FOUNDATION OPEN SOCIETY INSTITUTE
REPRESENTATIVE OFFICE MONTENEGRO

Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice

Key note speeches from the international expert roundtable, held in Podgorica, Montenegro, September 22-25, 2005

Podgorica
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Editor's note

International expert roundtable "Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice" was held in Podgorica on September 22-25, 2005. The roundtable was organized by the Foundation Open Society Institute, Representative Office Montenegro[1] and covered the following five issues[2]:

- Self-declaration rights
- Voting rights
- Majorities
- Conditions for organizing of the referendum
- International aspects of recognition of the referendum results

The round table gathered participants[3] from Great Britain, Ireland, Macedonia, Poland, Serbia, Slovenia, Spain, Switzerland, the United States, and Montenegro. Representatives from the OSCE/ODIHR from Warsaw and the OSCE missions in Belgrade and Podgorica, as well as from the Council of Europe, the US Consulate in Podgorica, Embassy of the Czech Republic in Belgrade, the British Office in Podgorica and the Consulate General of Croatia attended the round table as guests.

This publication contains keynote speeches delivered by nine distinguished professors and/or practitioners in international, constitutional and election laws. The Foundation Open Society Institute would like to take this opportunity to express its sincere gratitude to the keynote speakers, as well as to all other participants whose discussions and comments had highly contributed to the professional level and quality of this event.

1 **Foundation Open Society Institute - Representative Office Montenegro (FOSI ROM)***, is a non-governmental and non-profit organization established in March 2002, following the reorganization of the Open Society Institute – Montenegro. Its aim is to provide support to the development of the civil society and reform programs in Montenegro.*

FOSI ROM has continued to implement similar civil and reform oriented programs similar to those conducted by the Yugoslav Open Society Office during the period 1993-1999 and the Open Society Institute Montenegro from 1999 to March 2002.

The Foundation Open Society Institute - Representative Office Montenegro supports the country's efforts to develop in compliance with EU standards and practices, as well as to reach its developmental goals by relying on open society values and principles. The Foundation tackles these issues through the following programs: European Program, Education Reform Program, Law Program, Public administration/Local Government Program, Capacity Development Program, as well as through the Roma and Women Programs.

FOSI ROM is part of the Open Society Institute from Zug, Switzerland, which is a constituent of the Open Society Institute network founded by the philanthropist George Soros.

2 *Agenda of the roundtable is given in Annex I*
3 *List of participants is available in Annex I*

SESSION 1
Self-declaration rights, with regard to international law and practice

Legal Aspects of the Exercise of the Right of Peoples to Self-Determination in the Case of Montenegro

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1. Contents and legal nature of the right of peoples to self-determination

Concrete application of this fundamental, jus-cogens rule of the international law leads to frequent political and legal disputes and doubts. It is caused by the specific and inadequately clarified contents of this right, as well as by a high level of its political dependence in the process of its concrete application. Namely, calling upon this right, or demanding its application, the states disappear and are created, which is undoubtedly the most delicate and the most sensitive political process in modern international relations. The processes of creation and disappearance of states by its nature causes more or less instability in the international community, causes the changes in the existing balance of powers, thus indirectly affecting the interests of other countries and of the whole international community. Therefore, concrete exercise of this right frequently, unfortunately, depends on the interests of other states, great forces in the first place and the international community as a whole, resulting to a greater or lesser extent in their interference in the procedure of direct exercise of this right. It is unambiguously confirmed by the historic and contemporary practice in exercise of this right in all stages of its evolution; anti–imperial; anti-colonial; anti-totalitarian or anti-hegemonistic (anti-communist).

1 The research topics of interest for professor Vucinic are international law, human rights and case law. He published several publications on this subject, like "Straits in the International Law", "International Legal Status and the Protection of the Fundamental Human Rights and Freedoms", "Fundamental Human Rights". As legal specialist, he was onboard the State Commission for delimitation with the Republic of Croatia.

The formulation of the right of peoples to self-determination and its evolution from the political principle into a positive, jus-cogens right of the modern international law, after the First, and in particular after the Second World War, is the result of the wish of the international community for these delicate political processes to be put under some sort of legal control. In the broadest sense of philosophy and political sciences, the right to self-determination is an expression of essential liberal-democratic principle formulated by John Locke that "legitimate are only the authorities based on explicit approval of those whom it governs". This is an essential collective, but also individual right of the majority, i.e. each individual at a certain territory to decide, by free expression of their will, under which form of government they shall live. To be more specific, as is pointed out by Clark Friedrich "freedom to self-determination of nations envisaged by human rights covenants is a modern version of ancient freedom of Ancient Greece; it is the freedom of every individual to live under the government belonging to the same national group as he/she does, and to participate in it". (C.J. Friedrich, Limited Government: A Comparison, New Jersey, 1974, p.106). Thus, in political sense as a collective right, self-determination essentially comes down to the right, or freedom of the majority within a group defined as people and every individual within that group to live under own government and participate in it, to control it and periodically change it. As an individual right, self-determination includes also the freedom of national and politic expression, or identification of each individual with an entity defined as a "nation".

Detailed legal contents of this right is defined in Article 1 of both international covenants on human rights (International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)). In line with these provisions, all peoples have the right to:

- freely determine their political status, their state and legal status; to establish own state or join with other people or peoples and establish a joint complex state, federal on confederal union; this is the so-called external aspect of the right to self-determination;
- freely pursue and develop their economic, social and cultural development, or the so-called internal aspect of the right to self-determination;
- freely dispose of their natural wealth and resources, or the so-called economic aspect of self-determination;
- the states parties to covenants on human rights, including those having responsibility for the administration of Non-Self-Governing and Trust Territories (colonies), shall promote the realization of the right of self-determination, and shall respect that right, in conformity with articles 1 and 55 of the Charter of the United Nations.

With the UN Declaration on Principles of International Law Friendly Relations and Co-operation among States of 24th October 1970 (UN Res.2625, XXV) the contents of this right has been completed by the following:

- Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Final Act of the Conference on Security and Co-operation in Europe (CSCE, today's OSCE – Organisation for Security and Cooperation in Europe), in late 70-ties also endeavoured to define more closely the contents, the nature and manner of exercise of this right. In principle VIII it is emphasised that this right is applied to peoples within sovereign states in Europe, and not to national minorities, to which principle VII on protection of national minorities is applied. Constitutional peoples in multiethnic, complex states (federations like Soviet Union, Socialist Federal Republic of Yugoslavia and Czechoslovakia) are not the minorities and thus enjoy this right. This document removes the last remaining dilemmas regarding the issue of how many times this right may be exercised.

In 70-ties and 80-ties of the last century certain intellectual and ideological circles within the so-called "real socialism" advocated the standpoints that this right is applied only to peoples under the colonial domination and that when once being used it is lost and may not be used again. Such points of view were best proved wrong in post-cold war practice in the application of this right, not only relating to numerous peoples from once "socialist federations". In a certain sense, it is the collective natural right of peoples, meaning that a people always have the right to reconsider own political status in specific historic circumstances and make certain decisions in the given context. Modern Euro-Atlantic integration processes are the best confirmation of this. The creation of a new, highly specific political, economic and legal union at confederal, federal, but also certain unitary grounds is nothing else but another determination, or self-determination of numerous European peoples who have already exercised this right once, regarding their political status in the new historic, political and economic circumstances.

Compared to the concrete manners of exercise of this right, the CSCE Final Act particularly highlights the necessity to protect the international legal order and the legitimate interests of the CESC participating states. Participating countries shall, whenever applying this principle, act at all times "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States". In this context of particular im-

portance is also the final provision of this document which emphasises that participating states to CESC expressed their determination to apply equally and unconditionally all ten principles of the Declaration of principles guiding relations between participating states, taking into account all others when interpreting each one of them (meaning also the principle of refraining from the use of force, peaceful settlement of disputes, territorial integrity and respect for fundamental human rights).

On the other hand, what remained unclear and ambiguous, even rather questionable, were essential elements of the contents of this right, particularly when it comes to their application in practice: right holder has not be precisely defined because the notion of people has not been internationally determined and defined; in different circumstances the term people may imply and include different entities and groups of individuals; what remains legally unspecified is also the duty holder in relation to the right holder; moreover, there are no clear or generally accepted standards of international law regarding the conditions and the criteria for different forms of the exercise of this right in different historic and political circumstances; and finally, the relation of this right with other, also very important rules of modern international law has not been legally defined, with the principle of territorial integrity, for instance, with which the right to self-determination is often in collision.

The exercise of the right to self-determination in practice in all historic and political periods and phases of its application definitely showed that these essential questions are more of a political than legal nature, or to be more precise, the questions to these answers depend more on political estimates and considerations than on precise legal criteria, although it is possible to establish relatively objective legal criteria for the answers to the above mentioned questions of fundamental significance for the direct exercise of this right. Here there is also a subtle and fragile line where legal criteria turn into law, or where prior political issues determine the application of this right, which basically makes it difficult, sometimes fully excludes the objective and impartial exercise of these legal rights. It was also the case with other norms of the international law, particularly in the situations when different political actors wished to achieve or protect different interests and values applying the same rule of the international law.

The notion of people may be defined in at least two ways, each of them having diametrically opposite consequences in case of direct application of this right. According to the so-called territorial and democratic, political concept, people may be defined as a group of all people, individuals regardless of their national, ethnic, religious or any other origin, who permanently dwell – reside at the territory of one state, or within frontiers of some administrative-political territory which is not a state (colony, federal unit, Union member state, administrative province).

According to the so-called ethnic and cultural, national concept, a people is a group of individuals of common or similar ethnic origin, common traditions, culture, language,

religion, racial features, living in one or more states, or clearly defined territories which do not have the status of a state.

It would be ideal if in concrete cases both concepts of the term "people" would coincide, but frequently it is not the case, which leads to harsh disputes, the situation which, in order to avoid the use of force and atrocities, requires the intervention or arbitrage of the international community, i.e. great forces. So far, especially in anti-colonial practice of the UN, the first "territorial, democratic, political" understanding of the term "people" was prevailing practice, and this right was recognised to peoples as groups of individuals within the administrative boundaries of certain territories, together with the principle of "previous administrative frontiers"– uti possidetis juris. It actually means that the administrative frontiers of colonial territories at the time of gaining independence, i.e. the exercise of the right to self-determination, became internationally recognised borders of the newly sovereign states. The essential negative consequence of such a practice stemmed from the fact that many peoples in the "ethnic, cultural and national" sense of the word, i.e. the members of the same tribal, ethnic, linguistic and cultural groups remained divided into several independent states.

As is well known, the international community recommended the application of the same principles in cases of disintegration of Yugoslavia and Soviet Union. On the basis of the recommendations of the Badinter Arbitrage Commission, advisory body to EU, established by the decision of the Conference on Yugoslavia, the right to self-determination was acknowledged to peoples as groups of individuals within the frontiers of the existing federal units, with the abovementioned idea of the preservation of Republic frontiers that, after the recognition, became the borders of newly sovereign states. Since in majority of federal units the majority of population consisted of members of one dominant ethnic, cultural, national group (Slovenians in SR Slovenia at the time, Croats in SR Croatia, Macedonians in SR Macedonia, Moslems and Croats in BiH) in the cases of all peoples except the Serbs there coincided the two concepts of the "people", i.e. the acknowledgement of this right to all the peoples in "ethnic, cultural, national" sense except to Serbs. That led to violent reactions of the Serbian regime at the time that, with the assistance of the Yugoslav People's Army, own police and criminal para-military groups, organised armed rebellions of Serbs in Croatia and BiH, and started the war, i.e. aggression against the newly sovereign states for the violent change of borders and the achievement of own concept of self-determination expressed in the political motto "all Serbs in one state, with all means at any cost".

Duty holder in relation to "people" as the right holder, is not precisely defined either, although in this case, with systematic and targeted interpretation, it is determined more easily than when it regards the right holder. In cases of anti-colonial self-determination the situation is the clearest: the primary and specific duty holer is the colonial power exercising the domination and power over a certain people; secondary and general duty

holder is the international community.

In other cases it is the state, i.e. state authority, or the authority of joint state in cases of multiethnic and multinational states, exercising domination over the given people, or "functions" in such a way to prevent, hinder or forestall free and unhindered development and affirmation of the given people. Additional duty holder here is also the international community which is obliged, through proper institutions and bodies, to state and acknowledge when the conditions have been fulfilled for the exercise of the given self-determination, which in principle depends much more on political than on legal circumstances.

Finally, the given international documents do not contain any precise definitions of the manner and conditions for the exercise of the right in specific cases, which also results in a high degree of legal uncertainty and inequality, i.e. political arbitration of the international community. The exercise of this right in practice mostly implies a referendum or a plebiscite as the most frequent manner of "determining popular will" or "determination of political status", and in some cases, particularly in "anti-colonial determination" there is the decision of the international organisations and their relevant bodies (UN, Security Council, General Assembly). What is of special importance in this context is the fact that the international law does not contain any precise rules and standards, in the form of international agreements, international usages or general principles of the right in foro domestico, on the conditions for the exercise of this right. Thus, there are no legally binding rules regarding the issues like who has the right to vote, what is the required turnout for the plebiscite-referendum to be valid, what majority is needed for the positive decision, how to formulate the question or questions on the ballot paper. The rules regarding these and similar issues have been devised on the case-by-case basis, most frequently by the given local administration of the territory (or liberation movement) in cooperation and coordination with the relevant international organisations, the Society of Peoples and the OUN, primarily.

Referendum practice after the World War I and II shows the tendency for the right to vote – exercise the right to self-determination to be recognised to individuals who had permanent residence or who were essentially linked to the territory whose political status is being decided upon. This category included a certain number of people who were not residing at the given territory at the moment because they had to leave at as refugees, because of expulsion they were exposed to by the state which governed the territory due to their very endeavours towards self-determination (East Timor case). Regarding the majority required for the positive decision, the practice here is not common and ranges from simple majority of those who turned out to some form of qualified majority, most frequently 50 % + 1 of all who cast ballot provided that at least half of the electorate turned out in the referendum.

The exercise of the universal, "natural" right recognised for all peoples in the form of

creation of an independent state, seems to be linked to the fulfilment of the following conditions:

- the existence of the representative government – authority which denies the people their fundamental rights, serves as an instrument for domination and hegemony over the given people, or a non-functioning government thus preventing social, economic and cultural development of the given people;
- already exhausted, or unable to apply any form of the so-called "internal self-determination";
- a certain degree of unity and homogeneity of the given population, i.e. people expressed in the existence of a certain form of qualified majority in favour of independence;
- readiness of the international community, especially the great forces to recognise the independence, i.e. have a new state with international personality.

As was already pointed out, fulfillment the given conditions is more judged by political than by legal criteria, which is unfortunately the consequence of the "real" nature of relations among states and the international politics in general. The use of force in order to exercise this as well as other rights is not allowed and it may be attained only peacefully – the legitimacy of the political goals depends on the legality of methods and means required for their attainment. The only exception to this is the case where by prior use of force the people was prevented from exercising this right, and in this case the use of force is regarded as legitimate self-defence.

2. Legal grounds for the exercise of the right to self-determination in the case of Montenegro

The request of the Republic of Montenegro as a constitutional member state of the State Union of Serbia and Montenegro, i.e. of the citizens of Montenegro for the exercise of the right to self-determination in the form of creating an independent, modern and internationally recognised state is based both on the fundamental principles and norms of the international law and on the rules of the constitutional law, or the Constitutional Charter of Serbia and Montenegro.

In the form of the fundamental principle on which the UN actions are based, the right to self-determination is envisaged by Article 11 and 55 of the UN Charter. In this context the view of self-determination relates to methods for development and enhancement of friendly relations among states aimed at strengthening peace and security and the resolution of economic, social and cultural issues, and general respect for human rights. More specifically the right to self-determination has been envisaged and regulated by the provisions of the article 1 of both International Covenants on Human Rights (ICCPR, ICESCR), and even more concretely by the Declaration on Principles of International Law Friendly Relations and Co-operation among States of 1970 (Declaration of 7

principles). At the regional level it has been envisage by the rules of the so-called "soft law" or the Final Act of CECS (today's OSCE) from late 70-ties, or to be more precise by the Principle VIII of the document. Finally, the most precise and the most specific in relation to Montenegro is this right envisaged by the recommendations of the Badinter Arbitrage Commission (recommendation no. 10), the advisory body to EU made up of presidents of constitutional courts of the oldest EU member states with the aim of formulating legal rules for the case of disintegration of SFRY, so that this process could be subjected to some sort of legal control.

All the abovementioned principles and rules of the international law, both of general (jus cogens) and specific nature, oblige the State Union of Serbia and Montenegro and each member state. They are fully applicable to the current factual and political situation of Montenegro, meaning that they provide international law grounds for the request of Montenegro, i.e. its citizens, for self-determination.

At the constitutional law level, this right is expressly envisaged and regulated by Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro of 2003. Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro, and the decision is taken following a referendum. The law on referendum shall be passed by a member state bearing in mind the internationally recognized democratic standards. (art.60, paragraph 3). A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state (art.60, paragraph 5). Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia. (art.60, paragraph 6).

Linguistic, systemic, targeted and any other interpretation of the Constitutional Charter as a whole and the provisions of article 60 in particular, as well as the whole preparatory works and negotiations while drafting the Constitutional Charter, especially the negotiations of the Belgrade Agreement as the basis for the substantive legal source of the Constitutional Charter, undoubtedly reflect the crystal clear intention of all the signatory parties to recognise to member states the right to self-determination and the manner of its exercise, in the form of an independent, sovereign and internationally recognised state. Thus, this in no way may be the violent and illegal secession or separation, but legally regulated and previously agreed procedure for the exercise of the right to self-determination.

Thus, Montenegro as a collective political entity – a member state of the Sate Union of Serbia and Montenegro, i.e. its citizens, enjoy full and unimpaired right to self-determination, on the basis of the international and constitutional law in its full content capaci-

ty, as envisaged by the given principles and norms of the international law. All three aspects (external, internal, economic) are inter-related and conditioned, which means that the external freedom – an independent and sovereign state is the prerequisite for the internal and economic freedom, i.e. free choice and determination regarding the development of internal legal, political, social and economic system in accordance with the interests of majority of citizens of Montenegro. It means that the sovereign, independent and internationally recognised state – based on the rule of law and respect for human rights, parliamentary democracy, market economy, social justice, with the full capacity and authorities required for the inclusion (again determination) in Euro-Atlantic integration processes, as any other independent state in narrower and wider region; thus, no so-called "micro", "mini" state or similar social and political experiments "in vivo".

The right holder, i.e. people consists of the citizens of Montenegro regardless of their national or ethnic origin, religious or linguistic community, cultural tradition, i.e. all the individuals permanently residing at the territory of Montenegro, who enjoy the suffrage in line with Montenegrin legislation, whose existence is fore and utmost permanently linked to the territory of Montenegro and who thus have the exclusive right to decide on the political status and the destiny of own state. As international documents and practice undoubtedly confirm, self-determination is essentially and dominantly a territorial right, i.e. the decision on the status of a certain territory is made by those who reside there – whether they want at own territory the sovereign authority (government), the authority they constitute themselves with own sovereign, free will or the authority established and exercised by somebody else.

Duty holder is also known and specified: primarily it is the other member state of the State Union, i.e. the Republic of Serbia; secondarily, it is the international community, i.e. other states and relevant international organisations. Regarding the contents of the duty, duty holders are obliged not only to recognise and accept the results of the free and democratic expression of popular will, i.e. the majority of citizens in Montenegro, but also to refrain from any interference in the process of its exercise. This, either by giving support and encouraging the opponents to independence, especially use of force or violence on their part, which particularly relates to Serbia, or by imposing conditions and the so-called "standards" of the practical exercise of this right unknown in so-far international and comparative law practice relating to the international community and its main actors.

The manner of exercise of this right is also specified and known: referendum-plebiscite, upon the expiry of a three-year period from the establishment of the State Union of Serbia and Montenegro, prescribed and applied in accordance with laws adopted by the given member state bearing in mind the internationally recognised democratic standards. Thus, the exercise of the right to self-determination, in particular proscription of concrete conditions is in exclusive competency of the Republic of Montenegro,

with the obligations that these conditions are in accordance with recognised international standards in this context.

3. Main political conditions for the exercise of the right to self-determination in Montenegro

In a wider social and factual sense, the fundamental political requirements for the exercise of this right in Montenegro have long been fulfilled. To be more exact, for a long time now Montenegro is in a political status for which the exercise of the right for self-determination is envisaged, i.e. in a situation when it is necessary for its citizens to decide whether to establish an independent state and take own destiny in own hands. Namely, as of early 90-ties of the last century, the disintegration of former Yugoslavia, Montenegro is in a sort of anarchical natural state, a state "without the state", i.e. in joint state with Serbia which is almost non-functioning, with constant disputes, tensions, conflicts and permanent deficit of legitimacy, and even when it is "functioning" then it is a as rule to the detriment of Montenegro and the essential interests of its citizens. Such a "state" is primarily an institutional, legal and political framework for centuries-old aspirations for Greater Serbia and its elites for full domination and hegemony over Montenegro and its citizens, turning Montenegro into a simple geographical term within the united-unitary Serbian state.

Moreover, the issue of relations between Montenegro and Serbia, both present and future, may not be regarded outside the general context of the disintegration of former joint state, SFRY. In that sense, it may be concluded that the process of disintegration of former Yugoslavia is not completed until the relations between Serbia and Montenegro are not regulated on the basis of the same legal and political principles that was the case with other republics of former Yugoslavia, now sovereign and independent states. The prolongation of the "anarchical natural state" referred to earlier in relations between Serbia and Montenegro causes further instability and permanent tensions, both in their mutual relations and in the narrower and wider region.

The three-year experience in the functioning of the State Union of Serbia and Montenegro clearly shows that, notwithstanding the good will, the existing state and legal framework is objectively unsustainable, inadequate and unacceptable for Montenegro. The practice of relations with Serbia for the past 150 years shows that the relations of equality with Serbia are possible only on the basis of the principle of sovereignty and independence. Huge differences in the size, different priorities and interests in internal and foreign policy and permanent aspiration of proponents of Greater Serbia to use the joint state as a tool for domination, denial and negation of Montenegro and its essential political, economic, cultural and other interests show and prove that the principles of sovereignty and independence are the best model for establishing normal, friendly and fraternal relations between the two close states and close peoples. Let me reiterate once

again that two times in the past century, in 1918 and 1992, the proponents of Greater Serbia with the assistance of some citizens of Montenegro who are avid proponents of Greater Serbian state and its national idea, during the war and post-war circumstances, by the threat and use force, abolished the Montenegrin state and denied the majority of citizens of Montenegro their national, political and cultural rights.

Therefore, the establishment of the independent and sovereign state and its inclusion as such in Euro-Atlantic integrations is an essential factor of peace, security and stability, not only in mutual relations of Serbia and Montenegro, but in the whole region. It is a precondition, with a number of bilateral, inter-state agreements, for regulating in a much better manner than is now the case, in this "joint state", all the matters of importance, primarily relating to economic cooperation and in effect achieve a much greater degree of economic interdependence and integrity, such as the joint market. The independent and sovereign state on the basis of the right to self-determination is ultimately the guarantee for Montenegro and its citizens never again to be the hostages of the politics that caused the greatest wars, crimes and destruction ever since the World War II in Europe, the politics whose actors are being trialled at the International War Crime Tribunal for the former Yugoslavia in the Hague.

The fact that a significant percentage of citizens of Montenegro does not support the idea of independence and does support the joint state "with" (but in essence "under") Serbia, as well as the possibility for their use of force in order to prevent the self-determination and keep Montenegro in the "union" with Serbia by force, is stated as the major argument within the internal and international comunity against the exercise of the right to self-determination and the referendum. As was already highlighted, the right to self-determination was actually envisaged for peaceful and legal resolution of such and similar situations, when one territorial and political unit is divided around such and similar issues and when it is at its "historic crossroads", when the fundamental democratic principles call for establishing the sovereign will of citizens as the basis of any legitimate democratic authority, so that in democratic and fair conditions the majority may make the decision regarding the future of the community. On both occasions in the last century, in 1918 and in 1992, the decision regarding the destiny of Montenegro was adopted in circumstances which were far from democratic and fair ones, in war and post-war context, by applying brutal violence, deceit and corruption. Although the present situation is burdened with these relicts and the ressentiment of the past, although not even now the use of force may be fully excluded, current conditions for the referendum may be characterised as peaceful, fair and regular by all the objective political criteria, so that the decision of the majority made in such circumstances may be regarded as legitimate and legal. Current conditions in Montenegro clearly enable free determination and popular vote regarding the future status of the state.

Threat or use of force by any of the actors, domestic followers of the idea of Greater Ser-

bia, Serbia itself, or both, against the legitimate demand for self-determination of Montenegro, would undoubtedly constitute grounds for legal and legitimate defence in the sense of article 2, paragraph 4 of the UN Charter and in that context it would be legally and politically sanctioned, i.e. would constitute grounds for legal and legitimate self-defence in line with article 51 of the UN Charter. In the given political, military and security circumstances in the narrower and wider region the likelihood of the use of force by any of the actors is greatly reduced and essentially comes down to psychological and political threats and competitions, especially if Serbia refrains from the interference in the process of Montenegro's self-determination.

And last, but not the least, the current State Union of Serbia and Montenegro as such, envisaged by the Belgrade Agreement and constitutionally and legally defined by the Constitutional Charter of the State Union of Serbia and Montenegro, is hardly sustainable and by its nature has to evolve either in two independent and sovereign states or in a united unitary and centralised state. Functioning within Euro-Atlantic integrations, particularly the enforcement and application of the EU decisions calls for a much more coherent and centralised state than is the case with current Union of Serbia and Montenegro.

4. Manner and conditions for the exercise of the right to self-determination in Montenegro

As envisaged by the rules and international practice discussed above, the referendum-plebiscite is the most frequent and the most characteristic manner of the exercise of the right of peoples to self-determination. In the case of Montenegro, referendum is explicitly envisaged by the article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro. Proscription of conditions, administration, publication and adoption of the results of the referendum are in the sole competency of the member state, with the obligation, which is not precise and clear enough, that when passing the law on referendum it should bear in mind the internationally recognised democratic principles. I say this because of the arguments presented above that the international law does not contain obligatory and precise rules of general nature regarding the conditions for referendums that would be applicable to all specific current or future cases of the exercise of the right to self-determination. Thus, there are no general rules of the international contractual and case law, nor the general principle of the right in foro domestico stipulating who has the right to vote in the referendum, what majority is needed for the referendum to be legally valid, what majority is needed for the positive decision on independence. Lacking such general rules, it is necessary to analyse the practice of the referendums on independence in the past, especially the practice following the dissolution of former communist federations, SFRY, USSR, CSSR in the first place, as well as the practice of self-determination of the European states in Euro-Atlantic inte-

grations, especially when joining the EU. It is also necessary to analyse the experiences of comparative law, i.e. current laws of the states from narrower and wider region relating to these matters.

In relation to the question who has the right to vote in the referendum, i.e. who has the right to determination regarding the political status of a certain territorial and political unit, with the exception of Croatian referendum in 1991, where all the "nationals" voted, i.e. all the individuals of Croatian ethnic origin, thus even those who were residing permanently outside the territory of Socialist Republic of Croatia at the time, the international practice undoubtedly shows the tendency, that we may characterise as an "internationally recognised standard" that only the "citizens", i.e. people who permanently reside at the given territory the have the voting right, i.e. the right to self-determination.

In relation to the other two important legal matters, what majority is required for the validity of the referendum (the so-called "referendum census") and what majority is required for the positive decision on independence, the practice of referendums for independence after the World Wars and the so-called "cold war" is uneven and different, but still we may discern the tendency for it to be "50%+1" of the registered voters, i.e. "50%+1" of the voters who actually voted in the referendum. In any case, the prevailing standpoint is that "some form of qualified majority" is required for organising and recognising the results of the referendum on independence.

The practice of the states, in particular EU and Council of Europe members, or the analysis of their laws on referendums regarding the constitutional and state and legal status issues shows the following:

Twelve (12) states do not require any "referendum census" for its validity: Austria, Denmark, Finland, France, Ireland, Hungary, Germany, UK, Spain, Switzerland, Australia, and Canada – Quebec;

Six (6) states require referendum census of "50% +1", i.e. such a turnout out of the total registered number of voters for the referendum to be valid; Italy, Poland, Portugal, Slovakia, Slovenia, Sweden;

Thirteen (13) states require simple majority, "50%+1" of those who actually voted for the positive decision: Austria, Finland, France, Ireland, Italy, Poland, Portugal, Slovakia, UK, Slovenia, Spain, Switzerland, and Canada – Quebec;

Six (6) states require the additional, qualified majority to pass the positive decision; Hungary - 25% of all registered voters; Germany – 25% of all registered voters; Denmark – 40% of all registered voters; Scotland - 40% of all registered voters; Australia and Switzerland require "simple majority of voters and in the majority of federal units".

Current Referendum Law of Montenegro envisages 1) a simple majority (50%+1) of registered voters to cast ballots for the referendum to be valid; 2) the obligation that "50%+1" of those casting ballots to be in favour of the positive decision on independence. The law also envisages that the right to vote in the referendum is given exclusive-

ly to "citizens", i.e. people permanently residing at the territory of Montenegro. Therefore, this law is in accordance with prevailing comparative law practice of the countries in the narrower and wider region and may consitute good grounds for organising popular vote regarding the state status of Montenegro.

In the comments given on this law on 6th July 2001, the OSCE/ODIHR recommended "consideration of some level of weighted or qualified majority in order to safeguard the stability of the Republic and the region. The authorities of Montenegro should consider the merits of a qualified majority requirement, either based on a percentage of the registered voters or of the participating voters, in order to approve a referendum addressing constitutional issues. In the absence of determining international standards on the issue, the widest possible domestic political approval of the referendum regulations and proceedings is desirable before a referendum is called in Montenegro." They also recommend careful consideration given to the referendum question or even two referendum questions and the procedures to be followed in these cases.

In no way do they recommend for the federal citizens, born in Montenegro but living permanently in Serbia, to be eligible to vote in Montenegro on the referendum regarding the state status of Montenegro because it would be contrary to international standards relating to self-determination.

Regarding the referendum campaigns and the media, ODHIR recommends that the authorities in Montenegro should provide for full equality of all the participants in the referendum process regarding free expression and defence of own political views and opinions.

