence in support of his assumptions. In these undertakings he largely neglected, for instance, the repression against the Kurds by the government power of the States they live in, who all belong to the same Islamic civilization. He did not anticipate the present conflicts between the Sunni and Shiite populations in Iraq under foreign occupation. Perhaps he could *a posteriori* construe civilizational differences between these two Islamic religions. However, it is a struggle of a majority population which was formerly oppressed against a previously dominant minority. This has very little to do with civilizational differences, if at all.

There are many other examples like this from the former times. The Slavic Orthodox people in Macedonia, still under the Ottoman rule before the Balkanic Wars of 1912-1913, were enrolled either to the Bulgarian, or Serbian, or Greek Orthodox Churches and their schools according to their individual choice. As it happened, two or three brothers from the same family belonged to different Churches, depending on the prospects of getting a scholarship. However, during the Second Balkanic War in 1913, when the Greek and Serbian Armies occupied that territory, they killed and oppressed not only the Moslem Turks and Albanians, but also members of other Orthodox congregations. That was but another example of the war for territorial conquest and not

a clash of civilizations.

In traditional Orthodox States such as Greece, Orthodox Churches other than the national one are simply banned.²⁹ For this reason the Macedonian Slavic population in Greece has never enjoyed minority protection, either on the basis of their ethnic origin, or different language, or even religion.³⁰

To sum up, the main shortage of Huntington's theory is that, by announcing the clash of civilizations, we can all fall into the trap set by the Islamic terrorists who desire to oppose peoples against each other, one culture against another, a religion against another religion.³¹ However, the strong opposition in some member States of the European Union to the admission of Turkey as a full member has exactly the same roots. This opposition also comes with a price.

*

There are other interpretations of ethnic conflicts throughout the world, which are not so much based on pretended civilizational differences, but which,

²⁹ According to Yugoslav Constitutions of 1921 and 1931, "recognized religions" were only those recognized as such before 1918 in any part of the Kingdom. That included the Serbian Orthodox, Catholic, Islamic and Jewish communities. It was, however, expressly provided that other religions could only be recognized by law. Because the Bulgarian Orthodox Church was treated as schismatic, there were no practical means for its legal recognition.

³⁰ Nicolas C. Alivizatos, *The Constitutional Treatment of Religious Minorities in Greece*, *Mélanges en l'honneur de Nicolas Valticos, Droit et justice*, Paris 1999, pp.629-642, brings some precious data on the actual situation in his State, at which he is very critical. According to Article 3 of the Constitution adopted in 1975, less than a year after the fall of the colonels' dictatorship, "the prevailing religion of Greece is that of the Eastern Orthodox Church of the Christ". Beyond it only two religious minorities are actually officially recognized in Greece: the Moslem minority in Thrace and the sparse Jewish minority. Unlike them, the Catholic Church with a few thousand believers mainly in the Cyclades, and even the thinner Protestant denomination in the area of Athens, are not officially recognized, the same as Jehovah's Witnesses. This also means that there is no possibility to organize the Macedonian Orthodox Church on the Greek soil.

³¹ This was stressed in the inspiring speech by the French President Jacques Chirac at the opening session of the UNESCO conference in Paris on 15 October 2001. Cf. *Le Monde* of 16 October, p.17.

nevertheless, can lead to wrong political decisions with far-reaching harmful consequences.

There are doctrinal attempts to define in abstract terms the “ethno-nationalism” (different from the so-called “civic nationalism”), as the main cause of conflicts of this kind.³² Such, otherwise convincing, conclusions can be followed by the one that in an actual conflict, for instance in the former Yugoslavia, there was no “blameless side”. Consequently, the responsibility for all the calamities which affected the civilian population, is shared by all the conflicting parties.

Sometimes, this is simply not true. The Polish State between the two World Wars was not a model of western democracy. Anti-semitism, together with xenophobia especially against Polish Ukrainians, was widespread. Hence, ethno-nationalism existed in Poland like that in Germany. However, it was not Poland that committed the aggression against the Nazi Germany on 1 September 1939, but the opposite occurred. The Nazi regime erected all its extermination camps on the soil of the occupied Poland. And although we now all hate the Communist and National-socialist totalitarianism equally, it was Germany that invaded the Soviet Union on 22 June 1941, grossly violating the Molotov-Ribbentrop Pact of 23 August 1939.

There were still Germans, mostly in emigration, who cannot be blamed for all these misdeeds committed allegedly in the name of their Nation. Willy Brandt had no personal responsibility to kneel at the monument of the Warsaw ghetto. However, if ever a monument in honour of civilian victims in the besieged Sarajevo is erected, the then UN Secretary-General Boutros Boutros-Ghali will have every reason to do that.

Still, the gesture of the German Chancellor was highly appreciated throughout the world. He symbolized another Germany, profoundly different from the time of Adolf Hitler, Heinrich Himmler or Joseph Goebbels. It should, however, never be forgotten that the final outcome of the Nazi aggressive wars was the ethnic cleansing of 10 to 12 millions of ethnic Germans from the Baltic countries in Northern Europe to Yugoslavia and Romania in

³² See an excellent analysis to this end by Asbjorn Eide, *Human Rights an Transition: Ethno-nationalism and the Falling Dominoes in Former Yugoslavia*, in: Milica Develić Đilas, Vladimir Đerić (eds.), *The International and the National, Essays in Honour of Vojin Dimitrijević*, Belgrade 2003, pp.93-110.

the South, where they peacefully lived before Hitler.

In some other legal analyses facts are compared carelessly, without entering into their deep causes. In this respect I can quote as an example the conclusion by my friend Rein Müllerson, with whom I otherwise agree. "The experience of such culturally different countries as Nazi Germany, democratic Kampuchea, Bosnia, and Rwanda show that there is no specific genocidal culture in the world, or to put it another way, that acts of genocide can be committed by people whose culture, traditions, or religion differ widely".³³ It can, nevertheless, be reasonably doubted that the acts of genocide were committed by "peoples", perhaps in the sense of Thomas Hobbes.

Let us analyze a few of the examples quoted above. When Müllerson mentioned Nazi Germany, this implies that he has in mind the Germany of Adolf Hitler and not that of Konrad Adenauer or Angela Merkel.

The example of "democratic" Kampuchea needs a larger explanation. During the harsh years of the Vietnam War, Cambodia, under the rule of its Prince film-maker Norodom Sihanouk, looked like a paradise. However, that weak regime was unable to prevent the abuses of its national territory for the transportation of arms, ammunition and warriors of Vietcong between North and South Vietnam.

