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The Revocation of the Kosovo Autonomy 1989 – 1991 and Its Consequences For the Idea of European Integration

Joseph MARKO

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Author: Joseph MARKO

Coordination: Daniel BRAUN and Granit TËRNAVA

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A personal foreword: The same mistakes again and again?

This publication served as a report, originally commissioned by the Prosecutor´s Office (OPT) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in preparation for the indictment and proceedings against Milan Milutinović, Dragoljub Ojdanić and Nikola Šainović as well as Slobodan Milošević. The expert witness opinion was ordered to prepare an overview on the historic context of the development of the constitutional system of the Socialist Federal Republic of Yugoslavia (SFRY) and the constitutional status of Kosovo within this federal system until its break-up in 1991 and the adoption of the new constitution of the Federal Republic of Yugoslavia (FRY) of 1992. From the very beginning it was made clear to me that the rules of Anglo-saxon criminal procedure are practiced. Hence, judges will officially not read anything in advance about the historic, that is, factual and political context, but have to listen and finally to evaluate all what is then called "established facts" in legalese on the basis of the oral presentations of witnesses nominated both by the prosecution and the defence lawyers and their possible cross-examination by one of the two sides in such adversarial proceedings. Moreover, there is a second characteristic of Anglo-saxon rules of criminal procedure to be taken into account, namely the possibility of plea-bargaining so that prosecution and defence can agree to set aside factual evidence which will not be presented then in the hearings before judges.

These observations shall make clear that the final product, the judgment, whether guilty or non-guilty and in particular its legal reasoning in order to explain and thereby justify the verdict, may not give a full picture of the events under consideration and therefore does not necessarily represent what is called "material truth" in continental European rules of criminal procedure. It will thus come as no surprise that those who have been found guilty and sentenced to several years in prison, but also their families and ethnic communities, let alone entire "nations" to whom they declare to "belong" or which they are seen to "represent",

will not believe in the "truth" and therefore justice of the verdict. Or as one of the indictees before the ICTY expressed it: "You have your facts. We have or facts. You have a complete right to choose between the two versions…", thereby perfectly expressing the gap between knowledge and acknowledgment[1] of both empirical and normative plausabilities which must fit together to create the legitimacy of any criminal court, whether local or international.

But the ICTY was more or less heavily criticised also in academic literature because of its lack of this "sociological" legitimacy.[2] Guilty sentences as well as acquittals were seen as too "individualised and de-contextualised"[3] by criminal procedures and, finally, handed down without the necessary outreach programs to explain it to the various societies of the successor states of SFRY. Thus, as critics argued, its judgments became never politically accepted in the respective societies as several opinion polls demonstrate[4] and could therefore not contribute to transitional justice in terms of reconciliation after violent inter-ethnic conflict.

So *why publish this expert witness report almost 20 years later*? More than three decades after the break-down of Yugoslavia and all the international efforts to prevent and stop the various wars on the territories of its successor states as well to support their transformation to rule of law, democracy and market economy through "Europeanization",[5] we

1 I thereby follow the theoretical and empirical insights of Edith Marko-Stöckl, "My Truth, Your Truth – Our Truths? The Role of History Teaching and Truth Commissions for Reconciliation in Former Yugoslavia", in: *European Yearbook of Minority Issues*, Vol. 7, 2007/8, Leiden-Boston 2010, pp 328 – 352, in particular at 348-9.

2 Harry Hobbs, "Hybrid Tribunals and the Composition of Courts: In Search of Sociological Legitimacy", *Chicago Journal of International Law,* 16:2 (2016), pp 482 – 522, at 494.

3 Karen Engle, "A Genealogy of the Criminal Turn in Human Rights", in: Karen Engle et.al. (eds), *Anti-Impunity and the Human Rights Agenda*, Cambridge: Cambridge University Press 2016, pp 15 – 67, at 57.

4 Milan Milanović, "Courting Failure. When Are International Criminal Courts Likely To Be Believed By Local Audiences?", in: Kevin J. Heller et.al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford: Oxford University Press, 2020, pp 261 – 290. See also, for instance, Milica Kostić, "Public Opinion Survey in Serbia Sheds Light on ICTY Legacy", 22 January, 2018, at www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/, (accessed on 15 July 2023) or Aidan Hehir, "Lessons Learned? The Kosovo Specialist Chambers´ Lack of Local Legitimacy and Its Implications", *Human Rights Review* 2 (2019), pp 267 – 287.

5 Frank Schimmelfennig and Ulrich Sedelmeier, "The Europeanization of Eastern Europe: the External Incentives Model Revisited", 22/23 June 2017, at www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-Sedelmeier-External-Incentives-Revisited-JMF.pdf (accessed on 15 July 2023).

witness not only in light of recent political events in Bosnia-Herzegovina and Kosovo at the brink of mass violence, but all over Europe so-called "democratic backsliding." Instead of the "stabilisation of democracy" as this had been predicted by "transformation theories" in the 1990s,[6] we see again nationalistic populists in power who have established their authoritarian regimes under the euphemistic label "illiberal democracy" by abolishing freedom of information through a politically independent press and TV, manipulating general elections, and capturing the economic resources of the respective country. Thereby they can (mis-) use their newly gained, quasi monopolistic powers in the economy and politics for the formation of strong executive "leadership" and the "reform" of the judiciary in order to stabilize the political power of their own political party or ruling coalition against the change of government and opposition in the next elections which is the basic characteristic of political pluralism as the "essence" of democracy. It is thus worth quoting a report of the Belgrade Institute of European Studies from the following expert witness report concerning the Serbian constitution of 1990:

> "The Serbian constitution adopted in 1990, which was the normative result of authoritarian and populist nationalism, is a paradigmatic instance in the abuse of law in order to secure the continuity of a political regime. … its democratic form … was expected to secure the authoritarian structure of government based on the leadership of one man. … Parliament is largely a simulation of democracy. The main political decisions are made by a single person, the President of the Republic, while the role of Parliament is to give these decisions an aura of constitutionality … The regime needs the Constitution, parliament and government primarily to legalize and institutionalize its own power."[7]

In conclusion, do we make the same mistakes again and again? Not to understand that from the very beginning after the break-down of communist regimes in Central Eastern and South Eastern Europe communism was

6 Wolfgang Merkel, *Systemtransformation*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2nd ed., 2010.

7 Institute for European Studies, *Inter-Ethnic Conflict and War in Former Yugoslavia*, Belgrade 1992, pp 23–4.

not necessarily replaced by liberalism, democracy and market systems as transformation theories had predicted, or better said, hoped for, but by more or less political mobilization of the electorate on the basis of (ethno-)national sentiments which not only led to the peaceful "divorce" of Czechoslovakia, but also to the ethnicized conflicts and wars on the territories of the former SFRY. It is my heartfelt conviction after 30 years of work as a researcher and practicioner in the field of human and minority rights with a special focus on South Eastern Europe that constitution-engineering for powersharing mechanisms as this was the case in Bosnia-Herzegovina and Kosovo is a necessary effort after violent ethnic conflict. But powersharing is not sufficient to "keep" the only negative peace, for instance, by UN peace-keeping forces deployed in "buffer zones" and territorially, institutionally and educationally segregated "ethnic" communities as this is the case even in Cyprus to this day despite its being a member state of the EU for almost twenty years now. Positive peace in terms of inter-ethnic coexistence and cooperation cannot be achieved by punitive measures in terms of retributive justice alone, but needs restorative justice through reconciliation measures in order to prevent "intergenerational vengeance." Or, as this was expressed by the first President of the ICTY, Antonio Cassese, that "... feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence."[8] Also the European Union has postulated that transitional justice shall be "an integral part of state- and peace-building [that] should also be embedded in the wider crisis response, conflict prevention, security and development efforts of the EU."[9]

Therefore, the publication of the expert witness report shall serve a dual goal:

First, when single judges or panels of judges "determine the facts", the report will demonstrate that the decision about what is true or not true is not easy. Thus, when reading the judgments against Milan Milutinović[10] and Slobodan

8 Quoted from Anne Leebaw, "The Irreconcilable Goals of Transitional Justice", *Human Rights Quarterly*, 30:1 (2008), pp 95 – 118, at 113.

9 See Foreign Affairs Council, 16 November 2015, Council Conclusions on EU's Support to Transitional Justice, at https://data.consilium.europa.eu/doc/document/ST-13576-2015-INIT/en/pdf (accessed on 24 September 2023).

10 ICTY, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, 2009.

Milošević[11] and the legal reasoning based on the testimonies and the cross-examination of individual eye witnesses, the publication of this report will help to "understand" not only the intricacies of the Anglo-saxon system of criminal procedure, but even more so the factual details mentioned by these witnesses with more or less accuracy and, even more important, the *missing* factual evidence necessary to get a comprehensive picture of events *beyond single, fragmented acts* evaluated by the judges whether they had been individual criminal deeds or not. Reading only these judgments without a "narrative generalization" based on a "comprehensive" analysis — following from scientific methods which this published report offers — will indeed create a good impression why the normatively necessary "individualization" and alleged "de-contextualization" by the ICTY procedures were not "accepted" as "truthfinding" endeavors by political elites and society-at-large.

One example, dealing with the topic of the expert witness report, namely the abolishment of the constitutionally guaranteed territorial autonomy of Kosovo under the Yugoslav federal constitution of 1974, must suffice for the purpose of demonstration.

On the 3rd of May 2002, the former President of Kosovo, Ibrahim Rugova, was called for his testimony and to report about the events in connection with the parliamentary debate within the Kosovo Assembly about "the suspension of the federal status of Kosova, that is, autonomous status of Kosova" on 28 March 1989.[12] He told about the pressure due to the fact that there were police in the parliament building and the members had to vote under pressure. Also, that there were "demonstrations in this time, 1989" where "some were injured, and about 20 were killed." Moreover, he reported that "special measures or extraordinary measures" were taken with "several institutions suspended" and "police control ... established over Kosova." Moreover, "Albanian police of Kosova became dismissed from their jobs, in 1991, all of them were dismissed." In the following he reports about the "Constitutional Statement, or the Statement for Independence, which is asking for Kosova to become an independent republic equal to the other former republics of the former Federation."

11 ICTY, Prosecutor v. Milošević, Case No. IT-02-54-T, 2006.
12 Prosecutor v. Milošević, Case No. IT-02-54-T, Transcipt pp 4191 – 4194.

Judge Robinson, however, was not satisfied with this answer and asked "Dr. Rugova" to clarify his answer concerning the constitutional status of Kosovo: "In 1990, Kosovo had declared itself in independent entity within Yugoslavia, equal to the other republics. That is a status to be distinguished from independence." In his reply, "the witness" repeated: "We proclaimed Kosova — at that time the former Yugoslavia, the Federation, still existed, and that being the case, Kosova too being either a republic or an independent country, would have relations with the other republics."[13] It will come as no surprise that Slobodan Milošević in his cross-examination came back to the question whether Ibrahim Rugova was referring to Kosovo to become an equal republic within the framework of the SFRY or to become an independent state through secession from "Serbia."[14]

So, is it possible to "establish the facts" on the basis of this witness testimony and the cross-examination *without* any explanation of the doctrines of public international law and the constitutional law of SFRY concerning the principles of the sovereignty of states and the self-determination peoples including secession, as my expert witness report does? And what might have been the distinction between "special measures and extraordinary measures" which is also clarified by the report? And what about guessing about figures of dimissed police officers and other employees whereas my report tries to answer all these legal and empirical questions on the basis of careful research of sources taken from the Official Gazettes of Serbia and Kosovo themselves. By the way, this proves the statement of the Belgrade Institute of European Studies quoted above about the effort of the regime to "legalize" its unconstitutional measures.

Thus, it shall be no surprise that opinion polls in Serbia and Kosovo quoted above confirm the rejection of the findings of the ICTY and other criminal tribunals as *ethnically biased* following from desired forms of justice which are fundamentally incompatible when, for instance, Serbs in Bosnia and Herzegovina as well as Kosovo correctly claim that the

13 Prosecutor v. Milošević, Case No. IT-02-54-T, Transcipt p 4205.
14 Prosecutor v. Milošević, Case No. IT-02-54-T, Transcipt pp 4298 – 4309.

conflict was not one-sided and crimes were committed on "both sides." However, what turns these claims into an unjustifiable *equalization of crimes*, thereby *blurring the lines of aggressor and victims* or even leading to the reversal of this relationship, are claims for the mathematical ethnic *reciprocity* of indictees and guilty verdicts and acquittals through courts leading to the assertion that members of the own group would be the "real" victims if this is not the case. Hence, in the end, war criminals found guilty of genocide remain "heros" of their own people as the celebrations of Ratko Mladić in Republika Srpska and Belgrade in recent years demonstrate.

Milan Milanović tries to explain why the ICTY was therefore doomed to fail from the very beginning, since the factors of ethnification and societal polarization did not simply disappear with the end of the wars. He summarizes his findings with the following predictive factors: Ethnic *group cohesion* and *polarization* remained in place. And, in my opinion, not the least because of the strict corporate powersharing institutional arrangements both in Bosnia and Herzegovina[15] as well as Kosovo[16] which "cement" the ethnic divisions of society. Moreover, in conflicts driven by ethno-nationalism, *elite continuity* requires to maintain entrenched nationalist narratives. Prime Minister and then President of the Republic of Serbia from 2014 on, Aleksandar Vučić, was the former Minister of Information in the Milošević-regime; also, Bakir Izetbegović, the son of Bosniak wartime president Alija Izetbegović, as well as Prime Minister und President Hashim Thaçi, one of the former leaders of the Kosovo Liberation Army (KLA), may serve as prime examples for this elite continuity. Finally, there is a trend to *authoritarianism* including *threats* against and repression of alternative views expressed in the media and public education,[17] at best leading to the marginalization of a weak and fragmented "parliamentary opposition", but to the complete abolishment of political pluralism at worst. Milanović thus comes to

15 See Joseph Marko, "Defective democracy in a failed state? Bridging constitutional design, politics and ethnic division in Bosnia-Herzegovina", in: Yash Ghai and Sophia Woodman (eds.), *Practicing Self-Government*, Cambridge: Cambridge University Press 2013, pp 281 – 314.

16 See Joseph Marko, "The New Kosovo Constitution in a Regional Comparative Perspective", *Review of Central and East European Law*, 33 (2008), pp 437 – 450.

17 See, for instance, the recent report of the Helsinški Committee for Human Rights in Serbia, *Serbia: Captured Society*, Belgrade 2023.

the preliminay conclusion: "There is, in other words, always some kind of group narrative that cognitive biases can latch onto — what varies is what those in power do with them. At worst, as happened in former Yugoslavia, they will facilitate the creation of group-specific realities, that the work of the elite-discredited international criminal court or tribunal will be incapable of penetrating."[18]

Moreover, as analysed in more detail in academic literature, this was and is not only the problem of courts´ procedures and outreach programs, but also of international donors such as the USA and the EU, if they do not reflect the new nationalist ideologies of the political elites of successor states and their democratic backsliding on the basis of nationalist-authoritarian populism and therefore the lack of support of international tribunals by governments, both in Serbia as well as in Kosovo.[19] Also problematic is the lack of effective civil society support by governments or international donors to overcome the ethno-nationalist and fascist binary thinking in "friends v. foes" (C. Schmitt).

Finally, the second goal to be addressed in this foreword as problem for the support of transitional justice through reconciliation is the problem of how to teach the recent history of these wars in the 1990ies. As Edith Marko-Stöckl reported already in 2010, the first approach of the OSCE in Bosnia and Herzegovina was to blacken incriminated words, sentences or paragraphs in textbooks for primary and secondary school students. As one could have imagined, this even raised the curiosity of pupils to get to the "bottom" of those "facts" they were denied to read. Hence, under the direction of the OSCE, a local Commission for the Development of Guidelines on Textbook Writing for the Subject of History and Geography was established in 2004 and finally published "Guidelines for Writing and Evaluation of History Textbooks for Primary and Secondary Schools in Bosnia and Herzegovina" in which the principle of multi-perspectivity in order to enable pupils to learn tolerance was demanded.[20]

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18 Milanović, *Courting Failure*, p 267.
19 See, in particular, the analysis and conclusions of Gëzim Visoka, "Assessing the potential impact of the Kosovo Specialist Court", September 2017, in particular pp 27 – 30, at www.paxforpeace.nl. (accessed on 15 July 2023).
20 Marko-Stöckl, *My Truth, Your Truth–Our Truths?*, p 339.

However, a recent study on history teaching materials for the OSCE report "on learning and teaching about the period of 1992 – 1995 in primary schools throughout Bosnia and Herzegovina"[21] provides devastating results. The author highlights her key findings more than twenty-five years after the end of the war:

"... • The analysed textbooks and teaching materials are ethnocentric and develop three mutually exclusive narratives.

• ... [They] contribute to the politicization and instrumentalization of the past rather than to mutual understanding and reconciliation.

• All recount the conflict-ridden 1990s almost exclusively as the years of one´s 'own' victimhood, promote empathy only toward one's 'own' people, and portray the 'other' side almost exclusively as perpetrators.

• The implementation of multiperspectivity and related learning outcomes is not a predominant approach in any of the analysed textbooks and teaching materials.