Undoubtedly it would be useful, especially having in mind the post-referendum developments that agreement is reached among main political actors in Montenegro regarding these and similar issues. In that case, but here we should bear in mind that it takes at least two sides to have dialogue and agreement, the authorities in Montenegro would have the full legitimacy and legality to organise and hold the referendum, the actual exercise of the right to self-determination in accordance with the current legislation, endeavouring to provide peaceful, free, equal, democratic and fair conditions for all the participants, both to state and defend own political stands and for the voting itself or the proclamation of plebiscite results. Imposing any other different and more stringent requirements for holding the referendum, which differ from those seen in comparative legal practice, by the international community, EU in the first place, would mean nothing else but discriminatory and unprincipled denial of the natural right to self-determination for the citizens of Montenegro, i.e. a specific form of using the policy of force. In the political sense it would mean the prolongation of instability, tensions and stagnation, both in Montenegro and in the region.

We may conclude that Montenegro, or its citizens have the right to self-determination and the establishment of an independent and internationally recognised state on the ba-

sis of international and constitutional law, they need that right in order to take own destiny in their own hands and overcome the "natural state" in which they have been living for quite some time now and on the basis of the principles of independence and sovereignty to build future relations with Serbia and all other nations and states, to finally have the conditions in which democratic and fair popular vote may be called and held.

Self-determination in International Law and the Position of Montenegro

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Introduction

Like 'sovereignty,' the concept of self-determination, which is referred to without elaboration in the UN Charter[2] and also enshrined in common article 1 of the two main global human rights treaties,[3] has come to mean all things to all people, and its exercise is controversial. Whereas I can do nothing about its controversial aspect, the aim of this paper is to clarify its meaning in international law, and to consider the relevance of the legal framework to the position of Montenegro.

Two forms of self-determination

In international law, self-determination has two manifestations, 'internal' and 'external.' Both concern the right of a population grouping – referred to sometimes as a 'self-deter-

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2 UN Charter, Art. 1(2) and Art. 55. See J. Crawford, The Creation of States in International Law (Oxford, 1979), at p. 89.

3 International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 UNTS 3.

mination unit' and/or a 'people' – to choose their status. Internal self-determination involves the right of a people to some form of autonomy within a larger framework of a state, for example autonomy within a federal system. External self-determination, by contrast, involves the right of a people to choose their external (i.e. international) status, whether remaining within a state in which they are currently located, joining a different state, becoming an independent state, or some other status. Self-determination has a special status in international law, in that the obligation to fulfil it where it subsists operates *erga omnes* – against all – which means that all states, not just the particular self-determination unit affected and, where relevant, the state in which it is located or is occupying it, have an interest in its fulfilment.[4]

The key controversy in relation to self-determination has been the question of which groups are entitled to which form of the right; in other words, who constitutes a 'people', or what constitutes a 'self-determination unit,' for the purposes of 'internal' and 'external' self-determination. The answer is different depending on which type of self-determination is at issue.

Internal self-determination

Applicability and meaning

In broad terms, all groups within the state are entitled to internal self-determination, whether they are formally constituted – such as Montenegro within the current arrangement in Serbia and Montenegro – or not – such as minority groups within Montenegro. For the group it includes the right to a degree of autonomy; for the individuals in the group it includes an entitlement to participate in public life (e.g. to stand in elections for public office) and to use their own language.[5]

Montenegro

The relevance of this right to Montenegro depends on whether it remains part of the state of Serbia and Montenegro, or claims independent statehood.

If remaining part of Serbia and Montenegro

If the *status quo* is maintained, Montenegro would enjoy this internal right vis-à-vis the state as a whole. One aspect of the realization of this right could therefore involve the

4 See East Timor (Portugal v. Australia), ICJ Reports 1995, p. 90, at p. 102, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, ICJ Reports 2004, p. 136 (hereafter 'Wall Advisory Opinion'), at pp. 199-200, paras. 155-156.

5 See, e.g., ICCPR, Art. 27. On the right to public participation as an aspect of the right to self-determination, see e.g. T. Franck , 'The Emerging Right to Democratic Governance', 86 (1992,) AJIL 46, at pp. 57 – 60.

continuation of the present degree of autonomy enjoyed by Montenegro. The state of Serbia and Montenegro would also be obliged to ensure the realization of internal self-determination on the part of sub-Federal groups, such as minorities in Montenegro, and any inability on the part of the Federal authorities to ensure this on the part of the Montenegrin authorities would be irrelevant in terms of the state's duty to fulfil this obligation.

If becoming an independent state

If Montenegro claimed independent statehood, the focus would narrow to those groups within it and the realization of their right to internal self-determination. This would have two consequences. As will presumably be covered in more detail in the session on international recognition, conformity to self-determination norms now sometimes plays a role in the decisions by states as to whether they will recognize entities claiming to be new states as enjoying this status. Indeed, the adoption of such an approach crystallized with the position adopted by the then EC in relation to the break-up of the old Soviet Union and the SFRY at the start of the 1990s.[6] The second consequence is that if it became a state Montenegro would be subject to an ongoing obligation to secure the right of internal self determination of those within its territory.

External self-determination

What the right involves

As mentioned above, the right of 'external' as opposed to 'internal' self-determination entitles a population grouping to choose the external (i.e. international) status of their territory, whether forming part of, or enjoying some kind of free association with, another state (whether the state in which they are currently located, or another state), becoming an independent state, or some other political status.[7]

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6 See the EC 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 16 December 1991 (reproduced in 4 (1992) EJIL 72) (hereafter 'EC Guidelines'), and Badinter Opinions, Nos. 1, 2 & 4, infra, note 16.

7 The Declaration on Friendly Relations states the options for (external) self-determination in the following terms:

[t]he establishment of a sovereign and independent State; the free association or integration with an independent State or the emergence into any other political status freely decided by a people…

Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970, (hereafter 'Friendly Relations Declaration'). In Resolution 1541, the General Assembly sets out three scenarios whereby a 'Non-Self-Governing Territory can be said to have reached a full measure of self-government':

(a) Emergence as a sovereign independent State;

Who gets the right

The first aspect of this right requiring clarification is who is entitled to it, since its nature presupposes that if some option other than the *status quo* is to be followed, and the entity in question is currently part of state, then that state is to lose part of its population and territory. Because of the potentially destabilizing effects of this, the circumstances in which the right arises are narrow.

States

States have a right to external self determination.[8] Serbia and Montenegro thus has the right as a single state; Montenegro, as a sub-state entity, does not have the right on this basis.

By virtue of a special arrangement

Traditionally, external self-determination was accorded not because a territory fell within a particular category, but rather as an *ad hoc* mechanism of solving a particular territorial dispute.[9] The entitlement arose, as it were, in the form of a gift by the disputants involved, one or more of which purporting to enjoy the legal competence to dispose of the juridical status of the territory. An example of this would be the plebiscites utilized in Europe as part of the Versailles settlement to determine the status of disputed territories, including the plebiscite held in the Saar territory in 1935.

As a matter of the 2002 Agreement, Montenegro has a right to what is in effect external self-determination, in being given the option to determine whether to remain part of, or become independent from, the State Union after three years. Does this create a right in international law, or merely an 'internal' right within the state? In other words, is the state now called Serbia and Montenegro obliged to abide by it in international law, or only as a matter of internal law? The answer to this depends on the status of Serbia and

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(b) Free association with an independent State; or

(c) Integration with an independent State.

General Assembly Resolution 1541 (XV), Annex, Principle VI. See also Western Sahara, ICJ Reports 1975, p. 12 (hereafter Western Sahara Advisory Opinion), para. 57; Crawford, Creation of States, supra, note 1, at pp. 102 and 367.

8 See, e.g., Crawford, Creation of States, supra, note 1, at p. 101, point (3)(b).

9 Crawford, Creation of States, supra, note 1, at p. 93, text accompanying note 56 (and see sources cited in note 56).

Montenegro when they made the agreement, which will be addressed further below.

Colonies, Mandate and Trust territories

After the Second World War, the right of self-determination became applicable to particular categories of territory, emerging in customary international law after the establishment of the United Nations[10] in relation to people in Mandate and Trust territories,[11] building on the Charter provision that there should be 'progressive development towards self-government or independence' in Trust territories (the League Mandate system was subsumed within the Trusteeship system).[12]

The category of 'Non-Self-Governing' territories was instituted within the UN under Chapter XI of the Charter (and defined in Article 73), covering 'territories whose peoples have not yet attained a full measure of self-government.'[13] Although this question-begging definition potentially covered both Mandate and Trust Territories and colonies, it was formulated to provide a regime for the latter that would complement the Trusteeship system for the former.[14] As a result, only colonial territories (and other dependent territories other than Mandate and Trust territories) were treated as 'Non-Self-Governing' territories for the purposes of Article 73.[15] At the same time, colonial territories joined Mandate and Trust territories as enjoying the right of external self-determination in the post-war period, and the category of 'Non-Self-Governing' territory was sometimes used to refer to both types of territory, or, put differently, territories entitled to external self-determination. As with Trust territories, this entitlement for colonies built on the Charter provision that 'self-government' should be developed within Non-Self-Governing territories.[16]

10 On the self-determination entitlement forming part of customary international law, see Western Sahara Advisory Opinion, at para. 56.

11 On the self-determination entitlement of Mandate and Trust territories, see Legal Consequences for States of the Continued Presence of South Africa in Namibia Opinion(South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, para. 52 p. 12 (hereafter 'Namibia Advisory Opinion 1971'), at p. 31, para. 52; Crawford, Creation of States, supra, note 1, at pp. 92, 101 and 334 (Mandate and Trust territories 'constitute, as it were, the primary type of self-determination territory', id. p. 334).

12 UN Charter, Art. 76(b).

13 UN Charter, Art. 73.

14 As for its applicability to colonies, the General Assembly stated that

[t]he authors of the Charter…had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.

General Assembly Resolution 1541 (XV), Annex, Principle I.

15 Crawford, Creation of States, supra, note 1, at pp. 358 – 363.

16 UN Charter, Art. 73. As the International Court stated in the Namibia Advisory Opinion,

…the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter

Traditionally, a right to external self determination has been regarded as limited to peoples in colonial and Mandate and Trust territories, categories which do not apply to Montenegro. In recent years, however, two further possible categories have been suggested for this right. These categories are different from the colonial category in that they are not based on the territory's status, but rather depend on the occurrence of particular events in it. Absent such events, the right does not exist.

Constituent components of a federal state when the state dissolves

The first possible post-colonial category of self-determination unit covers the constituent entities of a federal state when that state dissolves. Like the inclusion of internal-self determination as a factor in international recognition policy, this category of external self-determination unit became prominent when it was adopted by then EC states in the context of the break-up of the SFRY.

How is a particular situation regarded as 'dissolution' for these purposes? Problematic here is that a factual situation where one or more constituent republics declare independence, thereby withdrawing from participation in Federal structures, could be regarded as either a purported act of unilateral secession, which does not by itself give rise to a right to external self-determination, or the dissolution of the Federal state, which under this approach does. Which of these two situations subsists is likely to be determined by the recognition policy of other states, as was arguably the case with the SFRY in 1991, where European states adopted the view of the advisory Badinter Commission[17]

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of the United Nations, made the principle of self-determination applicable to all of them.

Namibia Advisory Opinion 1971, at p. 31, para. 52. . Similarly, a category of peoples subject to 'alien subjugation, domination and exploitation' has also sometimes been used in connection with the self-determination entitlement. It has sometimes been defined in a manner suggesting it as an umbrella category for all territories enjoying an external self-determination entitlement, including but not limited to Mandate/Trust Territories and Colonies. For example, General Assembly Resolution 1514 utilizes the 'alien subjugation' category in its first paragraph and goes on to refer to Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence General Assembly Resolution 1514 (XV).

17 In relation to the recognition process, see e.g. the EC Guidelines, supra, note 5; 'Declaration on Yugoslavia', 16 December 1991 (reproduced in 4 (1992) EJIL 73); and see Opinions 1-10 of the Arbitration Committee created as part of the Conference on Yugoslavia (all reproduced in 31 (1992) ILM 1494 (hereafter 'Badinter Opinions'). See also R. Badinter, 'L'Europe du Droit', 3 (1993) EJIL 15; M. Craven, 'The European Community Arbitration Commission on Yugoslavia', 66 (1995) BYIL 333; A. Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', 3 (1992) EJIL 178; S. Terrett, The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World (2000).

that the situation was one of dissolution not secession.[18]

Even if it is a situation of dissolution, the next question is which groups within the dissolved state enjoy a right to external self-determination? Again, the view of the Badinter Commission, adopted by EC states, was that in situations of federal state dissolution, the *federal* components enjoyed an external self-determination entitlement.[19] So, for example, the entire population of Bosnia and Herzegovina, and not the Bosnian Serbs, were regarded as enjoying a right to external self-determination.

Under this approach, Montenegro was regarded as enjoying a right to external self-determination in 1991 on the basis that it was a constituent Republic within a Federal state that had dissolved.

Flagrant violation of internal self-determination

The second post-colonial category covers peoples who are denied their right to internal self-determination in some particularly extreme manner, for example through being subject to gross violations of human rights.[20] However, this category does not command widespread support at present.[21]

Once exercised is extinguished

The need to preserve the stability of international boundaries has not only led to a narrowing of the circumstances where a right to self-determination exists; it is also the reason why any given self-determination entitlement is extinguished once it has been exercised. This is not to say that a different self-determination right might exist for the population grouping concerned. A colonial people which became an independent state no

18 *Badinter Opinions*, Nos. 2 and 3.

19 *Badinter Opinions, Nos. 2 and 3.*

20 *The Quebec Opinion refers to a situation when 'the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated,' (Reference re: Secession of Quebec, [1998] 2 SCR 217 (reproduced in 37 (1998) ILM 1340), para. 135) and 'where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development' (id., para. 138). When dismissing the situation in Quebec as falling into this category, the Canadian Supreme Court quotes with approval a statement that implies a high threshold for the category: '[t]he Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights,' (id., para. 135). Seemingly, the Quebec Opinion is concerned with the right to secession, rather than the right to external self-determination strictu sensu; although the former implies the latter, the reverse may not be true. Regrettably, the Supreme Court sometimes uses the terms 'right to secession' and 'right to external self-determination' interchangeably.*

21 *On the second category, the Canadian Supreme Court remarked that 'it remains unclear whether this…proposition [this basis for secession] actually reflects an established international law standard,' (Quebec Opinion, para. 135).*

longer has a right to self-determination as a colonial people, but does have this right as the population of a state. By contrast, colonial people who chose to form part of the population of another state do not themselves have a continuing right to self-determination, although they form part of a larger population grouping – covering the territory of the state – which does.

Consequences of enjoying the right

Distinct legal entity

One juridical consequence of the self-determination entitlement is that the 'self-determination unit' constitutes a distinct legal entity. The UN General Assembly stated that a Non-Self-Governing Territory

> …has…a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the…territory have exercised their right of self-determination in accordance with the Charter.[22]

Whatever meaning of 'Non-Self-Governing Territory' was intended here, this formulation is applicable to all territories entitled to external self-determination. Because the local population enjoys the right to alter its external status, it must already possess a form of distinct legal personality; if it chooses statehood, it is the connection between the self-determination unit and the state it becomes that provides the legitimacy for that state. In other words, even when self-determination has not been realized in practical terms, the self-determination unit must already have some juridical significance because of the prospective effect it will have on the legitimacy of a state (if this status is chosen by the people in the unit).[23] All self-determination units enjoy international legal personality, then; the precise nature and effect of this personality can vary, however, depending *inter alia* on whether or not the unit forms part of the territory of a state.

When the unit forms part of the territory of a state, as was the case for many colonial territories, it enjoys, as it were, a dual status: as both part of the territory of that state (pending the outcome of a self-determination consultation), and as a distinct juridical unit. This dual status necessarily means that the nature of the state's title with re-

22 Friendly Relations Declaration. See Crawford, Creation of States, supra, note 1, at pp. 366 – 7.

23 As James Crawford states in relation to self-determination units,

there is nothing self-contradictory in an entity having a limited status, consisting primarily in the right at some future time to choose some permanent status.

Crawford, Creation of States, supra, note 1, at p. 99.

spect to the unit is of a special kind. As Crawford remarks, whereas self-determination status does not deprive the administering state of sovereignty, it does 'substantially limit' this sovereignty.[24] Sovereignty is conditional, in the sense that the continuance of title depends on the support of the local population in a self-determination consultation.

Exercising the right – choosing external status

How is the choice between the different options for the exercise of the external right to be determined? Is a popular consultation – referendum – required, or is some less directly representative basis permissible, such as a vote in a legislature and/or a decision made by the executive? Is the position the same across the different options for the realization of external self-determination?

It is uncertain whether or not the self-determination entitlement as formulated in the colonial era required a popular consultation to validate independent statehood as the realization of the self-determination entitlement. There were many instances where former colonies became independent states in circumstances where the population involved did not choose this status through a referendum. However, with the articulation of self-determination as a human right, *inter alia* through the two main global international human rights treaties, which entered into force in 1976, arguably the policy basis for the exercise of self-determination has broadened from simply the negative repudiation of colonialism (something which, if independence were opted for, would not itself necessitate popular support) to the positive validation of territorial status by the territory's population. In consequence, a popular consultation is now arguably required to endorse the adoption of each of the different forms of realizing external self-determination, including independence.

This position is reflected in canonical judicial and academic commentary on the subject. In its 1975 Advisory Opinion on the situation the Western Sahara, the International Court of Justice stated that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'[25] and referred to taking into account the wishes of the local population as a 'basic need' when choosing between the options for the realization of external self-determination.[26] James Crawford in 1979 asserted that the right of a self-determination unit

24 *Crawford, Creation of States, supra, note 1, at pp. 363 – 4.*
25 *Western Sahara Opinion, at para 55.*
26 *Western Sahara Opinion, at para. 58.*

> …to choose its own political organization…in view of its close connection with fundamental human rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.'[27]

It is also reflected in the practice of the EC and its Badinter Arbitration Committee, which insisted on the popular approval of independence before recognizing the four SFRY Republics making declarations to this effect as states, although in the case of Bosnia and Herzegovina the referendum approving independence was boycotted by the Bosnian Serb population.[28]

Implementing a self-determination outcome

If a self-determination unit forms part of a state, and opts for an outcome that involves separation from that state (whether becoming an independent state or forming part of another state), the state is obliged to implement this outcome and renounce its claim to sovereignty.

The status of self-determination as an *erga omnes* obligation, as mentioned above, places it into a special category as far as the position taken by other states when it is breached. In such a circumstance, any state is entitled, in its relations with the state breaching the right, to invoke the breach, to claim cessation, guarantees of non-repetition, and compensation for those directly affected, and to bring a case before an international court or tribunal against it provided such a court has jurisdiction over the states and subject-matter involved.[29] In its Advisory Opinion on the barrier constructed by Israel in the Occupied Territories the International Court of Justice asserted that all states also have an *obligation* to 'see to it' that impediments to the fulfilment of *erga omnes* obligations are 'brought to an end,' provided that such states act within the boundaries of international law.[30] It is unclear what this amounts to, but it suggests positive action on the part of the 'not directly affected' state, beyond the usual negative legal obligation not to *assist* in the commission of a breach of international law which applies to all areas of international law.

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27 Crawford, Creation of States, supra, note 1, at p. 101.

28 See Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 (1993) EJIL 36, at p. 50.

29 See the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, and the accompanying Commentaries adopted by the Commission on 10 August 2001 (reproduced in J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, 2002)), in particular Article 48(1)(b).

30 Wall Advisory Opinion, supra, note 3, at p. 200, para. 159.

Situation of Montenegro

As mentioned, Montenegro as a Republic of the former SFRY enjoyed a right of external self-determination in 1991 on the basis that the state within which it was located had ceased to exist. Despite this, Serbia and Montenegro claimed to be the continuation of the SFRY (but called the FRY), then in 2000 claimed to be a new state, initially with the same name and from 2004 called the State Union of Serbia and Montenegro.

Has the right of self-determination enjoyed by Montenegro in 1991 been implemented, and thereby extinguished? Although the legal status of the FRY between 1991 and 2001 is uncertain, Montenegro clearly formed part of a new state, with Serbia, from 2001 onwards, and union with another entity to form a single state is a valid option for the exercise of external self-determination. The key issue is the nature of the popular consent given to this outcome.

According to news reports, the population of Montenegro voted for union with Serbia in the FRY in 1992.[31] Unfortunately, I have not been able to find information verifying whether this referendum was regarded to be free and fair. However, even if this referendum was free and fair, it was conducted in the broader context of Serbia and Montenegro constituting the continuance of the old (albeit renamed) SFRY, something at odds with the position in international law. The result was, thus, a vote in favour of something – remaining part of an existing state – legally impossible. Equally, a vote conducted on the basis of the continuance of the SFRY presupposed that Montenegro did not have a right to external self-determination based on the dissolution of the SFRY. It could be argued, therefore, that the position of the population of Montenegro on this particular right has never been expressed. In other words, although they voted to remain in a state with Serbia, this vote was conducted on the particular basis (that the SFRY continued to exist) in complete contradiction to the actual basis on which they enjoyed a right to external self-determination, and involved a decision in favour of an option which was legally impossible.

For these reasons, it can be argued that Montenegro *remains* a self-determination unit on the grounds of the 1991 dissolution of the SFRY, its population not having yet validly expressed their view as to the exercise of their particular right to external self-determination on this basis.

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31 See Y. Chazan, 'Bosnia starts to draw battle lines', The Guardian, 3 March 1992; C. Sudetic, 'Turnout in Bosnia Signals Independence', New York Times, 2 March 1992.

Because of this, the Belgrade Agreement can be viewed as not merely an internal document between two constituent entities within a state; it can also be seen as an international agreement between two self-determination units which, as mentioned above, enjoy international legal personality in international law. Equally, its provisions allowing for a self-determination referendum can be understood as a means through which the population of Montenegro can validly exercise their right in this regard.

The occurrence of particular events could also give Montenegro a right to self-determination for other reasons; specifically, if there was a flagrant denial of the right of internal self-determination (although, as mentioned, the existence of a right to self-determination on this basis is uncertain) or if the state of Serbia and Montenegro ceased to exist. Bearing in mind the position taken by EC states in 1991 as far as the SFRY was concerned, it is possible that the unilateral declaration of independence by Montenegro, and Montenegro's withdrawal from federal/union structures might be viewed as having precipitated the dissolution of the state.

Assuming that the popular consultation is conducted in a free and fair manner, a majority decision by those voting in favour of continuance of or separation from the Union will constitute a valid expression of the view of the local population for the purposes of the exercise of their right to external self-determination. In consequence, the state of Serbia and Montenegro, and other states, will be bound to abide by this result. For Serbia and Montenegro, this would mean either permitting the current arrangement, or allowing Montenegro to become independent in a practical sense, renouncing title over Montenegrin territory and recognizing Montenegro as an independent state. For other states, this would mean continuing to recognize Serbia and Montenegro as a state or (if independence is chosen), conducting relations with Serbia on the basis that it no longer forms part of a union with Montenegro, and conducting relations with Montenegro on a basis that respects its entitlement to external self-determination.

If independence is validly chosen and implemented, the population of Montenegro would continue to enjoy a right to external self-determination as a state. It could, therefore, decide to re-join a union with Serbia at some future date. If continuance of the Union with Serbia is validly chosen and implemented, the population of Montenegro would no longer have a right to self-determination on the basis of the 1991 dissolution of the SFRY, but together with the population in Serbia would have a right to external self-determination as the people of a single state.

SESSION 2
Voting rights –comparative experiences

Montenegro: Residency Requirements for Voting in a Referendum

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Statement of Purpose

The Constitutional Charter of the State Union of Serbia and Montenegro provides Montenegro the right to hold a referendum on secession from the state union. Montenegrin law requires that an individual be a resident in Montenegro for 24 months in order to vote in referenda. This presentation analyzes whether Montenegro's domestic laws concerning residency requirements for voting in a referendum on state status meet international law standards and state practice. It is clear from this analysis that Montenegro's laws are consistent with international law and practice.

- International Law provides wide discretion in setting residency requirements for voting in elections and referenda.
- Montenegro's Referendum Law is objective, sets clear criteria and is reasonably necessary to protect the democratic integrity of the vote.
- Montenegro's residency requirement ensures that the future of Montenegro will be decided by those who have a long-term commitment to living in Montenegro.
- Montenegro's 24-month residency requirement is consistent with recent European Com-

1 Professor of law and international relations. He worked and cooperated with a number of distinguished organisations in the United States, such as Carnegie Endowment for International Peace and American Association for International Law. He served in the Department of State's Office of the Legal Adviser, and also advised on a number of occasions the countries of the Western Balkans and the Baltic countries on matters of public international law. He is the author of a number of books on topics of international law, human rights, etc..

mission opinions and European Court of Human Rights cases, and with state practice.
• The OSCE/ODIHR and the Venice Commission have found Montenegro's residency requirement reasonable to protect the integrity of the democratic process.
• Montenegrins residing in Serbia are not living abroad, nor are they refugees. Rather, they have taken up residence, voluntarily and peacefully, in the neighboring Republic of the same state, and thus do not qualify for a refugee exception.

Relevant Montenegrin Law

In March 2002, Serbia and Montenegro signed the Belgrade Agreement, forging a loose formal relationship between the two member states. Both the Belgrade Agreement and the Constitutional Charter make clear that after the expiration of three years, each member state may withdraw from the state union following a referendum.
Article 60 of the Constitutional Charter provides that: "Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro. The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum."
Article 60 of the Charter further provides, "The law on referendum shall be passed by a member state bearing in mind the internationally recognized democratic standards."[2]
Article 7 of the Constitutional Charter provides that, "A citizen of a member state shall have equal rights and duties in the other member state as its own citizen, except for the right to vote and be elected."[3]
Building from the Charter, Montenegro's Election Law sets clear criteria for voter eligibility. Article 11 provides that,
"A citizen of Montenegro, who has come of age, has the business capacity and has been the permanent resident of Montenegro for at least twenty four months prior to the polling day shall have the right to elect and be elected a representative."[4]

I. International Law Provides Wide Discretion in Setting Residency Requirements

Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms,[5] the International Covenant on Civil Political Rights,[6] nor any other interna-

2 *Id.*

3 *Id.*

4 *Montenegrin Law on the Election of Municipal Councillors and Representatives (in the Parliament of the Republic of Montenegro) (1998, 2000, 2001 and including amendments of 20 July and 11 September 2002), available at http://www.legislationline.org/view.php?document=55519.*

5 *Available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.*

6 *Available at http://www.ohchr.org/english/law/ccpr.htm.*

tional convention or treaty to which Serbia and Montenegro is party[7] establishes binding standards relating specifically to residency requirements in referendum laws.[8]
Nor is state practice in the area consistent enough to create customary international law. Rather, states consider such details of their internal election laws to fall within what has been described as the "reserved domain of domestic jurisdiction,"[9] not subject to obligation under international law unless freely negotiated in some international convention or treaty.
Those conventions and declarations which do address general questions of international democratic standards require that the domestic laws be objective and reasonable. As such, the principles and standards set by the following international organizations are useful in guiding and describing state practice regarding voter eligibility requirements.

International Conventions and Proclamations Recommend a Standard Objectivity and Reasonableness

International conventions and proclamations simply provide that election standards should be objective and reasonable.

International Covenant on Civil and Political Rights: Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[10] provides that, "Every citizen shall have the right and the opportunity…without unreasonable restrictions: (b) to vote…"

UN Election Standards: The United Nations Human Rights Committee produced Standards of Elections in 1996. The committee provided that the right to vote in elections and ref-

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7 A Council of Europe convention grants the right to vote to every foreign resident in a state, "provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections." This provision provides a useful guideline on residency requirements, though only applies to foreigners living abroad who want to participate in elections, not to residents of the same state living in different republics, as in the case of Serbia and Montenegro. Serbia and Montenegro is not a party to this convention. "Convention on the Participation of Foreigners in Public Life at Local Level," ETS - No. 144, Chap. C, Art. 6(1), Strasbourg, 5.II.1992.

8 Serbia and Montenegro is a party to Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 of which provides that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 3 (Mar. 20, 1952). The European Commission on Human Rights has interpreted this provision as applying only to institutions established by the constitutions of the Contracting Parties which possess inherent rule-making power. See Polacco & Garofalo v. Italy, No. 23450/94 (Eur. Comm'n H.R. Dec. Sept. 15, 1997). This treaty obligation is not therefore applicable to Montenegro's Referendum Law. Even if it were, however, the case law of the European Court of Human Rights establishes that Article 3 does not create any "obligation to introduce a specific system." Mathieu-Mohin & Clerfayt v. Belgium, 113 Eur. Ct. H.R. (ser. A) at 23 (1987).

9 [illegible] 4th ed. 1990).

10 Serbia and Montenegro became a party to the ICCPR via succession on April 27, 1992.

erenda must be established by law and may be subject to reasonable restrictions.[11]

Inter-Parliamentary Union Standards: In 1994, the Inter-Parliamentary Union set out principles and standards to guide states in conducting free and fair elections. Among the principles is, "The right of every citizen to be registered as a voter, subject only to disqualification in accordance with clear criteria established by law, that are objectively verifiable and not subject to arbitrary decision."[12]

Although, Montenegro is not a party to any international conventions or treaties that contain specific criteria relating to residency requirements,[13] and state practice in the area is not consistent enough to create customary international law, Montenegro's residency requirement does fall within the standards set by these international organizations. Article 11 of Montenegro's Election Law sets clear criteria for voter eligibility. The criterion is reasonable, objective, and well within international law standards and state practice.

European Commission Opinions and European Court of Human Rights Cases Support Wide Discretion in Setting Residency Requirements

Recent European Commission opinions and European Court of Human Rights cases have recognized residency requirements of four years in Italy, and ten and twenty years in France/New Caledonia.

European Commission of Human Rights: In *Polacco & Garofalo v. Italy* (1997), the European Commission of Human Rights held that a four-year residency requirement to stand in a parliamentary election was justified, partly due to "the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country's day-to-day problems."[14]

European Human Rights Committee: In 2000, the European Human Rights Committee upheld a residency requirement of 20 years for participation in New Caledonia's ballot on autonomy from France.[15] In *Marie-Helene Gillot v. France*, the Committee rejected the claim

11 "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service," 57th Sess., 510th mtg. at 15, available at http://www.forcedmigration.org/guides/fmo020/fmo020-5.htm.

12 The Declaration on Free and Fair Elections which 'urges governments and parliaments throughout the world to be guided by the principles and standards set out' (154th session, Paris, 26 March 1994, http://www.ipu.org/cnl-e/154-free.htm).

13 A Council of Europe convention grants the right to vote to every foreign resident in a state, "provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections." This provision provides a useful guideline on residency requirements, though only applies to foreigners living abroad who want to participate in elections, not to residents of the same state living in different republics, as in the case of Serbia and Montenegro. Furthermore, Serbia and Montenegro is not a party to this convention. "Convention on the Participation of Foreigners in Public Life at Local Level," ETS - No. 144, Chap. C, Art. 6(1), Strasbourg, 5.II.1992.