By 1970 the United States was already waging a lost war in South Vietnam, probably the same as now in Iraq. Those in the U.S. Government who encouraged the *coup d'Etat* and the destitution of Norodom Sihanouk in Cambodia on 18 March 1970, bear responsibility for all the calamities which have affected that previously prosperous and happy State, until the present date. The anti-communist regime of General Lon Nol imposed from abroad was soon replaced by the Khmer Rouge. There is, therefore, no legal ground sometimes to bring to criminal justice (in case it actually exists) persons who provoked bloody internal armed conflicts like that. The genocide by the Khmer Rouge was mainly directed against the urban population of Cambodia, similar to the later events in the former Yugoslavia.

Bosnia is not at all a good example for the genocide committed "by peo-

³³ Cf., Rein Müllerson, *On Cultural Differences, Levels of Societal Development and Universal Human Rights, Theory of International Law at the Threshold of the 21st Century*, Essays in honour of Krzysztof Skubiszewski, The Hague 1996, pp.927-953, at p.934.

ple". The only crime that can be qualified in legal terms as genocide was the one that occurred in Srebrenica in July 1995. Even that massacre cannot be imputed to the Serbian people as a whole. Other atrocities committed in Croatia, Bosnia-Herzegovina and Kosovo were crimes against humanity or war crimes, bearing personal criminal responsibility of the perpetrators and their superiors on various sides. However, for the dynamics of the demise of the Yugoslav Federation and the responsibility of Governments for large-scale and systematic crimes that ensued, Bosnia was merely a by-product of that entire process. The central issue was the situation in Kosovo.³⁴

Finally, the genocide with probably the greatest number of victims after World War II occurred in Rwanda, between 6 April and 17 July 1994. In that short period of time, between half a million and 800 thousand Tutsi and moderate Hutu were brutally killed, including women and children.

The population of that East-African State of some 7.8 million is traditionally divided along tribal lines between the majority agriculturalist Hutu and the minority cow-breeders Tutsi. The former German and Belgian colonizers found support in Tutsi as allegedly being the local "aristocracy". After the country acquired its independence in 1962, the majority Hutu demanded a greater voice in the State's affairs, but Tutsi were always over-represented in the Army and Government.

The massacre started after the airplane crash over Kigali under still mysterious circumstances, in which both presidents of Rwanda and Burundi perished. In the wake of the loss of their national leadership the Hutu erected barricades throughout the country and the massacre started. According to some, that genocide was spontaneous. But some see in it a carefully premeditated and organized action. In any event, the operation *Turquoise* by 2,500 French soldiers stopped the crimes and a new coalition Government was established.³⁵ It seems, however, that now all the power is in the hands of Tutsi again.

³⁴ There is no room to explain here all these events and their deep causes in detail. But a careful reader should not overlook the excellent book by Noel Malcolm, *Kosovo: A Short History*, London 1998, 492 pages. This author has previously also published: *Bosnia, A Short History*, London 1994, 360 pages.

³⁵ These data were collected from: Jean-Paul Bazelaire et Thierry Cretin, *La justice pénale internationale, son évolution et son avenir De Nuremberg à La Haye*, Paris 2000, pp.57-61.

At first glance this act of genocide looks for the most part like the one committed by a “people” against another “people”. Nevertheless, its victims, who were Tutsi and moderate Hutu, cannot have a shared responsibility with their executioners. Its deep cause can be found in unequal chances between members of the two tribes who otherwise largely share the same Roman-Catholic religion and French language. This situation reminds of that in Kosovo.

*

Many massacres such as the above-mentioned ones could have been prevented if the UN Security Council, or some foreign powers, had not made wrong and inadequate decisions, and had the UN troops acted properly on the ground. Such wrong decisions, with all their tragic consequences, are most often based on the approach that there was “no blameless side” in an actual conflict.

However, the main cause of most of these inter-ethnic conflicts lies in somebody’s wish to conquer a foreign territory, or to commit ethnic cleansing, acts of genocide, or “humanitarian resettlement”, or in the best case a forceful assimilation of alien population, in one’s own territory. The crimes in progress very soon reveal the truth that the well-being of one’s own population is not of the primary concern. The territorial conquest becomes the purpose in itself, regardless of all its consequences.

Attempts to explain these conflicts in terms of the clash of civilizations can only encourage such bloody confrontations in the future and produce new human suffering on all sides, without offering viable solutions to their prevention.

This theory is in contradiction with itself. If its author really believes in all the values of the Western Civilization as he described them, a Western democratic Government cannot expel overnight all its citizens belonging to Hindu, Buddhist, Islamic, or even Orthodox civilizations. That is, of course, not in the mind of Samuel Huntington, but there are some extremist groups in these States which uphold such a policy, either directly or by implication. The same as at the time of the National-socialist regime in Germany, measures of this kind are not “recognized by civilized nations” and they themselves constitute international crimes.

V. Human Rights and Multiculturalism

Some legal authors and diplomats from the Third World object to the set of human rights as codified, for instance, in the 1948 Universal Declaration, as being a product of “Judeo-Christian civilization”, reflecting an individualist ethos which is not in conformity with “communitarian” traditions of other societies.³⁶ It seems that there are some misunderstandings here, especially in respect of the first objection referred to above.

Are human rights really a product of Christian or even Judeo-Christian tradition as such? There are writers from the West who are trying to impose this prejudice on others. By doing so they prove in their arrogance the superficial knowledge of some facts from the past.

Early Christian teachings can in modern terms be characterized as “anarchist”. There was, for instance, to the Christians from the 2nd century A.D. a serious problem as to whether military profession was compatible with their faith. However, when under the Roman Emperor Constantine the Great, Christianity became the State religion, and soon after that the exclusive religion in the Empire, the Church doctrine had no choice but to accommodate to this new reality. The teachings about just wars were revived and further developed.³⁷

The Eastern Church in Constantinople submitted itself to the secular power, which became part of its tradition. The developments in Western Europe were different. Popes heading the Catholic Church as an organization inspired or even waged numerous wars against “infidels” of various kinds. Among them were the Crusades to recover the Holy Land. Later on, in Catholic countries there ensued prosecutions of Protestants by the Inquisition, which was very remote from the original Christian teaching. But it was not very much different in the protestant countries of the same period. In all these

³⁶ See in this respect the larger explanation, Müllerson, above n. 33, pp.927-953; C.N. Kakouris, *L’universalité des droits de l’homme, le droit d’être différent. Quelques observations*, Hacia un nuevo orden internacional y Europeo, Estudios en homenaje al Profesor Manuel Diez de Velasco, Madrid 1993, pp.415-425.