• Where present, multiperspectivity and critical thinking are not designed to challenge the actions of members of one´s 'own' people."

Unfortunately, the reports about history teaching in Kosovo come to the same results with the conclusion that Kosovar history education needs a change.[22] These reports must be seen as a writing on the wall! The only conclusion, hard to avoid for all international actors, not only the OSCE, but also the various EU bodies, can only be: Against all international

21 Heike Karge, *History Teaching Materials on 1992 – 1995 in Bosnia and Herzegovina: Building Trust or Deepening Divides*, Sarajevo 2022.

22 See Abit Hoxha and Anna di Lellio, "Are you a partisan or a chetnikë. Teaching History in Kosovo Serbian Schools", 13 shkurt 2017, at https://sbunker.net/op-ed/88663/are-you-a-partisan-or-a-chetnike-teaching-history-in-kosovo-serbian-schools/ (accessed on 15 July 2023); Joanna Hanson, "Kosovar History Education Needs a Change", 9. 4. 2019, at https://kosovotwopointzero.com/en/kosovar-history-education-needs-a-change/ (accessed on 15 July 2023); Rodoljub Jovanović, "Reaching Peace by Teaching War: How History Teachers in Kosovo Teach About the Kosovo War?", in: Ioannis Armakolas et al. (eds.), *Confronting Multiple Crises: Local and International Perspectives on Policy-Making in Kosovo*, Prishtina: Kosovo Foundation for Open Society 2022, pp 111 – 144.

recommendations and guidelines for the multiperspectivity approach and critical thinking, intergenerational vengeance is instilled into pupils to this day, laying the ground for renewed spirals into violent conflicts.

In the final analysis, cooperation with authoritarian nationalists is no guarantee for political stability, but exactly the opposite! What we need is no longer an even more refined institutional design of power-sharing with ethnic quotas, but re-education at all levels to explain the advantages of rule of law based on human and minority rights by an effective, that is politically and ethnically independent and impartial, judicial system as prerequisite for multiethnic societies as this is proclaimed for Kosovo in Article 3 of its constitution. Hence my own optimistic conclusion that my expert witness report can contribute through its comprehensive multi-factor analysis to the required multiperspectivity approach for critical thinking also in future educational efforts.

At the end of this introduction, I would like to thank my former student at Graz University and now Professor of Political Science at the University of Prishtinë, Dr. Arben Hajrullahu, not only for having taken the initiative to publish this expert witness report and to supervise the Albanian translation, but also for many fruitful discussions over the last decades and his long-standing friendship. Many thanks go also to the Program Manager of the Konrad-Adenauer-Foundation in Kosovo, Granit Tërnava, for his readiness to finance this project and to the translators into the Albanian and Serbian languages. Last, but not least my thanks go also to my other former student and long-standing friend, Dr. Marko Kmezić, now Senior Researcher at the Center for South-East European Studies at the University of Graz, who supervised the Serbian translation.

Expert Witness Report On Constitutional and Legal Issues in the MOS case

By Joseph Marko/Graz-Bolzano

0. Executive Summary

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Executive summary

The Revocation of the Autonomy of SAP Kosovo

1. The SFRY Constitution of 1974 brought full equalization of the institutions of the Republics and Socialist Autonomous Provinces (SAPs) and afforded each the same constituent status on the level of the Federation in the decision-making processes in the legislative, executive and judicial institutions. The only important distinction between Republics and SAPs remained the characterisation of the Republics as states whereas the SAPs were called socio-political communities. In connection with the distinction between nations and nationalities, the conclusion was drawn in Yugoslav constitutional doctrine that only nations and therefore Republics, but not nationalities and Autonomous Provinces had a right to self-determination including secession.

2. The constitutional system of 1974 was criticized by Serb constitutional lawyers as asymmetric federalism discriminating against the Socialist Republic of Serbia (SRS). This criticism and the claims of Kosovo Serbs were taken over by the League of Communists of Serbia after Slobodan Milošević had become president of the party and removed his opponents. The first attempts to overcome the alleged asymmetry of the SFRY Constitution were the proposals for the amendment of the SFRY Constitution in 1987. However, the larger reforms of the federal relations and the relations between the SRS and the SAPs were postponed. The amendments adopted in 1988 brought only minor adjustments, but left the institutions and powers of the SAPs untouched.

3. In the parallel process of amending the SRS Constitution in 1988 and 1989, many powers and institutions of the SAPs were to be subordinated to the republic institutions. This met fierce political resistance in the ranks of the Communist parties in Vojvodina and Kosovo. The resistance was overcome by mass demonstrations leading to the resignation of the leaders of state and party institutions not only in Vojvodina and Kosovo, but also in Montenegro. Finally, the amendments were adopted by the Kosovo Assembly in March 1989 after a “state of emergency” had

been declared. These events raise serious doubts about the legitimacy of these constitutional amendments. From the perspective of Yugoslav constitutional law, the amendments did subordinate the institutions of the SAPs to the republic institutions and thereby weakened the powers of the SAPs, but they were not contrary to the SFRY Constitution.

4. The new Constitution of the Republic of Serbia adopted in September 1990 downgraded the territorial autonomies of Vojvodina and Kosovo below the level of local self-government. Their parliaments lost their constitution-making and legislative power. Presidencies, Supreme Courts and Constitutional Courts were abolished. This was a violation of the still valid SFRY Constitution which did guarantee these institutions. Moreover, the constitution had no institutional links with the federal level and was thought by Slobodan Milošević to provide the legal framework for an independent state of Serbia. Political and scholarly criticism was raised against the unique powers of the President of the Republic in a "state of emergency."

5. The new Constitution of the Federal Republic of Yugoslavia (FRY) adopted in 1992 no longer mentions the APs. In contrast to the SFRY Constitution they are, therefore, no longer constitutionally guaranteed by the Federal Constitution. The adoption of this new constitution which did not follow the procedure foreseen in the SFRY Constitution raises serious doubts about the legitimacy of this constitution.

6. Already after the amendments of the SRS constitution in 1989, the Serb Assembly started to recentralize the police by ordinary legislation. In March 1990 the Assembly adopted a "Program on the Realisation of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" and an "Operative Plan." As can be seen from the measures proposed, they wanted to take over full control of virtually every aspect of life in AP Kosovo and to change the ethnic balance by providing a return program for Serbs and Montenegrins who had emigrated. Because of the resistance of the Albanian representatives of the Kosovo Assembly and the local Albanian population, this plan was implemented in 1990 and 1991 by abolishing the constitutionally guaranteed institutions of the province through several laws. The leading positions in administrative, judicial and municipal institutions as well as other positions in the economy, health

service, education, TV and radio were taken over from Kosovo Albanians. These laws and decisions of the Serb Assembly de jure abolished the autonomy of Kosovo, but not of Vojvodina. This was in violation of the SFRY Constitution even before the adoption of the new Constitution of the Republic of Serbia. However, as the "Program" and "Operative plan" and the 250 decisions already implemented in 1990 obviously show, these measures cannot have been a spontaneous re-action of the Serb Assembly. They must already have been planned systematically for some time in advance.

The Powers of Various State Bodies

7. The President of the FRY has a strong legal position in taking together the provisions of the Serb constitution of 1990, the FRY constitution of 1992 and respective legislation. In actual fact thus he could dominate the entire decision-making process from determining a state of war to the operative command of the Army of FRY.

8. The unclear constitutional provisions concerning the command authority of the President of FRY and the President of the Republic of Serbia over "armed forces" can be harmonised by interpretation. Hence the President of FRY commands the Yugoslav Army, whereas the President of the Republic of Serbia commands the Territorial Defence of Serbia.

9. The provisions of the FRY constitution and the Serb constitution with regard to a declaration of a state of war are not harmonised.

10. With regard to the subordination of MUP and police forces, the respective provisions of the Yugoslav Law on Defence and the Serb Law on Defence and Law on Internal Affairs are neither harmonised.

International Obligations of FRY

11. The SFRY was obliged to abide by international humanitarian law and the international laws of war as a signatory to many international

conventions such as the Geneva Conventions of 1949 and their Additional Protocolls of 1977, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights of 1966 or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These conventions were also binding for the FRY both from the perspective of constitutional law and public international law and were incorporated into the domestic legal order.

12. With regard to the respective provisions, the President of FRY was obliged to order full investigation and to instigate proceedings before a military court. Since the President of FRY was responsible "to supervise the implementation of the system of command" (Article 4 of the Law on the Yugoslav Army), he had a positive legal duty to supervise the actions of the Army and could not simply wait on reports.

13. Between December 1992 and December 1998 the General Assembly of the United Nations adopted a number of resolutions where it expressed grave concerns about the human rights situation in Kosovo. The General Assembly urged the authorities in the Federal Republic of Yugoslavia in those resolutions to take all necessary measures to bring those human rights violations to an immediate end, to revoke all discriminatory legislation and to re-establish the democratic institutions of Kosovo, including the Parliament and the judiciary.

14. However, despite the fact that none of the resolutions of the General Assembly had any positive effect, the UN Security Council started to pass resolutions only in March 1998. In a series of resolutions following this first resolution the SC demands that FRY stop all actions of security forces against the civilian population and bring to justice those members of the security forces responsible for the mistreatment of civilians and the destruction of property, as well as immediately take all steps for the achievement of a political solution and to co-operate with the ICTY. However, FRY did not comply with any of the SC resolutions. Finally, SC Res 1244 of 10 June 1999 provided the basis for the establishment of UNMIK, which took over all legislative, administrative and judicial power in Kosovo.

1. The Revocation of the Autonomy of the SAP Kosovo

1.1. Constitutional Developments

1.1.1. The Status of Republics and Autonomous Provinces of the Socialist Federal Republic of Yugoslavia under the constitutional system of 1974

15. Going back in the history of the constitutional development of the Socialist Federal Republic of Yugoslavia (SFRY) after 1945 one has to take into account that the system of territorial autonomy as a means of inter-ethnic accomodation had been taken over from the Soviet model with a hierarchy of territorial units.[23] With the first Yugoslav federal constitution in 1946[24] thus, six Socialist Republics and two autonomous territorial units within the framework of the Socialist Republic of Serbia (SRS) were created, namely Vojvodina and Kosovo.[25] Whereas Vojvodina was given the status of a autonomous province from the very beginning, Kosovo was first given the status of a autonomous region.

23 On the development of the forms of territorial autonomy in the Soviet Union see Wolfram Gärtner, Die Erscheinungsformen der Sowjetautonomie (The Forms of Soviet Autonomy), *Recht in Ost und West* (1990), pp 228 – 238. Ratko Marković, Autonomous Provinces in Contemporary Constitutional System of the SFRY, *Yugoslav Law* (1985), p 125 declares that the Soviet model had been a role model for the Yugoslav constitution of 1946.

24 The text of the Yugoslav Federal Constitutions of 1946 and 1963 can be found in English translation in Jan F. Triska (ed.), *Constitutions of the Communist Party-States*, Stanford 1968, pp 453 – 541.

25 In the following, three names for the same territory will be used: In English and under the constitutional system of 1974 in Serbo-Croatian language the name is Kosovo. In Albanian and therefore according to Albanian sources the name of the province is Kosova. Only with the Serb constitution of 1990 the province was given (again) the name Kosovo and Metohija in Serbian.

16. However, Kosovo´s constitutional position was — in the course of the 1960s — in terms of powers and institutions gradually "up-graded" to a province.[26] With the adoption of the new constitution of SFRY and the constitutions of the Republics and Socialist Autonomous Provinces (SAPs) in 1974[27] this process of up-grading came to an end with the institutional equalization of Republics and SAPs.

17. As far as the institutions of the SAPs are concerned, they had the following institutions: They had parliaments, called assemblies (Art 300 Constitution SAP Kosovo), with constitution-making and legislative power. They had presidencies (Art 309) consisting of a president and eight members. The president of the League of Communists of Kosovo is ex officio member of the Presidency (Article 343, para 4). They had governments, so-called executive councils (Article 349), and administrative organs (Article 362). And finally, they had a full-fledged judicial system of ordinary courts (Article 237) including supreme courts (Article 390) and, in addition, constitutional courts (Article 372).

18. At the federal level Republics and SAPs were — as distinct entities — directly[28] represented in the federal institutions through delegations either on the basis of the parity principle (Presidency, Article 321 SFRY constitution) or the proportionality principle (both Houses of Parliament, Articles 291 and 292, Executive Council, Article 348, Supreme Court, Article 370 and Constitutional Court, Article 375 item 6).

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26 On the development of autonomous provinces in the constitutional system before 1974 see Jovan Đorđević, *Ustavno Pravo (Constitutional Law)*, Beograd 1984, pp 663 – 684.

27 The texts of these constitutions can be found in *Ustavi i ustavni zakoni. Prvi dio. Tekstovi ustava i ustavnih zakona* (Constitutions and constitutional laws. Part 1. Texts of the constitutions and constitutional laws), Informator, Zagreb 1974. An English translation of the SFRY constitution is published in Albert P. Blaustein/Gisbert H. Flanz (eds.), *Constitutions of the Countries of the World*. Yugoslavia, March 1986 (Oceana Publications).

28 This means not through delegation through bodies of the Republic. According to the theory of the Soviet system of delegation from soviets on the lowest territorial level to the Supreme Soviet representatives are elected indirectly, i.e. delegated, from one level to the next. This means that the parliaments of the SAPs would have to elect their representatives to the Parliament of the Republic which in turn elects its representatives to the Federal Parliament. In the Yugoslav system however, the Parliaments of the SAPs did elect their representatives directly to the Federal Parliament. The same holds true for the Federal Executive Council and the Federal Presidency.

19. As far as their influence on the decision-making process is concerned, any amendment of the Federal Constitution was only possible with the consent of the Assemblies of SAPs (Articles 398 and 402 SFRY constitution) and they had the same absolute veto power with regard to amendments of the Serbian Constitution (Article 427 Serb constitution). Moreover, they had a veto power against the conclusion of international treaties, if their powers were affected by the terms of the treaties (Article 271 SFRY constitution).

20. Moreover, the status of both SAPs was guaranteed by the Federal Constitution.

This can be seen from the provisions of Article 5 SFRY constitution which requires the consent of the SAPs for any change of their territories and borders as well as the borders of the SFRY itself.

21. Also the following institutions of the SAPs are guaranteed under the SFRY constitution: Assemblies (Articles 132, 300), Presidencies (Article 147), Executive Councils (Articles 148, 276), Administrative organs (Article 149) and Courts (Articles 222, 371 Supreme Courts of SAPs), Public Prosecutors (Article 235) and National Banks (Art 260). For the implementation of federal law on the territory of SAPs, only the administrative organs of the SAPs are competent without interference by Republic administrative organs (Articles 273, 274).

22. Although there formally was a legal hierarchy between the Federation and the Republics, i.e. constitutions and laws of the Republics had to be in conformity with the federal constitution, the Constitutional Court of the Federation was not empowered to declare provisions of a constitution of a Republic or SAP which it deemed unconstitutional to be null and void. The Court could give only an advisory opinion to the Federal Parliament (Article 378 SFRY constitution) on this question.[29] Only in case of inconformity of laws of the Republics and SAPs with the Federal constitution or with federal laws, the respective parliament first had the

29 Which then, in practice, had to start negotiations with the Republic Parliament to bring the unconstitutional provision into conformity with the Federal constitution. But there was no legal enforcement mechanism.

obligation to bring the unconstitutional or illegal provision in line with the federal provision. If it failed to do so within the time-limit of six months, the Federal Constitutional Court could only then declare the respective provision invalid through a new decision (Article 384 SFRY constitution).

23. The same system was applied in the Constitution of the Socialist Republic of Serbia with regard to the constitutions and laws of the SAPs. Article 402 simply reads "The Constitutional Court of Serbia gives its opinion to the Assembly of the SRS on the question whether a provincial constitution is not in conformity with the Constitution of SRS." According to Article 410, in case of conflict between laws of the republic or the SAPs with the SRS constitution or of provincial laws with republic laws, the Constitutional Court of Serbia had to give an opinion to the respective assembly which had the obligation to bring the respective provision in line within six months. If it failed to do so the Constitutional Court had again to adopt a decision to declare the respective provision invalid. In effect thus, neither the Assembly nor the Constitutional Court of Serbia could enforce their opinion on the Assembly of an SAP in case of conflict between the constitutions.

24. The SAPs were thus — as far as institutional design and decision-making on the federal level is concerned — equal to the Republic of Serbia through the Federal Constitution of 1974: they could participate in the decision-making process on federal level without the representatives of Serbia being able to give them instructions. Secondly, the legislative, executive and judicial institutions of the SAPs were not subordinated to the respective institutions of the Republic of Serbia. However, one important difference remained between the Republics and SAPs which became the cornerstone for the determination of the bearers of the right to self-determination including secession.