14 Polacco & Garofalo v. Italy, No. 23450/94, European Comm'n H.R. Dec. Sept. 15, 1997.

15 Marie-Helene Gillot et al. v. France, App. No. 932/2000, available at http://www.echr.coe.int/eng.

brought by a group of French nationals living in New Caledonia and decided that New Caledonia could set high residency requirements because the referendum involved self-determination and the end of colonization in the territory. Furthermore, the Committee held that in such situations, states can establish residency requirements to ensure that only long-term residents have the power to change the political status of the territory.

European Court of Human Rights: In a separate case concerning New Caledonia, *Py v. France* (2001), the European Court of Human Rights found that a 10-year residency requirement for participating in congressional and provincial assembly elections did not violate the applicant's right to take part in the Congress.[16] The Court recognized the rule as necessary to protect against large numbers of votes cast by recent arrivals with no solid link to the territory. The Court set out international election standards in a footnote to *Py v. France*, "The rules on granting the right to vote, reflecting the need to ensure both citizen participation and knowledge of the particular situation of the region in question, vary according to the historical and political factors peculiar to each State."[17]

The Refugee Exception for Out-of-Country Voting is Inapplicable

States experiencing ethnic and/or political turmoil are more likely to allow citizens living outside its territory to participate in national elections and sovereignty referenda. Out-of-country voting gives refugees and victims of forced migration the opportunity to participate in their countries' political life, despite being unable or unwilling to return to the country. Even in these situations, states can set residency requirements. Iraq, Eritrea, and East Timor serve as examples of states that allowed citizens living abroad to participate in their countries' elections and referenda despite being unable or unwilling to return to the country.

Unlike those countries, Montenegrins living in Serbia are not refugees, rather they voluntarily and peacefully moved to their current residences. Montenegrins residing in Serbia are not living abroad, but rather have taken up residence in the neighboring Republic of the same state. Montenegro's residency requirement is reasonable criteria necessary to protect the democratic integrity of the referendum process.

II. The OSCE/ODIHR and the Venice Commission Agree that Montenegro's Residency Requirement Complies with Internationally Recognized Democratic Standards

In 2001, the OSCE/ODIHR conducted an assessment of Montenegro's referendum law.[18] The report noted that Montenegro's 24-month residency requirement was widely ac-

16 *Py v. France, App. No. 66289/01, 44 Eur. H.R. Rep. 2, (2001) (Commission report).*

17 *Id.*

18 *"OSCE/ODIHR Report," Warsaw, July 6, 2001, at 8.*

cepted, and that "All political parties in Montenegro, including the opposition, agree with this provision and have raised no objections."[19] Furthermore, the OSCE/ODIHR recognized the residency requirement as necessary to protect the integrity of Montenegro's democratic process:

"Citizens of FRY born in Montenegro but permanently living in Serbia, in essence have taken the citizenship of Serbia and vote in elections there. If they were also allowed to vote in Montenegro, they would be given a double franchise within the same participating state."[20]

The report includes several other reasons for regarding Montenegro's residency requirement reasonable and necessary. These reasons include:

(1) the voters who elect the parliament should come from the same pool and have the same eligibility requirements as the voters who vote in referenda,

(2) precedence set in the 1992 referendum approving the FRY federation limited the opportunity to vote to citizens of either Serbia or Montenegro, residing in Montenegro, (3) a shorter residency requirement would not qualify many more citizens to vote than the 24-month requirement, and (4) besides the above, attempting to register Montenegrin citizens living in Serbia would present "insurmountable logistical difficulties."[21]

The report concludes, "ODIHR cannot recommend the inclusion of such federal citizens, born in Montenegro but living permanently in Serbia, to be eligible to vote in Montenegro…"[22]

The Venice Commission agreed with the OSCE/ODIHR's assessment in its 2001 "Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia":

"The right to vote in a referendum should follow the right to vote in an election. A different rule would entail a substantial risk of double voting since Montenegro citizens resident in Serbia may vote in Serbian elections. The Commission therefore fully shares the assessment by ODIHR that the residency requirement is justified in principle…"[23]

Although the Commission continues its report by mentioning that, "it seems excessive to require 24 months residence," this statement is qualified later by the Commission's analysis of Montenegro's unique situation, where population shifts could threaten the integrity of a potential referendum. Indeed, the Commission declares that:

"It is fully in line with international standards that in a federal State each citizen votes in the federated entity of his residence, irrespective of the fact of a possible entity citizenship,"[24] and later, "It is in full accordance with international standards that the referen-

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19 *Id.*

20 *Id.*

21 *"OSCE/ODIHR Report," Warsaw, July 6, 2001, at 8.*

22 *Id.*

23 *Venice Commission, Interim Report at ¶ 25.*

24 *Id.*

dum law requires that voters must have residence in Montenegro."[25]
The Venice Commission found Montenegro's 24-month residency requirement consistent with international standards and necessary to protect the integrity of Montenegro's democratic process.

Conclusion

International standards include the right of a state to establish laws regarding voter eligibility for participation in elections and referenda. The laws must set clear criteria and be reasonable. Under Montenegrin law, voters must reside in Montenegro for at least two years before they are eligible to vote in referenda. Residents of Serbia do not have the right to vote in a referendum held by Montenegro. Otherwise, Montenegrin citizens residing in Serbia, and eligible to vote in Serbian elections, would receive a double franchise within the same State. Such standards are clearly objective and reasonable.
The OSCE/ODIHR and the Venice Commission share the view that reasonable residence requirements are justified and that Montenegro's residence requirement is reasonable. A comparison of recent European Commission opinions, European Court of Human Rights cases, and relevant state practice indicates that Montenegro's residency requirement is reasonable and consistent with international standards.

25 *Venice Commission, Interim Report at ¶ 25.*

SESSION 3
Majorities

Majorities in Montenegrin Legislation and in International Law

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At the previous part of the conference we have dealt with an issue that has been much debated in the public, especially after the Prime Minister of Serbia, Mr Koštunica had a list made of alleged Montenegrin nationals dwelling in Serbia and took it to Brussels, to Mr Javier Solana, trying to prove that people who have been the residents of Serbia for decades already, should vote in Montenegro as well. However, it seems to me that, no matter how serious the issue of who has the right to vote might be and how eventually it may become the potential cause for dispute, in effect, regarding what is to follow in Montenegro, i.e. holding the referendum on independence next year, the discussion will focus on the issue of the *majority* to bring the decision.

I believe that this issue has been more or less resolved, but I presume that both politicians and specialised international bodies, such as the Venice Commission or maybe the OSCE/ODIHR, shall once again reconsider the issue of majority, since it is the one issue that, at the end of the day, shall decide on the outcome of the referendum itself. As for the Montenegrin referendum, all the participants refer to the famous sentence from the international documents, but also from the Constitutional Charter and the amendments to the Constitutional Charter, that is that the referendum should be held in accordance with *highest international standards*.

1 Apart from modern political systems, the theory of democracy and political transition is also in the focus of professor Darmanovic. He published a number of papers, the most significant being "Distorted Democracy" and "Real-socialism – the Anatomy of Collapse". Professor Darmanovic is one of the co-founders of the distinguished Montenegrin think-tank, the Centre for Democracy and Human Rights.

Montenegrin *opposition* normally claim that they would not participate in a referendum that would not be carried out in accordance with the highest international standards. Montenegrin *government* claims that, due to its dedication to European values and declared aspirations of Montenegro to become a part of the European family, it will be carried out in strict accordance with the highest European standards. The *EU* and its bodies emphasise the importance of the application of the international standards as the determining condition for the recognition of the referendum outcome, and the *Government of Serbia*, as well as the political parties in Serbia also say that the referendum in Montenegro is acceptable for them only if conducted in compliance with the highest international standards. However, here we come to a very simple question: *what actually are the international standards* and whether there are international standards at all referring to referendums. International standards would mean that there are some generally adopted instruments of international law which became part of the international legal documents, instruments that are not debated or questioned, but which simply have to be applied. But when you take a closer look, you see that actually *there are no generally accepted international standards* referring to referendums. There is only *relevant international practice* in developed democracies, as well as in new democracies of the post-communist wave. If this assumption – that there are no generally accepted international standards – is true, then the study of comparative referendum practice and acting in accordance with prevailing models, gains in importance.

The issue then becomes: what does Montenegro need to do in order not to go below the international practice. Referendum practice in developed democracies is relevant in our case only when relating to matters of utmost importance, such as: certain territory gaining independence; joining EU and ratification of European Constitution and other treaties of the EU; constitutional changes in certain sovereign countries. In short, what is relevant for Montenegrin case is the comparative practice from constitutional referendums and referendums regarding the status. And speaking of the issue of majority, the topic of this session, it regards two aspects: a) the turnout in referendum for it to be recognised as valid and b) the number of votes required to pass a decision.

Current Referendum Law of Montenegro envisages as follows:

a) A requirement for more than 50% of the whole electorate, i.e. persons registered in the Register of Electors, to actually cast vote for the referendum to be valid. According to the current law, the referendum may not be recognised as valid if, say, something similar to what happened in the French referendum on the new EU Constitution is to occur, when just a bit over 40% of French voters turned out at the referendum and decided to reject the proposal of the European Constitution.

b) The Law also envisages that, if the previous requirement is fulfilled, then the simple majority (50% + 1) of those to cast vote are required for the given option or one of the

alternatives to be voted for in the referendum. These are the two key points regarding the issue of majority in the Montenegrin referendum.

The logical question here is what the relation of this law with the prevailing international practice is, especially EU practice, since we aspire to be part of EU in future and since the EU is, in a way, seen as our supervisor in referendum issues. Regarding the constitutional systems and the referendum practice in EU and some other countries, the situation is as follows:

Constitution system and referendum practice of 9 EU member states: Austria, Finland, France, Ireland, Hungary, Germany, UK (in the case of Northern Ireland) and Spain have *no requirements regarding any form of qualified majority* in any stage of the voting process. Apart from these countries, the same is not required either by Australia, Canada (in case of Quebec), or Switzerland. Thus, no matter how important the issue may be, the referendum shall be valid irrespective of the turnout.

Six EU member states have similar provisions as the Montenegrin Law. In Italy, Poland, Portugal, Slovakia, Slovenia and Sweden over 50% of registered voters are requested to cast vote for the referendum to be valid. Thus, we may say that, regarding the turnout issues, Montenegrin Referendum Law is amongst the most stringent ones, together with these 6 EU member states.

When it comes to the *majority required to pass the decision*, in 12 EU member states (Austria, Finland France, Ireland, Italy, Poland, Portugal, UK in the case of Northern Ireland, Slovenia, Slovakia, Spain and Sweden), as well as in Canada in the case of Quebec and in Switzerland, *no qualified majority is required to pass the decision*, just a simple majority. It means that one option at the referendum should be voted for by more than 50% of those who cast ballot, regardless of the actual turnout.

Some sort of qualified majority is required by only a few countries. In Hungary and in Germany the additional majority criterion is required, so apart from the requirement that more of 50% of those who cast ballot are required to vote in favour of the offered option or one of the alternatives, this number, at the same time needs to represent at least 25% of the electorate of these countries. We should say that 25% of the electorate is not such a stringent requirement. Australia, which is not a relevant example in our case because of the federal nature of the state, requires apart from the 50%+1 majority of those who actually voted, that in case of federal referendum, another criterion needs to be fulfilled, i.e. that this majority is at the same time representative of the majority of federal units.

And finally, two relatively most stringent examples are the cases of Denmark and UK (in case of Scotland), and that is, apart from 50% of those who cast ballot, the additional requirement is that they are at last 40% of the electorate. In Scotland it led once to the failure of the referendum on devolution, but it succeeded the second time, especially when the politicians from London backed the idea. In Denmark, this provision has nev-

er been implemented in practice. Apparently, 40% of the electorate is hard to achieve for so severely divided a country as Montenegro is. However, it might sound paradoxical to you, but I am convinced that at least 40% of the electorate to support the referendum option or one of the alternatives is, in the case of Montenegro, less strict a demand than the one required by our law for the turnout to be over 50% of the electorate. If, for example, anti-independence opposition decides to pursue the threat of boycotting the referendum, it would be far harder to attract over 50% of the electorate to cast vote than it would be to achieve 40% votes "for". Clearly, if you manage to attract to election polls over 50% of the registered voters, you will have the required 40% of votes "for". Thus, we may conclude that the Danish and the Scottish case applied in specific Montenegrin circumstances do not seem so strict.

The real question here is, since in the comparative international practice the over 50% turnout requirement is one of the most stringent existing forms of qualified majority, whether something more will be required of Montenegro, since this "something more" is occasionally mentioned in the statements of politicians and international bureaucrats from Brussels, but also in various other places, such as events like this one. If we are to demand "something more", it would be an exception in Europe made for the case of Montenegro, because it is evident from the comparative practice of EU countries (even some countries outside Europe) that we may find no other qualified majority than the ones I already mentioned.

What could be the additional requirements for Montenegro? There is one unconfirmed story from 2001, when the issue of referendum was discussed for the first time, that there were some talks between the US ambassador in Yugoslavia at the time, Mr Montgomery and then the President of the Republic, and now the Prime Minister, Mr Đukanović, that perhaps 55% majority of those who cast vote would be a credible enough majority to bring the decision.

However, this idea (if ever there has been such an idea) has never been published officially, nor considered as a proposal. But, even if such an option would be reconsidered, the question remains: why should something that has never been used before anywhere else in the world would be applied to the case of Montenegro. Although I am now stepping out of the legal line of thinking, we may say that one such unusual proposal might perhaps be motivated by security reasons in Montenegro itself and the whole region. I think that all of you gathered here today quite justifiably presume that, after the end of Milosevic's era, the Montenegrin referendum will cause no violence. Present Government in Serbia may not like the idea of Montenegro as an independent state, but the thought that it could use the Army or some other form of widely organised violence to resolve the Montenegrin issue is, I believe, far from reality and I am certain that none of the decision-makers in Belgrade is even conceiving such a possibility.

Basically, additional qualified majority (some form of majority greater than 50% of those

who voted) at a popular vote, that is to be applied specifically in the case of Montenegro, could turn into a double-edged and relatively dangerous mechanism. Qualified majorities often prove suitable for voting in Parliaments, especially regarding delicate issues. However, qualified majority in popular vote means that the winning side may actually lose. Let us imagine, for the sake of the argument, the situation in which EU would set a rather difficult demand for Montenegro, let us say 55% of those who cast vote, and that the pro-independence option gets 54.5%. Who from EU would come to Podgorica to declare to the pro-independence majority that they did not win, but that they actually lost? What repercussions would that have? How would such a result be accepted by ethnic minorities who are, in a way, the foundation of Montenegrin stability, and who support the idea of independence?

The real issue is whether in such situations qualified majority is the mechanism of stability or causes further problems, if you ask for a greater majority than anywhere else in the world. Therefore, it seems to me that all the bodies that could be dealing with the Montenegrin referendum and the issue of majority, should rather turn to the conditions for holding a referendum. Thus, to ensure for all the participants to have equal opportunities to present own options and views, to have general stability and possible building up of a certain consensus regarding the post-referendum Montenegro, without entering into an issue for which no precedent may possibly be found.

I am aware that the ODIHR in its recommendations from 2001, mentioned, but rather timidly, that we should maybe think of introducing some form of qualified majority. The very statement does not give much hint about what kind of majority, but I think that here we need to be very precise. Once the qualified majority mechanism has been used, it inevitably has to be specifically, numerically expressed. Maybe the solution might be to conclude that Montenegrin Referendum Law already contains the requirement for qualified majority of 50%+1 of those who cast ballot for the referendum to be valid, because only six countries in EU have this relatively strict provision. I am afraid that if we are to take another route and if in the last minute some of the relevant European bodies are to produce for Montenegro a requirement for some unusual majority, then the Government in Podgorica and the Parliament would have no other option but to reject such a proposal, to hold the referendum despite all risks – here I do not imply risk of violence, but political risk – and confront EU partners with the mere fact of recognising or not the referendum results. All the rest would mean that the pro-independence parties are asked to lose the referendum before ever holding one. That is, in fact, what qualified majority means in Montenegro.

This is a divided society and despite that fact, we have to resolve the issue of our status. We cannot keep this issue open forever. If you have a look at the basic fact about transition today, all the relevant authors agree that the state issue is a difficult burden

for those who have not resolved it and intend to implement crucial economic and political reforms. There are two reasons for this. Firstly, the territory for which the reforms apply should be known so that they would be given the required legal expression and secondly, if the status issue is kept open indefinitely, the politicians will keep abusing it without end. Open state issue becomes an alibi for all the failures or problematic political and economic decisions.

This issue needs to be closed once. I think that at this point the circumstances in Montenegro from security and any other standpoint are such that there are conditions for this issue to be closed in a proper way. Some unusual requirement regarding the majority, if requested, would mean, as I have already pointed out, that pro-independence powers are asked to accept defeat in advance, as if, for example, starting a football match with the score of 0:1 or 0:2. Such a situation would not close the issue of status but would intensify the efforts of this or some other political generation in favour of independence to try to turn their option, which, by the way, seems to be the majority option in the Montenegrin society of today, into a reality. In addition, today's leaders and Montenegrin politicians, who, like all the politicians in the world, always have good survival instinct, would probably rather face the risk of turning down the proposal directly leading them to defeat, then surrender without fight.

Appendix

Table 1

No requirement regarding turnout	Turnout requirement of *50% + 1*
Austria	**Italia**
Denmark	**Poland**
Finland	**Portugal**
France	**Slovakia**
Ireland	**Slovenia**
Hungary	**Sweden**
Germany	
UK	
Spain	
Switzerland	
Australia	
Canada / Québec	

Table 2

Simple majority – 50% + 1 of those who cast ballot needed for decision	*Simple majority* (50% + 1) of those who cast ballot + some additional requirement
Austria	**Hungary** (25% of total electorate)
Finland	**Germany** (25% of total electorate)
France	**Denmark** (40% of total electorate)
Ireland	**Scotland** (40% of total electorate)
Italy	**Australia** (majority of voters in the majority of federal units)
Poland	
Portugal	
UK	
Slovenia	
Slovakia	
Spain	
Sweden	
Switzerland	
Canada / Québec	

Some Legal (and Political) Considerations about the Legal Framework for Referendum in Montenegro, in the Light of European Experiences and Standards

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Introduction

On 14 March 2002, the leaders of Serbia, Montenegro, and the Federal Republic of Yugoslavia signed an agreement in Belgrade by which the Yugoslav Federation –at that time, composed only by these two remaining Republics– was to give way to a new entity oficially named the State Union of Serbia and Montenegro, a loose association in which the two member states were to enjoy virtually all the prerogatives of independent states, except those requiring international recognition. The Belgrade Agreement provided for an artfully crafted, but unsatisfactory, solution to the long dispute between Serbia and Montenegro, as distant from the workable Federation demanded by the Belgrade authorities, than from the separation that Podgorica was pressing for. But, above all, the Belgrade Agreement was conceived from the moment of its inception as a provisional formula, as little more than a transitory step aimed at buying time [2], pleasing

1 Apart from Spain, Professor Flores also lectured at numerous other universities in Europe and the USA. He published over 60 comparative studies referring to elections and election law, party systems, constitutional processes and European integrations in the countries of Southeast Europe. He is the editor of a renowned journal for constitutional matters "Cuadernos Constitucionales" and the member of advisory boards of various journals and institutions in Europe.

2 See INTERNATIONAL CRISIS GROUP: "Still Buying Time: Montenegro, Serbia and the European

the international community, and preparing the two Republics for the next step. In fact, the Constitutional Charter in which the main features of this agreement were translated explicitly recognized the right of each member state either to initiate the proceedings for a change in the status quo, or to secede from the State Union, stating the moment –three years from the adoption of the Charter– and the manner –through a referendum– by which this change could take place.

With the right to secede from the State Union recognized and guaranteed in the Constitution itself, the time to put the process in motion really close in the calendar, and the decision to advance in that route already taken, the only remaining question is how to proceed; i. e.: how to hold a referendum on the issue of Montenegro independence in which citizens may freely express their will, and it may be duly taken into consideration. The following pages will try to address some of the most controversial aspects of the existing legal framework for a referendum on the issue of Montenegro independence, and will try to propose some solutions in the light of previous European experiences and generally accepted democratic standards.

A) The issue of the wording of the question

Which is the question submitted to the consideration of the electorate is, quite obviously, the single most determinant variable affecting the final outcome of a referendum. Therefore, the precise wording of the referendum question is of crucial importance, and so is the issue of who decides on it.

At this point, there seems to be a widespread consensus on the fact that the Montenegro referendum will be called specifically to decide "on breaking away from the State Union of Serbia and Montenegro" –as article 60, paragraph 2 of the Constitutional Charter of the State Union clearly says–. But despite the fact that the terms of the debate –whether to remain within the State Union, or to abandon it– may appear quite clear, the actual wording of the referendum question could very well complicate things. And if anything is beyond discussion in this debate, it is that the more precise the question is, the more meaningful the result will be [3].

Union", ICG Europe Report No. 129 (2002).

3 This is precisely the position sustained by the Venice Commission, which in its 2001 guidelines for constitutional referendums stated that "la question soumise au vote doir être claire (non obscure ou ambiguë); elle ne doit pas induire en erreur; elle ne doit pas suggérer una réponse..." (see VENICE COMMISSION / COMMISSION DE VENICE: Lignes directrices sur le referendum constitutionnel a l'echelle nationale (CDL-INF [2001] 10), Council of Europe, Strasbourg, 2001, II.E). And this is the position, too, of the OSCE / Office for Democratic Institutions and Human Rights, which in its Assessment of the Referendum Law. Republic of Montenegro / Federal Republic of Yugoslavia (OSCE/ODIHR, Warsaw, 2001, § C) concluded that "The wording of referendum questions is of crucial importance. The more precise the questions, the more meaningful the result. Similarly, the issue of who decides on the wording of the question should be stated explicitly in any legislation dealing with the referendum."

To begin with, Article 60, paragraph 1 of the Constitutional Charter opens the possibility of initiating the proceedings for a change in the structure and competences of the State Union before taking the more drastic decision to call a referendum. Consequently, voters could very well be confronted with a choice in which one of the options –to remain in the State Union under the newly agreed conditions– was largely unknown for most voters, or even with a triple choice –to keep the State Union as it was defined in the 2003 Constitutional Charter, to re-create it under the newly agreed conditions, or to do away with it–, in which confusion may grow exponentially.

But the more important risk is to have the question worded in a manner in which responses could be sensibly biased towards one of the two options, and there are way too many examples of how to do it in recent referendums as to candidly overlook this possibility. While the Slovenian and the Estonian referendums for independence of December 1990 and March 1991 confronted citizens of these republics with clear, straightforward questions like "Should the Republic of Slovenia become an independent state?" or "Do you want the restoration of State sovereignty and the independence of the Republic of Estonia?", the opposite happened in cases like the 1991 referendum for independence in Croatia, or the 1995 referendum in Québec, where long, elaborate, and even intricate, questions were put to referendum: "Do you want the Republic of Croatia to be a sovereign and independent State that guarantees cultural autonomy and all civil rights to Serbs and members of all other nations in Croatia, which could enter into an alliance of sovereign states with other republics (in accordance with the proposal for the solution of the crisis of the SRFY proposed by the Republic of Croatia and the Republic of Slovenia?"; "Do you agree that Quebec becomes sovereign after having made a formal offer to Canada of a new economic and political partnership within the context of the Bill on the future of Quebec and the agreement signed on June 1995". In the Croatian case, much attention was paid to provide the Serb minority with assurances that the breakup of the Yugoslav Federation would not harm their interests, and this was reflected in the careful wording of the referendum question [4]; while in Québec the question presented an artfully crafted wording that avoided the words "independence" or "statehood", and which opened the possibility of not entirely severing ties with Canada, which obviously intended to draw support from the segregationist side without excessively alarming moderate voters [5]. In both cases, clarity and straightforwardness were clearly affected.

Situations like these are clearly undesirable, and voters in Montenegro should definitely be confronted with a clear, easy-to-understand, question; one exclusively addressed to ascertain whether they want to remain within the existing State Union or to leave it in order to become an independent country [6]. More specifically, the wording of the question should

4 Sinisa RODIN: "Croatia", in in Andreas Auer and Michael Bützer: Direct Democracy: The Eastern and Central European Experience, Ashgate, Aldershot, 2001, pp. 29-38, in 37-38.

5 See John E. TRENT: "A Practical Guide to the 1995 Referendum",

6 It is worth noting that Article 6 in the draft "Referendum Law on the State Status of the Republic of Mon-

clearly avoid making any reference to a future membership in the European Union, a goal which the ruling Government in Podgorica has strongly endorsed, and which supporters of the separation are regularly linking to the goal of achieving independence for Montenegro –but which certainly would not be any closer if Montenegro became independent, nor any farther if it decided to stay within the existing State Union with Serbia.

For sure, the existing Law on Referendum does not address the issue of the manner in which the referendum question is worded, probably because if would be quite useless from a legal point of view –and perhaps rather naïve from a political perspective– to have a clause in the Law demanding that the referendum question be put in clear, fair, and neutral terms. This provides an even larger relevance to the issue of who is to decide on the wording of the question, an issue that the Referendum Law does address. Article 5, paragraph 1 of the Law on Referendum (consistent with Article 83 of the Constitution of the Republic of Montenegro) states that "The decision on calling a referendum shall be made by the Assembly of the Republic, by majority of votes of the total number of representatives in the Assembly", while paragraph 3 adds: "The decision on calling a referendum shall determine specifically the wording of the question on which the citizens are to pronounce themselves in the referendum, as well as the date of holding the referendum".

Undoubtedly, having the Assembly decide on the wording of the referendum question –and also on the date of the referendum itself– seems a much better solution than leaving the decision solely to the executive, be it the Government as a whole, or the Prime Minister individually. Debate in the legislature is bound to allow all significant forces to express their points of view and their preferences regarding both aspects of the popular consultation, and could pave the ground for a consensual decision. But in a deeply divided parliament like the actual Montenegrin Assembly, the requirement that the decision be taken just by a majority of votes of the total number of representatives may very well allow for the imposition of a specific wording and a precise date for the referendum by the ruling pro-independence majority, ignoring the preferences of the pro-federal minority. In order to avoid this undesirable possibility that could contaminate the campaign and provide an argument to challenge the final results of the referendum, a consensual solution involving the main political actors of the "yes" as well as of the "no" camps ought to be procured [7], regardless of whether the require-

tenegro" of 10 October 2001, a lex specialis intended to be additional to the Referendum Law adopted on 19 February 2001 and which was never passed, defined the referendum question to be "Do you want the Republic of Montenegro to be an independent state with full international and legal personality?". This wording could very well be used at this point, since it is entirely satisfactory, and so has been admitted by the OSCE (OSCE / Office for Democratic Institutions and Human Rights: Comments on the Draft "Referendum Law on the State Status of the Republic of Montenegro". Federal Republic of Yugoslavia, OSCE/ODIHR, Warsaw, 2001, p. 3).

7 Let it be noted that the position of the OSCE / Office for Democratic Institutions and Human Rights on this subject is even stronger than the one here sustained. In its Assessment of the Referendum Law. Republic of Montene-

ments of the existing law may be satisfied by other outcomes.

B) The issue of a minimum turnout threshold

A crucial aspect of the legal regulation of a referendum is that of the conditions that have to be met for it to be valid and –eventually– legally binding. This leads us to the highly contested issue of minimum turnout thresholds, since the active participation of a certain percentage of voters is a common requirement for the validity of a referendum in many post-communist countries, and elsewhere.

As Georg Brunner [8] has summarized, in Belarus, Bulgaria, Croatia, Lithuania, Macedonia, Poland, Russia, Serbia, Slovakia and the Ukraine there is either a constitutional or a legal provision requiring that at least half of the citizens entitled to vote show up and participate for the referendum to be valid. In Moldova, this requisite is aggravated, since the minimum participation quorum is fixed at 60% of the census, while in Latvia the participation quorum of 50% is calculated on the basis of the number of voters who participated in the last parliamentary elections. Therefore, only Estonia, Hungary, Slovenia and Albania happen to have referendum laws in which no quorum requirement is mentioned.

This requirement appears to be reasonable in those constitutional systems in which calling a referendum is a relatively affordable political instrument, specially in those places in which citizens themselves may demand one by submitting a relatively small number of signatures. The requirement of a minimum turnout level for the referendum to be valid provides ordinary citizens who may not feel at all concerned by the issue which motivated the signature drive with a powerful and easy-to-use instrument in order to make this initiative fail: abstaining. Perhaps the best-known example of this is provided by Italy, where just 500.000 citizens may demand a "referendum abrogativo" to be called, but it will only be valid if at least half of the registered voters effectively show up. Since 1970, when the institution was finally regulated, quite a large number of referendums have been called, but only those dealing with truly relevant political and social issues (like divorce in 1974, abortion in 1981, or the electoral system in 1991 and 1993) have been able to mobilize a sufficient number of voters to be successful, while those dealing with marginal issues, relevant for only a tiny minority (like hunting regulation and the use of pesticides in 1990, agrarian policy in 1997, or experimentation with stem cells in 2005) have failed due to a low turnout [9]. While it is reasonable and democratic to allow

gro..., cit. supra, § O, pointed out that "The use of a majority vote decision to call a referendum could weaken the institutional authority of the Assembly of the Republic", and recommended "that consideration be given to amending the Constitution of Montenegro to provide more stringent requirements for convoking a referendum".

8 Georg BRUNNER: "Direct vs. Representative Democracy", in Andreas Auer and Michael Bützer: Direct Democracy…, cit. supra, pp. 215-227, in 222.

9 See Paola TACCHI: Partitocrazia contro il referendum o il referendum contro la partitocrazia?, Giuffrè,

a minority to propose an initiative to amend an existing law, it seems even more so to spare citizens who feel comfortable with the status quo with the obligation to flock to the polls in order to prevent its change.

However, this argument does not hold so firmly in cases in which referendums may only be called after a parliamentary resolution, or when referendums deal with truly capital political decisions about which it is unthinkable that a citizen does not hold an opinion, or does not feel sufficiently concerned [10]. In the first place, because in such cases the 50% turnout requirement usually becomes meaningless, due to the high turnout provoked by the relevance of the question. As Kris W. Kobach [11] has noted, when questions involving the basic boundaries of the polity –namely: declarations of independence– have been submitted to referendum in post-communist Europe, the average turnout has been a whopping 79%, since such questions certainly generated an intense popular interest which automatically translated in massive levels of participation. And when constitutional issues –i.e.: questions related to capital changes in the form of government– have been submitted to a referendum, participation rates have been smaller, but nevertheless significant, with an average turnout of 58%. In fact, each and every independence referendum held in Central and Eastern Europe since 1989 (i.e.: those held in Slovenia in 1990, the three Baltic Republics, plus Croatia, Macedonia, and the former Soviet Republics of Georgia, Armenia and Azerbaijan in 1991, Bosnia-Hercegovina in 1992 and Moldova in 1994) achieved a turnout level well above the 50% level; with Bosnia-Hercegovina, at 64.1%, being the lowest. And only in one case –the highly controversial Polish Constitution of 1997– a constitutional referendum attracted less than 50% of the citizens to the polls (See Figure I in Annex). As Kobach has also argued, turnout levels in post-communist Europe have routinely fell below the 50% participation level only when routine policy questions have been submitted to referendum, with an average turnout for these referendums of just 46% [12].