³⁷ Nevertheless, it must be admitted that if things had happened otherwise, the Barbarians could have extinguished all Christians in the territories they captured and devastated.

events, what was at stake was nothing else but battles for the control of territories.

In addition, Christian churches promised equality of all their believers only in the other world. On Earth itself they always found excuses for slavery and slave trade, or for conquests of native territories. They were the principal support of the Feudal order which was itself a negation of equality of human beings. Only some courageous theologians like Bartolomé de Las Casas or Suarez condemned or tried to moderate the greatest abuses in their time. But neither of them taught equality of all human creatures on Earth, regardless of their religious affiliations.

The roots of human rights are often found in the teachings on natural law. But some scholars even now confuse natural law with the writings of Hugo Grotius, or of his predecessors and followers. Nevertheless, a careful reader of his magisterial work *De jure belli ac pacis* cannot find in it a consolidated list of immutable and everlasting rules of natural law, including human rights in the modern sense.³⁸

What Grotius tried to do in the time of the Thirty Year War was to establish a set of legal rules based on the “dictates of right reason” and on rational and social nature of man, as he perceived them. Although his rules were mostly of speculative character and highly imprecise, he still believed that they would be imposed on secular princes by themselves and would stop the actual war and prevent the future ones. But his attempt, like many other of this kind, failed.³⁹

*

Human rights in the modern sense, based on natural law, began to develop at

³⁸ See in this respect, Peter Pavel Remec, *The Position of Individual in International Law according to Grotius and Vattel*, The Hague 1960.

³⁹ It would be too much to pretend that his famous book was a direct source of the law of nations of that time and that it was as such observed by absolutist monarchs and their ministers. Nevertheless, it was consulted whenever a practical problem appeared. By that some of his allegations were gradually followed in the practice of States, and thus ultimately became rules of positive international law. Some others became obsolete.

the time which roughly corresponds with the larger period of the French Revolution, at the end of the 18th century. These ideas were secular and remote from the doctrine of any Church of that time. However, it must be admitted at the same time that all religions contain premises upon which human rights ideas and practices can be built.⁴⁰

That short period of time has left to the mankind some legal texts in written form of lasting importance. It was in fact the period of fecund law creating between two epochs: the time of a subjective and free determination of rules of natural law by scholars like Grotius, and the time which followed, that of voluntarist creation of positive law by all-mighty sovereign States of the West. It was, in fact, an era of the sublimation of natural law itself, and of the genius transformation of its precepts into written rules apt to be transformed into positive law.

All these legal acts of lasting importance confirm the equality and inalienable rights of every human person.⁴¹

In the domain of human rights the American Declaration of Independence of 1776 declared *inter alia*:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Much more exhaustive was, however, the Declaration of the Rights of Man and of the Citizen, which the French National Assembly approved on 26 August 1789, less than a month after storming the Bastille in Paris. It remained a masterpiece of concision, clearness and precision, entirely based on reason and on rational and social nature of man. Here will only be quoted two articles from it:

Article 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

⁴⁰ Cf., Müllerson, above n. 33, p.931.

⁴¹ Some internal legal acts reflected the rules of this kind as well. The matter was of the US Constitution of 1789. After Justinian's *Corpus Juris Civilis*, the French and Austrian Civil Codes in their original form were based on natural legal precepts.

...

Article 6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representatives, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

The historical and lasting importance of this Declaration is found in several aspects. First, it does not only proclaim a list of natural rights of individuals. Its legal and trans-temporal value rests upon an ingeniously conceived balance between the declaration of rights and duties.⁴² Exactly the duties formulated in such a way should have a superior value even to the constitutional acts of States. Neither the democratic majority expressed by a referendum, nor a majority of representatives in a legislative body should modify, abrogate, suspend or restrain these duties without running dangerous risks. This Declaration is therefore, in fact, a declaration of duties, i.e. obligations, in regard to man and the citizen. That is probably its primary advantage.

The French declaration announces furthermore some general principles of criminal law of lasting importance. Besides the basic principle from its Article 6 that law must be the same for all whether it protects or punishes, they are: the principle *nullum crimen sine lege* including the non-retroactivity of criminal laws, and the principle that limits to human liberties can only be determined by law. After this Declaration, important legal rules were aggregated in national legislations, concerning the personal criminal responsibility of an individual, the definitions of different forms of perpetration and participation in a crime, the mental (psychological) element of a crime (*mens rea*), grounds for excluding criminal responsibility, mistakes of fact and mistakes of law, etc.

Whenever a criminal judge grossly violates these general principles of criminal law, he commits a mockery of justice. This applies to national as well as

⁴² We find in this text duties of individuals in regard to their alike (Article 4). Also provided are duties of political associations and other bodies in regard of individuals (Articles 2 and 3). The most important are, however, statements of the obligations of State legislative and other bodies in favor of the freedoms and rights of individuals (Articles 5, 7, 8, etc).

to international judges.

The 1948 Universal Declaration of Human Rights was originally also an act based on natural law. A few States of that time if any, had all these rights guaranteed in their national legislation. Its drafters were strongly inspired by the 1789 French Declaration, but some human rights were added and couched in more precise terms. Its net advantage was the proclamation of a set of economic, social and cultural rights.

There is, however, the problem of relationship of these statements of human rights based on reason and natural and social nature of all human beings, and of the positive law of a given epoch. It is, for instance, not difficult to prove that the basic precept according to which all men are born free and equal in dignity and rights, is a pure fiction. The entire history of the mankind contradicts it.

However, by its revolutionary slogans “*Liberté, Egalité, Fraternité*” and by its Civil Code of 1803, France introduced the equality of all its citizens in all the countries it occupied. It was the first time that Jews became equal in rights with all other citizens. Since then, they contributed enormously to the economic and cultural well-being of the States in which they lived. Nonetheless, in the modern State of Israel there is still a minority of its citizens wishing to base its constitutional order on the same legal principles.⁴³

On the other hand, the guarantees of human rights from the French Declaration were grossly violated in that country, especially during the Jacobin Reign of Terror in 1793 and 1794. In 1802, Napoleon reintroduced slavery in French overseas territories, only to be definitely abolished there in 1848. France itself did not respect all these rights of the local population in its colonies, for

⁴³ A special problem is the respect of human rights and humanitarian law in the Israeli occupied territories of Palestine. In its 2004 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the I.C.J. *inter alia* stressed that: “All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such a construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.” I.C.J. Reports 2004, para.163, (3), D.

instance in Algeria following 1830. Its colonial rule knew grave abuses of human rights in all respects. The award of its citizenship to all inhabitants of these territories came after World War II, but then it was too late to keep these possessions as part of the metropolitan territory.