1.1.2. The right to self-determination including secession according to the SFRY constitution

25. Hence, according to Article 3 of the SFRY constitution only Republics had the status of "states" based on "popular sovereignty and the power and self-administration of the working class and all working people." In contrast SAPs are, according to Article 4, "autonomous, socialist, self-governing, democratic socio-political communities based on the power and self-administration of the working class and all working people" in which working people and citizens, nations and nationalities exercise their "sovereign rights." Moreover, Chapter I of the Introductory Part of the SFRY Constitution speaks of the foundation of the SFRY by the Yugoslav "nations, based on the right of each people to self-determination, including secession ..." and many provisions of the Constitution make a distinction between nations (narodi) and nationalities (narodnosti), a terminology consequently used throughout the text of the Constitution. According to Yugoslav constitutional doctrine all those peoples who did form their state on the territory of the SFRY were called nations, whereas those peoples who did form their state outside Yugoslavia were called nationalities. Insofar Hungarians in Vojvodina did form a nationality in the same way as Albanians in Kosovo.

26. Following from this distinction of Yugoslav constitutional doctrine and the text of the Introductory part of the SFRY constitution only nations had a right to self-determination including secession, whereas nationalities[30] respectively national minorities did not, even if they did form the vast majority of the population of an SAP.

27. This doctrine was affirmed by the Federal Constitutional Court in 1991 when it decided on the Constitutional Declaration of Kosovo as an Independent and Equal Unit within the Framework of the Federation (Confederation) of Yugoslavia as an Entity Equal to Other Units in the Federation (Confederation).[31] In its reasoning on the unconstitutionality of this declaration the Constitutional Court declared that "to proclaim

30 See Marković, *Autonomous Provinces*, p 122 and Tibor Varady, Collective Minority Rights and Problems in Their Legal Protection: The Example of Yugoslavia, *East European Politics and Societies* (1992), p 265.

31 Published in the Official Gazette of SAP Kosovo, Nr. 21/90.

the Albanian nationality in Kosovo a people of Yugoslavia is not in accordance with the Constitution of SFRY because according to the Constitution of the SFRY the Albanians in Kosovo are a nationality and cannot avail themselves of the right to self-determination and cannot thereby proclaim the SAP of Kosovo a federal unit like the republics. To wit, under the Constitution of SFRY, only the peoples of Yugoslavia, and not the nationalities have the right to self-determination."

28. However, nowhere in the said Constitution are the peoples in contrast to nationalities enumerated. This is also the reason why the Constitutional Court of Yugoslavia was not able to quote a provision as evidence for this argument.

29. To give this constitutional doctrine historic weight, Prof. Ratko Marković, in a scholarly article,[32] refers to a decision at the Second Session of AVNOJ[33] in 1943 where it is laid down that Yugoslavia "is built up, and shall be built up on the federal principle, which shall ensure full equality of status between the Serbs, Croats, Slovenians, Macedonians, and Montenegrins, namely of the peoples of Serbia, Croatia, Slovenia, Macedonia, Montenegro and Bosnia and Herzegovina." However, Ratković himself refers already to the fact that "Yugoslav autonomous provinces" were not the creation of the Republic of Serbia when following the order of events in the creation of those provinces: "At first their highest bodies decided to join Serbia as a federal unit within the framework of the federal Yugoslavia; this decision was then confirmed by the highest federal bodies of authority (namely the Presidency of AVNOJ at its third session), and finally the highest body of authority of Serbia enacted the laws on autonomies. This was then taken over by the Constitution of the Federal People´s Republic of Yugoslavia in 1946 and the Constitution of the People´s Republic of Serbia."[34]

32 Marković, *Autonomous Provinces*, p 122 Footnote 18.
33 This was the Anti-Fascist National Liberation Council of Yugoslavia, created and dominated by the Communist Partisan Resistance Movement.
34 Marković, *Autonomous Provinces*, p 120.

1.1.3. The Amendments of the Federal and Republic constitutions in 1988 and 1989

30. Already in 1985 the article of Prof. Ratko Marković expressed criticism against asymmetry and institutional inequality through the entire constitutional system of 1974. Later this criticism — which was politically in line with the infamous "Memorandum" of the Serb Academy of Sciences[35] — was also expressed by other Serbian constitutional lawyers published in legal journals.[36] This criticism can be summarised as follows:

31. First, the constitutional lawyers assert that Serbia was partitioned into three parts by the legal institutionalisation of territorial autonomy for Vojvodina and Kosovo so that Serbia does not enjoy full statehood and sovereignty as a republic. This would amount therefore to a discrimination against Serbia in comparison to the other republics of the federation where no such territorial autonomies had been established. Second, the Autonomous Provinces would have the same powers and institutions as the republics so that they would enjoy full statehood without being called states. In effect, the autonomous provinces would not only form a state within the state, but would also be privileged in the decision-making system at federal level against the Republic of Serbia. The Yugoslav Federation would, thereby, form an asymmetric federation discriminating exclusively against Serbia.

32. At the republic level the argument of a partitioning of Serbia into three parts led to the conclusion that the relations between the Republic and SAPs would discriminate against so-called Serbia Proper, i.e. the territory

35 According to Tim Judah, *The Serbs. History, Myth & the Destruction of Yugoslavia*, 2nd edition, Yale 2000, p 158 extracts of the unfinished Memorandum were published already on 25 and 26 September 1986 by the Belgrade newspaper Večernje Novosti. The full text is published by Academy of Science and Arts Presidency, Kosta Mihajlović/Vasilje Krestić, *Memorandum of the Serb Academy of Sciences and Arts*. *Answer to Critics*. Published on the Decision of the Presidency of the Serb Academy of Science and Arts. Editor Academician Miroslav Pantić. English version, Belgrade 1995.

36 Marković, *Autonomous Provinces*, pp 105 – 128; Jovan Đorđević, Status autonomije (pokrajine) i položaj SR Srbije (The Status of Autonomy (of the province) and the situation of the SR Serbia), *Opština* br. 9-10/1988, pp 15 – 27; Miodrag Jovičić, Neravnopravnost SR Srbije sa ostalim Republikama u Federaciji (The Inequality of the SR Serbia with the other Republics in the Federation), *Pravni život* (1988), pp 934 – 938; Radomir Lukić, Ostvarivanje Funkcije SR Srbije kao države (The Functioning of the SR Serbia as a state), *Pravni život* (1988), pp 927 – 933; Ratko Marković, Zašto Kosovo ne može postati republika (Why Kosovo cannot become a Republic), *Pravni život* (1989), pp 1017 – 1024.

without the SAPs since the SAPs had a veto power in all cooperative republic laws and the representatives elected on the territory of the SAPs could participate in the decision-making process on questions concerning Serbia Proper.[37] Moreover, constitutional provisions of the SAPs which were contrary to the constitution of the Republic could not be declared null and void by the Constitutional Court of Serbia (Article 402) and, finally, the SAPs had an absolute veto power concerning amendments of the Republic constitution (Article 427).

33. The first attempt to abolish this alleged asymmetry and institutional inequality in the federal system according to Serb constitutional lawyers was the procedure for amending the Federal Constitution of 1974.[38] In the public debate[39] in 1987/8 two contrary positions were taken. On the one hand, in line with the idea of a recentralisation of the Federation the proposal was made to abolish the territorial autonomies and to introduce instead the form of cultural autonomy for all minorities, i.e. also for Serbs living in other republics.[40] The contrary proposal was to upgrade the SAPs into republics. This proposal was seen as a criminal act under the Criminal Code violating "brotherhood and unity."[41] The Slovene and Croat press accused the Serb side of being nationalist and even fascist.[42] In conclusion, none of these contrary positions was adopted so that the big reform of the federal relations between the Republics on the one hand and the Socialist Republic of Serbia and the SAPs on the other was postponed. Without regard to many amendments concerning the economic system, only Amendments XXVII para 3, XXIX, XXXI, XXXIV, XXXVI, XXXVII and XLIII are of interest in this

37 What is not mentioned, however, in this criticism is the fact that an out-voting or majorisation could not occur since Article 343 of the Republic Constitution did provide for the necessity of a majority of the representatives from "the territory outside the territory of the Provinces" which is the constitutional phrase for Serbia Proper.

38 See the Proposal of the SFRY to Proceed to the Amendment of the Constitution of the SFRY, published in English in *Yugoslav survey* Nr. 1, 1987, pp 3 – 20. In particular in chapter III "Relations within the Federation and the Rights and Duties of the Federation" it is proposed to change the respective provisions of the SRFY constitution which „do not express the positions of the Socialist Republic of Serbia and the socialist autonomous provinces …".

39 See the scholarly article by Herwig Roggemann, Zur Verfassungsdiskussion in der SFR Jugoslawien (On the debate on constitutional reform in the SFRY), *Recht in Ost und West*, Heft 5, 15. Sept. 1989, pp 273 – 284.

40 See Roggemann, *Verfassungsdiskussion*, p. 280.

41 See Roggemann, *Verfassungsdiskussion*, p 280.

42 See for instance, Vjesnik, 17 February 1988.

context.[43] However, these amendments adopted in 1988[44] brought only more precision as regards the language of the text or detailed reforms for the specification of the legal hierarchy and very moderate accomodations for the hierarchy of the administrative organisation. In effect, the status of the SAPs, i.e. their institutions as guaranteed under the 1974 SFRY constitution, was in no way changed.

34. The parallel process of amending the SRS constitution[45] met massive political resistance in the SAPs which will be analysed below in the conclusions.

35. The (political) problem that there was no legal, but only a political mechanism to bring the constitutions of the SAPs in line with the SRS constitution, was changed by Amendment XXIX, item 1. According to this provision — in analogy to what the constitution of 1974 had foreseen already in the case of inconsistency of laws of the republic and provinces — the Constitutional Court of Serbia could declare that an unconstitutional provision ceases to be valid unless the provincial assembly does bring the provision in line within a year. This amendment, therefore, deviates from the entire constitutional system of 1974, but it does not contradict the Federal Constitution, since there is no express provision for the case of conflict between the constitutions of a Republic and an SAP.

36. Amendment XXXI suspended Article 296 of the Serbian Constitution and gives the Republic institutions vis-à-vis those of the SAPs a right to instruction how to implement laws of the Republic and means to enforce the implementation.

37. Amendment XXXIII interferes into the competences of the SAPs by giving the organs of the Republic the right to regulate many matters in a uniform way for the entire territory of the Republic such as: the official use of the Serbo-Croatian language and its alphabets — Cyrillic and Latin (para 1); the limitation and termination of property rights (para 2, item 4); national

43 The changes of the constitutional provisions in regard to the text of 1974 are summarily summarised in English in Yugoslav survey, Vol. XXX, Nr. 1 1989, pp 3 – 38.
44 Službeni List (Official Gazette) SFRY, Nr. 70/1988.
45 Službeni glasnik (Official gazette) SRS, Nr. 11/1989.

defence, territorial defence and civilian protection (para 3); protection of the constitutionally-based order (state security — para 4, item 1) and public security (para 4, item 3); establishment of regular courts (para 8); coordination of international cooperation by autonomous provinces with the organs of the SRS (para 9); the collection, recording and processing of statistical data (para 10); the bases of elementary and streamed education systems, the protection and use of cultural assets (para 11); the social plan and the urban plan (para 12); the setting up of work organisations (para 13, item 1); the tax and contributions system (para 13, item 2); environment protection (para 13, item 7); the resolution of conflict between the republic and provincial law (para 14).

38. Amendment XLIV did provide for the possibility that the Constitutional Court of Serbia could take over a case if the Constitutional Court of an SAP did not decide on that case within six months. However, this was only possible if the claim was made that a law or other regulation did simultaneously contradict both the SRS constitution and the provincial constitution.

39. Through Amendment XLVII the absolute veto power of the SAPs with regard to amendments of the Republic constitution was abolished. The assemblies of the SAPs got only a suspensive veto for six months. If a political consensus could not be reached between the respective assemblies within this time-limit, the assemblies of the SAPs could call for a referendum on the entire territory of the Republic. Again, this is not contradictory to the Federal Constitution, but deviating from its system foreseen for the amendment of the Federal constitution where the assemblies of the SAPs have absolute veto power.

40. All the amendments to the Republics' constitutions were reviewed by the Federal Constitutional Court. These decisions were published in the Official Gazette of SFRY Nr. 10/1999. In its decision on the amendments of the Constitution of the SRS, the Federal Constitutional Court, however, declared only Amendment XX, item 3 (real estate transactions could be prohibited by law), the provisions of Amendment XXVII, para 3 (possibility to exclude the official use of the Latin alphabet by law in favor of the Cyrillic script) and Amendment XXXIX, par 2, item 4 (provisions on the electoral basis for the elections into the councils of municipalities) unconstitutional.

1.1.4. The New Serbian Constitution of 1990

41. As far as the constitutional sphere is concerned, already in September 1990 a new Serbian constitution was adopted.[46] This constitution did not abolish the form of territorial autonomy as such, but revoked several institutions and powers of the Autonomous Provinces (APs) as guaranteed under the still valid Federal Constitution of 1974.

42. According to Article 110 of this constitution, the APs — after their characterisation as "socialist" had also been abolished — no longer had a constitution, but a "statute" which has to be approved by the National Assembly of the Republic in advance. The institutions of the APs are an Assembly, the Executive Council and administrative organs according to Article 111. In other words, the APs no longer have judicial powers with their own system of courts including a constitutional court. Moreover, as can be seen from Article 109, the Assembly no longer has legislative power. Nowhere does this constitution mention any representation and participation of the APs in the decision-making processes on the republic or federal level. Finally, the territory of the APs can be determined by republic law according to Article 108 para 3 and, according to Article 133, the APs can no longer participate in the process of amending the Serbian constitution.

43. Moreover, the new constitution was not adopted according to the rules for constitutional amendments foreseen under the Republic constitution of 1974 even in the amended version of 1989. In terms of constitutional theory, therefore, the new Serbian constitution can be called a "revolutionary" constitution.

46 Sl. gl. RS, Nr. 1/1990.

44. What was the reason for this revolutionary break of constitutional continuity? As can be seen from criticism in the newspapers and by critical academia,[47] the purpose for the adoption of this new constitution by the still ruling communist one-party system as to secure the power of the communist party in the coming multi-party elections and, in particular, the office and strong powers of the President of Republic for Slobodan Milošević. From the perspective of comparative constitutional law in particular the emergency powers of the President are extraordinary: according to Article 83, items 6 through 8 of the new constitution he can declare a state of war and may adopt then regulations with which he can change the powers of the government, ministries, courts and prosecutors. Moreover, he can declare a state of emergency on part of the territory of the Republic, if the security of the Republic, rights and freedoms of citizens or the functioning of state institutions are endangered. This is further specified in the "Law on Measures in Case of a State of Emergency".[48]

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47 See, in particular, the criticism by Prof. Dr. Pavle Nikolić, Secretay of the International Association of Constitutional Law, in his scholarly aricle „Ustav Republike Srbije of 1990 god. i problemi demokratizacije (The Constitution of the Republic of Serbia 1990 and problems of democratisation)", *Pravni život*, Beograd, Nr. 1-2/1991, pp 92 – 96: "The disadvantage of the new constitution of Serbia (1990) lies in the fact that it was adopted by a one-party parliament which was composed on the basis of a one-party system. ... The new constitution is, beyond doubt, an expression of the effort to adopt forms of modern democracy without losing power. ... The constitution of the Republic of Serbia returns to the idea of a separation of powers, but does not introduce a system which would lead to a real balance between the legislative and executive power ... The Constitution of Serbia establishes an unusual system of separation of powers which openly secures the prerogative of the executive in the hands of the President. ... The constitution of the Republic of Serbia is and cannot be the basis for the democractisation of Serbia, nor does it open the way for a process of genuine democratisation ... This points to the necessity of a radical reform, or said more precisely, to the derogation and adoption of a new constitution by an Assembly which will have legitimacy." See also the critical articles of Slobodan Inić, Predsjednička svemoć (Presidential Omnipotence), *Borba*, 23 August 1990, highlighting the presidential emergency powers in the sentence that "This President ... can lead an inner war in times of peace and this in a constitutional way!" See also the article by the same author "Loša balkanska kopija (A bad Balkan copy)", *Borba*, 24 August 1990, with the subtitle: If Serbs adopt this constitution, they must know that there will be no longer politics. There will be only one political person – the President of the Republic.

48 Sl. gl. RS 19/1991. Article 2 "specifies" the conditions for the declaration of a state of emergency on parts of the territory of the Republic Serbia, namely "when activities are undertaken which endanger: the constitutional order, the security of the Republic – her sovereignty, independence and territorial integrity, the exercise of economic and societal activities, the exercise and protection of the freedoms, rights and obligations of man and citizens and the work of state organs." Article 6 para 1 enumerates the measures the President can take: "...order the obligation to work, limit freedom of movement and residence, limit the right to strike, limit the freedom of assembly, limit the freedom of political, unionist and other activities." § 2 then gives him the possibility "to order also other measures in conformity with the law." Finally, Article 11 legitimizes the measures "ordered with special provisions on those parts of the territory of the Republic of Serbia before this law was set in force" – meaning with this abstract phrase Kosovo.