Milano, 1996.

10 In fact, some have argued that the 50% formula is not reasonable at all when participation levels are concerned. In the words of Kris W. KOBACH ("Lessons Learned in the Participation Game", in Andreas Auer and Michael Bützer: Direct Democracy..., cit. supra., pp. 292-309, in 293): "Some observers have suggested that 50% is an appropriate number below which referendum results are not valid –a sort of quorum for the electorate. But there is nothing magical about the number 50 when it comes to defining legitimate participation levels. To be sure, 50% has intrinsic validity when determining who wins. It represents a majority rule, by definition. But where participation is concerned, it is meaningless: if 50% participate, then 25% of the population, plus one, can decide the issue. And there is certainly nothing magical about 25%. The minimum level of participation cannot be set objectively at any particular number".

11 Kris W. KOBACH: "Lessons Learned in the Participation Game", cit. supra, p. 298-301.

12 Kobach's analysis could not take into consideration the results of the referendums held between March and September 2003 in the eight new member-states of the European Union in order to ratify the accession treaties, but their results largely confirm his previous findings: the average turnout rate was 59%, with Hungary presenting the lowest figure –and the only one below the 50% level: 45'6%– and Latvia the highest one, at 72'5%. See the complete data in Carlos FLORES JUBERÍAS: "Polonia, en la vía de la adhesión: el referendum del 8 de junio de 2003", in Rubén Darío

And in the second place, because in cases like this keeping the requirement of a minimum turnout level may very well become a highly disruptive feature: this requirement favors opponents of the proposed decision in a disproportionate manner, since they can simply refrain from participating, and profit from the unavoidable passivity of unconcerned citizens, and also from the abstention normally derived from absences, errors in the census, etc., in order to make the initiative fail. In fact, it can be argued –and the argument is widely backed by experience– that when a minimum turnout threshold exists, abstention happens to be a much more effective strategy for opponents of the proposed decision than voting against; therefore, keeping this requirement in the law is may well promote the boycott and the subsequent challenge to the legitimacy of the referendum by those who otherwise may choose to participate in it, and be bound to accept its results. Encouraging abstention campaigns which may weaken direct democracy, and biasing the referendum in favour of the "no" camp, consequently yielding false majorities, are the two most relevant arguments that Kobach has put forward when criticizing the introduction of participation thresholds.

As this American scholar has convincingly argued, in Central and East European democracies the risk of abstention campaigns is particularly acute, and even more so than in places like Italy when referendums have quite frequently failed due to a poor turnout. Since voting boycotts played a significant role in defeating communist regimes in the late 1980s –the November 1987 Solidarity-led boycott against the referendums called by General Jaruzelski, or the June 1990 boycott against the referendum on the election of the President proposed by the Socialist Party in Hungary are worth remembering– voting boycotts have managed to command a high esteem in the popular imagination, and this heritage makes it easier to wage an abstention campaign, even though oppressive regimes have long ago disappeared. The consequence of this is that, "regardless of whether such campaigns actually succeed in defeating the proposals that they target, they are always destructive with respect to the institution of direct democracy. They convey the message that non-participation is a responsible, acceptable, even noble, form of political behaviour".

Regarding the second consequence of participation thresholds, it is undeniable that such features provide a significant advantage to those against the measure under consideration, and consequently may bias the final outcome: "with a 50% minimum turnout threshold, proponents of the 'Yes' side must satisfy two conditions in order to win. First, they must ensure that a majority of the electorate turns out to vote. Second, they must win a majority of the votes cast. If they fail in either of these regards, they will lose the referendum. In contrast, the 'No' side can win either by ensuring that a majority of the electorate does not turn out, or by winning a majority of the votes at the polls. Thus,

Torres Kumbrián, José Luis González Esteban, Grazyna Bernatowicz & Joanna Grodzka (eds.): Polonia y España ante el futuro de la Unión Europea, Universidad de Castilla La Mancha, Toledo, 2003. pp. 143-167.

they have two ways of achieving victory". And, moreover, they may well count indifferent voters –and also voters who happen to be absent, or ill, or busy on the date of the vote– as if they were against the proposed measure, therefore amassing a false majority, and a distorted outcome.

The 2001 Montenegro Law on Referendum does indeed fit in the category of those laws that require a minimum turnout level, since Article 37 clearly declares that: "The decision in a referendum is taken by a majority vote of the citizens who have voted, provided that a majority of citizens with voting rights has voted". The formula has been subject since to repeat criticism from both sides of the political arena, and in fact its suppression was proposed in the draft "Referendum Law on the State Status of the Republic of Montenegro" of 10 October 2001, which –as it has already been noted– was never passed by the *Skupstina*. For the ruling, pro-independence, forces the requisite of a 50% participation for the referendum to be valid provides an powerful incentive for boycott, a possibility already foreseen by the anti-independence camp, which as early as 2001 declared its unwillingness to participate in the referendum unless some procedural guarantees –which are still absent in the Law [13]–, were introduced. And for the opposition, pro-federation, parties, the participation threshold is clearly insufficient, since a decision of the breakup of the State Union should only be taken by an absolute majority of the registered voters. Therefore, it is obvious that the actual system features a quorum requirement that is neither necessary, nor fair, nor satisfactory the existing political forces, and consequently its substitution for a better formula should be given due consideration.

C) The issue of the required majority

While the simple elimination of the requirement of minimum turnout for the validity of the referendum would solve some of the problems which have been underlined so far, it is not difficult to predict that it would create new ones, of equal or even larger relevance. Quite probably, the risk for a boycott of the referendum would largely disappear, since citizens opposed to the proposed initiative would realize that abstention was a useless strategy, and the only way to defeat it would be to actually show up at the polls

13 In October 2001, officials from the coalition Together for Yugoslavia expressed to the delegates of the Venice Commission visiting Montenegro that they would only participate in a referendum on the separation of Serbia and Montenegro provided that "(a) an absolute majority of the registered voters, and not only of expressed votes, is required for adoption; (b) citizens of Montenegro living outside Montenegro, in particular in Serbia, have the right to take part in the referendum; (c) the voters register is corrected, specially in areas where minorities live; and (d) only one question is put to referendum" (VENICE COMMISSION / COMMISSION DE VENICE: Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia. Adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 october 2001 (CDL-INF [2001] 23), Council of Europe, Strasbourg, 2001). So far, conditions (a) and (b) are contradicted by the relevant provisions of the applicable Law on Referendum, no significant effort has been made regarding condition (c), and there is no clue as to how the referendum question will be written (condition c), so the possibility of an effective boycott appears to be quite realistic.

and vote against it. Besides, supporters of the proposed measure and opponents to it would face the referendum in an identical position, since both factions should need to muster just a plurality of the popular vote in order to have their position advance.

But this is precisely the problem I was referring to: the simple deletion of the requirement of a minimum turnout for the validity of the referendum from the existing Law would allow the decision submitted to the popular vote to pass whatever the number of its supporters is, and regardless of the percentage of the actual voting census they represent, provided that they are at least one more than those opposing it. Therefore, a proposal submitted to referendum would be considered adopted if just two citizens voted for it, and only one against.

Such a possibility is certainly quite unlikely, and in fact it looks more a *boutade* or a provocation than a true working hypothesis. But leaving aside such improbable scenarios, it can very well be argued that a decision as important as becoming an independent and sovereign State should not be taken lightly. First, because it is a decision that affects, or even determines, each and every other political choice that citizens of a given country may wish to take; and secondly, because in most cases –and unlike many other political issues regularly decided by referendum– becoming and independent and sovereign State is a hardly reversible choice to which many generations will be bound in the future. In other words, it can very well be argued that a decision of such kind should only be taken after a solid majority of the citizens have in an undisputable manner decided to support it –and this is not something that the suppression of the minimum participation threshold envisaged in Article 37 of the Montenegro Law on Referendum can provide for. In fact, it is not even something that keeping this threshold could guarantee, unless someone believed that 26% in favor and 25% against independence constitutes a solid majority.

For that reason, attention should be drawn to the possibility of introducing in the existing Law on Referendum a rule requiring a minimum percentage of the electoral body voting in favor for the proposed decision be adopted, in lieu of the existing rule requiring a minimum turnout for the referendum to be valid, on the one hand, and a simple majority of the expressed votes in favor of the proposed decision for it to be adopted, on the other hand.

To begin with, this formula has already been supported by various European institutions, and is used in several Central and East European States. Croatia, where the 50% turnout + simple majority is used for ordinary referendums, requires the vote of a majority of registered voters when the referendum deals with more relevant matters, like the association of Croatia with other States; and Lithuania uses this formula regularly.

Besides, the Venice Commission has declared twice that such a formula is not only acceptable, but even preferable to the introduction of minimum turnout levels when set-

ting guidelines and defining standards for referendums in Europe [14]. Moreover, this consultative body of the Council of Europe has even recommended this formula in the specific case of the Montenegro Referendum Law, sustaining that in the case of a referendum for independence "acceptance by a minimum percentage of the electorate is preferable to requiring a minimum turnout in order not to provide an incentive for a boycott" and that "for a question of this importance it would be inappropriate to simply delete the rule on minimum turnout without replacing it by a rule on a minimum percentage of the electorate, leaving only a requirement of a minimum percentage of expressed votes"[15].

In a similar fashion, the OSCE Office for Democratic Institutions and Human Rights, in its thorough analysis of the Referendum Law of 19 February 2001 [16] and the draft Referendum Law on the State Status of the Republic of Montenegro of 10 October 2001 [17], declared that "ODIHR cannot recommend the absence of any qualified or weighted mechanisms for two reasons: firstly, the legitimacy of a referendum with less than 50% participation would be open to challenge both domestically and internationally; secondly, pressure on the opposition through such means is unlikely to achieve the intended results, may further increase political polarization, and hence may itself serve as an incentive for the opposition to abstain". As a consequence, the OSCE / ODIHR report recomended that "some qualified or weighted majority should be introduced for a referendum result to be valid", and recalled that although "international law and the OSCE commitments contained in the Copenhagen Document include no standards on the issue. However, best international practice in conducting referendums in similar situations inform us that some level of weighted or qualified majority is preferable in or-

14 In its 2001 guidelines for constitutional referendums, the Venice Commission concluded that "Il est admissible de subordonner la validité des résultats à l'acceptacion par un pourcentage minimal du corps électoral. Un tel quorum est préférable à l'exigence d'un taux minimal de participation" (VENICE COMMISSION / COMMISSION DE VENICE: Lignes directrices sur le referendum..., cit. supra, II.O). And it has confirmed and even clarified its position on this issue in the recent Draft Report on Parliamentary Assembly Recommendation 1704 (2005) on Referendums: Towards Good Practices in Europe (CDL-EL [2005] 032), Council of Europe, Strasbourg, 2005, declaring that: "The setting of a quorum for the vote to be valid gives the majority of voters the impression that if minimum is not achieved, their opinion is not taken into account. Moreover, in the case of a decision-making referendum, this blocks the whole process. It is therefore better to dispense with the quorum requirement, because it is difficult to make voting compulsory. If there has to be a quorum, it should be a quorum of approval (acceptance by a minimum percentage of the electorate) rather than a quorum of participation, which encourages opponents to call for a boycott in the hope of defeating the proposal despite being in a minority".

15 VENICE COMMISSION / COMMISSION DE VENICE: Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia, Adopted by the Venice Commission at its 48th Plenary Meeting (CDL-INF [2001] 23, Council of Europe, Strasbourg, 2001, § 23.

16 OSCE / Office for Democratic Institutions and Human Rights: Assessment of the Referendum Law, cit. supra.

17 OSCE / Office for Democratic Institutions and Human Rights: Comments on the Draft "Referendum Law on the State Status of the Republic of Montenegro..., cit. supra. § B.

der for the outcome of a referendum to be less contestable and stability safeguarded. Furthermore, a qualified majority requirement reduces the potential for repetitive referendums over the same issue as a result of minor shifts in the public mood". The Report, however, left the door open to the possibility of choosing between a qualified majority requirement based on a percentage of the registered voters, or one based on the number of the participating voters.

By and at large, the most usual manner in which these kind of requirements are addressed in comparative Constitutional Law is by introducing a clause by which a qualified majority of 50%+1 of all registered voters in favor of the disputed proposal is required for the referendum to be successful, the proposal being considered otherwise rejected. Other formulas, like the one introduced in 1997 in Hungary [18], by which it is sufficient to obtain the support of 25%+1 of all registered voters, or those requiring a qualified majority of the actual voters are, on the contrary, quite exotic.

Should such a formula be introduced in the existing legal framework for referendum in Montenegro, and applied to the announced referendum on independence? In my opinion, it could and it should be. The international community has repeatedly called for "a clear and substantial majority" in favor of the termination of the State Union with Serbia in order to consider the independence of Montenegro an acceptable possibility, in this requirement can hardly be considered satisfied with less than a qualified majority of 50%+1 of all registered voters. It should be remembered that each and every former-Yugoslav and former-Soviet Republic which gained independence by means of a referendum throughout the last decade, did so on the basis of a majority well above this threshold (see Table I in Annex), and that even in the case of Bosnia-Hercegovina, where the referendum on independence was thoroughly boycotted by the Serb community, the "yes" option attracted the vote of almost two thirds of all registered voters.

For sure, the introduction of such clause would make things a little bit more difficult for the "yes" camp, since the number of affirmative votes required for the referendum to be successful would remain the same regardless of the participation levels, or –to say it in other words– the share of the vote required for the referendum to be successful would increase as the participation level drops, and would only stay around 50% of the actual number of voters in the case of a massive turnout [19]. However, such a requirement does not sound unfair in the present circumstances: on the contrary, it is not particularly daring to predict that a declaration of independence sustained on a thinner majority would probably be contested by the losing side, stir internal dissent and conflict, and

18 Márta DEZSO and András BRAGYOVA: "Hungary" in Andreas Auer and Michael Bützer: Direct Democracy..., cit. supra., pp. 63-93, in 69-70.

19 More specifically: with a turnout of 65%, a majority of 76.9% of the votes cast would be needed to satisfy the requirement of 50%+1 of all registered voters. With a 75% turnout, 66.7% of the votes cast would suffice, and with a 81.8% turnout –the figure of the last parliamentary elections– independece could be achieved with the favorable vote of 61.1% of those actually participating in the vote.

create an unfavorable international environment for the recognition of an independent Montenegro.

D) The issue of public campaigning

The existing Montenegrin Law on Referendum provides only a few hints about the manner in which public campaigning should be carried out in the case of a referendum, leaving the details of the question to a future decision by the National Assembly, the adoption of which still has not taken place at this moment.

To be more precise, article 15 of the Law on Referendum states that "Publicity of the referendum administration procedure shall imply the right of every citizen to be informed in a timely and truthful manner and under equitable terms by means of public media, on all stages of the above procedure and the varied attitudes and opinions in respect to a referendum question", adding in paragraph 2 that "the competent assembly shall, by passing a special ordinance, prescribe more detailed conditions in respect to public campaigning by means of media", and in paragraph 3 that "Public referendum campaigning by means of media and public gatherings shall cease 48 hours prior to the referendum day".

The requirement that information on the referendum be provided by the public media in a timely and truthful manner and under equitable terms –i.e., without trying to influence public opinion in one specific sense– is without discussion a positive aspect of the existing legislation. In a country where public media are still a major source of information for large amount of people, neutrality on such a divisive and sensible issue is a must. But the existing legislation certainly falls short of providing the means for these goals to be effectively achieved, leaving the issue to a future decision of the convoking assembly –in this case, the *Skupstina*– and not specifying any procedural guarantees for its adoption. The fact that this special ordinance has not been passed yet, and that the referendum campaign is already –albeit unofficially– well on its way, might very well lead to a heated parliamentary debate in which supporters of the "yes" and "no" fields may try to secure a more favorable coverage of their positions on the public media. Strict adherence to the criteria already proposed by the Venice Commission [20], and to the caveats

20 Three statements contained in the already quoted guidelines for referendums issued by the Venice Commission seem relevant at this point. Namely:

a) "Le autorités doivent fournir une information objective; cela implique que le texte soumis au référendum ainsi qu'un rapport explicatif soient mis suffisamment à l'avance à la disposition des électeurs, de la manière suivante:

– ils sont publiés dans un journel officiel au moins un mois avant le vote;

– ils sont envoyés personnellement aux citoyens, qui doivent en disposer au moins deux semaines avant le vote;

– le rapport explicatif doit présenter non seulement le point de vue des autorités (exécutif et législatif), mais aussi celui des personnes ayant un point de vue opposé, de manière équilibrée"

b) "Les autorités (nationales, régionales et locales) ne doivent pas influencer le résultat du scrutin par une propagande excessive et unilatérale. L'utilisation de fonds publics à des fins de propagande par les autorités dans la campagne référendaire proprement dite (soit dans le mois précédant la votation) doit être exclue. Un plafond strict doit être fixé à l'utilisation

expressed by the OSCE/ODIHR [21] on this issue could be a good manner to avoid such an undesirable situation, as well as to conform the referendum campaign to the highest democratic standards

Besides, the Law on Referendum does not address the issue of public financing of the parties' campaigns. There is not any precedent in Montenegro of a referendum in which parties campaigning for any of the two possible positions received public funding in order to finance their activities, although parties in Montenegro do regularly receive state support when they participate in local and parliamentary elections. The rationale for this support lies in the fact that parties cooperate with the public and privately owned media, cultural and economic institutions, NGOs and individual citizens, and even with the State itself, in providing voters with information and arguments in order to decide their position and vote accordingly, and this is an activity which the State may wish to support financially. In fact, it is not unheard of that political parties receive State subsidies for their referendum campaigns, just as they do when running candidates for parliamentary or presidential elections. In case this possibility was to be taken into consideration by the National Assembly –an option which the Venice Commission has already considered desirable [22]– steps should be immediately taken in order to clarify the parties' positions on the issue and coordinate their initiatives and strategies in order to facilitate an equal distribution of funds between the "yes" and the "no" camps. In particular, the existing –and rather extended– practice of providing public funding to parties

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des fonds publics à des fins de propagande dans la période précédente"

c) Dans les émissions consacrées à la campagne électorale à la radio et à la télévision publiques, le temps attribué aux émissions favorables et défavorables au projet soumis au vote doit être égal. Un équilibre doit être garanti entre les partisans et les adversaires du projet dans les autres émissions des mass media publics, en particulier dans les émissions d'information. Les conditions financières ou autres de la publicité radio-télévisée doivent être égales pour les partisans et les adversaires du projet"

(VENICE COMMISSION / COMMISSION DE VENICE: Lignes directrices sur le referendum..., cit. supra, II.E, and II.H).

21 Two suggestions are made on this subject in the well-known OSCE / Office for Democratic Institutions and Human Rights: Assessment of the Referendum Law, cit. supra., § K:

– "Consideration should be given to extending the Article 15 'equal terms' principle to paid advertisements in private media in order to ensure that both sides of a referendum are fully explained to voters. ODIHR recommends that the same commercial rate for referendum advertisements be offered to all campaigning parties and that the times and location of the advertising be on similar terms. Alternatively, the law could prohibit all paid political advertising in referendum campaigns. These suggestions are made since the Article 15 goal of informing voters fairly may be weakened if the 'equal terms' principle regulates only public media."

– "The goal of Article 15 may also be circumvented if public media favors either side in the referendum campaign in news coverage, political coverage, forums, or editorials. ODIHR recommends that Article 15 be amended to prohibit biased coverage or treatment and that competent authorities be required to act immediately upon any violation."

22 See VENICE COMMISSION / COMMISSION DE VENICE: Lignes directrices sur le referendum..., cit. supra, II.F: "Les règles générales sur le financement des partis politiques et des campagnes électorales doivent s'appliquer, aussi bien en ce qui concerne le fiancement public que le financement privé".

depending on their parliamentary representation or the share of the votes obtained in the most recent elections appears inappropriate in a context like this, in which parliamentary support for the two confronted positions may very well be unbalanced; such a distributive criteria, if applied, would only aggravate this lack of balance, and affect in a negative manner the fairness of the campaign.

E) The issue of the repeat referendum

Article 12 of the Law on Referendum contains a provision that is clearly unfair, and which could also be highly detrimental for political stability in Montenegro. It says "If citizens have voted in a referendum against a specific question, a 12 month period is required to pass before the same question can be re-proposed for the vote in a referendum".

For sure, calling a new referendum on an issue already submitted to the people once is not critisizable in itself. Most legislations provide for this possibility, or simply do not rule it out, since it seems quite logical that changing circumstances may provide grounds for the people to hold a different opinion in a fresh referendum, and it seems clearly unfair to bind future generations by decisions taken in past referendums. In politics, there is not such a thing as a final word on a given issue.

But in the case of the Montenegro segregation, it seems quite difficult to justify why a new referendum may only be called if the outcome of the first one is negative, and not if it is positive. Certainly, calling a new referendum after the dissolution of the State Union with Serbia had been decided and carried out may result in a pointless effort: returning to the Union may not be an option any more, since the Union will cease to exist once Montenegro leaves it, and it would require the political will of both sides to revive it. But the manner in article 12 is worded simply amounts to say that supporters of the State Union ought to be permanently defending it with their votes, while supporters of Montenegro independence only have to win once in order to achieve their goal, definitively –and this is clearly unfair.

Besides, the 12-months interval between the first and a possible repeat referendum seems too short, and clearly detrimental to the goal of political stability. If the rationale for holding a second referendum on a given issue is letting the people position themselves again once the existing circumstances have significantly changed, or to provide future generations with the same right to decide that previous generations enjoyed, it is clear that such a short period is not appropriate: called with such a short interval, it is highly unlikely that a new referendum campaign would provide fresh ideas and new perspectives; conversely, it would only let parties repeat their old arguments pampered in fresh propaganda money, while tension and disenchantment with politics built up. In Québec, the Law on Referendum forbids holding two referendums on the same subject during the same legislature –in fact, it took 15 years to call another referendum after the

failed one of 1980, and no other has been called after the narrow defeat of the segregationists in 1995– and in Northern Ireland a 10-year interval is required by law in order to hold a repeat referendum on the territory's status –both formulas seem much logical than the one contained in article 12 of the Montenegro Law on Referendum.

Conclusions

After a careful analysis of some of the more controversial aspects of the existing normative regulation of referendums in Montenegro, it can be concluded that the legal framework for a referendum on the decision to break away from, or to remain in the State Union of Serbia and Montenegro is in conformity with the standards set by the international community –and more specifically, by the States of Europe through their common institutions– for a democratic vote. However, a number of provisions contained in this legal framework are indeed problematic from a legal perspective, and politically controversial –and so has been pointed out repeatedly by those same institutions.

In a referendum on such a relevant subject as national independence, and in a context like the present one in Montenegro, characterized by an acute division of the matter, it is absolutely essential that the rules of the game are clear, fair, and unanimously accepted by all the relevant political actors. While this is the single most important condition for the orderly and peaceful development of the process, the lack thereof would provide the justification for conflict before, during, and even after the democratic vote has taken place, whatever its outcome may be.

At this point there are technical deficiencies in the legal framework of the referendum in Montenegro which could be easily eliminated. On the contrary, the more politically controversial features of the Law on Referendum may perhaps require a careful search for an adequate formula, able to please all the political actors involved, and to meet the highest standards set by the international community. With the expiry of the 3-year period referred to in Article 60, paragraph 1 of the Constitutional Charter so close in time, it is highly convenient that immediate measures be taken, and absolutely essential that a maximum consensus is procured. The international community, through institutions like the OSCE Office for Democratic Institutions and Human Rights and the Venice Commission, which so many valuable contributions have already made to democracy and the rule of law in Central and Eastern Europe, should be a major partner in assisting the Montenegro legislature in achieving those goals in a satisfactory manner [23]. If Montenegro is going to become the newest member of the international com-

23 In fact, this cooperation happens to be an authentic constitutional requirement for the validity of the referendum itself, since the Constitutional Charter of the State Union of Serbia and Montenegro was amended not long ago in order to introduce an additional paragraph to article 60.3, by which "The regulations relating to a possible referendum shall have to be based on the internationally recognized democratic standards. A member state which organizes a referendum shall cooperate with the European Union in the field of observance of the international democratic standards, as en-

munity of sovereign and independent States, it should be only after transparent democratic process in which the whishes of all Montenegrin citizens are freely expressed and fairly accounted.

Annex

FIGURE I
REFERENDUMS ON INDEPENDENCE AND CONSTITUTIONAL REFERENDUMS IN EASTERN EUROPE

Country	Independence referendums				Constitutional referendums			
	Date	Turn-out %	Yes votes (% of voters participating	Yes vote (% of voters entitled)	Date	Turn-out %	Yes votes (% of voters participating	Yes votes (% of voters entitled)
Albania					06.11.94	84.4	41.7	35.2
					22.11.98	50.6	90.8	45.9
Armenia	21.09.91	94.4	99.2	93.6	05.07.95	55.6	68.0	37.8
Azerbaijan	29.12.91	95.3	99.6	94.9	22.11.95	54.6	91.9	50.2
Bosnia-Hercegovina	01.03.92	64.1	99.4	63.8				
Croatia	19.05.91	83.0	94.2	78.1				
Estonia	03.03.91	82.7	77.8	64.5	28.06.92	66.8	91.3	61.0
Georgia	31.03.91	90.5	98.9	89.6				
Latvia	03.03.91	87.6	73.7	64.5				
Lithuania	09.12.91	84.5	90.5	76.5	25.10.92	75.3	75.4	57.8
Macedonia	08.09.91	74.0	95.0	70.3				
Moldova	06.03.94	75.1	95.4	71.6				
Poland					25.05.97	42.9	52.7	22.6
Romania					08.12.91	69.2	77.3	53.5
Russian Federation					12.12.93	54.4	57.1	31.0
Serbia					02.07.90	76.0	96.8	73.6
Slovenia	23.12.90	93.3	94.8	88.5				
Ukraine	01.12.91	84.2	90.3	76.0				

Source: Georg BRUNNER: "Direct vs. Representative Democracy", cit. supra, pp. 221-222.

visaged by the Constitutional Charter".

SESSION 4
Conditions for organising the referendum

Code of Good Practice in Electoral Matters - International Standards and Legislation in Montenegro

Veselin Pavicevic[1]
Professor of the Election Law and of Election Systems at the Law School and Faculty of Economics in Podgorica

Lacking clearly and precisely defined international standards, the key points in the analysis of compatibility of Montenegrin legislation with the norms of the international law and practice should be sought within the existing recommendations and suggestions from the relevant addresses.
Until the Handbook on Referendums and Popular Initiatives is developed, following the Recommendation of the Parliamentary Assembly of the Council of Europe no. 1704 of 29 April 2005, among the most important reference points are undoubtedly the following:

1. Final documents of the OSCE Copenhagen conference on the Human Dimension, of 29 June 1990;
2. Overview of OSCE/ODIHR opinions and recommendations regarding the Montenegrin Referendum Law as of 6 July 2001;
3. OSCE/ODIHR mission reports on parliamentary and presidential elections in Montenegro held from 1998 to 2003;
4. Guidelines for constitutional referendums at national level from the Venice Commis-

1 Mr Pavicevic is also a professor of Sociology, Political Systems and Theory of Elections at the Faculty of Economy in Podgorica. His main field of research is the sociology of politics, or the sociology of choice. So far he has published a number of papers, the most important being the book entitled "Election System and Elections in Montenegro from 1990 to 1999". He is one of the co-founders of the Centre for Democracy and Human Rights.

sion of 6 and 7 July 2001;
5. Guidelines on Elections of the Venice Commission of 18 and 19 October 2002. Guidelines on Elections of the Venice Commission are concrete responses to questions and requests formulated in the Resolution 1264 of the Standing Committee of the Parliamentary Assembly of the Council of Europe of 8 March 2001. The Assembly has adopted this document under the name C*ode of Good Practice in Electoral Matters* in early 2003. As is said in this document, the recommendations are based on the key principles of the European electoral heritage and they are the core of positive practices in electoral matters.

Starting from the fact that the link between referendums and elections is as clear as direct and representative democracy are complementary to each other, special attention should be given to what the Guidelines of the Venice Commission say. That is, what does the positive legislation of Montenegro, primarily the Referendum Law, The Law on Election of Members of Parliament and Deputies and the Law on Register of Electors contain, or maybe do not contain in line with the given guidelines?

A) Universal suffrage – rules and principles:

1. Limitations:

Age – rules and principles are fully complied with – both active and passive electoral right is acquired when one comes of age, i.e. at the age of 18;

Nationality – nationality as a requirement for the right to vote existed in the electoral legislation of Montenegro in the period from October 1992 to February 1998. In the positive law it has been envisaged as a requirement for the passive electoral rights (Art. 41, para.1);

Residence – it is envisaged as a requirement and so is done following the interpretation of residence by the Guidelines of the Venice Commission. The length of residence varied during the development of electoral legislation in Montenegro and ranged from 3 to 24 months. With that, positive applicable provisions are the result of the consensus of the drafters and are the result of their endeavours to eliminate potential abuse of official authorities of the administration bodies. However, there is some gap in the current provisions that would enable abuse of the fundamental right, i.e. some voters may be deprived of this right at the local level if they change their place of residence within the territory of Montenegro at the given period, but this is obviously not reflected at the referendum;

Deprivation of the voting right– positive laws of Montenegro are among the most liberal ones, i.e. even where there are such cases they are based on the law and relate exclusively to civil incapacity and must be decided upon a valid court decision to that effect. No other category of voters may be affected.

2. Electoral registers:

• Electoral register in Montenegro is based on the principles of generality, it is centralised and permanent, and in comparative practice this has proven to be more efficient and effective than the special registers that are created for a given purpose;
• Electoral register is kept ex officio which reduces the room for improvisation and mistakes which inevitably accompany occasional administration, i.e. this solution increases the efficiency of the records control;
• Electoral register is a public record in which, with the obligation of the competent authority to inform the citizens thereof, one can do the following: have insight, register, erase, change, amend, or correct the data, within three days from the election announcement day until the day the electoral register is closed. Subsequent alterations of the data in the record can be made only after the court decision;
So, in terms of the register of electors I believe all the normative criteria are fulfilled, all those that are envisaged by the Guidelines of the Venice Commission.