The situation was more or less the same in other overseas territories of European powers. Nevertheless, after the decolonization came to its end and a mass of immigrants from the former colonies came to Europe, these States could not deny all human rights to persons who became their citizens.

In fact, the assimilation of the above rules of natural law into national legislation was a prolonged and painstaking process in the 19th century, initially confined to metropolitan territories only.

The question is what the real scope of validity of rules of natural law is. They are as such deprived of temporal sanction by States if not incorporated into their legislation. However, one of the fundamental natural rights of all men and of all human groups is resistance to oppression.⁴⁴ The precepts of natural law, whether embodied in positive law or not, should be observed simply in order to avoid greater evil. The ill-fated consequences of their disrespect cannot be avoided in the long run, regardless of the initial intention or wishes of the violator. Their flagrant violations always prove counter-productive for the violator himself, but they also affect a great number of innocent persons. On that relies their “sanction” and, so to say, their potential if not existing “legal force”.

It must, nevertheless, be stressed that all the concepts of natural law, like all other doctrinal postulates, must ultimately be proved or rejected by what actually becomes positive law in a given time. Notwithstanding the ingenuity of authors of legal concepts, they have no great value if not embodied in positive law, first of all in the rules of positive general international law. The measure of their “positivity” is, therefore, the test of their trustworthiness. It is on that the

⁴⁴ In this light the preamble to the 1948 Universal Declaration states with good reason that: “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”, meaning in this context the rule of positive law. And the preamble to the 1789 French Declaration did in the same spirit proclaim that: “the ignorance, neglect or contempt of the rights of man are sole cause of public calamities and of corruption of governments ...” Its Article 2 stated, in addition, the resistance to

relationship between precepts of natural law and positive municipal or international legal rules relies.

It must finally be admitted that the naturalist concept of human rights is secular and distanced from religious teachings although, as stressed, all religions contain premises upon which human rights ideas and practices can be built. It applies to all human beings on Earth regardless of their civilizational affiliations. It should be above these differences.

*

Nevertheless, some objections are now being raised against the universality of human rights if the obvious cultural diversity of the world is not seriously taken into account. The very concept of human rights is frequently taken as a product of the Western Civilization, and their promotion is seen as a policy of neo-colonialism in the Third World. These political objections cannot be neglected altogether.

These objections are likely to be a by-product of some doctrinal misunderstandings. Many advocates of human rights easily take as customary rules of general international law already in force, anything that is useful for the accomplishment of their noble aims. To them the 1948 Universal Declaration is not a document initially based on natural law, but a set of peremptory norms of general international law (*jus cogens*), having an *erga omnes* character as a whole. According to a hypothesis, all the rights declared in it must be applied and respected: (a) always, (b) everywhere, (c) in respect of all human beings, and (d) completely.⁴⁵ And if the content of these provisions is interpreted in the same way as for instance by the European Court of Human Rights, controversies about their universal character cannot be avoided.

It must be carefully distinguished, for the sake of legal security, between the precepts of natural law which can still be on the level of norms *de lege ferenda*, and the genuine rules of positive international law. Among these latter must further be distinguished between some rules which have already transformed into the norms of *jus cogens* as being of *erga omnes* character, and the conventional

oppression as being one of the four natural and imprescriptible rights of man.

⁴⁵ Cf., Kakouris, above n. 36, p.417.

obligations of States.

After the Universal Declaration was adopted by the UN General Assembly on 10 December 1948, a number of important multilateral conventions on human rights have entered into force. Among them the most representative is the 1966 International Covenant on Civil and Political Rights. States parties to these conventions undertook to apply them as treaty obligations, including the enforcement measures provided in them. Nevertheless, some of their provisions allow for a choice of measures, or even considerable restrictions in their implementation, in order to ensure such objectives as “morality”, “public order”, “national security”, etc. Hence, cultural diversities of their States parties can be taken into account within the normal implementation of legal obligations they assumed.

Much more important is the question of whether the “hard core” of human rights which actually constitutes *jus cogens*, and as such has an *erga omnes* character, can affect the cultural peculiarities of States belonging to different traditions.

To this group belong first of all some elementary rights of human beings whose gross and systematic violations constitute *international crimes*.⁴⁶ These violations relate to life, physical integrity (including torture), freedom of movement of human beings, etc.

In present international law international crimes include: (a) slavery and practices similar to slavery; (b) the most heinous of all, the crime of genocide; (c) crimes against humanity that can be committed not only in international and internal armed conflicts, but also in time of peace; and (d) a large spectrum of

⁴⁶ Their definition was proposed by Roberto Ago in the International Law Commission in draft article 19(2): “An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as crime by that community as a whole constitutes an international crime.” In its final text of Draft Articles on State Responsibility of 2001, the Commission deleted all the provisions concerning international crimes. It replaced this concept with the one of “serious breaches by a State of an obligation arising under a peremptory norm of general international law”. The new article 40(2) states: “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” These changes are only formal because in the new more confusing text they also apply to international crimes.

war crimes that can be committed in international and non-international armed conflicts. The latter three are conferred to the competence of the International Criminal Court in The Hague (the ICC).⁴⁷

It seems likely that international terrorism will soon become another international crime. It is, however, necessary that a general convention defines this crime in all its aspects, or perhaps a better solution is that the Rome Statute of the ICC be amended with its definition, as well as with that of the crime of aggression.

Civilizational differences cannot be an excuse for the commission of the above-mentioned crimes by a State, or against another State and its population, or against another ethnic or other group. In all the situations the same international crimes are involved. They all generate personal criminal responsibility of their perpetrators and superiors, as well as the international responsibility of the wrong-doing State which is currently not of the criminal character.

Large-scale and systematic commission of international crimes most often constitutes a "threat to the peace". As such it calls for enforcement action against the wrong-doing Government, or a faction in an internal conflict. The international community should not close its eyes to the fact that there exist some criminal governments, like the one that existed in Germany between 1933 and 1945. Situations like this, as happening now in the Sudanese province of Darfour, call for effective measures in order to stop the crimes.⁴⁸

Furthermore, there is a norm of *jus cogens* prohibiting the measures of discrimination of human beings, even if they do not consist of international crimes, either in the execution of municipal laws in force or committed in a State through an unlawful practice. There is no doubt that the principle of non-discrimination has become a peremptory norm of general international law.⁴⁹

⁴⁷ Other crimes in general international law are aggression and piracy on the high seas.