45. Moreover, despite of the fact that Article 135 of the Constitution declares that "the Republic of Serbia is within the framework of the SFRY", there are no provisions showing any institutional link with the Federation any longer.[49] This means that this constitution was the first step in preparation for the event of a dissolution of communist Yugoslavia and to have the constitutional basis for an independent national state.[50]

46. This was openly declared by Slobodan Milošević when the draft of the new Serbian Constitution was adopted at the end of June 1990: "We adopt this constitution in a time when Yugoslavia has begun to constitutionally confederalise in the frame of the existing inter-republic borders. ... In regard to these strong confederative tendencies of disintegration it would be irresponsible vis-à-vis Serbia and her citizens, if we had only one concept for the solution of the Yugoslav crisis: federal Yugoslavia. This is why this draft also allows for another possible option: Serbia as an independent state."[51]

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49 This was also expressed in scholarly articles. See Miodrag Jovičić, Ustav koga se Srbija neće stideti (A constitution which Serbia will not be ashamed of), *Pravni život*, Beograd, Nr. 7-8/1990, pp 1050 – 51: "A great historical chain connects the year 1903 with 1990. In the beginning there was the last constitution of an independent Serbia, which it adopted independently. At the end there is the constitution which Serbia will adopt by the end of 1990 as its own basic law after it had won back in March 1989 its constitution-making power. ... Serbia introduces its new constitution without link to the provisions of the federal constitution ... Serbia is, for the first time after 1903, free to conceptualize its constitution after its own will. ..." And Vladan Kutlečic, member of the constitutional commission and secretary of the Presidency of the Republic of Serbia frankly declared that Serbia should "adopt a complete and new constitution in order to regulate all problems, ... in the sphere of the political system and the organisation of power in the Republic, without – like the other federal units – taking account of the valid Yugoslav constitution, which is not worth the paper it is printed on." In Aktualna ustavno-pravna situacija zemlje i Predlog Predsedništva SFRJ za donošenje Ustava SFRJ (The topical constitutional situation of the country and the proposal of the SFRY Presidency for the adoption of a SFRY constitution), *Pravni život*, Beograd Nr. 3-4/1990, p 510.

50 See also Zdravko Huber, Ustav ranog postkomunizma (Constitution of an early post-communism), in: *Borba*, 28 September 1990, p 2: "The framers of the constitution of this Republic wanted to achieve a specific correction of Serbian statehood in connection with the existence of territorial autonomies. In the end they abolished all elements of provincial statehood and established the sovereignty of the Republic state. Serbia, therefore, has today the constitutional basis to exist as an independent, sovereign state, based on a parliamentary-presidential democracy and mixed economy. If it wants to transfer parts of its statehood on any federal institutions — this is a matter of agreement with other states, potential members of a Yugoslav federation."

51 See *Politika*, 26 June 1990.

1.1.5. The New Constitution of the Federal Republic of Yugoslavia of 1992

47. After Opinion Nr. 1 of the Arbitration Commission on the Former Yugoslavia, the so-called Badinter Commission, had declared on 11 January 1992 that SFRY was „in a process of dissolution“,[52] on 27 April 1992 a constitution for the new Federal Republic of Yugoslavia was adopted by the remaining representatives from Serbia and Montenegro in the Federal Chamber of the Assembly of the SFRY. In a Declaration of Promulgation of the Constitution of FRY of the same day, adopted “in the joint ceremonial session of the Federal Republic of Yugoslavia, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro”, the “representatives of the people of the Republic of Serbia and the Republic of Montenegro”[53] declare the reason for this new constitution: According to item 1 FRY is seen as “continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia ...”. Hence, the SFRY was, in their opinion, not dissolved and FRY did continue the international legal personality of SFRY with the consequence that the newly independent states of Slovenia, Croatia, and Bosnia and Herzegovina had seceded from SFRY and could therefore not be seen as successor states.

48. It goes without saying that the provisions of the SFRY constitution 1974 for its amendment were not obeyed. Hence, also this constitution is a revolutionary act.

49. Moreover, when the declaration speaks of the “representatives of the people of the Republic of Serbia” it has to be taken into consideration that Kosovo Albanians did not participate after all their institutions had been abolished by legislative measures in 1990 and 1991 which will be described in detail below.

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52 See the text which is reprinted in Marc Weller (ed.), *The Crisis in Kosovo 1989 - 1999, International Documents and Analysis, Volume 1*, Cambridge 1999, p 80.

53 This declaration is published in English in *Review of International Affairs*, Belgrade, Vol. XLIII, Nr. 1004, 1. V. 1992.

50. With regard to the question which units form the Federation, Article 2 simply refers to the Republic of Serbia and the Republic of Montenegro as "member republics." The Federal constitution no longer mentions that the Republic of Serbia contains territorial autonomies so that they are – in striking contrast to the Federal Constitution of SFRY – no longer guaranteed by the constitution of FRY. It contains, however, several provisions for the protection of "national minorities" (Articles 11 and 45 through 50). Only Article 15 which provides for Serbian and Cyrillic as official languages and scripts contains a weak reference insofar as it allows for "regions of the Federal Republic of Yugoslavia which are inhabited by national minorities" the official use of their languages and scripts in the manner prescribed by law.

1.2 Programs, Laws and Decisions of the Republic of Serbia abolishing the Autonomy of Kosovo

1.2.1. The "Law on Internal Affairs"

51. Following the amendments of the SRS constitution in 1989 the "Law on Internal Affairs" which was adopted in July 1989[54] abolished the decentralisation of the institution of the police throughout Serbia which had been developed in the "Law on Internal Affairs" 1985.[55] This law had established a regional structure with municipalities associated in inter-municipal regional associations to establish a joint secretariat for internal affairs. The secretary of the joint secretariat was appointed and dismissed by the assembly of the inter-municipal regional association. The municipalities which set up a joint secretariat provided the funds for its operation. Now with the 1989 law the regional secretaries were subordinated to the republic secretary. The republic secretary appointed and dismissed the heads of the secretariats with the prior approval of the government and the opinion of the appropriate municipal assemblies. The republic secretariat was obliged to take over the employees of the organs of internal affairs by the end of 1989, as well as their premises,

54 Sl. gl. RS Nr. 30/1989.
55 Sl. gl. SRS Nr. 22/1985.

equipment, and special purpose funds. Moreover, according to Article 12, the Presidency of the SRS was entrusted with control over the State Security Service as well as with coordination of its work which included "giving political and security directions, ordering measures and determining other tasks." Slobodan Milošević was the President of the League of Communists of Serbia and, therefore, the most influential member of the Presidency of the Republic. In November 1989 he became the President of the Republic. Therefore, he retained control and even command functions established by law over the state security forces.[56]

1.2.1. The "Program on the Realisation of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo"

52. However, not only the organisation of internal affairs of the APs should be subordinated to the Republic organs. With the "Program on the Realisation of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo"[57] and an "Operative plan" which the Serb parliament adopted in March 1990 a systematic approach was developed to subordinate all spheres of state, economy and education of Kosovo, but not Vojvodina to the respective Republic institutions.

53. First of all, the program refers to population figures for the conclusion that after World War II 400.000 Serbs and Montenegrins had emigrated from Kosovo, alone 135.000 between 1961 and 1989 so that the share of Serbs and Montenegrins in the population of Kosovo dropped from 43% before World War II to 15% in 1981 and below 10% in 1990. The reason for that is now exclusively seen to be the poor condition of Serbs and Montenegrins resulting from a lack of freedom and insecurity as a threat to the liberty and property of Serbs and Montenegrins caused by pressure from Albanian nationalists in Kosovo. The aim of the "Albanian nationalists and separatists" is seen as an "ethnically clean" Kosovo made possible by the expulsion of all Serbs and Montenegrins from that territory on order to achieve their

56 See Budimir Babović, *Analysis of Regulations Regarding Responsibility for Control of the Interior Ministry of the Republic of Serbia*, Belgrade 2003, p 11.
57 Sl. gl. SRS Nr. 15/1990. Excerpts are published in English translation in Weller (ed.), *Crisis*, p 60.

"basic goal — the secession of Kosovo from Serbia and later Yugoslavia and the creation of a Greater Albania."

54. In order to restore "the rule of law" and to end the "injustice" against Serb and Montenegrin emigrants, the Serb parliament then in this program — in a mix of threats against Kosovo institutions on the one hand and elaborating economic measures, intended only for Serbs and Montenegrins on the other — proposes:

"Rule of law will be secured for all Serbs and Montenegrins and other nations and nationalities which are threatened; ... all liberal and political rights are guaranteed to all citizens; ... Serbia will undertake all measures for faster economic development and the creation of jobs; ... Serb companies will invest capital in Kosovo; ... 1% of the personal income has to be paid in Serbia as a special tax for the support of the development in Kosovo with the aim of stopping the emigration and encourage the return of Serbs and Montenegrins."

55. At the same time the program of the Serb parliament warns:

> "The autonomy of Kosovo must not be used as an excuse for the malfunctioning of the rule of law ... and must not be misused for the following goal: to prevent the return of Serbs and Montenegrins ... and the secession of part of the territory of the Republic. ... The inadequate functioning of the executive organs, prosecution offices and judicial system must not call into question the realisation of the constitution, peace, freedom, equality and democracy, or efficient functioning of the rule of law. If this happens, the responsible institutions of Serbia will take over the respective administrative, prosecutorial and judicial powers."

56. This program is then followed by a so-called "Operative plan"[58] subdivided into 3 chapters with 94 items in which detailed legislative and administrative measures are proposed in all fields of public and "private

58 Sl. gl. SRS 15/1990, pos 266.

life"[59] including: the legislature, executive, judiciary, the creation of new municipalities with Serb majorities (item 15), economy, education, science and culture, health care and social affairs. For every measure the operative plan determines the responsible republic and provincial institution and sets a time-limit, in most cases until mid-1990.

57. An overview of all of these measures gives the impression that all political, economic, social and educational provincial institutions should be subordinated to the respective republic institutions although this is often euphemistically couched in terms of "co-operation and providing assistance."

1.2.3 The "Law on the Actions of Republic Agencies under Special Circumstances"

58. Since this "assistance" and "co-operation" obviously did not work, already on 26 June 1990 the Serb parliament adopted a "Law on the Actions of Republic Agencies under Special Circumstances."[60] Article 2 stipulates that "special circumstances" shall be deemed to have arisen in part of the territory of the SR Serbia when there are organised:

1. activities directed at overthrowing the constitutional order and the territorial integrity;

2. failures to comply with laws and by-laws;

3. acts which may be hazardous for human life and health;

4. exercise of rights and duties spelled out by the Constitution and by statute in a manner severely damaging public interests and their use in pursuit of unconstitutional objectives.

Article 3 then enumerates the measures to be taken by republic agencies from invalidation of acts of provincial institutions, enforcement of decisions of republic agencies to taking over the powers from the provincial institutions.

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59 Item 91 provides for the necessity to take measures to "reduce the fertility rate in Kosovo."
60 Sl.gl. SRS 33/90, excerpts from the text in English translation can be found in Weller (ed.), *Crisis*, pp 60-1.

59. On the same day — and published in the Official Gazette on the same day — the Serb parliament adopted a "Decision on the Existence of Special Circumstances on the Territory of the SAP Kosovo" without any reasoning as to which events led to the conclusion that special circumstances exist in Kosovo in the sense of Article 2 of the Law quoted above.

60. A complaint before the Constitutional Court of Yugoslavia lodged by several institutions of Kosovo against this Law was not decided before the dissolution of SFRY.[61]

1.2.4. The "Law Terminating the Work of the Parliament and the Executive Council of SAP Kosovo"

61. On 5 July the Serb parliament adopted the "Law Terminating the Work of the Parliament and the Executive Council of SAP Kosovo."[62] The term termination is in fact a euphemism for the abolition of these institutions. Article 3 regulates that the "rights and duties" of the provincial authorities be taken over by the Parliament and Executive Council of Serbia. Article 5 dismisses the civil servants of the affected institutions as well as the officials heading provincial organs of administration. A regulation for the implementation of this Law, adopted on 13 July, regulates the details for the new organisation and activity of the administrative organs of the province having been taken over by republic officials. Again, a complaint before the Constitutional Court of Yugoslavia was not decided before the dissolution of SFRY.[63]

1.2.5. The "Law on the Suspension of the Presidency of SAP Kosovo", the Dismissal of the member from Kosovo in the SFRY Presidency and the Dismissal of Judges of the Supreme Court and the Constitutional Court of Kosovo

62. In the following the other institutions of Kosovo at the provincial level also were subsequently abolished and its representative at federal

61 See Violeta Demaj, *Kosovo/a – Recht auf Unabhängigkeit?* (Kosovo/a – Right to Independence?), Wien 2003, p 80.
62 Sl. gl. SRS 33/90. The text in English translation can be found in Weller (ed.), *Crisis*, pp 61-2.
63 See Demaj, *Kosovo/a,* p 83.

level dismissed. On 18 March 1991, the Serb parliament dismissed Riza Sapunxhiu as member of the SFRY Presidency elected from Kosovo after the President of the Republic Slobodan Milošević, had explicitly requested the dismissal in a statement critical of the SFRY Presidency.[64] On the same day, the Serb parliament also adopted the "Law on the Suspension of the Presidency of SAP Kosovo."[65]

63. The judges of the Constitutional court were already dismissed with a decision published in Sl. gl. RS Nr. 22/90. With no provision for the re-appointment of constitutional court judges the court was effectively abolished. The same holds true for the dismissal of the judges of the Supreme Court published in Sl. gl. SRS 53/90.

1.2.6. The "Law on Labor Relations under Special Circumstances"

64. The "Law on Labor Relations under Special Circumstances"[66], in particular Article 8, did provide the grounds for the dismissal of civil servants in the provincial administration and workers in the self-management companies.

1.2.7. The Abolition of the Autonomy of Kosovo

65. These laws were then followed by almost 500 decisions of the Serb assembly which affected all spheres of state and society in Kosovo: the autonomous institutions of the administrative and judicial power on the provincial, district and local level, the entire self-management economy, the health service, social insurance system, and the entire educational system from pre-school institutions and primary schools to the university. These laws and administrative regulations and decisions resulted in a total abolition of the Kosovo autonomy.

66. See for instance numerous decisions removing and reappointing judges of courts at district and municipal level (Sl. gl. SRS Nr. 53/90, Sl. gl. RS Nrs 6 and 16/90 and 43, 48, 79/91).

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64 See *Borba*, 17 March 1991.
65 Both acts are published in Sl. gl. RS 15/91.
66 Sl. gl. SRS 40/90.

The public prosecutors at district and municipal level were removed from office by a decision published in Sl. gl. SRS Nr. 53/1990.

Also, public functionaries of provincial administrative agencies such as property rights affairs, geodetical affairs, finance, urbanism and housing, agriculture, education and information were removed from office (Sl. gl. SRS Nr. 39, 44, 53/90 and Sl.gl. RS Nr. 6/90).

Also the public functionaries of the municipalities were removed and reappointed (Sl. gl. SRS Nrs 43, 44, 53/90; Sl. gl. RS Nrs. 6, 13, 16/90 and Nrs 16, 30, 41, 44, 46, 62, 79/91).

Very important was also to bring TV and print media in line. See the decisions to remove directors and journalists in TV Priština (Sl. gl. SRS Nr. 34, 36, 43/90), regional radio-stations (Sl. gl. RS Nr. 6, 13, 20/90 and Nr. 27, 41/91), the newspapers Rilindija (Sl. gl. SRS Nr. 34, 37, 44/90 and Nr. 16, 46/91), Tan (Sl. gl. SRS Nr. 37/90) and Jedinstvo (Sl. gl. SRS Nr. 37/90)

Moreover, the entire system of self-managing companies in the following fields were taken over: mining and chemical industries, trading, textiles, agriculture, transport, hotels, breweries (Sl.gl. SRS Nr. 31, 34, 36, 39, 43, 46, 53/90, Sl. gl. RS Nr. 6, 13, 20/90 and Nr. 9, 17 27, 31, 38, 41, 46, 47, 48 63, 64, 72, 75 and 79/91).

Against the University of Priština (Sl. gl. RS Nr. 13/90 and Nr. 38 und 63/91) and in particular all the institutes of the medical faculty of the University Priština (Sl. gl. SRS Nr. 43, 53, Sl. gl. RS Nr. 6 and 20 and Nr. 9, 17, 27, 37, 41, 47, 64, 72 and 75/91) provisional measures were taken. Also, in health service centers throughout Kosovo (Sl. gl. SRS Nr. 39 and 43/90, Sl. gl. RS Nr. 6 and 20/90 and Nr. 31 and 41/91).

Provisional measures were taken also against cultural centers (Sl. gl. RS Nr. 6 and 13 as well as Nr. 41 and 46/91), against the Institute of the History of Kosovo (Sl. gl. RS Nr. 13/90), the Archive of Kosovo (Sl. gl. RS Nr. 13/90 and 17/91) and the National Theater (Sl. gl. RS Nr. 20/90).

As far as the educational system is concerned, with the Serb "Law on Schools" (Sl. gl. SRS Nr. 45/90) all laws adopted by the Kosovo parliament were abrogated and education according to uniform Serb law and curricula introduced.

Finally, with the "Law on Conditions and Procedures for the Distribution of Farmland to Citizens who want to live and work on the territory of the AP Kosovo and Metohija" (Sl gl. RS Nr. 43/91) socially owned property was given for private use only to Serbs and Montenegrins. Already by law of 1987 transactions of real property had been prohibited, but this was declared unconstitutional by the Yugoslav Constitutional Court (U 12/1-88, U 101/1-89 and U 102/2-89, 27 June 1990). However, the same law was adopted again by the Serb parliament on 18 April 1991 (Sl. gl. RS 22/91).