B) Equal suffrage:

1. Every voter is entitled to one vote;
2. When it comes to equality, especially equality referring to campaigns and media coverage, especially on the part of publicly owned media and funding of the campaign, the Referendum Law is not explicit enough. Article 15, paragraph 2 says that more detailed provisions on the campaign by public media shall be prescribed by the Parliament by a special decision on this and there is no provision dealing with the funding for the campaign;
We can presume that the greatest number of these issues will be regulated in the same fashion as for the elections, where most political parties reached a consensus on that, which was also the case regarding the length of residence;

C) Free suffrage:

1. When it comes to the freedom of voters to form an opinion, we have a similar problem to that related to the campaign but we must take into account the ODHIR recommendations of the 2001. The opposition should bear in mind the statement included in

the Guidelines of the Venice Commission where it says that, unlike elections, in the case of referendum total ban for the government to support, or oppose the referendum is not required.

2. When it comes to the freedom of voters to express their wishes and combat electoral fraud, the document envisages rules of conduct covered in 15 items. Ten of these are completely incorporated in the current laws on the elections, three are partly covered and two have never made part of the election legislation and practices in Montenegro. They refer to electronic voting methods and the use of mobile ballot boxes.

D) Secret suffrage:

The legislator has envisaged a very high level of protection. Nevertheless, there is the recommendation of the observation missions relating to one technical issue, that the coupon should be separated from the ballot by the voter and not by the member of the board which is meant to eliminate any possibility to abuse this or to manipulate this procedure, which eventually does not affect the regularity of elections.

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Finally, as for the conditions for implementing the principles, in line with the Guidelines of the Venice Commission, the following may be said:

1. general conditions – to respect fundamental human rights, especially the freedom of expression and assembly – this requirement is fulfilled to that extent to meet the criteria of good practices in elections;

2. Unlike the general condition, for the electoral law it may not be said that it enjoys the necessary level of stability. When I say so, I do not refer to the protection of manipulation of one or several political parties in relation to other participants in the electoral process, but I refer to the fact that the system, in accordance with the will of the key players in the political scene, is in some structure elements frequently subject to changes and very often this is done in intervals shorter than one year before the elections. Thus I believe that I can rightly say that the existing political parties see the political space here as their own private property and they use the election rules as one time rules to manage conflicts. To put it in other words, the only permanent thing in the development of the electoral system in Montenegro is the strengthening of the position and roles of political parties at the expense of other participants in the electoral process, namely voters, candidates and election administration bodies. Obviously, when it comes to citizens and candidates, this problem may not reflect on referendums, but only when it

comes to elections. However, regarding the bodies in charge of administering the referendum, I would like to draw your attention to a detail from the referendum law. Taking into account the fact that there is a danger of boycott of the referendum, the legislator has chosen the only possible solution which is not to prescribe the duty to have multi-party bodies. The danger that I mentioned, whether open or latent, must be taken into account as the possibility to challenge the validity of referendum results by the proponents of the boycott. In that case, the only solution to the problem is in the hands of the authorised observation missions.

3. Last and above all, it is beyond dispute that both according to the law and according to the fact, the required number of procedural guarantees has been provided, particularly as regards the organisation of polling.

Montenegro Referendum Legal Requirements

Hrair Balian[1]
Deputy Director Centre for Security Policy, Switzerland

Let me start my presentation with 2 disclaimers and a clarification: First, I represent here my personal views and not those of the institution where I work, the GCSP; and Second, my attending this conference and speaking on the legal requirements of the possible referendum does not mean support for secession and independence.

However, if Montenegro is to decide on the question of ending the state union, then that decision is best expressed through a referendum that: (a) is held in accordance with S&M's and the Republic's constitutions and laws, (b) complies with international standards for a democratic vote, and (c) conditions are created for a stable transition to independence, once the decision is made.

Therefore, I will speak about the domestic and international legal requirements for a referendum. In this context, most of what I will say today will be restatements of positions we took 3-4 years ago when I was the head of the OSCE/ODIHR's election section. The ODIHR reports on the issue, still very much timely today, can be found on the OSCE website in far more detail than time permits to cover today.

1 *Before joining the Geneva Centre, dr Balian was with the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) in Warsaw. He was responsible for strengthening democratic institutions through long-term observation missions and technical assistance programmes throughout the OSCE region. From 1996 through May 1998, he was in Sarajevo with the International Crisis Group (ICG). As Director of the ICG Balkans Project, he developed and implemented the organisation's policy, research and advocacy work in the region. He was the principal author, contributing writer, and editor of more than 100 ICG policy reports, papers, and advisory opinions analysing the implementation of the Dayton Peace Agreement and suggesting measures to overcome obstacles.*

Starting with the domestic constitutional and legislative framework for a referendum on the future status of Montenegro, 2 constitutional documents are relevant: the Constitutional Charter of the State Union of S&M; and the Constitution of Montenegro.

Let's start with the Constitutional Charter of the State Union and see what is provided with respect to the rights of the state union members to secede. 3 clauses of Art. 60 are relevant: first, the article acknowledges that 3 years after signing the Constitutional Charter, the member states or republics have the right to initiate proceedings to secede from the state union; second, the decision to secede must be taken in a referendum; and third, the proceedings must be governed by republic-level referendum laws that are in accordance with international standards.

Next, let's look at the Montenegro Constitution in which 3 articles arguably address the issue: Articles 2, 118 and 119.

- Article 2 reads: "*Any change in the state status … shall be decided only by citizens in a referendum*".
- Article 118 reads: "*… The Assembly shall decide on the amendment to the Constitution by a two–thirds majority vote of all representatives*".
- Article 119 states: *"If the proposal to amend the Constitution addresses the provisions regulating the state status … or if the passing of a new Constitution is proposed, the Assembly shall be dissolved on the day the proposal is adopted, and a new one convened within 90 days from the date the proposal is adopted. The new Assembly shall decide by a two-thirds majority vote of all representatives only about those amendments to the Constitution …."*

Conflicting interpretations of the impact of these 3 constitutional articles are possible and indeed have been made:

- The CoE's Venice Commission took a restrictive and, in my view, paradoxical interpretation that, in addition to the referendum, a 2/3 majority in the Parliament is required for a change of status.
- Others argue more convincingly that: (1) art. 2 of the Constitution specifically empowers the voters of Montenegro to decide the status of the entity in a referendum; (2) the current Constitution loses its legal relevance if the vote is in favor of independence; and (3) a new constitution must be promulgated pursuant to a Constitutional Assembly or another traditional forum for drafting a constitution for a new state.[2]
- Wisely, the ODIHR did not venture to interpret the 3 constitutional provisions and instead urged that the Constitutional Court of Montenegro should urgently address the issue and give an authoritative interpretation in order to avoid unnecessary and destabilising disputes after the referendum is held.

To date, I believe the Montenegro Constitutional Court has not addressed this controversy, and before a referendum is called on the question of Montenegro's status, the first

2 *See Paul R. Williams and Eric J. Kadel Jr:, A Draft Legal Analysis of the Venice Commission's Interim Report on the Constitutional Situation of the FRY, 11 December 2001*

urgent task must be for the court to sort out this constitutional controversy, convincingly and of course without taking a position on the substance of the referendum. In accordance with international best practices on constitutional ambiguities, the best interpreter of a national constitution is the Constitutional Court of Montenegro.

Keeping the constitutional requirements in mind, let's now examine Montenegro's legislation with respect to referenda. A general law on referenda adopted in Feb 2001 regulates the conduct of referenda in Montenegro. In addition in Oct 2001 when a referendum on status was under consideration, a *lex specialis* was proposed addressing the specific issue of status referendum. This was abandoned later, but may again be proposed.

In general, both laws are in conformity with international standards for a democratic vote. However, the laws contain some politically problematic provisions that I will discuss here briefly. The laws also contain some important technical provisions that must be improved. Those are detailed in the ODIHR reports, therefore I will not spend time today on those technical provisions.

What are the politically problematic provisions? I have 3 main areas of concern:

First, the general law on referenda requires that, for a referendum to be valid, 50% +1 of all registered voters must take part in the vote and the referendum must be approved with a simple majority of those who take part in the vote. However, the *lex specialis* removed the 50%+1 turnout requirement for the referendum on the status of Montenegro. While there are no international standards or OSCE commitments on what should be the required majority to approve such referenda, some level of weighted or qualified majority would improve the credibility of the referendum decision and will promote a more stable transition in Montenegro.

Second, the law provides that 12 months must pass after a referendum before the same question can be proposed for a repeat referendum. This 12 months interval is too short for repeat referenda, and could be longer in order to promote stability. For example, in the case of Northern Ireland, a 7-year interval is provided for repeat referenda on the territory's status.

The third area of concern seems to be the most controversial and relates to citizenship and residency requirements. The Montenegro constitution and legislation stipulate a 24-month residency requirement in the Republic for a citizen of the Republic to take part in the referendum. Recently, Belgrade insisted that citizens of S&M born in Montenegro but permanently residing in Serbia – some 260,000 voters – should also have the right to vote in the Montenegro referendum. This argument is not reasonable.

In July 2001, the ODIHR published a report in which we commented, *inter alia*, on this same issue. The 260,000 citizens of S&M of voting age, born in Montenegro, entitled by birth to Montenegrin citizenship, have moved to Serbia during the past decades, have

been permanently residing in Serbia, have been voting in elections in Serbia, and have had no nexus with Montenegro other than their birth there.

The law governing parliamentary elections in Montenegro also limits the eligibility of voters to citizens with two year residency in the Republic. And all political parties in Montenegro, including the opposition, have agreed with this provision and have raised no objections during repeat parliamentary elections.

Thus, citizens of S&M born in Montenegro but permanently residing in Serbia, in essence, have taken the citizenship of Serbia and vote in elections there. If they were also allowed to vote in Montenegro, they would be given a double franchise within the same State. The State Union's Constitutional Charter art. VIII also agrees – "A citizen of a member state has equal rights and duties in the other member state, as its citizens, except for the voting [electoral?] right." This could be another controversy that the Montenegro Constitutional Court could be asked to address.

The CoE's Venice Commission as well agreed fully with this analysis in an opinion published in 2001.[3] However in June 2005, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution 1459 (2005), which states:

- "… priority should be given to granting effective electoral rights … to the highest possible number of citizens …."
- "… any exceptions from this rule must be prescribed by law, pursue a legitimate aim and not be arbitrary or disproportionate."
- Then the resolution invites Council of Europe member states to "grant electoral rights to all their citizens …, without imposing residency requirements".

This resolution is legitimately concerned with countries where the right to vote is denied to some citizens altogether. In S&M this is not the case, citizens born in Montenegro but residing in Serbia do have the right to vote in Serbia and have exercised this right in Serbia for many years. If they were also given the right to vote in Montenegro, they will in essence have the right to vote in both places, creating an unacceptable anomaly. For example, during federal elections or a referendum to approve a new constitutional charter, they will have the right to vote twice, once in Serbia, the place of their residence and second in Montenegro, the place where they were born. Surely, this makes no sense. Also, the last quote from the PACE resolution cannot be justified: many long-standing democracies around the world have a residency requirement for the right to vote. Moreover, the more competent body within the CoE to determine such legal issues, the Venice Commission, has already issued an opinion on the subject agreeing with the residency requirement.

Having addressed only the politically controversial issues, I do not mean to leave the impression that the laws governing the referendum are perfect and there is no need for

3 *"On the Constitutional Situation of the FRY", CDL-INF-(2001)023, 26 Oct 2001.*

improvements in important technical aspects. On the contrary, the ODIHR has already been on the record with clear recommendations that should be heeded urgently. It is critical that all concerned with the referendum in Montenegro adhere even more strictly to all international standards for a democratic vote. Thus, the referendum must be conducted under the strictest provisions for a universal, secrete, free, fair, equal, accountable and transparent vote defined the 1990 Copenhagen doc. Special care must be given to fair media coverage of the pros and cons of the referendum substance, in particular the coverage of the state owned or controlled media. While in the past, Montenegro has conducted presidential, parliamentary and local elections generally in accordance with international standards, the conduct of the referendum must be held to even higher standards and must be judged by the international community accordingly.

To sum up and conclude my intervention:

- First, the Constitutional Court of Montenegro must address urgently the controversy of the constitutional articles 2, 118 and 119;
- Second, some level of weighted or qualified majority should be required for approval of the referendum results;
- Third, the law on repeat referenda on the status, now possible every 12 months, should be changed to distance such votes and promote stability;
- Fourth, there is no rational for changing the current Montenegro citizenship and residency requirements in order to allow S&M citizens born in Montenegro but leaving in Serbia to take part in the vote. Nonetheless, this could be a second issue that the Constitutional Court of Montenegro could address; and
- Fifth, the ODIHR recommendations from 2001 for a democratic referendum must be heeded urgently, the conduct of the referendum must be held to even higher standards, and the referendum must be judged by the international community accordingly

SESSION 5
International aspects of recognition of the referendum results

Slovenian Experiences in the Preparation and Administration of Referendum and Gaining Independence

Ciril Ribicic[1]
professor of Constitutional Law at the Faculty of Law in Ljubljana:

The exercise of the right to self-determination, which includes the right to independence, is too grave, too delicate and too complex an issue to be resolved by listening to the advice "from aside".

- I limit my presentation to Slovenian experiences relating to preparations and administration of the referendum on independence of Slovenia for which I believe may prove to be a learning experience if you find yourselves in a similar situation to the one in which Slovenia was 15 years ago.
- I wrote about that in the book called Constitutional and Legal Aspects of Slovenia's Gaining Independence as early as 1992; my views, opinions and remarks stated there have not changed significantly in these 13 years.
- I speak as a professor of constitutional law and as a participant of these historic events (a deputy and the president of the opposition party who invited the delegates to leave the 13th Congress of the Yugoslav Communist League and later a signatory to the agreement of parliamentary parties on referendum).

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1 Professor Ribicic has been at the Faculty of Law for over thirty years now. Apart from the constitutional law, he also teaches the law of the Council of Europe. He is the author of numerous publications and articles on the subject. He was also active in politics and was an MP in the Parliament of Slovenia for ten years. He was a member of the Constitutional Commission and also headed the Working Group on State System. He wrote about constitutional aspects of Slovenia's gaining independence, and the essays on parliamentary order. Professor Ribicic is also the Judge of the Constitutional Court of Slovenia.

Constitutional and legal aspects of Slovenia's gaining independence in 1992

1. Introductory remarks
2. Historic steps towards Slovenia statehood
3. Reform of Yugoslav Federation 1968-1974
4. Political struggle for a different Yugoslavia
5. Recognising the asymmetric position of Slovenia
6. Slovenia's gaining independence after the 1990 elections
7. Slovenian and Croatian confederation model
8. Referendum preparation and administration
9. Implementation of referendum decision
10. Independence, armed aggression and international recognition of Slovenia
11. Post-Yugoslav constitutions of Serbia. Croatia, Macedonia and Slovenia
12. Constitution of the Republic of Slovenia from 1991

Right to self-determination

- Belgrade constitutional law school regarded the right to self-determination as a one-time right that is lost upon the entrance into the federation.
- The right to self-determination, which includes the right to independence, should obviously be regarded as permanent and unalienable, which gains (not loses) its full meaning with entering into the federation.
- Slovenia resolved this issue, which should not be disputable, with its amendment 10 to the Constitution of Slovenia from September 1989 defining the right of Slovenian people to self-determination as "permanent, integral and unalienable".

Slovenia had huge problems over this since the official, political stand in Yugoslavia in late 80-ties was that the right to self-determination, especially the right to independence was a one-time right used when entering the federation, as was said in the Constitution of Yugoslavia from 1974, and it was interpreted as already used right. In many scientific gatherings we tried without success to contradict the theory of used right propounded by our colleagues from Belgrade constitutional law school. That is why Slovenia decided to go into the changes of Constitution and at the beginning of this process in amendment 10 in September 1989 it was clearly said what the right to self-determination meant, including the right to independence. It was clearly said that it was a permanent, integral and unalienable right. It was an important step in gaining independence of Slovenia.

Referendum question

- In Slovenia we formulated it in a manner which linked, not separated.
- It led to what the proponents of autonomy aspired to (greater autonomy and independence of Slovenia), without stressing the final goal or giving details of the manner of gaining independence.
- Among other things, the possibility for confederational cooperation with the other Republics was not excluded, obviously once Slovenia has become independent and internationally recognised.
- The question was short, clear, and understandable and did not allow for different interpretations.

Referendum question of 25th December 1990

Should the Republic of Slovenia become an autonomous and independent state?
- YES
- NO

There were many political debates regarding the referendum question. Eventually we came up with the question "Should the Republic of Slovenia become an autonomous and independent state?" with possible answers "Yes" and "No". In my opinion, it is a successfully formulated question in the sense that it linked instead of separating the political forces in Slovenia at the time. Thus, if you had asked whether you are for separation as soon as possible and at all costs or if the question had been whether you are in favour of Slovenia remaining in Yugoslavia you would have had divisions and conflicts. Thus, I believe that we joined those forces that were in favour of independence of Slovenia with the others who aimed at a greater level of autonomy for Slovenia, without excluding the possibility of a confederal union of sovereign independent states that would be created at the territory of former Yugoslavia. To my mind, the question was short, simple and understandable. There were very few non-valid ballots and I think that even those were not caused by the question itself. The question was well-put from that point of view. The question did not go into concrete details, did not mention the final goal but still the Referendum Law envisaged the legal and other consequences of the decision in referendum.

What the negative result may not mean?

- Referendum in no way exhausts the permanent and unalienable right of the Slovenian people to self-determination, and especially their right to an autonomous and inde-

pendent state. (Article 11 of the Law on Referendum regarding the Autonomy and Independence of the Republic of Slovenia)

Consequences of the referendum decision

- The referendum question was published in the Law with detailed explanations of what voting "yes" or "no" implied.
- (Constitutional) legal preparation for independence within six months – the most important obligation stemming from the referendum decision.
- Negative decision would not exhaust the right of Slovenian people to self-determination.

It was already defined in the Law on Referendum which said that in half-a-year's time all the legal, primarily constitutional, grounds for independence should be prepared. On the very last day of the expiry of this deadline, at the secret session of the Parliament held during the night, Slovenia adopted the Fundamental Constitutional Charter to proclaim its independence, or, half a year after the referendum, as was envisaged by the Referendum Law. The law also said that the negative decision may in no way exhaust the right to self-determination.

Majority required for the decision

- The facts in favour of simple relative majority: a large share of members of other nations, poor turnout because of possible earthquake, floods, harsh winter with heavy snow, etc (simple majority of those participating in the referendum).
- Why the more demanding majority was accepted (all those with the right to vote, not only those taking part in the referendum):
- "For" was unanimously decided by all the political parties with their special agreement (by the way: today the provision of this agreement that no party or coalition is to claim the results of the referendum is not respected),
- Referendum on self-contributions - in some local communities it was not possible to introduce them unless it was the decision of the majority of the electorate,-
- It is a key decision with far-reaching consequences since it involves the exercise of the right to self-determination
- For the international community, the minimum majority would not be convincing.

This caused huge debates. The things stated in the first line (in the sense of earthquakes, floods or snowstorms) were not serious arguments, i.e. they were stated by those who did not estimate realistically the political forces and popular opinion in Slovenia. The serious debate, though, was held on whether to impose relative or absolute majority, i.e. the majority

of all those with the voting right, and during the debate there was also a compromise proposal regarding simple relative majority, but including more than one third of the electorate. But also the provision which you have that was discussed here, we also have in our current constitution of the Republic of Slovenia: when it comes to referendum on amendments to the constitution, than majority of voters should turn out for it to be valid.

Who has the right to vote in referendum?

- All those who had the right to vote at the elections in spring 1990, i.e. half a year before the referendum (regardless of the nationality, on the basis of permanent residence only).
- At the same time they were promised the possibility of acquiring citizenship only on the basis of permanent residence at the time of the referendum.
- Specific promise to Italian and Hungarian communities (minorities) that their status would not be aggravated.
- It was not done only because of the results, but also in order to convince the international community that all the European and international democratic standards have been respected and complied with.

Here the Slovenian referendum was very open. The right to vote at the Slovenian referendum was given to everybody who had that right to vote at the parliamentary elections half a year before and that meant all those who had permanent residence in Slovenia regardless of their nationality. At the time, nationality was such a relative thing in former Yugoslavia and it was not only that all those who had permanent residence had the right to vote in this referendum but they were also promised before the referendum, which was even explicitly stated in the Referendum Law, that everybody would be granted citizenship solely on the basis of the fact that at the time of the referendum they had permanent residence in Slovenia. That promise was mostly fully kept. Special promise was given to Italian and Hungarian minorities that their status would not be aggravated, which was also respected (you are aware that today they have their members in the Parliament and some other rights which are above European standards when it comes to minorities). Slovenia, thus, tried to convince the Yugoslav public and the international community at the time of the legitimacy of its referendum.

Elements giving legitimacy to the referendum decision in the eyes of the international public

- Unity of the political parties (Demos coalition and opposition) on the basis of a special agreement.
- Application of the referendum decision (88.5% of all those with the right to vote voted "yes").

- This high result was also caused by the mistakes made by the opponents of independence outside Slovenia: attempts of recentralisation, Great Serbia aspirations, armed conflicts in Kosovo, Vojvodina and Montenegro, invitations to boycott the products of Slovenian economy.
- Failed attempts to achieve to achieve confederation and inclusion into European integrations with the agreement of all federal members of SFRY. Majority support among other nations living in Slovenia.
- Majority support among both autochthonous Slovenian communities.
- Promise of acquiring Slovenian citizenship without extra conditions.

When we look at the elements which had the aim of convincing both the domestic and the international public that the referendum did express the real will of Slovenian people and all those living in Slovenia at the time, we may say the basis of this was the agreement of all the political parties represented in the Parliament. Thus, when it comes to referendum in Slovenia, we did not have organised opposition to this proposal. And this majority, the absolute majority of all the voters in favour of the decision, was the result of the fact that when all the political forces, all the Parliamentary parties decide to support the referendum, than relative majority is not appropriate. In such circumstances it is only fair that the conditions for validity of referendum decision are set higher than when it is about a less important matter or when the decision is opposed by organised opposition. I also believe that the eventual result that I am going to comment on a bit later was partly caused by the mistakes made by the opponents to Slovenia's autonomy at the time.

I think that one of the most significant mistakes which contributed the most for the great majority of Slovenians to realize that they should leave Yugoslavia was the boycott of Slovenian products. From that moment onwards, it was clear that we, as the most developed economy, did not have the good prospects within the Yugoslav federation. According to my estimates, not only did we get majority support from Slovenians, but also from Italians and Hungarians as well as from other nationalities living in Slovenia.

The invitation to the delegates to leave the Congress of the Yugoslav Communist League, January 1990

The next slide shows the moment when we left Belgrade in January 1990, actually when the Slovenian delegation left the 14th Congress of the Yugoslav Communist League. At the moment when I invited our delegates to leave the Congress, I was thinking, as far as I can recall it now, what was waiting for us outside the Sava Centre, the police, the army, or something else…Today I could say that at that moment, the exact moment shown in this picture, we realised that we might as well forget accession to European Union in

near future unless we became independent. We had, actually, come to the Congress with the programme entitled "Europe now!", but on the badge below that motto there were also the words "With Yugoslavia to Europe". At the Congress, all the amendments relating to changes connected with the European perspective were rejected with great majority so this addition to the "Europe now!" motto was not relevant any more.

Referendum results

- 1.359.581 ballot papers;
- "Yes" voted by 1.289.369;
- "No" voted by 57.800;
- Non-valid ballot papers: 12.412
- "Yes" was the answer of 88.5% of all those who had the right to vote.

Out of approximately 1.5 million people who had the right to vote, 1,359,581 people did actually vote. Out of these, about 95% said "yes", and 4% "no", meaning that 88.5 of all the holders of the voting right in the referendum said "yes".

Implementation of the referendum decision

- The referendum outcome was a democratic cornerstone for the whole process of gaining independence: the majority support to the process was not questionable any more.
- Without the referendum, the attempts to keep Slovenia within Yugoslavia with armed forces would become stronger and more persistent.
- The implementation of the referendum decision may be seen as a success story with the exception of the irregularities that were made after gaining independence to the so-called "deleted".

The question now is what the consequences were. The most important consequence was that everybody in Slovenia, in Yugoslavia at the time and everybody in the world knew that a very significant majority of all the inhabitants of Slovenia wanted a (more) independent state. To my mind, it is a success story but I also wish to raise two points of criticism.
Firstly, Slovenia had a very liberal stand during the preparations of the referendum, regarding the treatment of the people who lived in Slovenia and did not have Slovenian nationality and of minorities. The referendum question was set in a fair manner, and the same goes for the voting right, the issue of majority and the convincing final result. On the other hand, later on the public authorities of Slovenia made a serious mistake, without constitutional grounds they denied permanent residence to those who did not seek or were not grant-

ed Slovenian citizenship. On the basis of these decisions, Slovenian citizenship was given to some 180,000 people in Slovenia (close to 9% of the whole population) who came from other Republics and who decided to live in Slovenia. All they needed to do was to make an application stating that they wished to live in Slovenia and prove that they had had permanent residence in Slovenia at the time of the referendum. Some 10% of these people were not granted citizenship, they mostly did not apply for it, and some did not even believe Slovenia would survive as an independent state. They, as is only natural, became aliens. What was not fair and what should not have been done (it was both contrary to constitution and contrary to laws according to the decision of the Constitutional Court, which, unfortunately, is not being applied consistently at the moment) is to deny permanent residence to those who decided not to apply for citizenship or whose application was rejected. It was a mistake and unfortunately, Slovenia has not had found as yet enough strength to correct it, fully and for all, in an expedient and swift manner.

And secondly, if you ask me whether we convinced the international community, or those who on behalf of the international community decided on the destiny of the world at the time with this extraordinary result of our referendum, the answer is clear. No, we didn't. Half a year after the referendum the decision for independence was made and we had then the celebration where the representatives of all foreign countries were invited. No country was represented at the celebration, especially not those countries that were deciding on the destiny of the world at the time. With the exception of some representatives of these countries, their military attaches, in fact, who came to Slovenia then not for the celebration but to monitor what was going on, to see how efficient the Yugoslav Army would be when intervening against the autonomy. Maybe we did convince a great part of the international public, but certainly not those who were the decision-makers on behalf of the international community. Thus, it was only after successful resistance to Yugoslav Army that we convinced the majority of the statesmen of the world who were to decide one way or the other that they should support the independence of Slovenia. The results of referendums, no matter how convincing they might be, in themselves are not enough for any such decision.

Recognition of Referendum Results

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Introduction

The decision to hold a referendum, and how to vote in it, are political questions on which I make no comment. The hypothesis on which this paper is based is that a referendum will have been held in Montenegro in accordance with the first three paragraphs of Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, and that that referendum has resulted in a decision to secede. I have been asked to address international legal issues relating to the recognition of Montenegro following such an event.

I will consider the following, interrelated matters:

1 For over 35 years Doctor Mendelson was engaged in academic work at the universities of Oxford and London, from which he took early retirement in order to concentrate on his practice.
He has represented and advised numerous governments, inter-governmental organizations, non-governmental organizations, multinational and uni-national corporations, and individuals. His work involves litigation (e.g. in the International Court of Justice, European Court of Justice, European Court of Human Rights, international arbitral tribunals and national courts); transactions (e.g. inter-State negotiations and advising on contracts between States and corporations); advice; and expert evidence in foreign courts and international tribunals.
He is a recognized authority on the sources of international law and has practised extensively in most areas of the subject (writing about it, as well) including the law of the sea, boundaries, investment protection, the relation between international and national law (including immunities), international adjudication and arbitration, international organizations, and human rights. Amongst other honours, he has been elected a Bencher of Lincoln's Inn, a member of the American Law Institute, and an Officer of the Ordre de la Valeur of Cameroon. The author of numerous articles on many different aspects of public international law, he is currently writing a book on the subject.

1. What are the criteria of statehood in international law?
2. What does international legal theory say about recognition?
3. What are the modes of recognition?
4. Why does recognition matter?
5. How can recognition be accorded?
6. How, as a practical matter, would one go about obtaining it in the case of Montenegro?

1. What are the criteria of statehood in international law?

The Montevideo Convention on the Rights and Duties of States of 1933 is widely regarded as enunciating the classic criteria of the State in customary international law (even though it is binding on only a relatively small number of States and is not directly binding in the present case). These criteria are:

1. a permanent population;
2. a [reasonably] defined territory;
3. an [internally] effective government;
4. independence from any other State. (In the Convention, the fourth criterion is listed as "capacity to enter into relations with other States"; but this is a consequence of statehood and evidence of it, and it is generally agreed that the fourth criterion is independence.)
5. Kelsen also corrected added a fifth criterion: reasonable prospects of permanence – an entity which breaks away from a State and which is temporarily successful, but unlikely to be able to maintain its secession, is not entitled to be treated as a State.
6. Some have sought to add further criteria, such as respect for democracy and/or human rights. This is more disputable; but those in a position to affect Montengro's future may be in a position to insist on this. I shall come back to the point later.

I should stress that these criteria are a matter of fact and degree, and to some extent judgment. For instance, whether a government is in control of its territory is a question of fact; and even if it is not in a position to make initially to make its decrees fully effective, that will not be fatal as long as it is in *reasonable* control. Because these are questions of fact and degree, it follows that even independent outside observers with no agenda of their own can legitimately differ in the judgment that they make about these questions, or some may consider the criteria fulfilled before others. The matter is further complicated by the fact that the outside observers whose opinions really matter are the governments of other States, and they often *do* have an agenda of their own.

2. What does international legal theory say about recognition?

In the post, debate has raged between the proponents of two main theories: the "declaratory", and the "constitutive".

The "declaratory" theory holds that an entity which fulfils the international law criteria of statehood (what I shall call, for short, the "Montevideo criteria", though we have already seen that they are somewhat wider) *is already* a State, and entitled to be treated as such in its international relations. It therefore has the right to send and receive ambassadors, enter into treaties, defend itself by force, etc. etc. Recognition merely *declares* what is already legally the case. It follows logically that the granting or withholding of recognition should not make any legal difference, at least on the international plane – it has merely *political* significance.

The other school, the "constitutivist", holds that the opposite is the case: even if an entity objectively[2] satisfies the Montevideo criteria, it is not a State until it is actually recognized as such:, in other words, legally, it is only recognition that *constitutes* it a member of the international community, or club, of States. For some adherents of this school, the act of recognition is discretionary. For others, there is a *duty* to recognize an entity that fulfils the legal criteria: nevertheless, if other States do not do their duty, the entity is not constituted a State.