⁴⁸ See V.D. Degan, Humanitarian Intervention (NATO action against the Federal Republic of Yugoslavia in 1999), in: L.C. Vohrah *et al.* (eds), *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International 2003, pp.233-259. There are situations discussed in which the Security Council failed in its primary responsibility to maintain international peace and security under Article 24 of the U.N. Charter.

⁴⁹ It has already been declared in the Preamble and in Articles 1(3), 13(1) and 55(c) of

However, some explanation in this respect seems to be necessary. As Article 2(1) of the 1948 Universal Declaration states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The above means that States whose legal tradition is based on the inequality of sexes should make special efforts to eradicate the discriminatory measures against their female population. That also follows from the conventional obligations in this respect which most of these States have assumed. On the other hand, there is no rule of *jus cogens* imposing on States the recognition of the full marital status to homosexual marriages, although discriminatory measures against that population are not lawful.

Other norms of *jus cogens* should primarily be sought in conventional provisions on civil and political rights, allowing no exceptions or attenuation in their observance. To this class belong first of all human rights that cannot be derogated in any circumstances such as war, public danger or other emergency. Different conventions provide somewhat different lists of these non-derogable rights, though they are essentially the same. Article 4 of the 1966 International Covenant on Civil and Political Rights, defines its following provisions as non-derogable: Article 6 (right to life); Article 7 (right to human treatment); Article 8, paragraphs 1 and 2 (freedom from slavery and servitude); Article 11 (freedom from imprisonment for debt); Article 15 (freedom from *ex post facto* laws); Article 16 (right to juridical personality); and Article 18 (freedom of thought, conscience and religion).⁵⁰

To this list certain other fundamental rights of individuals should be

the UN Charter. It has been subsequently reinforced in Articles 1 and 2 of the 1948 Universal Declaration of Human Rights, and virtually in all the human rights conventions which followed.

⁵⁰ Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, is in that respect more restrictive, providing as non-derogable the following rights: right to life, right to human treatment, freedom from slavery or servitude, and freedom from *ex post facto* laws. The most extensive is, however, Article 27 of the American Convention of 1969. In addition to all the foregoing, it provides as non-derogable – right of the family, right to name, rights of the child, right to nationality, right to participate in government, as well as juridical guarantees essential to the protection of these rights.

added that perhaps may be derogated in public emergency for a short period of time only. Nevertheless, their violation justifies strong measures of intervention by the international community if committed for a longer period of time and on a large-scale and systematic basis. According to the text of the aforesaid 1966 International Covenant, these are the rights as provided in its Article 9 (right to personal liberty); in Article 10 (right to human treatment of imprisoned persons); and in Article 14 (right to a fair trial).

Even if the customary process has not already been accomplished in respect of all the above-mentioned rights, it seems most likely that all of them will in the foreseeable future transform into peremptory norms of general customary international law.

Hence, distribution of pornography does not belong to this group of human rights as an alleged manifestation of the freedom to expression. There are other issues such as death penalty, euthanasia, abortion, etc, but on neither of them there are as yet norms of *jus cogens* allowing or prohibiting such practices.

It must be concluded that cultural differences between States do not prove a serious obstacle in carrying out their obligations in the domain of human rights which now constitute *jus cogens*. Perhaps the most difficult to ensure is the perfect equality of rights of women in some States.

Regional organizations, such as the European Union, are entitled to claim from new States candidates to their membership a much higher degree of respect to individual freedom, political liberty and the rule of law, than what now constitutes *jus cogens* in this domain. Within the Council of Europe the legal protection of minorities is now higher than in any other part of the world.

What Western States are not entitled to do is to impose their democratic institutions on other States by force, or by trade restrictions, blockade or embargo. All these measures constitute unlawful intervention in internal affairs of the affected States.⁵¹ Ultimately, they all prove to be counter-productive.

⁵¹ Hence, the statement by the Hague Court in Nicaragua case of 1986 is still valid that: "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State." I.C.J. Reports 1986, p.133, para.263.

States seeking to attain economic progress in the present global economy need more and more highly educated population and more complex division of labour, which tend to be supportive of democratic political institutions.⁵² Such a progress within these societies will encourage higher standards of human rights. That will bring these States closer to the more successful ones.

VI. Fundamental Natural Rights and Duties of Ethnic Groups within a State

Only in ancient history were there isolated States like Imperial China, or Christian Europe, that belonged to one civilization in Huntington's terms. Massive migrations of populations cannot be avoided in modern times, which in most States like the U.K. and France create a mixture of various groups. Civilizational differences of the population constitute a normal situation, and if not grossly abused, they as such should not be the cause of conflicts.

The starting premise here is that just as every individual is entitled to some natural, unalienable and sacred rights, every independent State, according to the theory of fundamental rights and duties, also has some imprescriptible rights by the very fact of its existence,⁵³ and on the very same basis it is possible to define a number of natural and fundamental rights of all ethnic and religious groups living mixed in a territory.

Formulated on the basis of natural law, there follows a number of fundamental and inalienable rights and duties of all ethnic communities of citizens living together within a State, or in a component State of a federation, or in an administrative sub-division of a State, or even in a commune. Like all the other concepts of natural law it is above the civilizational differences of these groups. But there is again the question of the transformation of their totality into the

⁵² Quoted Francis Fukuyama, according to Müllerson, above n. 33, p.949.

⁵³ According to this teaching every independent State has natural rights to existence, sovereignty, equality, respect and communications. The content of these rights is provided in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UN General Assembly resolution 2625 (XXV) adopted on 24 October 1970).

rules of positive law.⁵⁴

These fundamental rights and duties will be explained here according to a certain hierarchy, in the order of their importance. Their sum relates to all ethnic groups of citizens regardless of their origin, or their share in the overall population. Nevertheless, an ethnic group in this sense is not a very small population of the same origin living dispersed and mixed with other citizens over a vast territory and not communicating with one another. However, that population is still a potential ethnic group and *in statu nascendi*, because it may organize itself in the future.

1. Right to existence

- *All ethnic or religious groups have the equal and inalienable right to exist. No group, on the basis of its alleged historical or other rights, its greatness, importance, or for any other reasons, shall under any circumstances deny this fundamental right to existence to any other groups living mixed with it on the same territory. There shall be no “constitutive nations” and “minorities”, no “dominant” and “second-rate” groups on any other grounds.*
- *Any propaganda threatening the right to existence of any group must be severely punished according to law.*

The deepest cause of most communal conflicts throughout the world lies in the fear of members of various groups for their very survival. For various reasons – whether justified or not – they sometimes feel that their physical existence is becoming threatened by another group with which they live together on the same territory.