67. In effect, according to figures given by Violeta Demaj[67] more than 220 Albanian judges and prosecutors and 115.000 administrative personnel including 4000 police officers were dismissed. About 90% of the Albanian work force became unemployed.

68. A reasoning for these measures against the Kosovo institutions is given in two documents: the report of the Federal Republic of Yugoslavia for the Committee on Elimination of Racial Discrimination (CERD/C/248) and the statements of the FRY representative´s concluding oberservations as well as in the Supplementary Report of FRY, 29 August 1994 with regard to Kosovo.[68]

The following arguments were used in these reports in order to explain the measures against the Kosovo institutions:

> "The Albanian national minority was given full territorial and cultural autonomy, but instead they wanted secession; … In suspending the Kosovo Parliament and the Executive Council, the Republic had to defend its territorial integrity and constitutional

67 Demaj, *Kosovo/a*, p. 83 and 89.
68 These documents can be found in excerpts in Weller (ed.), *Crisis*, pp 141 – 148.

set-up; … A large share of Albanians do not use the rights guaranteed by the Constitution of Serbia and FRY or boycott them, guided by separatist leaders; … The decrease of Albanians in the judiciary, police and health institutions was due not to discrimination or expulsion from work, but to their refusal to recognize the legitimate authorities of the state; for instance, 31 appointed Albanian judges and prosecutors had refused to take an oath of allegiance before the National Assembly and thereby disqualified themselves from office; the only demand is that Albanians show respect for the reality that Kosovo and Metohija are an integral part of Serbia; … The extremely negative economic trends forced the Serb authorities to take appropriate stop-gap measures with a view to precluding secession and establishing the rule of law; due to the appointment exlusively of Albanians to the management boards and leading positions, good quality was sacrificied for the sake of national quotas; to reverse this situation emergency measures were introduced in 330 enterprises and in the social services between July and November 1990; the interim organs in enterprises were faced with resistance and the boycott of their decisions by managers and workers of Albanian nationality who engaged in sabotage activities, theft, destruction of financial records and organised absenteeism; …Relations between workers of Albanian nationality and others in the health services were dramatically upset due to the outvoting of the non-Albanians. Numerous Albanian doctors, participating in the secessionist movement, gave different treatment to patients depending on their national affiliation. Therefore, the Assembly of Serbia passed stop-gap measures in 13 health institutions in the Province including the medical faculty. In the second half of 1990 some 1200 workers belonging to the Albanian national minority abandoned willfully their work posts in health institutions."

1.3. Conclusions

69. The SFRY constitution 1974 brought full equalization of the institutions of the Republics and SAPs and the same constituent status on the level of the Federation in the decision-making processes in the legislative, executive and judicial power. The only important distinction between Republics and SAPs remained the characterisation of the Republics as states whereas the SAPs were called socio-political communities. In connection with the distinction between nations and nationalities the conclusion was drawn in Yugoslav constitutional doctrine that only nations and therefore Republics, but not nationalities and SAPs had a right to self-determination including secession.

70. This doctrine can be criticized. As follows from the article of Prof. Ratko Marković quoted above, the autonomous status of Kosovo and the position of Albanians as a national minority were not created by the Federal Constitution of 1946 or even the Serbian Constitution. However, this means that even from the perspective of orthodox communist party history the first decision of the highest bodies of Kosovo to annex Kosovo to Serbia was an act of self-determination. Secondly, the historic reference to the second session of AVNOJ cannot prove the argument that only those peoples enumerated there did enjoy the status of nations once and for all. It is a fact that Muslims of Bosnia and Herzegovina who were seen only as a religious group after 1945 were first recognised as an ethnic group and finally as a "nation" under the constitutional system of 1974.[69] In contrast to the reasoning of the Constitutional Court of Yugoslavia with regard to Kosovo Albanians, neither Serb, Croat or Slovene constitutional law textbooks[70] argued — as far as I can see — that the recognition of Muslims as a "nation" under the Constitution of Bosnia and Herzegovina did violate the Federal Constitution.

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69 See the Preamble of the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974 in *Ustavi i ustavni zakoni. Prvi dio. Tekstovi ustava i ustavnih zakona* (Constitutions and constitutional laws. First Part. Texts of Constitutions and constitutional laws), Informator, Zagreb 1974, p. 61.

70 Jovan Đorđević, *Ustavno Pravo*, Beograd 1984; Smiljko Sokol/Ljubomir Valković, *Komentar Ustave Socijalističke Federativne Republike Yugoslavije*, Zagreb 1990; Majda Strobl/Ivan Kristan/Ciril Ribičič, *Ustavno Pravo SFR Jugoslavije*, Ljubljana 1986.

71. The first attempt to overcome the alleged asymmetry of the SFRY constitution were the proposals for the amendment of the SFRY constitution in 1987. However, the big reform of the federal relations and the relations between the SRS and the SAPs were postponed. The amendments adopted in 1988 brought only minor adjustments, but left the institutions and powers of the SAPs untouched.

72. The same cannot be said of the amendments of the SRS constitution in 1989. The political claim that the autonomy of Kosovo was abolished through these amendments is — from the constitutional perspective — wrong. The amendments adopted concerning the powers in particular of the assemblies of the SAPs did deviate from the entire constitutional system of 1974, insofar as the constitution of SRS in relation to the SAPs did follow the relations of the Federation to the Republics. However, they did not expressly contradict the SFRY constitution since the text of this constitution remained silent on the specific relations between the Republic of Serbia and the SAPs. Only the institutions of the SAPs were guaranteed under the federal constitution, but none of them was abolished through those amendments. Nevertheless, these constitutional amendments did weaken the powers of the institutions of the SAPs since they did provide the basis to bring them under control of the republic institutions.

73. The political events in connection with those amendments, however, raise serious doubts on their legitimacy and legality.

74. In the beginning of the 1980s the reaction of the League of Communists of Yugoslavia and the state institutions at federal and republic level to the political and economic crisis in Kosovo was twofold: suppression by criminal law on the one hand, economic development on the other.

75. First, all political claims of Kosovo-Albanian demonstrators for equality by up-grading the status of SAP Kosovo into a Republic were, at least since 1981, interpreted as a claim for separation from Serbia or, more or less thinly vealed, even secession from Yugoslavia in order to create a “Greater Albania.” Their claims were therefore suppressed

as "counterrevolutionary" according to the appropriate provision of the Yugoslav Criminal Code.[71]

76. Those Kosovo-Albanians convicted of making claims in public demonstrations which referred to "Kosova-Republika" were sentenced to several years in prison. Their attempts to appeal their convictions in the Federal Appeals Court on the grounds that their constitutionally guaranteed freedom of speech was violated were outrightly rejected as "manifestly ill-founded" without any reasoning in regard to questions of their human rights. [72]

77. This judgement and the text of the human rights catalogue in the SFRY constitution where a general limitation of human rights is foreseen "in the interest of the socialist community" (Article 153) show that in a communist one-party system without separation of state and party one and the same fact, demonstrations and political claims for constitutional reform could be interpreted by prosecutors and courts either as democratic expression of the will of the people or counter-revolutionary act in the sense of the Criminal Code.

78. Second, in actual fact more and more Serbs and Montenegrins did emigrate from Kosovo due to the severe economic situation[73] so that all programmes for the faster economic development of Kosovo which were adopted by the League of Communists of Yugoslavia and state institutions had obviously no effect.[74]

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71 See Article 114 Krivični Zakon SFRJ, Službeni list SFRJ, br. 44/1976. Between 1981 and 1987 1200 persons were held criminally liable, 4000 were convicted in misdemeanour procedures because of nationalist offences. In the same period 240 police officers were dismissed because of "enemy activities" or "inacceptable views." Criminal procedures were opened against 49 of them. And the Minister of Defence, Branko Mamula, declared in September 1987 that 216 illegal Albanian groups had been detected in the Yugoslav army. See Jens Reuter, Die politische Entwicklung in Jugoslawien (The political development in Yugoslavia), *aus politik und zeitgeschichte*, B 6/1988, p 6 based on reports in NIN, 28 June 1987 and NIN, 27 September 1987.

72 See *Yugoslav Law* Nr. 2/1988, pp 117-8.

73 See the research figures given by Momčilo Pavlović, "Kosovo under Autonomy, 1974 – 1990", in: Charles Ingrao and Thomas A. Emmert (eds.), *Confronting the Yugoslav Controversies*. *A Scholars' Initiative*, Purdue University Press, 2nd ed., 2013, pp 48 – 80.

74 See the following documents: Political Platform for Action by the League of Communists of Yugoslavia in Regard to the Development of Socialist Self-Management, Brotherhood, Unity and Community Spirit in Kosovo, *Yugoslav Survey* February 1982, pp 31 – 70; Development of Underdeveloped Republics and Kosovo Province, 1981 – 1985 and Development Policy, 1986

79. Also, since 1985, Kosovo Serbs in a sort of grass-root movement had started a campaign to inform the party and state authorities in Kosovo and Belgrade and the public about their alleged discrimination and suppression through demonstrations.[75]

80. These claims of the grass-roots movement of the Kosovo Serbs and the criticism of Serbian constitutional lawyers outlined above were finally taken over by the leadership of the Serbian communist party, after Slobodan Milošević had become President of the League of Communists of Serbia in 1986. In the following he successfully got rid of his opponents on the Kosovo question in state and party functions. Starting point was the 8th plenary meeting of the Central Committee of the League of Communists of Serbia in fall 1987 where he succeeded in discrediting his opponents in the party because of their weak position on Kosovo. As a consequence, the Belgrade chief of the communist party, Dragisa Pavlović, and the former mayor of Belgrade and member of the Central Committee of the League of Communists of Serbia, Bogdan Bogdanović, resigned. In November 1987 also the head of the Serbian State Presidency, Ivan Stambolić, resigned.[76] So Milošević had de facto gained power over party and state functions in Serbia.[77]

81. Both the criticism of the Kosovo Serbs and the Serb constitutional lawyers had already aimed at a revision of the constitution of the SRS in order to bring Kosovo under control of the republic institutions again. After the committees and leaders of the communist party in the provinces resisted, mass demonstrations were organised by the Serbian Socialist Alliance.[78] The mass protests of 100.000 persons against the so-called "autonomists" in Vojvodina climaxed on 6 October, when the entire communist leadership of state and party institutions resigned.[79] After a similar coup d`etat in Montenegro had failed in October 1988, protesters

– 1990, *Yugoslav Survey*, Nr. 4/1987, pp 21 – 40.

75 See Viktor Meier, *Wie Jugoslawien verspielt wurde* (How Yugoslavia was lost), München 1995, p 74 and a detailed analysis on "Kosovo Serbs, Serbian Nationalist Intellectuals, and Officials of the Milosevic Regime" in Pavlović, *"Kosovo under Autonomy"*, pp 66 – 74.

76 See Thomas Brey, Jugoslawien in der Zerreißprobe, *Osteuropa* (1989), p 570.

77 See the report on the events in Meier, *Jugoslawien*, p. 76 and Reuter, Jugoslawien im Umruch (Yugoslavia in change), *aus politik und zeitgeschichte*, B 6/1988, pp 6-7.

78 See Meier, *Jugoslawien*, pp 136-144 and Brey, *Jugoslawien*, pp 570 – 571.

79 Brey, *Jugoslawien*, p 571.

were more successful in January 1989. After two days of demonstrations by finally 120.000 persons, the Montenegrin President Slobodan Simović resigned. Massive resignations on all levels of party and state followed.[80] However, these events did only set the stage for the following events in Kosovo itself.

82. In the beginning of February 1989 the Central Committee of the League of Communists of Kosovo refused the approval to the amendments of the Serbian constitution and the miners of Trepca started a hungerstrike which became a general strike very soon.[81] On 27 February 1989 the SFRY Presidency, without the Slovenian member being present, voted for "special measures" in Kosovo "to protect the constitutional order, public law and order, personal safety and the property of all citizens and public property… ."[82] When the Party Presidency of the LCY assembled next day, Milan Kučan raised the question what the term "special measures" means. Raif Dizdarević argued that this term was to be understood as "full state of emergency." And Stane Dolanc, the Slovene member in the State Presidency, argued afterwards before the Slovene Presidency that these measures were legal, but not constitutional, since they were adopted on the basis of the Law on All People´s Defence, but not the constitution.[83] As a consequence, the right to peaceful assembly was suspended, 40.000 Albanians were obligated to work and special police and army troops deployed.[84]

83. Under these "special circumstances" the Kosovo Assembly finally voted for the proposed amendments of the SRS constitution on 23 March 1989. Immediately afterwards from 27 through 29 March 1989 street riots took place. Hundreds of persons were held "in isolation", i.e. arrested at an unknown place without indictment, or trial and access of a defence lawyer.[85] According to Nenad Zakošek[86] "isolation" was justified by the authorities

80 Meier, *Jugoslawien*, p 151 and Brey, *Jugoslawien*, p 573.
81 Brey, Jugoslawien, p 573.
82 Announcement from the session of the SFRY Presidency, *Tanjug*, 28 February 1989.
83 This is reported by Meyer, *Jugoslawien*, pp 161 – 164 based on Slovenian party archives.
84 Thomas Brey, Jugoslawien: Der Vielvölkerstaat zerfällt (Yugoslavia: The multinational state in dissolution), *Osteuropa* (1991), p 425.
85 See Jens Reuter, Die jüngste Entwicklung im Kosovo (The most recent development in Kosovo), *Südosteuropa* 1989), p 341.
86 See Nenad Zakošek, Nekontrolirano nasilje države (Uncontrolled power of the state), *Danas*, 30 May 1989, p 12.

to have a legal basis in Article 53 of the Provincial Law on Internal Affairs. This provision gives the organs of internal security, if there is a state of emergency, the power to "restrict the movement of persons against whom a reasonable doubt exists that they would endanger the constitutional order." This can, according to the law, be exercised without judicial or parliamentary control as long as the emergency situation exists.

84. However, such a legal provision is contrary to the idea of human rights as substantial element of the rule of law principle as Zakošek correctly argues and sheds a light on the understanding of legality and rule of law in the understanding of the communist regime. Although the power of the organs of internal security is based on law, the law gives them unrestricted powers without any control mechanisms. This contradicts the understanding of law which presupposes the existence of a sphere of unalienable rights of the individual and a guarantee for the observation of these rights also by statutes with a precisely regulated procedure for the limitation of human rights including control mechanisms.

85. The new Serbian constitution of 1990 reduced the status of the APs below the level of local self-government. Their assemblies have no legislative power and there are no Presidencies, Supreme and Constitutional Courts any more. These changes were a violation of the constitutionally guaranteed status under the still valid SFRY constitution of 1974 and even of the prohibition adopted through amendment XLVII, item 2 of the SRS constitution in 1989 which proclaimed that "the status, rights and obligations of the autonomous provinces as regulated by the constitution of SFRY must not be amended by constitutional amendments of the Socialist Republic of Serbia." It is in line with the substantial violation of the constitutions that the adoption of the new Serbian constitution did not follow the procedure foreseen in the constitution of the SRS 1974 as amended in 1989. Moreover, due to the abolishment of the Kosovo Assembly by the "Law Terminating the Work of the Parliament and the Executive Council of SAP Kosovo", the constitutionally foreseen participation of the Kosovo Assembly did not take place.

86. The political and legal function of this new Serbian constitution was thus assessed by the Institute of European studies in Belgrade in the following terms: "The Serbian constitution adopted in 1990, which was

the normative result of authoritarian and populist nationalism, is a paradigmatic instance in the abuse of law in order to secure the continuity of a political regime. ... its democratic form ... was expected to secure the authoritarian structure of government based on the leadership of one man. ... Parliament is largely a simulation of democracy. The main political decisions are made by a single person, the President of the Republic, while the role of Parliament is to give these decisions an aura of constitutionality ... The regime needs the Constitution, parliament and government primarily to legalize and institutionalize its own power."[87]

87. The new constitution for the Federal Republic of Yugoslavia in 1992 no longer mentions the Autonomous Provinces, but only the two member republics Serbia and Montenegro as constituent units. The existence and status of the APs is thus no longer guaranteed by the Federal constitution as this had been the case under the SFRY constitution. Again, the adoption of the new federal constitution did not follow the procedure foreseen by the SFRY constitution. Also the manner of the adoption of the constitution raises serious doubts about the legitimacy of this constitution. According to the assessment of the Institute of European Studies Belgrade, this new constitution was an illegal and illegitimate surrogate for the unresolved "Serb question." In their conclusion, this "war constitution" and the new state were only the attempt of the Serb regime to conceal the fact that the recognition of the Serb state had failed.[88]

88. As can be seen from the "Program" and the "Operative Plan" adopted by the Serb Assembly in 1990, the political elite under the leadership of Slobodan Milošević wanted to take full control over virtually every aspect of life in AP Kosovo and to change the ethnic balance by providing a return program for Serbs and Montenegrins who had emigrated. Because of the resistance of the Albanian representatives of the Kosovo Assembly and population, they then implemented this plan by abolishing the constitutionally guaranteed institutions of the province and taking over the administrative, judicial and municipal institutions as well as other positions in the economy, health service, education, TV and radio.