Which theory is right? Some have sought to answer the question by logic, pointing out, for instance, that the constitutive theory can lead to a rather strange relativity. Suppose that State A fully recognizes entity X as a State. State B recognizes it too, but only partially or provisionally – what is called *de facto* recognition. State C has not got round yet to making up its mind. And State D definitely refuses to recognize X as a State. Is X a State or not? For A, yes; for B, yes to some extent; for C, maybe, maybe not – we will have to wait and see; and for D, definitely not. But actually, although this relativity of existence is rather absurd, it is simply another manifestation of the fact that much of the time international law is *auto-interpretive,* which means that it is for each country to decide for itself on the legality of a particular situation. There is no over-arching court or other authority – even the UN - with the compulsory jurisdiction to decide these questions definitively.

I think it fair to say that we cannot answer these questions by logic. The answers can only be found inductively, by observing what States, who are the makers, interpreters, and appliers of international law regard as the right answer. But in fact, to ask whether the declaratory or the constitutive theory is right, i.e. best fits the practice, is to ask the wrong question, because it is too simplistic.

2 *Relatively speaking.*

• In the first place, we must ask: recognition of *what*? One can recognize a great variety of different types of entity or situation in international relations: recognition of States, of governments of recognized States, of belligerents, of insurgents, of international organizations, of title to territory, and so on. The is no *a priori* reason why the answer has to be the same in respect of each kind of situation. For instance, the declaratory view might be more consistent with practice in relation to statehood, whilst the constitutive could be (and I think actually is) more consistent with practice so far as concerns the legal personality of international organizations.

• Secondly, we must ask: recognition *on what plane?* Even if we were to take the view, for instance, that recognition of statehood is merely declaratory when it comes to strictly *international* legal relations, it does not follow that that this is necessarily true when it comes to the legal consequences of statehood in the *domestic* law of other countries. For instance, in quite a few countries the position is essentially that, if the government of the forum does not recognize the entity in question as a State, it has no right to sue or be sued in the domestic courts, own property, confer diplomatic status and immunities, etc. Nor will its laws generally be recognized, for the purposes of private international law.

• Thirdly, there may be *exceptions to the general rule*. Suppose, for instance, that a particular theory is, in general, the better explanation of how States behave in relation to a particular issue – say, statehood. That does not preclude the possibility that, in exceptional cases, the answer may be different. To be more specific, I think that in general governments will accept the statehood of entities that fulfil the Montevideo criteria, and refuse to accept it if they do not. But take the case of Southern Rhodesia, whose white racist government unilaterally declared its independence from the United Kingdom in 1965. It had a defined territory, a permanent population, an effective government, and it was independent in the sense that it was not taking orders from the UK or anyone else. (It is true that the secession was illegal under UK law, but that is not conclusive: international law recognizes does not make rebellion illegal, otherwise the USA, for instance, would have remained a colony in international law long after it ceased to be so in fact.) Since the British government renounced any intention to use force to bring Southern Rhodesia back into obedience, it had a reasonable prospect of permanence too. Nevertheless, the international community refused to recognize Southern Rhodesia as a State and so, for practical purposes, whatever the theorists might have said, it was not a State. Conversely, an entity can be recognized as a State even if it does not fulfil the Montevideo criteria. Thus, the Pope was recognized as an international legal person by the whole international community even when he controlled no territory, not even the tiny Vatican City; and quite a number of States recognized the Palestinian entity as a State (and not just as some other type of legal entity) even before it controlled any territory of its own. In short, even if the declaratory theory is more consistent with

State practice as a whole, so far as statehood on the international plane is concerned, there can be and have been exceptions.

3. What are the modes of recognition?

Having already pointed out that the *objects* of recognition can vary – different types of entity, different types of situation – I can be quite brief about the modes of recognition. They are essentially two: *de facto* and *de jure*. *De facto* recognition is a somewhat qualified, provisional and grudging form. If, for instance, a government has seized power in a way that another State considers to be unconstitutional under the law of the country in question, it might just be recognized *de facto*. This can be a way of saying, in the language of diplomacy: "We do not like you, and we hope you will disappear and a legitimate government will replace you; but in the meantime you are the ones in power, and so we have to deal with you". It can also be a means of expressing, not so much distaste, as caution: "There is a civil war in your country; you are in power now so we will recognize you for the moment; but we may change our mind if the situation changes." By contrast, de *jure* recognition is normal, straightforward acknowledgment of an entity or situation, without any of these qualifications. In a civil war, the previous government can continue to be recognized *de jure,* and the rebels as *de facto* in control of some or all of its territory. The term *de jure* does not have to be used: if there is no qualification, it is presumed to be *de jure*.[3]

4. Why does recognition matter?

Some have argued that it does not matter whether a country is recognized or not. Much of international relations these days is conducted in international organizations, and in such bodies it is possible for States to sit alongside others whom they do not recognize. (E.g. Israel and the Arab States.) Likewise, much of international law is regulated by multilateral conventions, and the fact that a party is not recognized by one or several others will not prevent its being a party. Even on a bilateral level, it is possible to have an *informal* agreement with an entity that one does not formally recognize. Equally, it is possible to have contacts similar to diplomatic relations without their being formally that.

3 We should, however, note two things about de facto recognition. First, recognition can always be withdrawn if the factual situation changes anyway, even if has been given de jure. And secondly, despite some divergences, international law and practice has not, at least for the better part of the last two centuries, usually made constitutional legitimacy a criterion. So in a sense, the de facto form of recognition is rather irrelevant from the standpoint of pure public international law. The reason it exists is essentially political. This does not mean that it is wholly without legal consequences, however, at least on the domestic legal plane. For instance, if a government of a State is recognized only de facto, it will not be entitled to the property of that State in a foreign country.

For instance, there is a Taiwanese "trade delegation" in London, and we have in the past had East German "journalists" too. So what does it matter?, some say.

Well, admittedly, if Montenegro opted for independence it might not matter too much if, for instance, Mali refused to recognize it. I do not imagine that Montenegro has much to do with Mali. But if the United States refused to recognize it, that might be a different matter. Relations with that powerful country might very well be important, given its influence in the world – and given also the significance of recognition or its absence in US *domestic* law. Perhaps *a fortiori*, if it was the European Union and its members who refused to recognize Montenegro. As a neighbour of other EU members, Montenegro could well be adversely affected by such a policy. As the Turkish Republic of Northern Cyprus knows to its cost, a refusal by the EU and its member States to accept its statehood has resulted in the denial of significant economic, not to mention political, advantages.

Recognition (or its absence) on the part of the international community *as a whole* is also very significant. If a country is recognized by most States (or if at any rate they do not refuse to recognize it) it can gain membership of the United Nations, its Specialized Agencies (such as the World Bank and International Monetary Fund), and many other international organizations that provide a forum for multilateral diplomacy, a vehicle for international assistance if required, and machinery for participating in the international regulation of trans-boundary problems. Such participation is a considerable advantage for States, or even indispensable,

In short, despite what some have argued, recognition *does* matter.

5. How can recognition be accorded?

When we speak of recognition, we usually think of an express statement by a Government that it recognizes the independent statehood of another country. But recognition can be implied too. The exchange of diplomatic representatives, the issue of a consular *exequatur*, and entering into bilateral treaty relations, are all means by which implied recognition can occur – though it depends on the intention of the State who is said to have granted such recognition. Conversely, co-participation in a *multilateral* treaty involving many parties, or in an international organization with many members, does *not* imply recognition. It can be a borderline question where the treaty or organization in question is open to only a few States.

I do not think that it is necessary in the present case to dwell any longer on this question of implied recognition, because in the case of Montenegro I do not think that it is likely that this is the way that things will happen. The international community, and the EU, in particular, has been so closely involved in the fate of the former Yugoslavia and its component parts that I cannot imagine that it will not be intimately involved in the af-

termath of any decision by this country to separate itself from Serbia. I therefore come to the last question I raised at the beginning of this talk:

6. How, as a practical matter, would a state go about obtaining recognition, and especially montenegro?

These days, the way that a new State comes into being is either by decolonisation (as process which has been almost completed) or by secession from a larger entity (e.g. the Republics of the former USSR), or by the complete break-up of a State into its component units, as the UN held was the case with Yugoslavia. Normally, such States apply for membership of the UN, a process which requires the agreement of both the Security Council and the General Assembly. Only States can be members of the United Nations, so it would be reasonable to surmise that admission to the UN is a form of collective recognition on behalf of the international community. Reasonable but, strictly speaking, wrong. The UN is *not* a body which has been empowered by its members, either in the Charter or in practice, to grant recognition on behalf of all of them. The entity in question counts as a member for all internal UN purposes, even if some Members were strongly opposed to its admission. And Article 2(4) of the Charter prohibits the illegal use or threat of force against "any State"; so if one Member were attacked by another, the attacker could not defend itself in the UN by saying that the object of its attack was not a State. But for *other* purposes, legally speaking, Members are free – outside the walls of the UN, so to speak – to continue to withhold recognition: as the Arab States did for a long time in relation to Israel, Iraq did in relation to Kuwait, and Morocco regarding Mauritiania.

Having said that, it is true that, *politically speaking*, the UN does operate as an organ of collective legitimation, and once a country is admitted the non-recognizing State is swimming against a very strong tide.

For all sorts of reasons, Montenegro would wish, I imagine, to join the UN in its own right, and it would get the benefit from this political stamp of approval. The UN does not lightly withhold recognition, so unless something terrible happened between now and the time when Montenegro chose to separate from Serbia, I doubt that there would be difficulties.

However, Montenegro would no doubt want EU recognition too, for at least three reasons. First, the EU is a very important regional power and (potentially) trading partner. Secondly, Montenegro would, I imagine, want to join the EU eventually – a process that is already in process, to a greater or lesser extent, with all of the former components of Yugoslavia that have not already joined. And thirdly, the UN has on the whole been content for the EU to take a leading role in matters of this sort concerning the former Yugoslavia, and it could defer admission until the EU is satisfied. Or again – which comes to

much the same thing – it could work hand in hand with the EU on this question.

I do not imagine that this would present any difficulty on the hypothesis that it was done in accordance with the Constitutional Charter, for two reasons. First, if international law recognizes the right of States to secede from a union even "illegally" in terms of the previous constitution, so *a fortiori* it should accept a withdrawal that was consistent with a prior agreement between the parties. Secondly, because it was the EU which itself sponsored the Constitutional Charter.

In the case of other States claiming to be the successors of the former Yugoslavia, the EU has insisted that there are sufficient guarantees in place for minorities within each new State. As I understand it, there is not a substantial ethnic minority or minorities in Montenegro, and if that is right it should not be a problem. Again, were the EU to insist on respect for human rights more generally, my understanding is that democracy and human rights have been making good progress here, anyway. And if there is a problem, I imagine that Montenegro would want to try and resolve it quite quickly, especially if it is hoping to join the EU as an actual member in the fairly near future.

Another point that the EU has been rather insistent on is a commitment of former components of the Federation to respect the integrity of international frontiers. This obviously means no use of force to try and change them, and it also means in practice, I think, respect for the administrative boundaries of Yugoslavia as at least a main basis for the international boundaries of the new State, under the doctrine that has become known as *uti possidetis.* I do not see that this commitment would in itself necessarily preclude litigation in, say, the International Court of Justice or an international arbitral tribunal as to exactly what the borders are. But I am told that, as a practical matter, Montenegro is unlikely to have any boundary problems with its neighbours; and if so, there is no more that needs to be said in that regard.

The final issue concerns succession to State property, rights and obligations, both national and international. The EU is clearly going to demand that these issues be resolved peacefully. But there are likely to be some complicated legal issues here. The Badinter Commission did not do a particularly impressive job of indicating the criteria that should be applied. But perhaps we should not be surprised, because the International Law Commission did not do a particularly impressive job itself in its attempts to codify the law on the succession of States. This was partly because the number of possible permutations is huge if one takes into account the number of different fact situations that can give rise to secession issues (such as decolonisation, unification, dissolution, the transfer of a piece of territory from one State to another, etc.) combined with the number of different issues that can arise (rights and obligations under multilateral treaties, rights and obligations under bilateral treaties, membership of international organizations, boundaries, debts to other States or monetary claims against them, State obligations to the nationals of other States, ownership of State treasury, archives, liability

for the payment of pensions, etc.) But it was also because the process of codification in the International Law Commission became, in this instance, heavily politicised, so that most States were left dissatisfied with the two Vienna Conventions on State succession and they have been rather a failure. That is not to say that there is no international law on the subject. There is always customary international law, but it is in some cases uncertain and, even when it is not, it can be hard to sort out the various strands, given all of the permutations. So in the case of the five successors to Yugoslavia, the problem has had to be dealt with by long and hard negotiations. If it comes to a similar process between Montenegro and Serbia, I suspect that things may also be difficult.

And, parenthetically, they are not made easier by the somewhat unfortunate wording of the fourth and fifth paragraphs of Article 60 of the Constitutional Charter of the State Union. These (together with the last paragraph) make at least some provision for the resolution of succession issues in the event of a separation. The basic idea is clearly to treat Serbia as the legal continuation of the entity formerly known as "the State Union of Serbia and Montenegro", with Montenegro being treated as the new State. This way of managing succession issues is entirely normal. However, the normal way of describing the legal relationship between the two entities, and the legal relations between them, is to term one State the "continuing State" (as in the case of Russia), and the new State (or States) as the "successor" (e.g. Georgia). But in the Constitutional Charter, it is *Serbia* that is described as the "successor State". It may be that this odd wording is due to a reluctance of the Montenegrin participants in the drafting of the Charter wishing to avoid the implication that Montenegro was not a State *before* entering the State Union. Or it may simply be a piece of poor drafting and confusion resulting from the fact that, *in relation to the former Yugoslavia*, Serbia and Montenegro was treated as a successor State of the federation. Or there may be yet another explanation. However, I think that the intention is clear enough, and I hope that the drafting will not cause problems.

Coming back to the conditions that the EU might attach to recognition, I strongly suspect that all it can do is say that the parties have to negotiate in good faith over this matter. I cannot believe that it would make the *successful outcome* of such negotiations a precondition to recognising Montenegro, because otherwise it would make it a hostage to possible Serbian unwillingness to be reasonable, and would indeed hand Serbia a powerful bargaining tool. So, as I say, I suspect that the most we will see in that respect is an insistence that Montenegro commit itself to negotiate peacefully over succession issues, and I cannot imagine that that would be a problem for Montenegro.

That, then, is my contribution to the question of the international aspects of recognition of the results of the referendum, on the hypothesis that it is in favour of withdrawal. I hope that it will be of some use in the discussions to follow.

ANNEX 1

International Experts Round Table

Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice

Podgorica, Hotel «Crna Gora»
22-25 September 2005.

Agenda

Friday 23. September

10.00-10.10 Opening:
Sanja Elezovic, Director of the Foundation Open Society Institute-Representative office Montenegro

10.10-11.30 Session 1: Self-declaration rights, with regard to international law and practice
Introductory speech:
10.10-10.30 Nebojša Vučinić, Professor of the International Law at the Law Faculty Podgorica, University of Montenegro: *Legal aspects of the exercise of the right of peoples to self-determination in the case of Montenegro*

10.30-10.50 Ralph Wilde, Reader UCL Faculty of Laws: S*elf-determination in international law and the position of Montenegro*

10.50-11.30 Discusion

11.30-13.00 Session 2: Voting rights –comparative experiences
Introductory speech:
11.30-11.50 Paul Williams, Executive Director of the Public International Law & Policy: *Montenegro: Residency requirements for voting in a referendum*

11.50-13.00 Discussion

15.00-16.30 Session 3: Majorities

Introductory speech:

15.00-15.20 Srđan Darmanović, Professor of the Contemporary Political Systems at the Law Faculty, Department for Political Studies Podgorica, University of Montenegro: *Majorities in Montenegrin legislation and in international law*

15.20-15.40 Carlos Flores Juberias, Professor of the Constitutional Law at the University of Valencia, Department for Constitutional Law and Political Sciences, Spain: *Some legal (and political) considerations about the legal framework for referendum in Montenegro, in the light of European experiences and standards*

15.40-17.00 Discussion

Saturday 24. September

10.00-11.30 Session 4: Conditions for organizing of the referendum

Introductory speech:

10.00-10.20 Veselin Pavićević, Professor of the Election Systems at the Economic Faculty Podgorica, University of Montenegro: *Code of good practice in electoral matters - international standards and legislation in Montenegro*

10.20-10.40 Hrair Balian, Deputy Director Centre for Security Policy, Switzerland: *Montenegro referendum legal requirements*

10.40-11.40 Discussion

12.00-14.00 Session 5: International aspects of the referendum results' recognition

Introductory speech:

12.00-12.20 Ciril Ribicic, Professor of Constitutional Law, Law Faculty University of Ljubljana: *Slovenian experiences in the preparation and administration of referendum and gaining independence*

12.20-12.40 Maurice Mendelson, Queen's Counsel. Barrister, Blackstone Chambers, London; Emeritus Professor of International Law in the University of London: *Recognition of referendum results*

12.40-13.40 Discussion

Concluding remarks:

13.40-14.00 Kazimir Zivko Pregl, Chairman of the Foundation Open Society Institute- Representative office Montenegro

List of participants[1]

1. Hrair Balian, *Deputy Director Centre for Security Policy, Switzerland*

2. Robert Beecroft, *Ambassador, Professor at the National Defense University, Washington D.C, USA*

3. Michael P Bourke, *Legal Services Manager, Personal Injuries Assessment Board Republic of Ireland*

4. Alan Carlson, *United States Consulate Podgorica, Serbia and Montenegro, Political and Economic Officer*

5. Igor Cupic, *Consulate General of the Republic of Croatia, Deputy General Consul*

6. Srđan Darmanović, *Professor of the Contemporary Political Systems at the Law Faculty, Department for Political Studies Podgorica, University of Montenegro*

7. Sanja Elezovic, *Director Foundation Open Society Institute-Representative office Montenegro*

8. Karsten Friis, *Senior Political Officer OSCE Mission to Serbia and Montenegro*

9. Vladimir Goati, *Center for Political Studies and Public Opinion research, Institute of Social Sciences, Belgrade*

10. Vanessa Jimenez, *Counsel, Public International Law & Policy Group, USA*

11. Carlos Flores Juberias, *Professor of the Constitutional Law at the University of Valencia, Department for Constitutional Law and political Sciences, Spain*

12. Biljana Kovacevic Vuco, *President of the Lawyers Committee for Human Rights (YUCOM)*

13. Stevan Lilic, *Professor at Law Faculty Belgrade, Serbia*

14. Maurice Mendelson, *Queen's Counsel. Barrister, Blackstone Chambers, London; Emeritus Professor of International Law in the University of London, UK*

15. Konrad Olszewski, *OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)*

1 *Alphabetical order*

16. Veselin Pavićevic, *Professor of the Election Systems at the Economic Faculty Podgorica, University of Montenegro*

17. Kazimir Živko Pregl, *Chairman of the Foundation Open Society Institute-Representative office Montenegro*

18. Irena Radovic, *British Office Podgorica, Head of Office*

19. Ciril Ribicic, *Professor of Constitutional Law, Law Faculty University of Ljubljana, Slovenia*

20. Vladimir Ristovski, *Head of Council of Europe Office in Podgorica*

21. Vladimir Savkovic, *OSCE Mission to Serbia and Montenegro, Senior Legal Assistant*

22. Gordana Siljanovska, *Professor of the Constitutional Law, Political Systems and Contemporary Political Systems at Law Faculty Skopje, Macedonia*

23. Wojciech Stanisławski, Centre for Eastern Studies, Poland

24. Srdjan Stojanovic, *Analyst, International Crisis Group*

25. Mijat Sukovic, *Montenegrin Academy of Science and Arts, Montenegro*

26. Karel Vondrak, *I Secretary of Czech Embassy in Belgrade*

27. Nebojsa Vucinic, *Professor of the International Law at the Law Faculty Podgorica, University of Montenegro*

28. Mladen Vukcevic, *Chairman of the Constitutional Court of Republic of Montenegro*

29. Elizabeth Walker, *Senior Research Associate Public International Law & Policy Group*

30. Noel Whelan, *Barrister, Ireland*

31. Ralph Wilde, *Reader UCL Faculty of Laws, UK*

32. Paul R Williams, *Rebecca Grazier Professor of Law & International Relations American University,Executive Director of the Public International Law & Policy Group, USA*

Photos from the Round Table

ANNEX 2

LAW ON REFERENDUM

as of 19 Feb 2001

(OSCE – ODIHR Unofficial translation)

I BASIC PROVISIONS

Article 1

The present Law regulates the calling and administration of a referendum, being the form of a prior pronouncement of citizens, as well as bodies in charge of the administration of a referendum and protection of citizens' rights in the administration of a referendum.

Article 2

Referendum in the Republic of Montenegro (hereinafter referred to as: the republican referendum), shall be called in the territory of the Republic or a part thereof, for the purpose of a prior pronouncement of citizens on specific issues lying within the competence of the Assembly of the Republic of Montenegro (hereinafter referred to as: the Assembly of the Republic).

Referendum in a municipality, the capital city of the Republic i.e. the administrative center (hereinafter referred to as: the municipality) shall be called for the purpose of a prior pronouncement of citizens on specific issues lying within the competence of the municipal assembly.

Article 3

The republican referendum must be called for the purpose of a prior pronouncement of citizens on any changes in the status of the country, changes in the form of a government and any changes of frontiers.

The republican referendum can be called for the purpose obtaining an opinion of citizens prior to making a decision on specific issues lying within the competence of the Assembly of the Republic.

The municipal referendum must be called for the purpose of a prior pronouncement of citizens on the establishment of new municipalities, abolishment or amalgamation of the existing municipalities and any changes in the domicile of municipalities.

The municipal referendum can be called for the purpose of obtaining an opinion of the citizens prior to making a decision on specific issues lying within the competence of the municipal assembly, in the manner and following the procedure prescribed by the municipal statute in conformity with the present Law.

Article 4

The outcome of a referendum shall be binding on the assembly calling the referendum.

Article 5

The decision on calling a republican referendum shall be made by the Assembly of the Republic, by majority of votes of the total number of representatives in the Assembly.

The decision to call a referendum in a municipality shall be made by the municipal assembly, in conformity with the statute of the municipality.

The decision on calling a referendum shall determine specifically, the wording of the question on which the citizens are to pronounce themselves in the referendum, as well as the date of holding the referendum.
The decision to call a referendum shall be publicized in the manner applicable to the regulations of the authority calling the referendum.

Article 6

Citizens shall pronounce themselves in the referendum on one or more questions.

Article 7

No less than 45 days and no more than 90 days shall pass between the day a referendum is called and the day it is held.

Article 8

The right to pronounce themselves in a referendum shall be enjoyed by the citizens who, pursuant to election laws, enjoy voting rights.

Article 9

No one shall, on whatever account, hold any citizen liable for having voted in a referendum, nor shall any citizen be requested to state who he has voted for or why he has abstained from voting.

Article 10

Referendum shall be administered by secret ballot.
Voting shall be performed by voting tickets/ballots.
Every citizen shall vote only in person.

Article 11

The authority which has called the referendum shall be obliged, not later that 15 days from the day of submittal of a report by a competent commission, to ascertain the outcome of the referendum.
Should the outcome of a referendum entail an obligation on the part of the authority referred to in Paragraph 1 of this Article to pass an act, the above authority shall, within 60 days from the day of the referendum, pass the respective act.

Article 12

If citizens have voted in a referendum against a specific question, a 12month period is required to pass before the same question can be re-proposed for the vote in a referendum.

Article 13

The administration of a referendum shall be performed by the referendum administration bodies i.e. commissions and polling committees.

Article 14

The funds required for the administration of a referendum shall be apportioned to in the budget of the Republic i.e. a municipality.

All activities and actions related to the administration of a referendum shall be exempt from any fees whatsoever.

Article 15

The procedure of administering a referendum shall be made public.
Publicity of the referendum administration procedure shall imply the right of every citizen to be informed in a timely and truthful manner and under equitable terms by means of public media, on all stages of the above procedure and the varied attitudes and opinions in respect to a referendum question.

The competent assembly shall, by passing a special ordinance, prescribe more detailed conditions in respect to public campaigning by means of media.

Public referendum campaigning by means of media and public gatherings shall cease 48 hours prior to the referendum day.

Article 16

The protection of citizens' rights in the administration of a referendum shall be provided by the referendum administration commissions, the Constitutional Court of the Republic of Montenegro and other competent courts.

II REFERENDUM ADMINISTRATION BODIES

Article 17

Bodies in charge of the administration of a referendum shall act in compliance with the law.
The referendum administration bodies shall be responsible to the authorities that have appointed them.
State government agencies and organizations, as well as local self-government/municipal agencies shall be obliged to provide the referendum administration bodies with the relevant data and information needed for performing their activities.

Article 18

Bodies in charge of the administration of a referendum shall decide by majority of votes of the total number of their members.

Article 19

The activities of the referendum administration bodies shall be made public.

Article 20

Commissions for administration of a referendum shall be composed of a chairman, a secretary and a certain number of members.

The principle of a proportionate representation of political parties in the assembly that has called the referendum, must be observed when appointing the members of commissions.

Deputies are appointed to the chairman, secretary and members of referendum commissions.

The term of office of the chairman, secretary and members of referendum commissions shall last until the ascertainment of the referendum outcome by the assembly that has called the referendum.

The chairman, secretary and members of commissions in charge of a referendum shall be appointed from among the jurists and must have a voting right.

Article 21

A republican referendum shall be administered by:
• the Republican Commission in charge of the administration of a referendum (hereinafter referred to as: the Republican Commission),
• the commission for administering a republican referendum in a municipality, and
• polling committees.

Commissions referred to in Paragraph 1 of this Article shall be appointed by the Assembly of the Republic of Montenegro, not later that 10 days after coming into force of the decision on calling the referendum.

Article 22

The Republican Commission shall be composed of a chairman, a secretary and nine members. The Commission for administering a republican referendum in a municipality shall be composed of a chairman, secretary and seven members.

Article 23

The Republican Commission shall:
• adopt its internal regulations,
• provide for a lawful administration of a republican referendum,
• coordinate the activities of commissions and furnish them with instructions for the administration of a republican referendum,
• supply the voting material to all bodies administering a republican referendum, and provide for technical preparation for the referendum,
• prescribe forms for the administration of a republican referendum,
• establish the outcome of the vote in a republican referendum,
• report to the Assembly of the Republic on the outcome of the vote in a republican referendum, and
• likewise perform other tasks as stipulated by the present Law.

Article 24

The Commission in charge of administering a republican referendum in a municipality shall:
• adopt its internal regulations,
• determine polling stations,

• appoint polling committees and provide for proper performance of their activities,
• provide for technical preparations for voting in a republican referendum,
• take over from the polling committees the voting material in a republican referendum,
• establish the outcome of the vote in a republican referendum in the territory of the municipality,
• report on the outcome of the voting to the Republican Commission,
• likewise perform other duties as stipulated by the present Law.

Article 25

A municipal referendum shall be administered by the:
• Commission for administering a municipal referendum, and
• polling committees.

The Commission for administering a municipal referendum shall be appointed by the municipal assembly, not later than 10 days from coming into force of the decision on calling the referendum.
The decree on the establishment/appointment of the commission for administering a municipal referendum shall prescribe the number of members and appoint the members of the commission, in conformity with the present Law.

Article 26

The Commission for administering a municipal referendum shall:
• adopt its internal regulations,
• provide for a lawful administration of a municipal referendum,
• supply the voting material and prescribe forms for the administration of a municipal referendum,
• determine polling stations,
• appoint polling committees and provide for proper performance of their activities,
• establish the outcome of the vote in a municipal referendum,
• report on the outcome of the voting in the municipal referendum to the municipal assembly,
• publicize the results of a municipal referendum by every polling station in the municipality, and
• likewise perform other duties as stipulated by the present Law.

Article 27

A polling committee shall be appointed for each polling station, not later than 10 days before the day determined for the pronouncement of citizens in a referendum.

A polling committee shall be composed of a chairman and six members.

Deputies shall be appointed to the chairman and members of polling committees.
The chairman and members of polling committees shall be appointed for each referendum.
The principle of a proportionate representation of political parties in the assembly that has called the referendum, must be observed when appointing the polling committee.
The chairman and members of polling committees must have a voting right.

Article 28

Polling committees administer the voting at polling stations, provide for regularity and secrecy of voting and establish the results of voting at their respective polling stations.
Polling committees shall provide for maintenance of order at polling stations during the pronouncement of citizens in a referendum.

A polling committee appoints, from among its members, two commissioners who shall be in charge of administering the voting out of the polling station; if possible, one of these commissioners shall represent one of two opposition parties in the respective assembly that has won the largest number of votes in the previous elections.

III ADMINISTERING A REFERENDUM

Article 29

Provisions of the Law on Election of Councilmen and Representatives related to polling stations and voting at polling stations, voting by mail; voting material; voting; establishing of voting results; repeated elections; observation of elections; financing elections and other matters shall be applied accordingly to the procedure of administering a referendum, if not otherwise provided by the present Law.

Article 30

Referendum shall be administered in conformity with the voters' registers that are used for elections.
In the procedure of administration of a referendum, provisions of the Law on Voters' Registers shall be applied accordingly.

Article 31

The voting ticket/ballot shall contain the following:
1. the designation of the authority which has called the referendum,

2. the date when the referendum shall be held,
3. the question on which the citizens are to pronounce themselves in the referendum,
4. the words "FOR" and "AGAINST" printed one beside the other, if there is only one question; if there are more referendum questions, in that event each of the questions shall be preceded by a respective ordinal number and printed one below the other,
5. the seal of the competent commission.

In addition to the data referred to in Paragraph 1 of this Article, each voting ticket shall contain also, in the upper right corner of its back side, the title of the municipality, the title of the polling station, designation of the polling station and the seal of the polling committee comprising the title and the name of the respective polling station.

Article 32

A voting ticket shall be comprised of two portions i.e. of a counterfoil or a stub of a ballot with a uniform serial number, and of a ballot paper.

A uniform serial number must not be printed on the ballot paper.
The counterfoil or a stub of the ballot and the ballot are separated by perforations.
The range of serial numbers on the counterfoil corresponds to the number of voters enlisted in the voters' register, while the number of voting tickets shall be determined for each polling station according to the order of serial numbers on counterfoils.

The counterfoil or stub of a ballot is printed widthwise, in such a manner as not to exceed a half of the voting ticket width.

Article 33

If there is only one question in a referendum, a citizen shall vote by circling the word "FOR" or the word "AGAINST".

If there are more questions on which citizens are to pronounce themselves in a referendum, a citizen shall vote by circling the ordinal number printed in front of the question.

If there is one question in a referendum, invalid shall be deemed any ballot paper which has been left blank, or which has been marked in such a manner that it could not be established with certainty what the citizen has voted for, or a ballot on which both the word "FOR" and the word "AGAINST" have been circled.