This is then the cause of many ensuing misfortunes. The instinct of survival and self-defense conduces the members of a group to threaten the existence of the “hostile” group as a whole. Then social and even family

⁵⁴ This author has already published the list of these rights and duties on several occasions in English, French and Croatian. Here, a slightly abridged text from his article: *Fundamental Rights and Duties of Ethnic Groups within a State – A Naturalist Concept*, *Jugoslovenska revija za međunarodno pravo* 1996 No.1-2, (Belgrade), pp.139-164, is presented. All the contributions in that issue were dedicated to the 70th anniversary of Professor Milan Šahović.

relations between relatives, and former friendships, rapidly deteriorate and the paranoia on a massive scale takes over. Such tensions make it extremely difficult to distinguish between the causes of the actual conflict and their consequences. A potential social conflict can gradually degenerate into an armed struggle in which the right to existence of all individuals becomes threatened, regardless of their origin or affiliation. Just and rational solutions to such conflicts are very difficult to find. It is even more difficult to literally implement them.

In this connection it must be stressed that the relations between ethnic and other groups do not entirely depend on their mutual sentiments. The existing proportions among the population of these groups on a territory cannot be petrified by the will of legislator or otherwise. Like individuals, and even like States, ethnic groups are living bodies which are not eternal or immutable. Due to the natural processes of assimilation, migrations, diseases and varying birthrate, proportions between various ethnic groups on a territory are subject to continuous changes. But the natality is a factor which itself is neither constant nor foreseeable, because it can change unexpectedly.⁵⁵

It is, however, of the utmost importance that the State with its policy and legislation does not deliberately intervene in this process with the aim of changing these proportions. Above all, it must by no means threaten this fundamental right to existence of any ethnic or religious group of its citizens.

Members of certain groups have a deeply rooted feeling that they constitute the only autochthonous element in the territory which they believe belongs to them alone, and that they alone have the so-called "historical rights" to it. Individuals belonging to other groups are in their eyes nothing but "intruders".

In multiethnic States or territories this is a typical cause of other groups'

⁵⁵ The inner factor which resulted in the destruction of the Yugoslav Federation altogether was the high birthrate of Albanian population in Kosovo, which was the highest in Europe. It was easy to manipulate the national sentiments of the Serbs in Yugoslavia, which see in that province the hearthstone of their Nation, when the Serbs fell below 20% of its total population. To this the demonstrations of Albanian students in Prishtina in March 1981 were added, claiming for Kosovo the status of the seventh Yugoslav Republic. Before that Kosovo was, with Vojvodina, an autonomous province within Serbia, and at the same time an element of the Yugoslav Federation. Since these events Yugoslavia gradually lost its character of a free association of equal republics and provinces and of its equal nations and "nationalities" (of which Albanians and Hungarians were the most numerous).

mistrust and their fear that they may be deprived of their political rights, forcibly assimilated, expelled or even physically exterminated.

The alleged “intruders” in their turn start to fabricate arguments about their own even older title of “historical rights” over the same territory. These arguments soon lose any rationale and themselves become the cause of mutual distrust and conflicts. Each group becomes convinced that its “title” is stronger and older than that of other groups. Finally, the question arises not as of “titles” but of the bare survival of all the inhabitants of such a territory.

“Historical rights” of one population over a territory is a highly relative argument. In itself, it is an obstacle to the co-existence and friendly relations among more groups which have to live together. Even if the ancestors of an ethnic group settled in that territory in ancient times, they must have met some other known or unknown tribes living there before them. Who can really trace one’s lineage only five or six centuries back?

The difference of a few centuries of settlement of several groups should never be a reason for the discrimination of their descendants, or even for the denial of the right to existence of members of one group by another group. Even the most recent immigrants, once they have acquired citizenship and after their children are born as citizens, must have the right to exist in the respective State or region like all the others.

The fundamental right to existence of other groups, including especially that of migrant workers, is sometimes readily denied by political parties, or unstable individuals. These arguments are quite frequently defended as the exercise of the so-called freedoms of association, expression and the press. However, because of their ill-fated and far-reaching harmful consequences, especially in multiethnic States lacking stable democratic institutions, they should not remain “freedoms”. They should be forbidden as criminal acts and heavily penalized.

Intercommunal conflicts of today have become more dangerous for the maintenance of international peace and security than the disputes and contests between States and their military alliances. At any rate, it is much more difficult to terminate an internal conflict and to find a just and lasting solution to it than to reach a peace treaty between belligerent States.

Now the question is how to redress the situation after large-scale ethnic cleansing has already taken place. If it is accepted as a *fait accompli* with regard to a future political settlement and as a justification for altering frontiers between new States, lasting peace will never be restored in such a region.

Therefore, any peace settlement should be based on the right of all refugees and displaced persons of whatever origin to return to their homes in safety and dignity. All contracts or laws on disappropriation or confiscation of their property should be canceled. All owners of the destroyed property should be compensated on an equitable basis as much as possible. All persons accused of international crimes should be brought either to domestic or to international justice.

Peace on any other basis would encourage the aggressor to attempt to gain new territories in the future, which he would then ethnically cleanse again. On the other hand, under these circumstances nobody could deny the victims of the aggression the right to re-conquer their lost territories. The expected consequence would then be the same as the fate of the German population in Eastern Europe after the fall of the Nazi Germany.

*

The fundamental right to existence of all ethnic and confessional groups is not yet firmly established in all its aspects in general international law as such.

The broadest basis for the responsibility of intellectual criminals, who did not personally commit crimes or ordered their subordinates to do so, is found in Article III of the 1948 Genocide Convention and in the same text in Article 4(3) and Article 2(3) of the Statutes of the international criminal tribunals for the former Yugoslavia and Rwanda.⁵⁶ The Rome Statute of 1998 does not have such a provision.⁵⁷ Nevertheless, direct and public incitement of others to commit genocide constitutes a separate crime in Article 25(3) sub-paragraph (e).

⁵⁶ According to this common provision, in addition to genocide itself, the following acts shall be punishable: conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide.

⁵⁷ Acts of perpetration of or participation in all the crimes within the jurisdiction of the ICC are regulated by its Article 25(3).

On that basis, any person who has in writing or speech, directly and publicly incited the committal of genocide against members of one or more ethnic groups can be accused and punished.

This basis of international criminal responsibility has proved to be too narrow. On the one hand, any propaganda threatening the right of existence of any settled group on a territory should be punishable as an international crime, even if it does not consist of a direct and public incitement to commit genocide, or of a complicity in genocide in the narrowest sense of this term.