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87 Institute for European Studies, *Inter-Ethnic Conflict and War in Former Yugoslavia*, Belgrade 1992, pp 23-4.
88 Institute for European Studies, *Conflict*, p 29.

89. As far as the laws and decisions adopted under "Special Circumstances" are concerned, already the "Law on the Actions of Republic Agencies under Special Circumstances" had no basis in the constitution and was, therefore, unconstitutional. "Special circumstances" were not foreseen in the constitution, but only a "state of emergency."

90. The laws abolishing the Kosovo Parliament and its Executive Council, as well as the Presidency of Kosovo and the dismissal of the judges of the Supreme Court, the Constitutional Court and the Kosovo member in the Federal Presidency were violating the status of Kosovo guaranteed under the SFRY constitution 1974.

91. Finally, the dismissal of public functionaries and employees and the other preliminary measures in all of the fields elaborated above not only violated the non-discrimination provisions of the SFRY constitution (Article 154), but also the constitutionally guaranteed self-management rights (Art 10, 11, 13, 14 SFRY constitution). In particular Art 14 last paragraph SFRY constitution declares ex constitutione all acts and activities unconstitutional violating these rights.

92. However, as the "Program" and "Operative plan" and the 250 decisions implemented already in 1990 obviously show, these measures cannot have been a spontaneous re-action of the Serb authorities. They must have systematically been planned for some time in advance already.

2. The Position and Powers of Various State Bodies under the Serbian Constitution of 1990 and the FRY Constitution of 1992 and respective legislation

2.1. The President of the Federal Republic of Yugoslavia

93. The powers of the President of the Federal Republic of Yugoslavia are enumerated in Article 96 of the constitution of the Federal Republic of Yugoslavia (FRY) of 1992[89]:

"The President of the Republic shall:

1) represent the Federal Republic of Yugoslavia at home and abroad;
2) promulgate federal laws by decree; issue instruments of ratification of international treaties;
3) nominate a candidate for prime minister of the federal government, after having heard the opinions of spokesmen for the parliamentary groups in the Federal Assembly;
4) recommend to the Federal Assembly candidates for appointment as justices of the Federal Constitutional Court, justices of the

89 I use the English translation published by the Ministry of Information of the Republic of Serbia, *Constitution of the Federal Republic of Yugoslavia*, Belgrade 1992.

Federal Court, the Federal Republic Prosecutor, and the governor of the National Bank of Yugoslavia, after having obtained the opinion of the presidents of the member republics;

5) call elections for the Federal Assembly;
6) appoint and recall by decree ambassadors of the Federal Republic of Yugoslavia, pursuant to the recommendations of the federal government; receive the letters of credence of foreign diplomatic envoys;
7) confer decorations and honours of the Federal Republic of Yugoslavia, as provided for by federal statute;
8) grant pardons for federal statutory criminal offences;
9) perform other functions as envisaged by the present constitution."

94. According to Article 135 of the FRY Constitution, the Army of Yugoslavia is in wartime and peacetime under the command of the President of the Republic, pursuant to decisions of the Supreme Defence Council. The President of the Republic presides over the Supreme Defence Council which is composed of the President of the Republic and the presidents of the member republics (Article 135, para 2 and 3). And Article 136 prescribes that "the President of the Republic shall appoint, promote and dismiss from service officers of the Army of Yugoslavia stipulated by federal law; shall appoint and dismiss the president, judges and judge assessors of military tribunals and military prosecutors."

95. What is of particular interest here is the command authority over the Army of Yugoslavia (VJ) and the interplay between different organs.

According to Article 78, item 3 of the FRY Constitution, the Federal Assembly decides on war and peace and may declare a state of war, a state of imminent threat of war, or a state of emergency. However, if the Federal Assembly is unable to convene, the federal government has the power to proclaim an imminent threat of war, state of war, or emergency subject to the opinion of the President of the Republic and the presidents of the Federal assembly chambers (Article 99, item 10).

96. As stipulated by the constitution, the President of the Republic has then to co-operate with the Supreme Defence Council, over which he simultaneously presides. This relationship is regulated in more detail in

Article 41 of the Law on Defence.[90] Against this background, the President of FRY then, according to Article 40 of the Law on Defence, performs the following duties in line with the decisions taken by the Supreme Defence Council:

1) orders the implementation of the country´s defence plan;
2) commands the Yugoslav Army in peacetime and wartime;
3) outlines the division of the country into military territorial units.

97. According to Article 4 of the Law on the Yugoslav Army[91], the President of the Republic has the following powers in exercising the role of commander of the Yugoslav Army:

1) to define the basic elements of internal organisation, development and equipping the army;
2) to define the system of command of the Army and supervise the implementation of the system of command;
3) to decide to use the Army, and approve the plan of use of the Army;
4) to stipulate and order the implementation of measures for putting the Army in a state of readiness in the event of imminent threat of war, a state of war or a state of emergency;92
5) to lay down guidelines for undertaking measures for the preparation of mobilisation and to order the mobilisation of the Army;
6) to adopt the basic rules and other instruments relating to the use of the Army;
7) to adopt rules governing the internal order and relations of military service;
8) to carry out other duties in commanding the Army, in accordance with federal law.

98. The Law on the Yugoslav Army contains more detailed provisions stipulating additional powers of the President of FRY, such as:

90 Službeni list SRJ (Official Gazette of FRY), Nr. 43/1994. See below 2.6.
91 Sl. l. SRJ, Nr. 43/1994.
92 See also Article 8 of the Law on Defence.

1) to define branches and services of the Yugoslav Army (Article 2);
2) to assign generals and other officers to posts with the establishment of the rank of general (Article 16, para 1);
3) to give permission for a member of the military to receive a decoration from another country (Article 34, para 1);
4) upon the proposal of the Chief of the General Staff, he may approve an extraordinary promotion of a professional officer to the rank of general (Article 46, para 1);
5) to promote professional and reserve officers to the initial ranks; promote army officers to the rank of a major-general or senior ranks; make decisions on the transfer, service status, admittance to and termination of the military service of generals; appoint officers with the rank of colonel to posts with the established rank of general (Article 151);
6) to reduce, commute or annul any disciplinary measure or punishment upon the proposal of the Chief of the General Staff (Article 168);
7) to adopt the rules of military discipline (Article 173);
8) to decide on the restitution of rank to a professional soldier or member of the reserve forces who has been stripped of it (Article 208);
9) to decide to release soldiers from military service 60 days early, if compatible with the requirements of replenishment and combat readiness of the Army (Article 296 para 3).

In exercising these powers, the President of the Republic adopts decrees, orders and decisions.

99. The relationship between the President of the Republic and the Supreme Defence Council is delicate for the following reasons:

On the one hand, the President of the Republic seems to be in a subordinate position, implementing only the decisions of the Supreme Defence Council. On the other hand, however, he is in a leading position. The Supreme Defence Council is a collective body, which is not in permanent session. As a consequence, the Supreme Defence Council is dependent on the President of the Republic and his initiatives insofar as he convenes the sessions, proposes the agenda, ensures that the

conclusions are implemented, etc. Moreover, the President of the Republic can act even if the Supreme Defence Council does not meet. According to Article 4 of the Law on the Yugoslav Army, the President of the Republic has autonomous powers to exercise the command over the VJ. The provision stating that the President of the Republic verifies the decisions of the Supreme Defence Council by issuing decrees indicates his dominant position.

Moreover, one has to take into account his de jure advisory opinion in declaring a state of war when the Federal Assembly is unable to convene. In actual fact, he could dominate the entire decision-making process from determining a state of war, to decisions of the Supreme Defence Council and the operative command of the Yugoslav Army.

100. As far as breaches of the laws of war are concerned, the responsibilities of the President of the Republic will be dealt with in chapter 3.

101. A relationship between the President of FRY and the units and organs of internal affairs including the police can be established in a state of war and in an emergency situation. Article 17 of the 1994 Law on Defence regulates: "In the event of an imminent threat of war, a state of war or a state of emergency, the units and organs of the interior may be used to carry out combat tasks, that is, be engaged in fighting or armed resistance. In combat tasks, these units and organs are subordinated to the Yugoslav Army officer commanding the combat operations."

102. The direct responsibility of the FRY President is not specified here. It is clear, however, that the person in command of combat operations cannot wilfully change the orders issued and decisions taken by the FRY President. The conclusion that the FRY President is responsible follows also from Article 4, para 2, item 2 of the Law on the Yugoslav Army, which stipulates that he "monitors the implementation of the command system."

103. Moreover, the Defence Plan of the country is a significant document regarding the subordination of MUP forces to the VJ in peacetime. It is adopted by the Supreme Defence Council and the President of the Supreme Defence Council orders its realisation (Article 40 and Article 41,

para, 1 items 1 and 2 of the Law on Defence). The country´s defence plan establishes the obligations of the citizens and the state organs (including MUP) regarding the general mobilisation and the organisation of defence preparations, as well as the obligation of the VJ commands, units and institutions to act in accordance with plans for the mobilisation and use of the VJ and the orders of the President of the Republic (Article 6 of the Law on Defence).

104. That means it is a legally established obligation of the MUP to implement decisions of the Supreme Defence Council in peacetime conditions regarding the organisation and preparation of citizens for combat (Article 15 of the Law on Defence).

2.2. The President of the Republic of Serbia

105. Article 83 of the Constitution of the Republic of Serbia[93] enumerates the powers of the President of the Republic of Serbia. He shall:

1) propose to the National Assembly a candidate for the post of Prime Minister after hearing the opinion of the representative of the majority in the National Assembly;
2) propose to the National Assembly the candidates for President and justices of the Constitutional Court;
3) promulgate the laws by ordinance;
4) conduct affairs in the sphere of relations between the Republic of Serbia and other states and international organisations in accordance with law;
5) command the armed forces in peacetime and war and the popular resistance in war; order the general and partial mobilization; organize the preparations for defence in accordance with law;
6) if the National Assembly is not in a position to meet and after obtaining an opinion from the Prime Minister, establish the fact of existence of an immediate danger of war or proclaim the state of war;

93 Sl. gl. RS, Nr. 1/1990.

7) at his own initiative or the proposal of the Government during a state of war or immediate danger of war, pass enactments falling within the competence of the National Assembly, provided his being bound to submit them to the National Assembly for approval as soon as it is in a position to meet. By way of enactments promulgated during the state of war it shall be possible to restrict some freedoms and rights of man and citizen, and to alter the organisation, composition and powers of the Government and of ministries, courts of law, and public prosecutor´s offices;
8) at the proposal of the Government, if the security of the Republic of Serbia, the freedoms and rights of man and citizen or the work of State bodies and agencies are threatened in a part of the territory of the Republic of Serbia, proclaim the state of emergency and issue acts for taking measures required by such circumstances, in accordance with the Constitution and law;
9) grant pardons;
10) confer decorations and awards as provided for by law;
11) establish professional and other kinds of services to conduct affairs falling within his jurisdiction;
12) conduct other affairs in accordance with the Constitution.

106. Although the institutional system created by the Serbian Constitution of 1990 cannot be called a presidential system of government from the perspective of comparative government due to the dual executive and the vote of no-confidence (Article 93), the President of the Republic has nevertheless a strong position. He is directly elected by the people (Article 86) and can only be impeached by a two-thirds majority of all members of the National Assembly (Article 88 para 2). He is then recalled if the majority of the voters votes for the recall in a referendum (Article 88 para 3). The President can dissolve the National Assembly upon the proposal of the Government (Article 89). Article 84 gives him a suspensive veto in the legislative process.

107. Extraordinary from a comparative perspective are the powers given to the President in case of a state of emergency as already outlined above in chapter 1.1.4.

108. According to Article 135 para 2 of the FRY constitution the President of the Republic of Serbia is a member of the Supreme Defence Council and thereby participates in the command authority over the Yugoslav Army. According to Article 83 para 5 of the Serb constitution, the President of the Republic of Serbia is also commander of the armed forces.

These two provisions provide for considerable constitutional confusion. Whereas the FRY constitution does not use the term "armed forces", but speaks of the Yugoslav army, the Serb constitution uses the term "armed forces." None of the constitutions mentions the territorial defence (TO).

109. In order to clarify the meaning of "armed forces" used in the Serb constitution and the relationship to the Yugoslav Army it is necessary to see the history of the system of armed forces created under the SFRY constitution. According to Article 240 para 2 of the SFRY Constitution the Armed Forces of the SFRY were composed of the Yugoslav People´s Army (JNA) as a common force of the SFRY and the territorial defence (TO) "as the broadest form of organized total national armed resistance" in the Republics and Socialist Autonomous Provinces. The Law on All-People´s Defence of the SFRY[94] contained the detailed provisions for the system of command and control over both the JNA and the TO. The JNA was a classic mobile army. The TO was based on the territorial principle and the competent organs in the Republics and Autonomous Provinces were in charge of the TO. TO staffs were established in towns, municipalities, local communes and major enterprises. The organisation of the TO was meant to create conditions for all-people´s defence in the entire territory, from work organisations and local communes up to the level of the Republic. This should enable TO units to operate successfully even in temporarily occupied territories.

110. The SFRY Presidency was the supreme organ of command and control of the SFRY armed forces, including the TO. In addition, each republic and autonomous province had a TO commander appointed by the SFRY Presidency at the proposal of the respective republic or autonomous province.

94 Sl. l. SFRJ, Nr. 21/1982.

111. The position of the TO in the Republic of Serbia was changed with the new constitution of 1990. Whereas Article 296 of the Constitution of the SRS had defined the Serbian TO as part of the armed forces of the SFRY and stipulated the organisation of the TO at the level of the Republic, Autonomous Provinces and municipalities as part of a unified system of all people´s defence of the SFRY, the new Serb constitution of 1990 does not contain any provisions about territorial defence.

112. Nevertheless, the National Assembly adopted a new Law on Defence in 1991.[95] This law, however, did not regulate the organisation of the armed forces, but Article 5 para 1 indicated that a separate law would be adopted. Should the interests of the Republic of Serbia be jeopardised before the adoption of the separate law, Article 5 para 2 prescribed the use of the TO in accordance with this law.

According to Article 31 para 2 of the Law on Defence, the TO as part of the still existing system of common armed forces of the SFRY, had to protect the territorial integrity and constitutional order of the SFRY and the Republic of Serbia. A separate chapter in the Law on Defence is dedicated to the TO (Articles 31 through 67).

113. According to Article 6 of the Law on Defence, the President of the Republic had the following powers. He

1) heads the armed forces in times of peace and war and is authorised to solve organisational and personnel issues in the domain of territorial defence;
2) approves the defence plan of the Republic of Serbia as well as other documents setting out measures for organising and implementing defence preparations;
3) orders the implementation of state of alert measures and other necessary measures;
4) defines the principles of organisation and strength of the police forces in the event of imminent threat of war and in a state of war;

95 Sl. gl. RS, Nr. 45/1991.

5) may order the use of the police in war, during an imminent threat of war, and in any other emergency situation in order to protect the constitutional rights and responsibilities of the Republic and its citizens.

As can be seen from these powers, the President of the Republic had decisive influence on all aspects of the defence of the Republic.

114. Moreover, the Law provided for an intensive build-up of the TO in the Republic of Serbia. In transitional provisions a tight schedule was stipulated for the transfer of responsibilities, equipment and material from all people´s defence to the Republic of Serbia. In that way, pending the adoption of the law on armed forces of the Republic of Serbia, the TO practically functioned as the armed forces of the Republic of Serbia.

115. On the other hand, the TO of the Republic of Serbia remained, according to the still valid SFRY Constitution, de jure under the command of the SFRY Presidency and not the President of the Republic of Serbia. According to Articles 113 and 115 of the Law on All-People´s Defence, the TO commanders of the Republics and Autonomous Provinces were accountable to the SFRY Presidency in terms of their performance, combat readiness, the use of units and installations, and the command and control in accordance with the command and control of the armed forces.

116. How can the various command authorities over "armed forces" according to the FRY Constitution and the Serb Constitution be brought into line?

117. After the adoption of the Constitution of FRY and the Law on the Yugoslav Army, the President of the Republic of Serbia is — from a constitutional point of view — only participating through the Supreme Defence Council in the command authority over the VJ. However, he had full command authority over the TO of the Republic of Serbia instead of the former SFRY Presidency as the constitution of FRY no longer foresaw such a command authority for the President of FRY. His command authority over the TO is, according to the Serb Constitution, implied in the power to command the "armed forces" of the Republic of Serbia.

118. However, both constitutions foresee the declaration of a state of war and a state of emergency. According to Article 78, item 3 of the FRY Constitution, this is the power of the Federal Assembly and according to Article 99 FRY Constitution of the Federal Government if the Assembly cannot convene, the President can declare a state of war. According to Art 83 Serb constitution, the President declares the state of war and state of emergency which is, however, restricted to part of the territory of the Republic.