If there are more questions on which citizens are to pronounce themselves in a referendum, invalid shall be deemed any ballot paper which has been left blank i.e. on which

no ordinal number has been circled, or which has been marked in such a manner that it could not be established with certainty what the citizen has voted for, or a ballot on which several ordinal numbers have been circled.

Article 34

Transparent/invisible ink – spray and optical readers shall be used in a referendum.

Article 35

After the voting has finished, the polling committee shall undertake to establish both the number of citizens who voted "FOR" and the number of citizens who voted "AGAINST", if there has been only one question in the referendum; if there have been more questions in the referendum, the polling committee shall establish also the number of votes awarded to each particular question.
The record or the report of the referendum administration body shall contain the data referred to in Paragraph 1 of this Article.

Article 36

The Republican Commission shall establish and make public the outcome of the republican referendum.

The Commission for administration of a municipal referendum shall make public the data on :

- the number of voters enlisted in the voters' register,
- the number of voters who have voted at the polling station,
- the number of voters who have voted out of the polling station,
- the number of voters who have actually voted,
- the number of received ballot papers,
- the number of unused ballot papers,
- the number of used/marked ballot papers,
- the number of valid ballot papers,
- the number of invalid ballot papers,
- the number of voters who have voted "FOR",
- the number of voters who have voted "AGAINST",
- the number of votes awarded to each particular question.

The outcome of the republican referendum shall be publicized in the Official Gazette of the Republic of Montenegro, and the outcome of the municipal referendum shall be publicized in the Official Gazette of the Republic of Montenegro – Municipal Regulations, not later than 15 days from the date of holding a referendum.

Article 37

The decision in a referendum is taken by a majority vote of the citizens who have voted, provided that the majority of citizens with voting rights has voted.

IV PROTECTION OF THE RIGHTS OF CITIZENS IN THE ADMINISTRATION OF A REFERENDUM

Article 38

Every citizen who has the right to pronounce himself in referendum can make, on the account of irregularities in the administration of a referendum, representations to the competent commission.

Representations referred to in Paragraph 1 of this Article shall be made within 72 hours of passing a decision i.e. conducting an act.

Representations referred to in Paragraph 1 of this Article shall be lodged directly with a competent commission.

Article 39

Representations against a decision, an act or a failure from the part of a polling committee shall be lodged with a competent commission.

Representations against a decision, an act or a failure from the part of a commission in charge of administering a republican referendum in a municipality, shall be lodged with a Republican Commission.

Article 40

A competent commission shall take a decision on the representations within 24 hours after representations have been made and deliver it to a person making a representation.

Should a competent commission approve a representation, a respective decision or an act shall be made void.

Should it happen that a competent commission fails to pass a decision on a respective representation within a period of time stipulated by the present Law, the representation shall be deemed as being approved.

Article 41

Against a decision of the commission for administration of a municipal referendum, de-

nying or rejecting a representation, or against a decision, an act of a failure on the part of this Commission, a citizen can lodge a complaint with the Constitutional Court of the Republic of Montenegro.

Article 42

Against a decision of the commission for administration of a republican referendum in a municipality, denying or rejecting a representation, a citizen can lodge a complaint with the Republican Commission.

Against a decision of the Republican Commission denying or rejecting a representation, or against a decision, an act or a failure on the part of this Commission, a citizen can lodge a complaint with the Constitutional Court of the Republic of Montenegro.

V CONCLUDING PROVISIONS

Article 43

On the day on which the present Law shall come into force, the Law on Referendum (Official Gazette of the Republic of Montenegro, Nos. 3/92 & 7/92) shall cease to be valid.

Article 44

This Law shall come into force on the day of its publication in the Official Gazette of the Republic of Montenegro.

Constitution of the Republic of Montenegro

In accordance with the Amendment LXXXII, item 1, para. 7 of the Constitution of the Republic of Montenegro, the Assembly of the Republic of Montenegro, at its session held on October 12, 1992, has passed

THE DECISION

ON THE PROMULGATION OF THE CONSTITUTION OF THE REPUBLIC OF MONTENEGRO

The Constitution of the Republic of Montenegro having been adopted by the Assembly of the Republic of Montenegro at its session held on October 12, 1992 is hereby promulgated.

No. : 02-2893

In Podgorica, on this 12th day of October 1994

The Assembly of the Republic of Montenegro

President of the Assembly

Dr. Risto Dj. Vukcevic

(signature)

Mindful of the historical right of the Montenegrin people to have its own state, acquired through centuries-long struggle for freedom;

Dedication of the citizens of Montenegro to freedom, democracy and equality among peoples and friendship among nations;

In the belief that nature is the source of health, spirituality and culture, of the human kind, whereas the state is a guardian of sanctity and purity of nature;

Determination of its citizens for Montenegro to continue to live in the joint state of Yugoslavia as a sovereign and equitable republic;

The Assembly of the Republic of Montenegro, striving to provide permanent peace and secure all the tributes of tranquility, honour, justice and freedom,

hereby adopts and promulgates

Section I

Basic Provisions

Article 1.

STATE

Montenegro is a democratic, social and ecological state.

Montenegro is a republic.

Montenegro is the member of the Federal Republic of Yugoslavia.

Article 2.

SOVEREIGNTY

Montenegro shall be sovereign in all matters which it has not conferred on to the jurisdiction of the Federal Republic of Yugoslavia.

Sovereignty is vested in all the citizens of the Republic of Montenegro.

Citizens shall exercise their sovereignty directly and through their freely elected representatives.

Any change in the status of the country, change of the form of government and any change of frontiers shall be decided upon only by citizens in a referendum.

Article 3.

DEMOCRACY

No authority shall be either established or recognised which does not result from the freely expressed will of citizens.

Article 4.

RULE OF LAW

The state is founded on the rule of law.

The government shall be in conformity with the Constitution and Law.

Article 5.

DIVISION OF POWER

The government of Montenegro shall be arranged according to the rule of the division of power into the legislative, executive and judicial.

Legislative power is vested in the Assembly, the executive power in the Government and the judicial in the courts of law.

Montenegro shall be represented by the President of the Republic.

Constitutionality and legality shall be protected by the Constitutional Court.

Article 6.

THE STATE SYMBOLS

Montenegro shall have a coat of arms, a flag and a national anthem.

Article 7.

THE CAPITAL CITY AND ADMINISTRATIVE CENTRE

The administrative centre of Montenegro shall be Podgorica.
The capital city of Montenegro shall be Cetinje.

Article 8.

TERRITORY

The territory of Montenegro shall be a single and inalienable territory.
Montenegro shall be organised in territorial units - municipalities.

Article 9.

LANGUAGE AND ALPHABET

In Montenegro Serbian language of the iekavian dialect will be the official language.
Cyrillic and Latin alphabets shall be deemed to be equal.
In the municipalities in which the majority or a substantial number of population consists of the national minorities and ethnic groups, their respective languages and alphabets shall be in the official use.

Article 10.

CITIZENSHIP

Montenegro shall confer Montenegrin citizenship on its citizens.
No person may be deprived of the Montenegrin citizenship nor of the right to change the citizenship.

Article 11.

RELIGION

The Orthodox Church, Islamic religious community, the Roman Catholic Church and other faiths shall be separate from the state.
All the faiths shall be deemed to be equal and free in the performance of their religious rites and affairs.
All the religious denominations will independently arrange their interior organisation and religious affairs within the legal set-up.
The state shall offer material assistance to religious denominations.

Article 12.

LEGISLATURE

The law shall prescribe and regulate the following, in accordance with the Constitution:

1. Manner in which rights and freedoms shall be exercised if this is necessary for their exercise;
2. Manner of establishing, organising and competence of the state authorities and the procedure before the authorities if this is necessary for their proper functioning;
3. The system of the local self-government;

4. Other matter of interest for the Republic.

Article 13.

LIMITS OF FREEDOM

In Montenegro everything shall be deemed to be free if not prohibited by law.
Everyone is obliged to uphold the Constitution and the law.
Public officials must consciously and honestly perform their duties and shall be held responsible for their performance.

Section II

Freedoms and Rights

Article 14.

BASIC PROVISIONS

Freedoms and rights shall be exercised in accordance with the Constitution.

Article 15.

FREEDOM AND EQUALITY

All citizens are free and equal regardless of any particularities and/or other personal attributes.
Everyone shall be equal before the law.

Article 16.

INVIOLABILITY

Freedoms and rights are inviolable.
Everyone is obliged to respect freedom and rights of other.
Any abuse of the freedom and rights shall be deemed to be unconstitutional and shall be punishable according to law.

Article 17.

PROTECTION

Everyone is entitled to an equal protection of his freedoms and rights in the procedure prescribed by law.

RIGHT OF APPEAL

Everyone is guaranteed the right to an appeal or some other legal remedy against the decisions deciding on his rights or interests based on the law.

Article 18.

LEGAL ASSISTANCE

Everyone shall have the right to legal assistance.
Legal assistance shall be offered by the Bar Association, as an independent service and by other legal services.

Article 19.
ENVIRONMENT

Everyone shall have the right to a healthy environment and shall be entitled to a timely and complete information on its state.
Everyone has the duty to preserve and promote the environment.

1. Personal Freedoms and Rights

Article 20.
PERSONAL INVIOLABILITY

Physical and psychological integrity of a man, his privacy and personal rights are inviolable.
Dignity and safety of a man are inviolable.

Article 21.
CAPITAL PUNISHMENT

Human life is inviolable.
The capital punishment may be ruled and pronounced only for the most serious criminal offence.

Article 22.
DETENTION

Every person is entitled to personal freedom.
The seizure or detention must be understood by the arrested person to be an arrest, promptly and in his own language or in the language which he understands, and the reasons for the arrests must be communicated.
Detained person must be promptly informed of his right to remain silent.
At the request of the person detained, the arresting authority must promptly inform close relations of the detained about his arrest.
Person detained shall have the right to have the defence council of his choice present at the hearing.
Illegal arrest shall be deemed to be a punishable offence.

Article 23.
CUSTODY

A person reasonably suspected of having committed a criminal offence may be detained and held in confinement on the basis of the decision by a competent court of law, only when this is indispensable for the conduct of criminal procedure.
Person detained must be given the warrant for the arrest with adequate explanation at the time of the arrest or within 24 hours at the latest from the moment of the arrest. The detained person shall have the right of appeal against the arrest which shall be decided upon by the court of law within 48 hours.

The length of detention must be of the shortest possible duration.
The detention ordered by a first instance court must not exceed three months from the day of arrest. This time limit may be extended for further three months by the decision of a higher court. If by the end of this period the indictment has not been filed, the accused shall be released.
The detention of persons underage (minors) may not exceed 60 days.

Article 24.

RESPECT OF HUMAN DIGNITY

Respect of human dignity and dignity in all criminal and any other proceedings is hereby guaranteed, both in the case of arrest or limitation of freedom and during serving of pronounced sentence.

PROTECTION OF PHYSICAL INTEGRITY

The use of force against a suspect who has been detained or whose freedom has been restricted and any forcible extraction of a confession or statement, shall be prohibited and punishable.
No one may be subject to torture, humiliating and degrading treatment or punishment.
Medical and other scientific experimentation may not be carried out on an individual without his consent.

Article 25.

RULE OF LEGALITY

No one may be punished for an act which did not constitute a penal offence under law or by-laws at the time it was committed, nor may a punishment be pronounced which was not envisaged for the offence in question.
Criminal offences and criminal sanction shall be prescribed by law.
Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty by a valid decision of the court of law.

COMPENSATION OF DAMAGE

Any person wrongfully detained or wrongfully convicted shall be entitled to compensation of damages by the state.

RIGHT TO DEFENCE

Every person shall be guaranteed the right to defend himself and the right to engage a defence counsel before the court of law or before some other body authorised to conduct proceedings.

Article 26.

All criminal and other punishable offences shall be determined and sentences pronounced according to legal regulation and provisions based on the law which was in force at the time the offence was committed, except if the new legal regulations and provisions are based on the law which is more lenient for the perpetrator.

Article 27.

NE BIS IN IDEM

No person shall be tried twice for the same offence.

Article 28.

FREEDOM OF MOVEMENT AND RESIDENCE

Citizens shall be guaranteed the freedom of movement and residence.

Freedom of movement and residence may be restricted only for purpose of conducting criminal investigations, for prevention of contagious diseases or when so required for the defence of the Federal Republic of Yugoslavia.

Article 29.

HOME

The home shall be inviolable.

A person in an official capacity may enter a dwelling or other premises against the will of the tenant and may search them, but only on the grounds of a search warrant issued by a court of law.

The search shall be conducted in the presence of two witnesses.

A person in an official capacity may enter dwelling or other premises without the court warrant and may conduct the search without the presence of two witnesses if so required for immediate apprehension of the perpetrator of a criminal act or for purpose of saving human lives and property.

Article 30.

PRIVACY OF MAIL

Privacy of mail and other means of communication shall be inviolable.

Under a court decision the principle of inviolability of the privacy of mail and other means of communication may be put in abeyance if so required for purpose of criminal proceedings or for the defence of the Federal Republic of Yugoslavia.

Article 31.

PERSONAL DATA

Protection of secrecy of personal data shall be guaranteed.

The use of personal data for purposes other than those for which they were compiled shall be prohibited.

Everyone shall have the right of access to personal data concerning his own person and the right of judicial protection in case of their abuse.

2. Political Freedoms and Rights

Article 32.
VOTING RIGHT

Every citizen of Montenegro who has reached the age of 18 shall be entitled to vote and be elected to a public office.
The voting right is exercised at the elections.
The voting right is general and equal.
Elections shall be free and direct and voting shall be by a secret ballot.

Article 33.
INITIATIVE, REPRESENTATION AND PETITION

Every person shall be entitled to a free initiative, to submit representation, lodge a petition or a proposal to a state authority and shall be entitled to receive an answer thereto.
No person shall be held responsible and neither shall suffer any other detrimental consequences for opinions expressed and contained in the initiatives, representations, petitions or proposals, except in case the person in question has therethrough committed a criminal offence.

Article 34.
FREEDOM OF MAN

Freedom of belief and conscience shall be guaranteed.
Freedom of thought and public expression of opinion, freedom of confession, public or private profession of religion and freedom to express national affiliation, culture and the freedom to use one's own language and alphabet shall be guaranteed.
No person shall be obliged to declare his opinion, confession and national affiliation.

Article 35.
FREEDOM OF PRESS

Freedom of press and of other public information media shall be guaranteed.
Citizens shall have the right to express and publish their opinion in the public information media.
Publication of newspapers and public dissemination of information by other media shall be accessible to everyone without prior permission, subject to registration with the competent authority.
Radio and television broadcasting organisations shall be established in accordance with law.

Article 36.
RESPONSE, RECTIFICATION, COMPENSATION OF DAMAGES

The right to a response and the right to rectification of incorrect published information

or data as well as the right to compensation of damages caused by publishing of incorrect information or data shall be guaranteed.

Article 37.

CENSORSHIP OF PRESS

Censorship of press and of other forms of public information media shall be prohibited.

DISTRIBUTION OF PRESS

No person shall have the right to prevent distribution of press and dissemination of other information except when the competent court of law shall find that they call for a forcible overthrow of the order established by the Constitution, violation of the territorial integrity of Montenegro and the Federal Republic of Yugoslavia, violation of guaranteed freedoms and rights or incite and foment national, racial or religious hatred and intolerance.

Article 38.

FREEDOM OF SPEECH

Freedom of speech and of public appearance shall be guaranteed.

Article 39.

FREEDOM OF ASSEMBLY

Citizens shall be guaranteed the right to peacefully assemble without prior approval, subject to prior notification of the competent authorities.

Freedom of association and other peaceful assembly may be provisionally restricted by a decision of the competent authority in order to prevent a threat to public health and morals or for the protection of human lives and property.

Article 40.

FREEDOM OF ASSOCIATION

Citizens shall be guaranteed the freedom of political, trade union and other association and activities, without the requirement of a permit, subject to registration with the competent authorities.

The state shall offer assistance to political, trade union and other associations whenever there is a public interest thereof.

Article 41.

PROHIBITION OF ORGANISATION

Political organisation in the state authorities shall be prohibited.

Professional members of the police force may not be members of the political parties.

Judges, justices of the Constitutional Court and the public prosecutor may not be members of the bodies of the political parties.

Article 42.

SECRET AND PARA-MILITARY ORGANISATIONS

Activities of political, trade union and other organisations aimed at the violent overthrow of the constitutional order, violation of the territorial integrity of Montenegro and of the

Federal Republic of Yugoslavia, violation of guaranteed freedoms and rights of man and citizen or inciting and fomenting of national, racial, religious and other hatred or intolerance shall be prohibited.
Establishment of secret (clandestine) organisations and paramilitary groups shall be prohibited.

Article 43.
INEQUALITY AND INTOLERANCE

Any incitement or encouragement of national, racial, religious and other inequality and incitement and fomenting of national, racial, religious and other hatred or intolerance shall be unconstitutional and punishable.

Article 44.
CITIZEN AND INTERNATIONAL ORGANISATIONS

Citizens shall have the right to participate in regional and international non-governmental organisations.
Citizens shall have the right to address international institutions for purpose of protection of their freedoms and rights guaranteed under the Constitution.

3. Economic, Social and Cultural Freedoms and Rights

Article 45.
PROPERTY

Property shall be inviolable.
No person shall be deprived of his property, nor may it be restricted except when so required by the public interest, as prescribed by law, subject to fair compensation which may not be below its market value.

Article 46.
INHERITANCE

The right of inheritance shall be guaranteed.

Article 47.
EARNING AND ENTREPRENEURSHIP

Freedom of earning and freedom of entrepreneurship shall be guaranteed.
All acts and activities creating or instigating monopoly and preventing market oriented economic activities shall be prohibited.

Article 48.
RESTRICTION OF OWNERSHIP AND EARNING

The right to own property and the freedom of earning may be restricted by law, i.e. legal regulations with the force of law, for the duration of a state of emergency, in times of immediate threat of war or a state of war.

Article 49.

TAXATION

All person shall be obliged to pay taxes and other dues.

Article 50.

COPYRIGHT

Freedom of creation and publishing of scientific and works of art, scientific discoveries and technical innovations shall be guaranteed and their authors shall be entitled to moral and material rights.

Article 51.

STATE OF EMERGENCY

Everyone shall be obliged to participate in prevention and elimination of the general state of emergency.

Article 52.

RIGHT TO WORK

Everyone shall have the right to work, to a free choice of occupation and employment, to just and humane conditions of work and to protection during unemployment.
Forced labour shall be prohibited.

Article 53.

RIGHTS OF WORK FORCE

All persons employed shall have the right to corresponding remunerations.
All persons employed shall have the right to limited working hours and a paid vacation.
All persons employed shall have the right to protection at work.
Youth, women and disabled persons shall enjoy special protection at work.

Article 54.

STRIKE

All persons employed shall have the right to a strike for protection of their professional and economic interests.
Persons employed in the state administration and professional members of the police force shall not have the right to strike.

Article 55.

SOCIAL SECURITY

Under a mandatory insurance scheme all persons employed shall provide for themselves and members of their families all forms of social security.
The state shall provide social welfare for citizens unable to work and without livelihood, as well as for citizens without the means of subsistence.

Article 56.

PROTECTION OF DISABLED PERSONS

Disabled persons shall be guaranteed social protection.

Article 57.

HEALTH CARE

Everyone shall be entitled to health care.

Children, expectant mothers and elderly persons shall be entitled to publicly financed health care, if they are not covered by another insurance program.

Article 58.

MARRIAGE

Marriage may be contracted only upon a free consent of both bride and groom.

Article 59.

FAMILY

Family shall enjoy special protection.

Parents shall be obliged to care for their children, for their up-bringing and education.

Children shall be obliged to care for their parents whenever they should be in need of care.

Article 60.

MOTHER AND CHILD

Mother and child shall enjoy special protection.

Children born out of wedlock shall have the same rights and obligations as children born in wedlock.

Article 61.

ABUSE OF CHILDREN

Abuse of children is prohibited.

Employment of children and minors on jobs hazardous for their health and development shall be prohibited.

Article 62.

EDUCATION

Everyone shall be entitled to education under equitable conditions.

Primary education shall be mandatory and free of tuition fees.

Article 63.

AUTONOMY OF UNIVERSITIES

The autonomy of universities, higher education institutions and scientific institutions shall be guaranteed.

Article 64.

SCIENCE, CULTURE AND ARTS

The state shall render assistance and instigate development of education, sciences, culture, arts, sports, physical and technical culture.

The state shall protect scientific, cultural, artistic and historical values.

Article 65.
STATE AND ENVIRONMENT

The state shall protect environment.
Freedom of earning and free entrepreneurship shall be restricted by environment protection.

4. Local Self-Government

Article 66.
LOCAL SELF-GOVERNMENT

The right to a local self-government shall be guaranteed.
Local self-government shall be exercised in the municipality and in the capital.
Citizens shall decide through local self-government directly and through their freely elected representatives on certain public and other affairs of direct interest for the local population.
Local self-government in the municipality shall consist of the assembly and of the president of the municipality.
The Republic shall offer assistance to the local self-government.

5. Special Rights of National and Ethnic Groups

Article 67.
PROTECTION OF IDENTITY

The protection of the national, ethnic, cultural, linguistic and religious identity of the members of national and ethnic groups shall be guaranteed.
Protection of rights of members of national and ethnic groups shall be exercised in accordance with the international protection of human and civic rights.

Article 68.
LANGUAGE, ALPHABET, EDUCATION AND INFORMATION

Members of national and ethnic groups shall have the right to free use of their mother tongue and alphabet, the right to education and the right to information in their mother tongue.

Article 69.
SYMBOLS

Members of national and ethnic groups shall have the right to the use and display of their national symbols.

Article 70.

ASSOCIATION

Members of national and ethnic groups shall have the right to establish educational, cultural and religious associations, with the material assistance of the state.

Article 71.

EDUCATIONAL PROGRAMS

Curriculum of educational institutions shall cover both history and culture of the national and ethnic groups.

Article 72.

LANGUAGE

Members of the national and ethnic groups shall be guaranteed the right to the use of their mother tongue in the proceedings before the state authorities.

Article 73.

REPRESENTATION

Members of the national and ethnic groups shall be guaranteed the right to a proportional representation in the public services, state authorities and in local self-government.

Article 74.

CONTACTS

Members of the national and ethnic groups shall have the right to establish and maintain free contacts with citizens outside of Montenegro with whom they are having a common national and ethnic origin, cultural and historical heritage and religious beliefs, but without any detriment for Montenegro.

RIGHT OF APPEAL

Members of the national and ethnic groups shall have the right to participate in the regional and international non-governmental organisations, and the right to address international institutions for purpose of protection of their freedoms and rights guaranteed by the Constitution.

Article 75.

EXERCISE OF RIGHTS

Special rights granted to members of the national and ethnic groups may not be exercised if they are in contradiction with the Constitution, principles of international law and principle of territorial integrity of Montenegro.

Article 76.

PROTECTION COUNCIL

Republican Council for Protection of Rights of National and Ethnic Groups shall be established in Montenegro, for purpose of preservation and protection of the national, ethnic, cultural, linguistic and religious identity of national and ethnic groups and for the exercise of their rights prescribed by the Constitution.

Republican Council for Protection of Rights of National and Ethnic Groups shall be headed by the President of the Republic.
Composition and competencies of the Republican Council shall be prescribed by the Assembly.

Section III
Organisation of the State

1. The Assembly

Article 77.
COMPOSITION AND ELECTION

The Assembly shall consist of deputies elected by citizens in direct and secret ballot, on the basis of a general and equitable voting right.
One deputy shall be elected for every six thousand voters.

INDEPENDENCE OF DEPUTIES

Every deputy shall decide and vote according to his own belief and may not be recalled.

PROFESSIONAL FUNCTION

Every deputy shall be entitled to a professional exercise of his function as deputy.

Article 78.
TERM OF OFFICE

Term of office of the Assembly shall be four years.
In cases of the state of war the term of office of the Assembly shall be extended for as long as peace is not established.
At the proposal of not less than 25 deputies, Government or the President of the Republic, the Assembly may decide to shorten the term of office.

Article 79.
IMMUNITY

A deputy shall enjoy immunity.
A deputy shall not be called to account for an opinion expressed or a vote cast in the Assembly.
No deputy may be subject to criminal proceedings nor detained without prior approval of the Assembly.
A deputy may be detained without the approval of the Assembly if he should be apprehended during a criminal offence for which the penalty prescribed exceeds five years of prison sentence.

The immunity enjoyed by the deputies is also enjoyed by the President of the Republic, members of the Government, judges, justices of the Constitutional Court and the public prosecutor.

Article 80.

PRESIDENT AND VICE PRESIDENT

The Assembly shall have a president and one or more vice presidents to be elected from among the deputies for the term of office of four years.

President shall represent the Assembly, call elections for the President of the Republic and perform other tasks prescribed by the rules of procedure of the Assembly.

Article 81.

COMPETENCIES

The Assembly shall:

1. adopt the Constitution;
2. enact laws, other regulations and general enactments;
3. enact development plan of Montenegro, budget and annual balance sheet;
4. determine principles for organisation of the state administration;
5. ratify international treaties within the competences of the Republic;
6. announce a republican referendum;
7. float public loans and decide on entering into indebtedness of Montenegro;
8. elect and dismiss president and members of the government, president and justices of the Constitutional court, president and judges of all the courts of law;
9. appoint and dismiss public prosecutor and other officials;
10. grant amnesty for criminal offences prescribed by the republican law;
11. perform other duties as prescribed by the Constitution.

Article 82.

SESSIONS

The Assembly shall sit in regular and extraordinary sessions.

Regular sessions of the Assembly shall be convened two times a year, in accordance with the rules of procedure of the Assembly.

The first regular session shall begin on the first working day in March and the second session on the first working day in October.

The Assembly shall convene in extraordinary session at the request of not less than one third of the total number of deputies, or at the request of the President of the Republic and of the Prime Minister.

Article 83.

DECISION MAKING

The Assembly shall decide if the session is attended by more than one half of the total number of deputies, and the decision shall be made by a majority of votes of the deputies present, if not otherwise prescribed by the Constitution.

When the Assembly is deciding on the enactments regulating the manner in which the freedoms and rights are exercised, on the electoral system, on the material obligations of the citizens, on the state symbols, on the dismissal of the President of the Republic and on the vote of confidence to the Government, on a referendum, on shortening of the term of office and on its rules of procedure, decision shall be brought by a majority of votes of the total number of deputies.

Article 84.

DISSOLUTION OF THE ASSEMBLY

The Assembly shall be dissolved if it should fail to elect the Government within 60 days from the date when the President of the Republic proposes candidates for the Prime Minister.
The Assembly may not be dissolved during the state of war, in case of an imminent danger of war or a state of emergency.
If the Assembly should cease to perform its duties as prescribed by the Constitution for a considerable period of time, the Government may, after hearing the opinion of the president of the Assembly and of the presidents of the clubs of deputies of the Assembly, dissolve the Assembly.
The Government shall not be entitled to dissolve the Assembly if a procedure had been instituted for the vote of no-confidence in the Government.
Dissolution of the Assembly shall be prescribed by the decree of the President of the Republic and a date shall be set for the election of the new Assembly.

Article 85.

INTRODUCTION OF BILLS

The right to introduce bills, other regulations and general enactments shall be vested in the Government, deputies and at least six thousand voters.

2. President of the Republic

Article 86.

ELECTION

The President of the Republic shall be elected in direct elections and by secret ballot, on the basis of a general and equitable voting right, and for a term of office of five years.
In the event of a state of war the term of office of the President of the Republic shall be extended for as long as the peace is not established.
The same person may be elected only two times for the President of the Republic.

Article 87.

TERMINATION OF MANDATE

The term of office of the President of the Republic shall cease when the term of office for which he has been elected expires, in the event of recall or by his resignation.

The President of the Republic may be recalled by the Assembly only in case the Constitutional Court should decide that he has breached the provisions of the Constitution.
The procedure to determine the breach of Constitution shall be instituted by the Assembly.

Article 88.
COMPETENCIES

The President of the Republic shall:
1. represent the Republic in the country and abroad;
2. promulgate laws by ordinance;
3. call elections for the Assembly;
4. propose to the Assembly candidates for the Prime Minister, president and justices of the Constitutional Court;
5. propose to the Assembly calling of a referendum;
6. grant amnesty for criminal offences prescribed by the republican law;
7. confer decoration and awards;
8. perform all other duties in accordance with the Constitution.

The President of the Republic shall be a member of the Supreme Defence Council.

Article 89.
PROMULGATION OF LAWS

President of the Republic shall promulgate a law by ordinance within seven days from the date of its adoption.
The President of the Republic may, within seven days from the date of adoption of a law, request the Assembly to decide again on the same law.
The President of the Republic shall be bound to promulgate a law passed for the second time by the Assembly.

Article 90.
PERFORMANCE OF DUTIES

In case of termination of the term of office of the President of the Republic, and until the election of the new President and in the case the President of the Republic is temporarily prevented to perform his functions, his duties shall be assumed by the President of the Assembly and in case the Assembly is dissolved, by the Prime Minister.

3. Government

Article 91.
COMPOSITION AND PRIME MINISTER

The Government is composed of the Prime Minister, one or more deputy prime ministers and ministers.
The Government shall be headed by the Prime Minister.

Article 92.

ELECTION

The candidate for the Prime Minister shall present to the Assembly his program and shall propose the list of ministers of his Government to the Assembly.

If the Assembly should not adopt the proposed program, the President of the Republic shall propose a new candidate for the Prime Minister within ten days.

Article 93.

INCOMPATIBILITY OF FUNCTION

A member of the government may not serve as a deputy or perform any other public function and neither may he professionally engage in other activities.

Article 94.

COMPETENCIES

The Government shall:

1. determine and conduct interior and foreign policy;
2. enact and execute laws and other regulations necessary for the enforcement of law;
3. conclude international treaties within the competences of the Republic;
4. propose development plan, budget and the annual balance sheet of the Republic;
5. determine organisation and manner of work of state administration;
6. perform supervision over work of ministries and other state administration authorities, and shall annul and abolish their regulations;
7. enact decrees and enactments during a state of emergency, in the event of imminent war danger or in the event of a state of war, if the Assembly shall not be able to convene, and shall submit to the Assembly the said enactments for its approval as soon as the Assembly shall be in session;
8. perform all other tasks as prescribed by the Constitution and law.

Article 95.

RESIGNATION AND RECALL

The Government and the member of the Government may submit their resignation.

Resignation by the Prime Minister shall be deemed to mean resignation of the Government.

The Prime Minister may propose to the Assembly to recall any member of the Government.

Article 96.