On the other hand, provisions in other general and in regional conventions on human rights do not precisely prohibit forcible expatriation of individuals from their country on the basis of domestic laws or in violation of them.⁵⁸ And they neither prevent nor provide punishment for forcible measures of assimilation of ethnic groups by a State, which can be very refined and perfidious.

*

It seems important that the fundamental right to existence of all groups should as such be endorsed in all the international instruments on human rights, the same as it is now with the right of non-discrimination. It is only under these clear and unequivocal terms that it is capable of transforming into a new peremptory norm of general international law.

For achieving lasting peaceful co-existence and amicable co-operation of all peoples on a territory, more important than formal legal rules seems to be maintaining their mutual confidence in each other. This means that no group should feel menaced in its existence, its equality and its respect by other groups.

2. Right to equality

- *All citizens of whatever ethnic or other origin are free and equal in rights. On the*

⁵⁸ However, Article 7 of the Rome Statute, among the crimes against humanity prescribes: (d) deportation or forcible transfer of population; (h) persecution against any identifiable group or collectivity on political, racial and similar grounds; (i) enforced disappearance of persons; and (j) the crime of apartheid. It is to hope that States will embody these crimes in their national legislation.

same ground all ethnic groups of citizens and all confessional congregations are free and equal before the law.

- *All individuals shall be equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talent.*

The right to equality is displayed in the legal principle of non-discrimination but is not tantamount to it. Its full respect in all its aspects should lead to conscious renunciation of “historical” or similar exclusive rights of members of one group over a territory which it inhabits with other groups. With even a better reason, it should result in the refutation of the division between “constitutive nations” and “minorities” in respect of their rights which has no basis in the positive international law. This seems to be a distant objective today, which in this intolerant world sounds rather like a dream.

Paradoxically, in an atmosphere of genuine equality, in which members of no group feel discriminated in any respect, the processes of spontaneous and natural assimilation of diverse populations are the speediest and the most efficient. And *vice versa*, nothing helps the consolidation and homogeneity of an ethnic or confessional group so much as its deliberate discrimination and oppression either by a State’s official policy, or by the hostile attitude against it on the part of the rest of the population.

Although the principle of non-discrimination is not tantamount to the principle of perfect equality of all groups, it is the most essential part of it. As already said, since the UN Charter of 1945 the non-discrimination of individuals has transformed into a *jus cogens*, binding all States and all other international persons without exception.

Most of all, persons belonging to one group must not be restricted in or deprived of their fundamental civil, political and other rights, in order to ensure “adequate advancement” of members of a numerically smaller group with a lower birthrate. If such measures against a group were undertaken “for the purpose of establishing and maintaining domination” by one group over another, then it is a case of the international crime of *apartheid*.⁵⁹

⁵⁹ Cf., Article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

All temporary measures in the period of public emergency derogating certain civil, political or other rights in an ethnically mixed region must under no circumstances involve discrimination of individuals, nor of groups.⁶⁰

The prerequisite to strict implementation of the fundamental right to equality is a firm legal order, based on the rule of law and with functioning independent judiciary.

It is, in addition, highly desirable that particularly States with mixed population adhere to the human rights conventions and protocols according to which individuals and groups within their jurisdiction may take their cases to impartial international bodies.

Although there is nothing to add to the existing legal instruments in respect of non-discrimination of individuals, what remains is to advance the idea of elimination of any distinction in the enjoyment of collective rights of majority and minority groups. This should result in the abandonment of any degrading or humiliating notion of ethnic, national or religious "minorities" in the municipal legislation.

*

However, the right to equality and the right to political representation, which will be discussed further, must be clearly distinguished from public positions and occupations, or civil service. Every citizen must have, without discrimination, an equal opportunity to accede to all public positions. These functions, which require special abilities, talent or competence, should not be distributed according to ethnic, regional, tribal, confessional or other proportions of the population.⁶¹ This is because such practice harms the entire

⁶⁰ Cf., Article 4(1) of the 1966 International Covenant on Civil and Political Rights. Article 4 (1) of the 1993 Declaration on Minority Rights (see below) provides in this respect that: "States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law."

⁶¹ In this respect it is worthy to quote a part of Article 6 of the 1789 French Declaration of the Rights of Man and of the Citizen: "All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their

society within a State and usually opens the door to grave abuses.

This however also includes the guarantee that members of all groups should have equal access to the highest level of education.

3. Right to proportionate sharing in the decision-making

- *Persons belonging to all ethnic or other groups, regardless of their number or percentage in population, are political subjects in their respective State. They shall vote and be eligible to election for representation in all political bodies by secret ballot and without unreasonable limits imposed by law. They shall be entitled to represent and to defend the interests of their constituency.*
- *In ethnically mixed territories, the rights of no group shall be derogated or reduced without the approval of its representatives and without their participation in the decision-making. The fundamental rights of all groups – especially the rights to existence, to equality, to proportionate sharing in decision-making, to the use of national language and to institutions – ought to be guaranteed by the constitution. They shall not be subject to modifications or abrogation by the majority decision in the parliament, in a popular referendum or otherwise.*

In ethnically mixed areas on different levels of self-government or administration, the principle of “one man, one vote” can be a rule but is not sufficient for all the purposes. The structure of power must be organized on such a basis as to prevent the domination and absolute legislative power of the most numerous population and its representatives. Especially, the restriction of existing rights, or even the adoption of discriminatory measures against smaller groups by means of legislative and other acts adopted by the majority vote, must be prevented.

Therefore, on the questions essential to the respect of the fundamental rights of specific groups, the simple majority vote must be excluded. On the other hand, questions to be decided either by consensus or by a qualified majority, must be restricted to the essential rights of particular groups, in order to prevent the obstructions of the decision-making in all other domains. And in order to prevent discrimination, any special rights which were already granted to

one group should be recognized to other groups as well. In this respect a kind of the “most-favored-nation clause” should be practiced.

For such a structure of power in a centralized State or in a Federation or in a component State of a Federation or in a province or commune, there are no universally recognized precepts. Probably no legal principles of universal application can be formulated in this domain. General international law is silent in this respect.

But even if the enactment of precise legal norms seems impossible, the most important goal to be achieved is to assure that no group, even the least numerous, feels marginalized, isolated and deprived of their rights. At the same time there must be assured a certain proportion in the political representation, according to the number of members of each group.