Following from the fact that the Constitution of the Republic of Serbia was intended to prepare the legal foundations for an independent state as outlined above in chapter 1.1.4., it is obvious that these provisions of the FRY constitution and the Serb constitution were never harmonised.[96]

119. As far as the relationship between the President of the Republic and the Ministry of the Interior of Serbia (MUP Serbia) is concerned, the President of the Republic has no direct authority[97] over the MUP under the constitutional provisions for a parliamentary system of government.[98] But based on the respective provision of Article 83 of the constitution quoted above, Article 17 of the Law on the Government of the Republic of Serbia[99] stipulates that the Government submits a proposal to the President of the Republic of Serbia to declare a state of emergency[100] and proposes documents containing measures that need to be undertaken if the security, freedom and the human rights or the functioning of the organs of government are threatened in a part of the territory of the Republic. Article 17 of the Law on Internal Affairs of the Republic of Serbia[101] then regulates that the MUP will undertake measures to protect the security of the Republic and its citizens based upon orders and

96 See Sl. list SRJ, Nr. 34/1992 and Nr. 29/2000.

97 Budimir Babović, *Analysis of Regulations regarding Responsibility for Control of the Interior Ministry of the Republic of Serbia*, Belgrade 2003, at §§ 74-5 is wrong in this respect from the point of constitutional law. It is true that the ministries also implement general acts of the President according to Article 94 para 2, but para 3 prescribes that the ministries are independent thereby.

98 The President of the Republic has no right to dismiss any of the ministers nor does he have a right to propose a vote of no confidence in the Government or any individual minister.

99 Sl. gl. RS, Nr. 5/1991.

100 Article 18 of the Law on the Government of the Republic of Serbia, however, stipulates that the Government in a state of war or immediate threat of war proposes to the President of the Republic acts on questions in the competence of the National Assembly. This provision indicates that the command authorities of both presidents are neither harmonised on statutory level.

101 Sl. gl. RS, Nr. 44/1991.

other instruments issued by the President of the Republic of Serbia. Finally, according to Article 6, items 4 and 5 of the Law on Defence, the powers granted to the President of the Republic encompass only the police, and not the MUP in its entirety.[102] In this context, the police is perceived as an element of the defence system under the command authority of the President of the Republic.

120. Article 9 of the Law on Internal Affairs prescribes that the minister is obliged to submit a report on the performance of the Ministry of the Interior and on the security situation in the Republic, if requested by the National Assembly and the President of the Republic. A request directly from the Minister of the Interior is, however, contrary to Article 85 of the Constitution of the Republic of Serbia.

121. Very significant powers were given to the President of the Republic of Serbia in the Law on Ranks of MUP members adopted in 1995.[103] This law enabled the President to strengthen and directly exercise his influence over the police service in Serbia. According to Article 6 "generals and authorised officials in posts for which the rank of general is required as per the job specification shall be appointed and promoted by the President of the Republic." Hence the most significant personnel decisions were put in the hands of the President since for practically all management positions in the MUP Serbia (assistant ministers and administration chiefs) the rank of general is required. According to Article 13 of the Law on Ranks he became also the highest disciplinary instance for those MUP employees who had received the rank of general.

122. On 21 April 1997, President Milošević issued the decision that the RDB, the State Security Department, would henceforth work "pursuant to instructions of the President of the Republic and the Government of the Republic of Serbia."[104] This means that the Minister of Interior was formally put aside.

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102 The police is an organisation to maintain public law and order. Hence the police is part of the MUP structure, but the MUP itself has numerous other tasks. See the Law on Ministries of Serbia, Sl. gl. RS Nr. 7/1991 and Babović, *Analysis*, § 33.

103 Sl. gl. RS, Nr. 53/1995.

104 ICTY evidentiary material, K0227740.

2.3. The Deputy Prime Minister of FRY

123. According to Article 68 of the Law on Defence, the civilian protection units are engaged in protection and rescue operations from devastation caused by war, natural disasters and calamities and risks in both peacetime and war.

124. According to Article 84, para 1 of the Law on Defence, the Deputy Prime Minister is the commander of the civilian protection. The rules governing the organisation and establishment of the civilian protection units, staffs and commissioners are, however, appointed by the Minister of Defence (Article 86).

2.4. The Serbian Minister of the Interior

125. According to the Law on Internal Affairs 1991 the Minister of the Interior is authorised to:

1) determine the field of work of the organisational units, their organisation, their seat and the territory for which they are established (Article 6, para 2);
2) regulate the manner in which the MUPs duties are carried out (Article 7);
3) issue regulations regarding official identification papers and weapons of authorised officials (Article 18, para 4) and employees carrying out certain duties (Article 26, para 6);
4) call persons from the reserve force to carry out certain peacetime tasks of the MUP, "... and particularly prevent activities aimed at threatening the security of the Republic, to prevent disturbances of the peace and re-establish law and order after major disturbances and to provide assistance in case of general danger caused by natural disasters" (Article 28).

126. According to Article 6 of Regulations on the Internal Organisation of the MUP of 5 June 1996, he can form special and specialised units,

operations groups or other specialised units.[105] Assignment to posts for which the rank of general is not required is in the competence of the Minister of Interior according to Article 6 of the Law on Ranks.

127. According to Article 17 of the Law on Internal Affairs, the MUP Serbia directly implements the "orders and enactments issued by the President of the Republic of Serbia in order to end the state of emergency." Hence the minister is subordinated in this respect.

128. However, as can be seen from Milošević´s decision of 1997 above, the Minister was formally put aside in the direction of the MUP.

2.5. The Supreme Command and the Chief of General Staff of the Army of Yugoslavia

129. In 1987 the SFRY Presidency adopted a decision changing the name of the General Staff of the JNA into General Staff of the Armed Forces.[106] This decision had the effect of establishing a common General Staff for both component parts of the armed forces, the JNA and the TO. Thereby the TO ceased to be directly subordinated to the SFRY Presidency, but was instead subordinated to the Armed Forces General Staff and to the strategic military zone.

130. The SFRY constitution does not mention the term "supreme command". The term Staff of the Supreme Command appeared first in the 1991 amendments to the Law on All-People´s Defence. Article 106 regulates in more detail the constitutional provisions relating to the SFRY Presidency as the supreme organ of command and control of the armed forces. According to Article 79 of the Law on All-People´s Defence, the Federal Secretariat for National Defence acted as the Supreme Command Staff of the SFRY armed forces.

105 Babović, *Analysis*, § 87.
106 Military Official Gazette, Nr. 27/1987.

131. According to the Law on the Yugoslav Army the VJ General Staff is now the highest professional and staff organ for preparations and use of the Army in peacetime and war (Article 5, para 1).

132. In accordance with the basic principles of organisation, development and establishment of the Yugoslav Army and the acts adopted by the President of FRY, the Chief of the General Staff has the following powers according to Article 5, para 2 of the Law on the Yugoslav Army:

1) to define the organisation, development plans and the establishment of Army commands, units and institutions;
2) to define the Army recruitment and replenishment plans and the number of conscripts;
3) to adopt the rules of military training in the Army;

4) to draw up education and training programmes for professional and reserve officers;
5) to perform other duties stipulated by this law.

For the purpose of implementing the instruments adopted by the President of FRY and discharging military command duties and other duties envisaged by law, the Chief of the General Staff issues rules, orders, directives, instructions and other documents (Article 6, para 1 of the Law on the Yugoslav Army).

133. There are also other powers of the Chief of the General Staff regulated in the Law on the Yugoslav Army:

1) he decides on the persons for the organs of security and military police (Article 30 para 2);
2) he can extraordinarily promote professional non-commissioned officers and professional officers to the next higher rank (Article 46, para 2);
3) other authorities in promotions of VJ officers are regulated in Article 152.

2.6. The Supreme Defence Council

134. The constitutional provisions on the composition of the Supreme Defence Council were already outlined above 2.1.

135. The joint and individual accountability of the Supreme Defence Council is not specified in the Constitution, the Law on Defence, or even the Rules of Procedure.

136. The only possibility is to have a subsidiary political responsibility of each of the three members from the point of view of their positions as Presidents of FRY and the Republics. From this perspective the President of FRY is in a stronger position as head of state and president of the Defence Council. Given his decisive role in the defence system of the FRY and within the VJ he should bear more responsibility.

137. The powers of the Supreme Defence Council are more closely defined in Article 41 of the Law on Defence: it

1) adopts the country´s defence plan;
2) takes decisions on the basis of which the President of FRY commands the Yugoslav Army;
3) assesses potential threats of war and other dangers relevant for the security and defence of the country;
4) determines the quantity of equipment and weapons necessary for the country´s defence;
5) determines the requirements for arranging the territory for defence;
6) establishes the strategy of armed struggle and the rules of employment of forces for defence of the country and the waging of war;
7) approves basic elements for developing plans and programmes of training for defence purposes;
8) carries out other duties stipulated by federal law.

138. Organising and preparing citizens for combat is carried out both in the VJ and in the "units and organs of the interior" (Article 15 of the Law on Defence). This means that it is the legally established position of the MUP Serbia to implement decisions of the Supreme Defence Council in peacetime conditions of organising and preparing citizens for combat.

2. 7. The State Security Department, the Public Security Department and the MUP Staff Kosovo and Metohija

139. The Serb Ministry of the Interior according to the Law on Internal Affairs in 1991 consists of two basic services, called departments: the State Security Department (RDB) and the Public Security Department (RJB). The RDB is in charge of activities related to the protection of the security of the Republic of Serbia and the prevention of activities aimed at undermining or overthrowing the constitutional order (Article 1 of the Regulations on Internal Organisation of the MUP Serbia).[107]

140. The Public Security Department is in charge of activities related to protecting the lives, and personal and property safety of the citizens; preventing and uncovering crimes; maintaining law and order; providing security at rallies and other gatherings of citizens; providing security for certain persons and facilities; road traffic safety; controlling the state border crossings; fire protection; citizenship; personal ID cards; citizens´ residence and domicile.

141. A Department is run by a chief who organises its work and is responsible for it. In principle, he enjoys a high degree of independence in taking decisions. However, in the case of important decisions, he has to consult the minister, who may in turn decide to put the matter on the agenda of his specialist staff. A department chief may set up permanent or temporary staffs.

142. Based on this authority, on 15 August 1998 the RJB Chief decided to establish the MUP Staff for the AP Kosovo and Metohija. Major-General Sreten Lukić, Deputy Chief of the Belgrade SUP was appointed the person in charge of this Staff.[108] A month later, on 16 June 1998, the MUP Serbia Staff for Preventing Terrorism was formed and Sreten Lukić was appointed its commander too. It had the task of "planning, organising and controlling the work and engagement of the Ministry´s organisational units and the redeployed and attached units in preventing terrorism in

107 ICTY evidentiary material 1099.
108 Babović, *Analysis*, § 53.

the Kosovo and Metohija area."[109] So it is clear that its activities were not to apply to all of Serbia, but just to Kosovo and Metohija. The head of the Staff was to answer for his work, the work of the Staff and the security situation to the Minister, whom he was to keep informed of events, measures taken and their results. This means that he enjoyed a high degree of autonomy in taking measures.[110]

2.8. Conclusions

143. The President of the FRY has a strong legal position in taking together the provisions on the Supreme Defence Council and the Laws on the Yugoslav Army and the Law on Defence. In actual fact thus he could dominate the entire decision-making process from determining a state of war to the operative command of the Yugoslav Army.

144. The unclear constitutional provisions concerning the command authority of the President of FRY and the President of the Republic of Serbia over "armed forces" can be harmonised by interpretation. Hence the President of FRY commands the Yugoslav Army, whereas the President of the Republic of Serbia commands the Territorial Defence of Serbia which is constitutionally not foreseen, but regulated in detail by the Serb Law on Defence.

145. The provisions of the FRY constitution and the Serb constitution with regard to a declaration of a state of war are not harmonised. Only in case of a state of emergency the powers of both presidents would not overlap if a state of emergency is declared for the entire territory of Yugoslavia, whereas the respective Serbian provisions speak of a state of emergency only in part of the territory of the Republic of Serbia.

146. With regard to the subordination of MUP and police forces, the respective provisions of the Yugoslav Law on Defence and the Serb Law on Defence and Law on Internal Affairs are not harmonised.

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109 ICTY evidentiary material K0229694.
110 Babović, *Analysis*, § 54.

3. International Obligations arising from International Law with regard to the Kosovo conflict

3.1. International Treaties binding FRY and their implementation in domestic law

147. As a signatory to international conventions the SFRY was obliged to abide by the international humanitarian law and the international laws of war.

The SFRY had signed and ratified, inter alia, the following conventions:

- the Geneva Conventions of 1949 and the two Additional Protocols of 1977, (Sl. list SFRJ, Nr. 16/1978);
- the Convention on the Prevention and Punishment of the Crime of Genocide, (Sl. vesnik Prezidijuma Narodne Skupštine FNRJ, Nr. 2/1950);
- the Convention for the Suppression on the Traffic in Persons of the Exploitation of the Prostitution of Others, (Sl. list FNRJ, Nr. 2/1951);
- the Protocol Amending the Slavery Convention Signed at Geneva 25 September 1926, (Sl. list FNRJ, Nr. 6/1955);
- the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, (Sl. list FNRJ, Nr. 7/1958);
- the Convention Concerning Freedom of Association and Protection of the Right to Organise, (Sl. list FNRJ, Nr. 8/1958);
- the Convention Relating to the Status of Refugees, (Sl. list FNRJ, Nr. 7/1960);

- the Convention Concerning Discrimination in Respect of Employment and Occupation, (Sl. list FNRJ, Nr. 3/1961);
- the Convention Against Discrimination in Education, (Sl. list SFRJ Nr. 4/1964);
- the Protocol Relating to the Status of Refugees, (Sl. list SFRJ, Nr. 15/1967);
- International Convention on the Elimination of All Forms of Racial Discrimination, (Sl. list SFRJ, Nr. 6/1967);
- the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (Sl. List SFRJ, Nr. 50/1970);
- the International Covenant on Civil and Political Rights, (Sl. list SFRJ; Nr. 7/1971);
- the International Covenant on Economic, Social and Cultural Rights, (Sl. list SFRJ, Nr. 7/1971);
- the International Covenant on the Suppression and Punishment of the Crime of Apartheid, (Sl. list SFRJ, Nr. 14/1975);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Sl. list SFRJ, Nr. 9/1991).

148. From the point of constitutional law this obligation also applies to the FRY which explicitly accepted on that date it was proclaimed all obligations of the SFRY. The Declaration adopted by the participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, adopted on 27 April 1992, under item 1 stipulates that "the Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally in the past."[111]

149. From the point of public international law, the question whether FRY was bound by the international obligations of the SFRY relates to the question of who is the legal successor of the SFRY. This matter has been discussed at length in the Decision on Motion Challenging Jurisdiction.[112] In

111 I use the English translation published in The Ministry of Information of the Republic of Serbia, *Constitution of the Federal Republic of Yugoslavia*, Belgrade 1992, p 57.

112 Prosecutor vs. Milan Milutinović, Dragoljub Ojdanić, Nikola Šainović, *Decision on Motion*

conclusion, the FRY remained bound by obligations made by the SFRY being only excluded from the daily work at the General Assembly as stated in a letter of the Under-Secretary General.[113]

150. The SFRY had signed and ratified the Geneva Conventions of 1949 on 21 April 1950 and the two Additional Protocols of 1977 on 11 June 1979, a fact which makes it clear that at the time of its break-up SFRY was a high contracting party of the Geneva Conventions of 1949 and the two Additional Protocols. It can therefore be concluded that in 1998 and 1999, international humanitarian law as written down in the four Geneva Conventions of 1949 and in the two Additional Protocols of 1977 was applicable on the territory of the Federal Republic of Yugoslavia.

151. Depending first and foremost on the classification of the situation in Kosovo as an armed conflict and furthermore on the determination of the character of the armed conflict as international or non-international, the next step is to consider the applicable set of rules.

152. In the case of armed conflicts, civilians are protected by the following sets of rules. First of all, human rights as enshrined in the Universal Declaration of Human Rights of 1948 have to be protected. Those rights are further elaborated in the two International Covenants of 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

153. Especially the ICCPR serves as a good source of material as its Article 4 clearly states that human rights are to a certain extent derogable in times of a declared public emergency, but also defines that the rights enshrined in Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 are not derogable under any circumstances. The rights concerned are the inherent right to life of Article 6 of the ICCPR, the absolute prohibition of torture and inhuman or degrading treatment as put forth in Article

Challenging Jurisdiction, IT-99-37-PT, of 6 May 2003. See also International Court of Justice, Decision on the *Application for Revision of the Judgment of 11 July in the Case concerning the application of the Convention on the Prevention and punishment of the crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, Preliminary Objections* of 3 February 2003, General List N° 122.

113 United Nations doc. A/47/485.

7 of the ICCPR, the prohibition of slavery, slave-trade and servitude of Article 8 ICCPR, para 1 and 2, the prohibition of imprisonment on the sole ground of inability to fulfil a contractual obligation as defined in Article 11 of the ICCPR, the prohibition of retro-activity in criminal law of Article 15 of the ICCPR, the right to recognition as a person before the law in Article 16 of the ICCPR and the freedom of conscience, thought and religion as put forth in Article 18 of the ICCPR.

154. Nevertheless, the protection of the civilian population during armed conflicts is, first and foremost, covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977.