VOTE OF CONFIDENCE

The Government may raise the question in the Assembly of its vote of confidence.

Article 97.

VOTE OF NO CONFIDENCE

The Assembly may vote no confidence in the Government.

The proposal for a vote of no confidence may be submitted by not less than ten deputies.

The vote of no confidence for the Government shall be performed three days at the earliest from the date the proposal to that effect had been submitted.
If the Government has received a vote of confidence, the proposal to vote on no confidence for the same reasons may not be submitted before a period of 90 days from the date of previous voting.

Article 98.

TERMINATION OF MANDATE

The Government shall terminate its mandate when the mandate of the Assembly is terminated, when the Assembly is dissolved, when it submits its resignation and when it receives the vote of no confidence.
The Government which has received a vote of no confidence or whose mandate has been revoked because of the dissolution of the Assembly shall remain in office until the election of the new Government.

Article 99.

STATE ADMINISTRATION

The affairs of the state administration shall be conducted by the ministries and the state administration authorities.
Certain tasks of the state administration may be transferred by law to the local self-government.

TRANSFER AND ENTRUSTING

Certain tasks of the state administration may be entrusted by decree to the local self-government, to the institutions and legal persons.

4. Courts of Law and Public Prosecutor

Article 100.

INDEPENDENCE AND AUTONOMY

Courts of law (judiciary) shall be independent and autonomous.
Courts of law shall rule on the basis of the Constitution and the law.

Article 101.

JUDICIAL COUNCIL

Courts of law shall adjudicate in a council, except in cases specified by law when a single judge shall rule.

JUDGES

Judicial functions shall be performed by the judge and jurors.

Article 102.

PUBLIC TRIALS

Trial before the court of law shall be public.

In exceptional cases only the court may decide that the public shall not be allowed to attend the trial or any part thereof.

Article 103.

PERMANENT FUNCTION

Judges shall have a life tenure.

A judge's tenure of office may be terminated at his own request or when he meets conditions for retirement, and if he should be sentenced to a prison sentence without the right of appeal.

A judge may be dismissed if he has been convicted of an offence making him unsuitable to perform judicial functions, or when he performs his judicial function unprofessionally and unconscientiously, or when he has permanently lost the working capacity for performing judicial function.

A judge may not be transferred against his will.

Article 104.

SUPREME COURT

The Supreme Court shall be deemed to the highest instance court of law in the Republic.

Article 105.

PUBLIC PROSECUTOR

Public Prosecutor shall perform the tasks of criminal prosecution, shall apply legal remedies for protection of constitutionality and legality and shall represent the Republic in property and legal matters.

COMPETENCE

Public Prosecutor shall perform his function on the basis of the Constitution and law.

TERM OF OFFICE

Public Prosecutor shall be elected for the term of office of five years.

Article 106.

INCOMPATIBILITY OF FUNCTION

Judges and the Public Prosecutor may not be delegates or perform any other public function and neither engage in any professional activity.

Section IV

Constitutionality and Legality

Article 107.

CONSTITUTIONALITY AND LEGALITY

The law must be in conformity with the Constitution, and all other regulations and enactments must be in conformity with the Constitution and law.

Article 108.
VACATIO LEGIS

Statutes, other laws and general enactments shall be published prior to coming into force.
Statutes, other laws and general enactments shall come into force on the eighth day from the day of publication.
Exceptionally, when justified reasons shall prevail as prescribed during their adoption, provision is made for the statutes, other laws and general enactments to come into force on the day of publication.

Article 109.
RETROACTIVE EFFECT

Statutes, other laws and general enactments may not have a retroactive effect.
Exceptionally, only certain provisions of statutes, if so required by the public interest, as prescribed when they were adopted, may have a retroactive effect.

Article 110.
LEGALITY OF INDIVIDUAL ENACTMENTS

The Court of law shall decide on the legality of particular enactments in an administrative suit, on the basis of which the state administration authorities and authorities with public authorisation are ruling on the rights and obligations, if for a certain matter no other judicial remedy has been prescribed.
Exceptionally, in certain types of administrative matters, administrative suit may be dismissed by decree.

Constitutional Court

Article 111.
COMPOSITION OF COURT

The Constitutional Court shall have five justices.
The term of office of a justice of the Constitutional Court shall be nine years and the justice may not be re-elected.

ELECTION

Justice of the Constitutional Court shall be elected from among the distinguished legal experts with at least 15 years of professional experience.

TERM OF OFFICE

President of the Constitutional Court shall be elected from among the justices of the Constitutional Court, for a term of office of three years.

INCOMPATIBILITY OF FUNCTION

President and justices of the Constitutional Court may not be deputies and perform any

other public function and neither engage in any other professional activity.

Article 112.

TERMINATION OF FUNCTION

Justice of the Constitutional Court shall terminate his office for which he has been elected at his own request, or after meeting the requirements for retirement, or if he is sentenced to a term of imprisonment without the right of appeal.

DISMISSAL

Justice of the Constitutional Court shall be dismissed from duty if he is sentenced for the offence which makes him unsuitable for the function or if he has permanently lost the capacity for performing his function of justice of the Constitutional Court.

SUSPENSION

The Constitutional Court may decide to suspend the justice of the Constitutional Court if against him criminal proceedings have been instituted and he shall not perform his function for the duration of the proceedings.

Article 113.

THE CONSTITUTIONAL COURT SHALL:

1. decide on the conformity of law with the Constitution;
2. decide on conformity of other regulations and general enactments with the Constitution and law;
3. determine whether the President of the Republic has committed a violation of the Constitution;
4. decide on constitutional complaints for violation, by individual enactments or deeds, of the freedoms and rights of man and citizen as prescribed by the Constitution, whenever this protection is not within the competencies of the Federal Constitutional Court and whenever some other legal remedy is not prescribed;

COMPETENCIES

1. rule on the conflict of competencies between the administrative and judicial authorities, on conflict of competence between these authorities and authorities of the local self-government and in conflicts of competencies between the units of the local self-government;
2. decide on conformity of statutes of a political party or association of citizens;
3. decide on banning of a political party and association of citizens;
4. decide on electoral disputes and disputes connected with a referendum, which are not within the competencies of the regular courts of law;
5. performs other task prescribed by the Constitution.

The Constitutional Court may rule on constitutionality and legality of laws which have ceased to be in force, if from the moment they have ceased to be in force until the procedure has been initiated a period of not more than one year has elapsed.

Article 114.

INITIATING PROCEEDINGS

All persons are entitled to initiate the proceedings of assessing the constitutionality and legality.

Proceedings before the Constitutional Court shall be initiated by state agencies and legal entities after finding that their rights or interest have been violated by the act whose constitutionality and legality are being challenged.

The Constitutional Court may itself initiate the proceedings for assessing the constitutionality and legality.

Article 115.

CESSATION OF VALIDITY

When the Constitutional Court shall decide that the statute, other regulation or a general enactment is not in conformity with the Constitution or law, such a statute, other regulation or general enactment shall cease to be in force with the day of publication of ruling to that effect by the Constitutional Court.

PROVISIONS ORDER

During the proceedings and until the ruling, the Constitutional Court may order a suspension in the execution of an individual act or deed undertaken on the basis of the statute, other regulation or a general enactment whose constitutionality i.e. legality is being assessed, if such an execution would cause irreparable damage.

Article 116.

DECISION

The Constitutional Court shall decide by a majority of vote of the justices.

The decision of the Constitutional Court shall be generally binding and final.

Decision of the Constitutional Court shall be published together with the opinion of justices who did not vote in favour of the decision.

Whenever necessary, execution of the decision of the Constitutional Court shall be enforced by the Government.

Section V

Amendments to the Constitution

Article 117.
PROPOSAL OF AMENDMENTS

A proposal to amend the Constitution may be submitted by at least 10,000 voters, by not less than 25 deputies, by the President of the Republic and by the Prime Minister.
A proposal to amend the Constitution shall contain the provisions where amendments are requested and an adequate explanation thereof.
The Assembly shall decide on the proposal for amending the Constitution by the two-thirds majority of votes of all of its deputies.
If the proposal to amend the Constitution should not be adopted, the same proposal may not be submitted again before one year has elapsed from the day the proposal was refused.

Article 118.
AMENDMENTS

The Constitution shall be amended by the Constitutional amendments.

DRAFT

The Assembly shall provide the draft of the amendment to the Constitution.
The Assembly shall decide on the amendment to the Constitution by the two-thirds majority of votes of all of its deputies.

Article 119.
SIGNIFICANT AMENDMENTS AND A NEW CONSTITUTION

If the proposal to amend the Constitution shall pertain to the provisions regulating the status of the country and the form of rule, if it restricts freedoms and right or if the adoption of a new constitution is proposed, with the day of adoption of the amendment to that effect the Assembly shall be dissolved and a new Assembly convened within 90 days from the day such an amendment was adopted.
The new Assembly shall decide by a two-thirds majority of votes of all the deputies only on those amendments to the Constitution which are contained in the adopted amendment, i.e. the adopted amendment for the promulgation of the new constitution.

Section VI

Final Provisions

Article 120.
CONSTITUTIONAL LAW

The Republic of Montenegro shall pass a constitutional law for purpose of enforcement of the Constitution.
The Constitutional law shall be adopted and shall come into force simultaneously with the Constitution of the Republic of Montenegro.

Article 121.
COMING INTO FORCE

The present Constitution shall come into force with the day of its promulgation.

Constitutional Charter of the State Union of Serbia and Montenegro

Proceeding from the equality of the two member states, the state of Montenegro and the state of Serbia which includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija, the latter currently under international administration in accordance with UN SC resolution 1244, and on the basis of the Proceeding Points for the Restructuring of Relations between Serbia and Montenegro of 14 March 2002,

The National Assembly of the Republic of Serbia, the Assembly of the Republic of Montenegro and the Federal Assembly have adopted the following:

I

Name **Article 1**

The name of the state union shall be Serbia and Montenegro.

Principle of Equality **Article 2**

Serbia and Montenegro shall be based on the equality of the two member states, the state of Serbia and the state of Montenegro.

Aims **Article 3**

The aims of Serbia and Montenegro shall be:

– respect for human rights of all persons under its jurisdiction;

– to preserve and promote human dignity, equality and the rule of law;

– to join European structures, particularly the European Union;

– to harmonize regulations and practices with European and international standards;

– to create a market economy based on free enterprise, competition and social justice; and

– to establish and ensure the smooth operation of the common market on its territory, through coordination and harmonization of the econom-

ic systems of the member states in line with the principles and standards of the European Union.

Symbols **Article 4**

Serbia and Montenegro shall have its flag, anthem and coat-of-arms that shall be regulated by the law of Serbia and Montenegro.

Territory **Article 5**

The territory of Serbia and Montenegro shall be made up of the territories of the member states of Serbia and Montenegro.

The border of Serbia and Montenegro shall be inviolable. The border between the member states shall be unchangeable, except by mutual consent.

Seat of the Institutions **Article 6**

Belgrade shall be the administrative center of Serbia and Montenegro. The seat of the Assembly of Serbia and Montenegro and the Council of Ministers shall be in Belgrade and the seat of the Court of Serbia and Montenegro in Podgorica.

Citizenship **Article 7**

A citizen of a member state shall also be a citizen of Serbia and Montenegro. A citizen of a member state shall have equal rights and duties in the other member state as its own citizen, except for the right to vote and be elected.

II

The Charter on Human and Minority Rights and Civil Freedoms **Article 8**

The Charter on Human and Minority Rights and Civil Freedoms, that shall form an integral part of the Constitutional Charter, shall be adopted under the procedure and in the manner stipulated for the adoption of the Constitutional Charter.

Exercise of Human and Minority Rights and Civil Freedoms **Article 9**

The member states shall regulate, ensure and protect human and minority rights and civil freedoms in their respective territory.

The attained level of human and minority rights, individual and collective and civil freedoms may not be lowered.

Serbia and Montenegro shall monitor the exercise of human and minority rights and civil freedoms and ensure their protection in the case when such protection has not been provided in the member states.

Direct Implementation of International Agreements **Article 10**

The provisions of international treaties on human and minority rights and civil freedoms applying to the territory of Serbia and Montenegro shall be directly enforced.

III

Principles of Market Economy **Article 11**

Economic relations in Serbia and Montenegro shall be based on the market economy underpinned by free enterprise, competition, a liberal foreign trade policy and the protection of property.

Serbia and Montenegro shall coordinate the economic systems and harmonize them with the member states.

Common Market **Article 12**

Serbia and Montenegro shall have a common market. The smooth operation of the common market shall be the responsibility of the member states.

Freedom of Movement **Article 13**

Movement of people, goods, services and capital in Serbia and Montenegro shall be free.

Setting obstacles to the free flow of people, goods, services and capital between the state of Serbia and the state of Montenegro shall be prohibited.

IV

International Entity **Article 14**

Serbia and Montenegro shall be a single personality in international law and member of international global and regional organizations that set international personality as a requirement for membership.

The member states may be members of international global and regional organizations which do not set international personality as a requirement for membership.

Establishing and Maintenance International Relations **Article 15**

Serbia and Montenegro shall establish international relations with other states and international organizations and shall conclude international treaties and agreements.

The member states may maintain international relations, conclude international agreements and establish their representative offices in other states if that is not in conflict with the competences of Serbia and Montenegro and the interests of the other member state.

Precedence of the International Law **Article 16**

The ratified international treaties and generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and the laws of the member states.

V

Establishing Competences of the State Union of Serbia and Montenegro **Article 17**

Serbia and Montenegro shall have the competences entrusted to it by the present Constitutional Charter.

The member states may jointly entrust to Serbia and Montenegro the performance of additional duties falling within their respective competence.

Financing of Competences of the State Union of Serbia and Montenegro **Article 18**

The member states shall secure the financial means for the performance of the entrusted competences and the additional duties of Serbia and Montenegro.

VI

1. ASSEMBLY OF SERBIA AND MONTENEGRO

Competence **Article 19**

The Assembly of Serbia and Montenegro shall decide on the Constitutional Charter as the highest legal instrument of Serbia and Montenegro in the way laid down by the present Constitutional Charter and shall enact laws and other instruments governing:

– the institutions established in line with the Constitutional Charter and their operation;

– the enforcement of international law and the conventions laying down the obligations of Serbia and Montenegro to cooperate with international courts;

– the declaration and abolition of the state of war subject to the preliminary approval of the Assemblies of the member states;

– military issues and defense;

– membership of Serbia and Montenegro as a personality of international law in international organizations and the rights and duties arising from that membership subject to preliminary approval of the competent bodies of the member states;

– the delimitation of the borders of Serbia and Montenegro subject to the preliminary approval of the Assembly of the member state in whose territory the border in question is located;

– issues pertaining to standardization, intellectual property, measurements and precious metals and statistics;

– policy of immigration, granting of asylum, the visa regime and integrated

– border management in line with the standards of the European Union;

– ratification of international treaties and agreements of Serbia and Montenegro;

– the annual revenues and expenditures required for financing the compe-

tences entrusted to Serbia and Montenegro at the proposal of the competent bodies of the member states and the Council of Ministers;
– the prevention and removal of obstacles to the free movement of persons, goods, services and capital within Serbia and Montenegro;
– the election of the President of Serbia and Montenegro and the Council of Ministers;
– the flag, anthem and coat-of-arms of Serbia and Montenegro; The Assembly of Serbia and Montenegro shall also perform other duties within the competence of Serbia and Montenegro laid down by the present Constitutional Charter. The Assembly of Serbia and Montenegro shall adopt its Rules of Procedure.

Composition and Election **Article 20**

The Assembly of Serbia and Montenegro shall be unicameral and made up of 126 deputies of which 91 shall be from Serbia and 35 from Montenegro.
The deputies of the Assembly of Serbia and Montenegro shall be elected from every member state in line with European and democratic standards on the basis of the laws of the member states. During the first 2 years upon the adoption of the Constitutional Charter the deputies shall be elected indirectly, in proportion to the representation in the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro.
At the first elections the deputies shall be elected from the membership of the National Assembly of Serbia, the Assembly of Montenegro and the Federal Assembly. If a member state holds parliamentary elections in that period, the membership of its delegation in the Assembly of Serbia and Montenegro shall be modified to reflect the outcome of the election.
After this initial period, the deputies of the Assembly of Serbia and Montenegro shall be elected by direct ballot.
The deputies shall have a 4-year term of office.

President and Vice-President of the Assembly of Serbia and Montenegro **Article 21**

The Assembly shall elect from among its deputies its President and Vice-President who may not be from the same member state.

Incompatibility of Functions **Article 22**

The President of the Assembly of Serbia and Montenegro and the President

of Serbia and Montenegro may not be from the same member state.

Manner of Decision-Making **Article 23**

The Assembly of Serbia and Montenegro shall take decisions by a majority vote of the total number of deputies. For a decision to be taken, the majority of the total number of deputies from each member state shall also have to vote for it.

Freedom of Expression and Immunity **Article 24**

The deputy shall enjoy the freedom of expression at the Assembly of Serbia and Montenegro and shall have immunity for the words uttered and for other acts he performs in his capacity as deputy.

The deputy may not be called to answer, detained or punished without the approval of the Assembly of Serbia and Montenegro except if found committing a criminal offence punishable by over 5 years in prison.

Apart from deputies, the President of Serbia and Montenegro, the members of the Council of Ministers and the judges of the Court of Serbia and Montenegro shall have immunity as well.

The Right to Submit a Draft Law **Article 25**

The Council of Ministers, a deputy and the Assembly of the member state may submit a draft law to the Assembly of Serbia and Montenegro.

2. PRESIDENT OF SERBIA AND MONTENEGRO

Competence **Article 26**

The President of Serbia and Montenegro shall:

– represent Serbia and Montenegro at home and abroad;

– chair the Council of Ministers and administer its work;

– propose to the Assembly of Serbia and Montenegro the members of the Council of Ministers and relief of duty of its members;

– be a member of the Supreme Command Council;

– pass decrees on the appointment and relief of duty of chiefs of diplomatic consular missions of Serbia and Montenegro and receives letters of credence and recall from foreign diplomatic representatives;

– confer awards and other decorations;

– proclaim laws passed by the Assembly of Serbia and Montenegro and the regulations passed by the Council of Ministers;
– call elections for the Assembly of Serbia and Montenegro and
– also perform other duties laid down by the Constitutional Charter.

Election **Article 27**

The President and the Vice-President of the Assembly of Serbia and Montenegro shall propose to the Assembly a candidate for the President of Serbia and Montenegro.
If the proposed candidate fails to win the requisite number of votes, the President and the Vice-President of the Assembly shall, within 10 days, propose a new candidate.
If that candidate, too, fails to poll the requisite number of votes, the Assembly shall be dissolved and elections shall be called.
If the elected President of Serbia and Montenegro is from the same member state as the President of the Assembly of Serbia and Montenegro, the President and the Vice-President of the Assembly of Serbia and Montenegro shall switch their posts.
The President of Serbia and Montenegro may not be from the same member state for two consecutive terms.
The procedure for the election and relief o duty of the President of Serbia and Montenegro shall be determined by law.

Accountability **Article 28**

The President of Serbia and Montenegro shall answer to the Assembly of Serbia and Montenegro.

The term of Office **Article 29**

The term of office of the President of Serbia and Montenegro shall last four years.

Termination of Office **Article 30**

The Serbia and Montenegro President's term of office may cease prematurely by his resignation, relief of duty and the dissolution of the Assembly of Serbia and Montenegro.
The Serbia and Montenegro President's term of office shall cease by his resignation when the Assembly takes note of it.

Relief of Duty **Article 31**

The Assembly may relieve the President of Serbia and Montenegro of his duty if it is established that he has infringed upon the Constitutional Charter. The infringement of the Constitutional Charter shall be established by the Court of Serbia and Montenegro. The procedure to establish the infringement of the Constitutional Charter shall be initiated by the Assembly of Serbia and Montenegro.

Performing Duties Following the Termination of Office **Article 32**

The President of Serbia and Montenegro whose term of office has ceased due to the dissolution of the Assembly of Serbia and Montenegro shall continue to carry out his duty pending the election of a new President.

If the President of Serbia and Montenegro tenders his resignation or is relieved of his duty, his office shall, pending the election of a new President of Serbia and Montenegro, be assumed on a provisional basis by the Vice-President of the Assembly.

3. THE COUNCIL OF MINISTERS

Competence **Article 33**

The Council of Ministers shall:

– chart and pursue the policy of Serbia and Montenegro in tune with the jointly agreed policy and interests of the member states;

– coordinate the work of the Ministries;

– propose to the Assembly of Serbia and Montenegro the laws and other acts falling within the purview of the Ministries;

– appoint and relieve of duty the heads of diplomatic-consular missions of Serbia and Montenegro and other officials in line with the law;

– pass by-laws, decisions and other general enactments for enforcement of the laws of Serbia and Montenegro and

– perform other executive duties in accordance with the present Constitutional Charter.

The Manner of Representation of Serbia and Montenegro **Article 34**

The member states shall be represented on a parity basis and on a rotation principle in the representative offices of Serbia and Montenegro to interna-

tional organizations, the United Nations, the Organization for Security and Cooperation in Europe, the European Union and the Council of Europe. The manner of representation of the member states in international financial organizations shall be determined by the Council of Ministers subject to the approval of the competent institutions of the member states. The representation of the member states in diplomatic-consular missions of Serbia and Montenegro shall be determined by the Council of Ministers subject to the approval of the competent institutions of the member states.

Election **Article 35**

The President of Serbia and Montenegro shall propose to the Assembly of Serbia and Montenegro candidates for Ministers of the Council of Ministers and candidates for the Deputy Minister of Foreign Affairs and Deputy Minister of Defense.

Two candidates for Minister shall be from the same member state as the President of Serbia and Montenegro and three shall be from the other member state. The candidates for the Minister of Foreign Affairs and the Minister of Defense shall be from different member states and the same shall apply to their Deputies as well. The Assembly shall vote for the list of candidates for the Council of Ministers. If the list does not obtain the requisite number of votes, the President may propose two more lists of candidates. If a list of candidates does not obtain the requisite number of votes within 60 days as of the date of the proposal of the first list of candidates, the Assembly of Serbia and Montenegro shall be dissolved and elections shall be called. The procedure for the election and the termination of the term of office of the Council of Ministers shall be determined by law.

Manner of Decision-Making **Article 36**

The Council of Ministers shall pass decisions by a majority vote.

If both proposals win the same number of votes, the vote of the President shall be decisive if at least one Minister from the other member state has voted in favor of the decision.

Accountability **Article 37**

The Council of Ministers shall answer to the Assembly of Serbia and Montenegro.

Term of Office **Article 38**

The Ministers shall have a 4-year term of office.

The Termination of the Term of Office **Article 39**

The term of office of the Ministers and their Deputies may cease prematurely by their resignation, by the vote of no confidence or by the dissolution of the Assembly of Serbia and Montenegro.

The Ministers and Deputy Ministers whose term of office has been terminated shall discharge their functions pending the election of new ones.

Ministers **Article 40**

The Minister of Foreign Affairs shall pursue and shall be responsible for the pursuit of the foreign policy of Serbia and Montenegro, shall negotiate international agreements and propose to the Council of Ministers candidates for heads of diplomatic-consular missions of Serbia and Montenegro. The Minister of Foreign Affairs shall coordinate the charting of foreign policy with the competent bodies of the member states.

Article 41

The Minister of Defense shall coordinate and implement the charted defense policy and command the military in accordance with the law and the powers of the Supreme Command Council.

The Minister of Defense shall propose to the Supreme Command Council candidates for posts and shall appoint, promote and relieve of duty military officers in line with the law.

The Minister of Defense shall be a civilian.

Article 42

After a period of 2 years, the Ministers of Foreign Affairs and of Defense shall switch posts with their Deputies.

Article 43

The Minister of Foreign Economic Relations shall be responsible for negotiations and coordination of the implementation of international agreements including treaty relations with the European Union and coordination of relations with international economic and financial institutions following the consultation with the competent Ministers of the member states.

Article 44

The Minister for Internal Economic Relations shall be responsible for the coordination and harmonization of the member states' economic systems in order to establish and ensure the smooth operation of the common market including the free movement of people, goods, services and capital.

Article 45

The Minister of Human and Minority Rights shall monitor the exercise of human and minority rights and, together with the competent bodies of the member states, shall coordinate activities for the implementation and compliance with international conventions for the protection of human and minority rights.

4. COURT OF SERBIA AND MONTENEGRO

Jurisdiction **Article 46**

The Court shall be competent to adjudicate:

– cases between the institutions of Serbia and Montenegro concerning the issues falling within their competence under the Constitutional Charter;

– cases between Serbia and Montenegro and one or both member states or between the two member states concerning issues falling within their purview;

– appeals filed by citizens if no other legal remedies have been stipulated, in the case that an institution of Serbia and Montenegro has interfered with the rights and freedoms that are guaranteed to them by the Constitutional Charter;

– compatibility of the Constitutions of the member states with the Constitutional Charter;

– compatibility of the laws of Serbia and Montenegro with the Constitutional Charter;

– compatibility of the laws of the member states with the law of the Serbia and Montenegro;

– legality of final administrative acts of the institutions of Serbia and Montenegro.

The Court shall take legal positions and give legal opinions on the activities to bring jurisprudence more closely into line.

Members and Election **Article 47**

The Court of Serbia and Montenegro shall include an equal number of judges from both member states.

The judges of the Court of Serbia and Montenegro shall be elected by the Assembly of Serbia and Montenegro upon the proposal of the Council of Ministers for a period of 6 years.

The judges shall be graduate jurists with at least 15 years of practical experience in that line of activity.

The judges may be elected only once.

The judges shall be independent in their work and may not be relieved of duty prior to the expiry of the period for which they have been elected, except in cases stipulated by law.

Decisions of the Court **Article 48**

The decisions of the Court of Serbia and Montenegro shall be binding and without the right of appeal.

The Court shall be authorized to put in abeyance the laws, other regulations and acts of the institutions of Serbia and Montenegro that are in conflict with the Constitutional Charter and with the laws of Serbia and Montenegro.

Operation of the Court **Article 49**

When assessing whether the laws or competences of the member states are in line with the laws and responsibilities of Serbia and Montenegro or whether this is the case between the member states, the deliberations at the meeting of the Court of Serbia and Montenegro shall also be attended by the judges of the Constitutional Courts of the member states who shall take part in decision-making.

When assessing whether the Constitution, laws or competences of a member state is in line with the Constitutional Charter, the laws and competences of Serbia and Montenegro, the deliberations at the meeting of the Court of Serbia and Montenegro shall also be attended by the judges of the Constitutional Court of that particular member state who shall take part in decision-making.

Organization, Functioning and the Manner of Decision-Making **Article 50**

The organization, functioning and the manner of decision-making of the Court of Serbia and Montenegro shall be regulated by law.

VII

Harmonization of the Legal Instruments **Article 51**

The Constitutional Charter, the laws and the competences of Serbia and Montenegro and the Constitutions, laws and competences of the member states must be harmonized.

Entry into force **Article 52**

The laws and other acts of the bodies of Serbia and Montenegro shall come into force not sooner than on the 8th day following their publication. By way of exception, when reasons exist for this as determined under the procedure of the enactment of a particular law or act, it may be stipulated that the laws and other acts of the bodies of Serbia and Montenegro shall come into force not sooner than on the date of their publication.

Retroactive Effect **Article 53**

The laws and other acts of the bodies of Serbia and Montenegro may not have retroactive effect. By way of exception, particular provisions of the law, if that is mandated by the public interest as determined under the procedure of its enactment, may have retroactive effect.

VIII

Army of Serbia and Montenegro **Article 54**

Serbia and Montenegro shall have an Army that shall be under democratic and civilian control.

Duty of the Army of Serbia and Montenegro **Article 55**

The duty of the Army shall be to defend Serbia and Montenegro in line with the present Constitutional Charter and the principles of international law that regulate the use of force. The defense strategy shall be adopted by the Assembly of Serbia and Montenegro in accordance with the law.

The Supreme Command Council **Article 56**

The Supreme Commander of the Army shall be the Supreme Command Council that shall decide on the use of the Army of Serbia and Montenegro.
The Supreme Command Council shall include the President of Serbia and Montenegro and the Presidents of the member states.
The Supreme Command Council shall take decisions by consensus.

Doing the Military Service **Article 57**

Conscripts shall do their military service in the territory of the member state whose citizenship they hold. It shall be possible for them also to do this service in the territory of the other member state if they so freely decide.

Conscientious Objection **Article 58**

A conscript shall be guaranteed the right to conscientious objection.

IX

Property of Serbia and Montenegro **Article 59**

The property of the Federal Republic of Yugoslavia required for the operation of the institutions of Serbia and Montenegro shall be the property of Serbia and Montenegro.
The property of the Federal Republic of Yugoslavia abroad shall be the property of Serbia and Montenegro.
The property of the Federal Republic of Yugoslavia located in the territory of the member states shall be the property of the member states on the territorial principle.

Breaking Away from the State Union of Serbia and Montenegro **Article 60**

Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro.
The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum.
The law on referendum shall be passed by a member state bearing in mind

the internationally recognized democratic standards.
Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor.
A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state.
Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia.

X

Adoption of the Constitutional Charter **Article 61**

The Constitutional Charter shall be adopted by the National Assembly of the Republic of Serbia and the Republic of Montenegro in an identical text and shall take effect when that text is adopted and promulgated by the Federal Assembly.

Change of the Constitutional Charter **Article 62**

The Constitutional Charter shall be changed under the procedure and in the manner in which the Constitutional Charter has been adopted.

XI

Transfer of Rights and Obligations **Article 63**

Upon the entry into force of the Constitutional Charter, all the rights and duties of the Federal Republic of Yugoslavia shall be transferred to Serbia and Montenegro in line with the Constitutional Charter.

Enforcement of laws of the Federal Republic of Yugoslavia **Article 64**

The laws of the Federal Republic of Yugoslavia governing the affairs of Serbia and Montenegro shall be enforced as the laws of Serbia and Montenegro. The laws of the Federal Republic of Yugoslavia governing the affairs other than those of Serbia and Montenegro shall be enforced as the laws of the member states pending the adoption of the new regulations by the member states except for the laws which the Assembly of the member state concerned decides not to enforce.

Harmonization with the Constitutional Charter **Article 65**

The member states shall amend their Constitutions or adopt new Constitutions in order to harmonize them with the present Constitutional Charter within 6 months as of the date of the adoption of the Constitutional Charter.

Transfer of Competences **Article 66**

The competence of military courts, Military Prosecutor's Offices and Military Attornies' Offices shall be transferred to the authorities of the member states, in accordance with the law.

XII

Law on the Implementation of the Constitutional Charter **Article 67**

The Law on the Implementation of the Constitutional Charter shall be adopted in the same manner and concurrently with the Constitutional Charter.

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