4. Right to free use of national language

- *All linguistic groups have the right to use their language and alphabet in a family, in private communications, in administrative and judicial procedure, as well as for other official purposes. The ignorance of the official language shall in no way impair the enjoyment of anybody's rights.*
- *Languages of proportionally substantial group or groups in a territory shall be in official use on equal footing, even if they do not have the status of the official language at the level of the respective State.*

In the past, there were regrettable instances of the policy of forcible assimilation where even the use of a native language in a family was strongly suppressed and severely punished. These assaults on privacy are not widespread at present, at least not in Europe, but they still have not been abolished everywhere.

Things are much more difficult with the use of minority languages in judicial and administrative procedures, at post-offices and other public agencies. Very few States provide precise regulations in this regard. In the criminal procedure the translation in the language of the accused is generally provided, but not in the case of petitions of individuals claiming their rights in civil or administrative proceedings.

Things are similar with the rules of positive international law in this respect. Article 27 of the 1966 International Covenant on Civil and Political Rights

is not quite precise. It first admits the attitude of some States to deny the very existence of ethnic, religious or linguistic minorities on their soil. In respect of the States in which such minorities are recognized, Article 27 provides that “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy” *inter alia* “to use their own language”. From its context, therefore, it still follows that it is a matter of the freedom of the use of the language with other members of the same group, but not for any official purposes.

Article 2 (1) of the 1993 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter “the 1993 UN Declaration”),⁶² has extended the scope of the rule from Article 27 by the following words:

Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference of any form of discrimination.

In some territorial entities within a State the concentration of linguistic groups is very high. Somewhere they practically constitute all the population. Somewhere they are in net majority, or in substantial proportion. It is then just and fair that their respective language is in the official use for all the purposes, on an equal footing with the official language of the State. This includes bilingual or even multilingual inscriptions of places, streets, public institutions, and issuing public communications and the official gazette, if any. This is also a goal to be reached, because general international law is still silent on this subject.

The discrimination in the use of ethnic languages marginalizes members of linguistic minority groups, and can be harmful to the enjoyment of the rest of their rights.

⁶² The UN General Assembly resolution 47/135 of 3 February 1993. Cf., *International Law Materials* 1993, No.3, pp.913-916.

5. Right to institutions

- *Linguistic groups are entitled to kindergartens and schools in their own language.*
- *All ethnic groups have the right to their cultural institutions, such as theaters, press, and an equitable share in programs of the State-owned radio and television network.*
- *To these ends ethnic groups shall be ensured an equitable share in the sums that may be provided out of public funds under the State, municipal or other budgets for these purposes.*

Essential to the survival of linguistic groups is their enjoyment of the right to kindergartens and elementary education in their own languages. It has been proved that kindergartens in ethnic languages are even more essential to the preservation of ethnic identity than secondary schools or the highest education level. When a child with both its parents employed forgets its language in its infancy, it is then lost to learning it even in the elementary school.

It is understood that in minority schools the teaching of the official language of the State should be obligatory. On the other hand, in ethnically mixed regions it is equally understood that the languages of the largest minorities are taught as obligatory in other schools.

In any case, when they are deprived of education in their own language, linguistic groups have the feeling of being condemned to slow assimilation with the majority population, even if they fully enjoy all the other above-mentioned fundamental rights.

The 1993 UN Declaration is not very explicit in this respect. Paragraphs 3 and 4 of its Article 4 provide the following “obligations” for States:

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother language.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory.

Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

The permissive language of these provisions does not recognize the right of minorities to schools in their languages.

By assuming the legal obligation to ensure the right of all ethnic groups to their institutions, and after carrying it out to the letter, respective States definitely renounce their declared or hidden policy of forcible assimilation of their ethnic minorities. As already said, the abandonment of such an objective is the best means for natural and spontaneous processes of assimilation. It must ultimately depend on the free will of parents whether they will use their language in the family and send their children to a minority kindergarten or school. And it depends again on the free choice of an adult to belong to whatever community he or she wishes to. It is a matter, in fact, of the natural right of a person freely to choose his or her affiliation.

Supporting and financing schools and other institutions of all the ethnic groups from the public funds in the territory in which they live, must constitute part of their fundamental right to institutions. Without their own institutions these groups will always feel unsatisfied.

Even if a deliberate long-term State policy attains its ultimate goal of assimilation and most members of a linguistic group forget their native language – as has happened to the Irish, the Welsh, the Basques, or the Bretons in France – their national sentiment or even aggressiveness will not vanish for that reason.

VII. Conclusion

Perhaps the above is not the complete catalogue of fundamental rights and duties necessary for sound relations of various ethnic and religious groups within a territory, regardless of their cultural affiliations. But attentive respect of these five fundamental rights, undertaken in good faith, would considerably diminish the existing communal tensions and prevent new conflicts everywhere.

On the contrary, systematic and large-scale violation of any of the above rights of one or more ethnic groups, will in the long run ruin every State with ethnically mixed population. As already stressed, due to many historic and recent factors, the majority of States of the present world fall into this category

of multi-ethnic States.

This explanation of the fundamental rights and duties of ethnic groups should however not be interpreted as an *a priori* attitude against the existence of nation States and of national sub-divisions in Federations of States. Such States are a result of historical, cultural and economic emancipation and of the former natural processes of assimilation of several groups into one nation. The existence of these States cannot, therefore, be contested. It is even more dangerous to contest the actual frontiers and borders between these States and their sub-divisions, especially when they are a result of long historical processes.

In nation States minority groups living together with the homogenous majority population are expected to be loyal to the State and to its institutions, to be patriots, to have a feeling of being part of it, and not to harm its vital interests. Such a loyalty can, however, reasonably only be expected if the majority population respects all the five fundamental rights of minorities mentioned above. These relations, therefore, work both ways, and the minority groups must also respect all these five fundamental rights of the majority group.

The ultimate goal of the mutual relationship based on the above-mentioned rights and duties should be a veritable elimination of the status of the dominant group – which usually constitutes the majority, but can even consist of a numeric minority – and of the status of inferior groups which are reduced in or deprived of their rights.

Finally, we cannot conceal the truth, that after the fratricidal war which consisted in the ethnic cleansing of territories and in large-scale annihilation of individuals only because they belonged to distinct groups, it will be extremely difficult to redress the injustices inflicted and to restore the minimum of tolerance and mutual confidence.

Respect for all the above-mentioned five fundamental rights of all ethnic groups is a far more efficient precept for preventing inter-communal conflicts than redressing all their harmful consequences after they happen. Nevertheless, full respect for these natural and inalienable rights according to the doctrine of natural law seems to be the only rational basis for the consolidation of new States within their recognized frontiers, and for peaceful relations between these States in the future.

Multiculturalism and International Law

Essays in Honour of Edward McWhinney

Edited by

Sienho Yee

Jacques-Yvan Morin

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2009