155. In the event that the conflict is classified as a non-international armed conflict, Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II applies. Article 3 gives to persons not taking active part in the hostilities a bundle of rights to be applied without any distinction founded on race, colour, religion or faith, sex, birth or wealth and similar criteria. These rights include prohibitions against violence to life or physical integrity including torture and inhumane, cruel, humiliating and degrading treatment,[114] the taking of hostages and the passing of sentences and executions without previous judgement by a regularly constituted court.

156. Subsequently, Additional Protocol II restates the scope and the principle of adverse distinction, meaning the protection has to be given to all people without any distinction on the above mentioned grounds, in its Articles 1 and 2. Persons who do not take active part in hostilities, either never have or have ceased to do so, are guaranteed fundamental rights as put forth in Article 4 of Additional Protocol II which are the prohibition of "violence to life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment" (Art. 4 para.2 lit. a), collective punishment (Art. 4 para.2 lit. b), hostage taking (Art. 4 para.2 lit. c) and acts of terrorism (Art. 4 para. 2 lit. d). Moreover, the prohibitions of

114 The two latter ones are classified as outrages upon personal dignity by Article 3, para. 1 lit. c of the fourth Geneva Convention.

outrages upon personal dignity (Art. 4 para. 2 lit. e) being understood as humiliating and degrading treatment, but also rape, enforced prostitution and any other form of indecent assault, all forms of slavery and slave-trade (Art. 4 para. 2 lit. f), pillage (Art. 4 para. 2 lit. g) and threatening to commit any of the mentioned acts (Art. 4 para. 2 lit. h). All these rights are then subsequently elaborated on.

157. Of special importance for the protection of the civilian population during a non-international armed conflict are also Articles 13 to 18 dealing under the title of Part IV with the protection of civilians, who should always be protected against dangers that might arise out of military operations as put forth in Article 13, which also states that civilians and civilian objects should not be objects of an attack.

158. Article 14 protects objects which are essential to the survival of civilians such as food, drinking water as well as livestock or crops, for example. Dangerous objects and works are protected by Article 15, cultural places and places of worship by Article 16. Article 17 strictly prohibits the forced movement of civilians.

159. However, should the conflict be an international armed conflict, the fourth Geneva Convention of 1949 and the first Additional Protocol of 1977 apply, which are more comprehensive than the rather restrictive norms of Article 3 of the fourth Geneva Convention and those of Additional Protocol II. Geneva Convention number four protects civilians in the case of an armed conflict (Section I), but includes also norms concerning occupied territories (Sections I and III) and the case of aliens on conflict territory (Section II). Moreover, the protection of internees is covered in Section IV.

160. Furthermore, the Convention on the Prevention and Punishment of the Crime of Genocide as adopted by the UN General Assembly in Resolution 260 A (III) of 9 December 1948 has to be taken into account as it prohibits genocide and defines it as an act with the intent to destroy in whole or in part a national, ethnical, racial or religious group as put forth in its Article 2. Acts of genocide are, according to the definition in Article 2 lit. a to d, killings of members of the group, serious bodily or mental harm to members of the group, deliberate infliction of living conditions on the group which are calculated to bring about its physical destruction in whole

or in part, imposition of measures with the intention to prevent births in the group and forced transfer of children of the group to another group.

161. As far as the implementation of these international obligations under domestic law is concerned, the following observations can be made.

162. The 1991 Law on Defence of the Republic of Serbia did not address the issue of penalties for violations of the laws of war since the SFRY regulations pertaining to the laws of war and the Penal Code of the SFRY containing the provisions on crimes against humanity and the international law were valid for the Republic of Serbia as a member state of the SFRY.

163. After the foundation of FRY, according to Article 19 of the Law on Defence of FRY, members of the VJ involved in an armed struggle were obliged to adhere, in all circumstances, to the rules of the international laws of war and other rules referring to the human treatment of the wounded and prisoners and the protection of the civilian population.

The SFRY Presidency had issued an Order on the application of the international laws of war by the SFRY armed forces.[115]

With regard to the Constitutional Law on Implementation of the Constitution of the FRY[116] which regulates the incorporation of federal laws and regulations into the legal system of FRY, the Order of the SFRY Presidency remained in force.

164. With regard to the provisions of the Order, the FRY President

1) should have been informed of war crimes and could have imposed punitive measures on the subordinate officers who failed to inform him;
2) as the most senior military officer, he should have taken all necessary actions to secure respect of the international laws of

115 Published in the Official Military Gazette Nr. 7/1988.
116 I use the English translation published in The Ministry of Information of the Republic of Serbia, *Constitution of the Federal Republic of Yugoslavia*, Belgrade 1992, pp 43 – 52.

war and to have the responsible officer institute the prosecution of individuals who violated the international laws of war;

3) as the most senior military officer, he was obliged to order a full investigation of violations of the laws of war, the collection of evidence, the submitting of evidence, and the instituting of proceedings before a military court to rule on such violations of the laws of war.

165. With regard to measures against the MUP for violations of the rules of the laws of war, the position of the President of FRY within the defence system and the VJ structure as the commander of the VJ includes measures against MUP units and other organs that have participated, as an integral part of the VJ subordinated to a VJ officer, in the performance of combat tasks (Article 17).

166. Actions of the MUP contrary to international humanitarian law which are not related to the VJ were to be penalised according to the Criminal Code and its provisions relating to crimes against humanity and international law.

3.2. Resolutions of the United Nations General Assembly and the Security Council

167. Immediately after the revocation of the autonomy of Kosovo, the General Assembly assessed in a series of resolutions the situation of human rights.[117]

168. After calling upon "the Serbian authorities to refrain from the use of force, to stop immediately the practice of 'ethnic cleansing' and to respect fully the rights of persons belonging to ethnic communities or minorities" already in Resolution 47/147, 18 December 1992, the General Assembly in Resolution 48/153 of 20 December 1993 under paragraph 18 summarises the human rights violations and urges the "authorities in the Federal Republic of Yugoslavia" under paragraph 19 to take measures:

117 Excerpts from the texts can be found in Weller (ed.), *Crisis*, pp 125 – 132.

"18. Strongly condemns in particular measures and practices of discrimination and the violation of human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including:

(a) police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, which leads to climate of lawlessness in which criminal acts, particularly against ethnic Albanians, take place with impunity;
(b) the discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in state-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities;
(c) arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations;
(d) repression by the Serbian police and military.

19. Urges the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro):

(a) to take all necessary measures to bring to an immediate end human rights violations inflicted on the ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary detention and the use of torture, other cruel, inhuman or degrading treatment and the occurrence of summary executions;
(b) to revoke all discriminatory legislation, in particular that which has entered into force since 1989;
(c) to re-establish the democratic institutions of Kosovo, including the Parliament and the judiciary;
(d) to resume dialogue with the ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia.

20. Also urges the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to respect human rights and fundamental freedoms of ethnic Albanians in Kosovo, and expresses the view that the best means to safeguard human rights in Kosovo is to restore its autonomy; ...".

169. This assessment of the human rights situation and the urgings of the General Assembly are then constantly repeated in the following resolutions.[118]

170. Noteworthy in this context is also, that the GA refers, in resolution 49/204, 23 December 1994, to the opinion of the Subcommission on Prevention of Discrimination and Protection of Minorities that the measures and practices quoted above "constituted a form of ethnic cleansing." In resolution 50/190, 22 December 1995, the GA is also "concerned at any attempt to use Serb refugees and other means to alter the ethnic balance in Kosovo ...".

171. Finally, in resolution 53/164, 9 December 1998 the GA under paragraph 8

> "strongly condemns the overwhelming number of human rights violations committed by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), the police and military authorities in Kosovo, including summary executions, indiscriminate and widespread attacks on civilians, indiscriminate and widespread destruction of property, mass forced displacement of civilians, the taking of civilian hostages, torture and other cruel, inhuman or degrading treatment, in breach of international humanitarian law including article 3 common to the Geneva Conventions of 12 August 1949 and Additional Protocoll II to the Conventions, relating to the protection of victims of non-international armed conflicts, and calls upon the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to take all measures necessary to eliminate these unacceptable practices."

118 Resolution 49/204, 23 December 1994; 50/190, 22 December 1995; 50/193, 22 December 1995; 51/111, 12 December 1996; 51/116, 12 December 1996; 52/139, 1 December 1997; 52/147, 12 December 1997.

172. However, first in 1998 did the UN Security Council start to deal with the situation in Kosovo. In order to examine the obligations the Federal Republic of Yugoslavia faced as a consequence of a series of resolutions by the UN Security Council, it is recommendable to do so in a chronological order starting with SC RES 1160 of 31 March 1998.[119]

173. First and foremost, UN RES 1160 puts an embargo concerning arms and related material on the Federal Republic of Yugoslavia and the Kosovo and requests regular reports from states on the measures taken to comply with the embargo.[120] It furthermore demands that the Federal Republic of Yugoslavia immediately take necessary steps for the achievement of a political solution and to implement the indicated actions of the Contact group.[121] Moreover, both parties to the conflict, the authorities of the Federal Republic of Yugoslavia as well as the leadership of the Kosovar-Albanian community are called on to enter into a meaningful dialogue under the auspices of the contact group as a genuine political process represents the sole way to defeat the at that time ongoing violence and terrorism.[122] Apart from clauses directed at the International Community, clause 17 of SC RES 1160 stands out as it firstly urges the Office of the Prosecutor of the ICTY to gather information, and secondly notes that the Federal Republic of Yugoslavia is obliged to cooperate with the Tribunal.

174. Contrary to the intention of the imposed actions, the situation in Kosovo worsened, and the UN Security Council adopted SC RES 1199 on 23 September 1998[123] in which it first demanded all parties to cease with hostilities, enter a ceasefire in order to facilitate a meaningful political dialogue and to improve the humanitarian situation in order to avert a humanitarian crisis. Furthermore, this resolution demanded that the Federal Republic of Yugoslavia cease all actions of security forces against civilians and to withdraw these repressing forces, to enable international monitoring

119 S/RES/1160 (31 March 1998).
120 S/RES/1160 (31 March 1998) para. 8, 9 and 12.
121 The Contact Group, consisting of representatives of France, Germany, Italy, Russia, United Kingdom and the United States of America, issued two sets of recommended activities in March 1998 which were subsequently forwarded to the president of the UN Security Council. See S/1998/223 of 12 March 1998 and S/1998/272 of 27 March 1998.
122 S/RES/1160 (31 March 1998) para. 1 to 4.
123 S/RES/1199 (23 September 1998).

by the EC-Monitoring Mission; to accredit diplomatic missions without any impediments, and to facilitate in cooperation with the International Committee of the Red Cross and the UN High Commissioner for Refugees the safe return of refugees and displaced persons as well as the access of humanitarian organizations and supplies to Kosovo.[124] On the other hand, the Security Council demanded that the Kosovar-Albanian leadership condemn terrorist actions. The Federal Republic of Yugoslavia, moreover, was reminded of its responsibility for the safety of diplomatic personnel on its territory and its obligation to facilitate the monitoring personnel a working climate free of threats of the use or the use of force. All authorities in the Federal Republic of Yugoslavia as well as the Kosovar-Albanian leadership were called upon to co-operate with the Office of the Prosecutor. Besides, it was emphasized that the Federal Republic of Yugoslavia had to bring to justice those members of the security forces responsible for the mistreatment of civilians and the destruction of property.

175. On 24 October 1998, the UN Security Council adopted SC RES 1203[125] in which the full compliance with all aspects of SC RES 1160 of 31 March 1998 and SC RES 1199 of 23 September 1998 was demanded from the Federal Republic of Yugoslavia and the Kosovar-Albanian leadership. Besides reaffirming the right of refugees and displaced persons to return safely, the responsibility of the Federal Republic of Yugoslavia to provide conditions enabling them to do so is explicitly mentioned.[126] Further operative clauses contain the obligations to cooperate with the OSCE Verification Mission to Kosovo and the ICTY.[127]

176. As the FRY did not comply with any of these demands, the UN Security Council dealt with the matter of the FRY and Kosovo once again in SC RES 1207 of 17 November 1998, reacting to a letter by the then-president of the ICTY, Judge Gabrielle Kirk-McDonald. It primarily deals with matters of co-operation with the Tribunal and is directed to both the FRY and the leadership of the Kosovar-Albanian community.[128]

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124 S/RES/1199 (23 September 1998) para 4.
125 S/RES/1203 (24 October 1998).
126 Ibid para 12.
127 Ibid paras 6 and 14.
128 S/RES/1207 (17 November 1998).

177. The further non-compliance, which also resulted in casualties as noted by the president of the UN Security Council,[129] subsequently led to two more resolutions during the course of the year of 1999, SC RES 1239 of 14 May 1999[130] and SC RES 1244 of 10 June 1999.[131]

178. SC RES 1239 deals primarily with the situation of refugees and displaced persons and the amelioration of their situation, calling on states and organisations to support those persons and civilians affected by the crisis. Once more, the call for a political solution for the conflict is demanded, as otherwise the situation would only be worsened.[132] It has to be considered that this resolution was adopted after the air strikes by NATO-forces were already underway.

179. Finally, SC RES 1244 of 10 June 1999[133] sets an end to the non-compliance as it paves the way for UNMIK, the United Nations Interim Administration for Kosovo, demanding full co-operation from the Federal Republic of Yugoslavia which had prior to this day consented to all principles[134] as annexed to the resolution.

3.3. Conclusions

180. The SFRY was obliged to abide by the international humanitarian law and the international laws of war as a signatory to international conventions such as the Geneva Conventions of 1949 and their Additional Protocolls of 1977, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights of 1966, the Convention on the Elimination of All Forms of Racial Discrimination of 1966 or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Taken altogether,

129 S/PRST/1999/2 (19 January 1999).
130 S/RES/1239 (14 May 1999).
131 S/RES/1244 (10 June 1999).
132 S/RES/1239 (14 May 1999) paras 2 and 5.
133 This resolution was adopted only 6 days after the suspension of NATO-air strikes.
134 The mentioned principles are: in Annex I the General Principles as adopted by the G8-foreign minister meeting at Petersberg on 6 May 1999 and in Annex II principles towards a resolution of the crisis in Kosovo. The latter ones were accepted by FRY on 2 June 1999.

these international obligations protect the civilian population in armed conflicts both of an international and non-international character against all forms of genocide and ethnic cleansing through killings, summary executions, cruel treatment such as torture, mutilation or any form of corporal punishment, rape, enforced prostitution, destruction of property and forced movement of civilians.

181. These conventions were also binding for the FRY both from the perspective of constitutional law and public international law and were incorporated into the domestic legal order.

182. With regard to the respective provisions, the President of FRY could have imposed punitive measures on subordinate officers of the Yugoslav Army who failed to inform him on war crimes, and he was obliged to order full investigation and to instigate proceedings before a military court. This includes also measures against MUP units who participated in the performance of combat tasks. Since the President of FRY was responsible "to supervise the implementation of the system of command" (Article 4 of the Law on the Yugoslav Army), he had a positive legal duty to supervise the actions of the Army and could not simply wait on reports.

183. Actions of the MUP not related to the Yugoslav Army had to be punished according to the Criminal Code and its provisions relating to crimes against humanity and internal law.

184. Moreover, between December 1992 and December 1998, the General Assembly of the United Nations adopted a number of resolutions where it expressed grave concerns about the human rights situation in Kosovo because of the police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in state-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities; the arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations.

185. The General Assembly urged the authorities in the Federal Republic of Yugoslavia in those resolutions to take all necessary measures to bring those human rights violations to an immediate end, to revoke all discriminatory legislation and to re-establish the democratic institutions of Kosovo, including the Parliament and the judiciary.

186. However, despite the fact that none of the resolutions of the General Assembly had any positive effect, the UN Security Council started to pass resolutions only in March 1998. In a series of resolutions following this first resolution the SC demands that FRY stop all actions of security forces against the civilian population and bring to justice those members of the security forces responsible for the mistreatment of civilians and the destruction of property, as well as immediately take all steps for the achievement of a political solution and to co-operate with the ICTY.

187. However, FRY did not comply with any of the SC resolutions. Finally, SC Res 1244 of 10 June 1999 provided the basis for the establishment of UNMIK, which took over all legislative, administrative and judicial power in Kosovo.

Biographic references

Joseph Marko, born 1955, is Professor Emeritus of Comparative Public Law and Political Sciences at the University of Graz/Austria with a special research focus on the protection of human and minority rights in divided societies, comparative federalism and regionalism, and conflict management. He is a former international judge of the Constitutional Court of Bosnia-Herzegovina (1997 – 2002), appointed by the President of the European Court of Human Rights pursuant to the Dayton Agreement, and served as politico-juridical advisor for constitutional reform in Bosnia and Herzegovina for High Representative Schwarz-Schilling in 2006/07. From 1998 – 2002 and 2004 – 2006 he also served as a member of the Advisory Committee for the Council of Europe´s Committee of Ministers under the Framework Convention for the Protection of National Minorities. In 2016/17 he was engaged as legal advisor for the UN Secretary General´s Special Representative, Espen Eide, for the negotiations on the re-unification of Cyprus. From 1998 to 2020 he was also scientific director of the Institute of Minority Rights at the European Academy Bozen/Bolzano. He has published and edited more than a dozen of books and more than 130 scholarly articles in his fields of research.

KONRAD
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