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**The Protection of Human Rights in Europe:  
Evolving Trends and Prospects**

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## **Table of Contents**

<b>Introduction.....</b>	<b>1</b>
<b>Integrating Europe through the Protection of Human Rights .....</b>	<b>3</b>
<b>The Protection of Minorities .....</b>	<b>7</b>
<b>Humanitarian Intervention.....</b>	<b>10</b>
<b>Conclusion .....</b>	<b>15</b>

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## Introduction

The events in Kosovo have made clear to all of us - even those of us who have been indifferent to, or unaware of, the dramatic changes that have occurred and are occurring on this continent in this decade - that Europe is undergoing a major transformation. A major transformation which was engendered by the fall of the communist regimes of Central and Eastern Europe at the beginning of the nineties and which has liberated hidden forces in societies long oppressed in the recent past by the totalitarian rule of the so-called socialist states.<sup>1</sup>

What are the basic constitutive elements of such a transformation? The first element (or driving force) is the willingness and, one may say, the impatience of the majority of the former socialist states to become integrated in the western European paradigm. Integrated with respect to all the parameters which define the western way of life: democratic governance, application of the rule of law, respect for civil and political rights, market economy; but also accession to the basic European institutions, the Council of Europe, the European Union and the North Atlantic Treaty Organisation.

The second element, which seems to conflict with the first, is a centrifugal tendency of a number of populations in Central and Eastern Europe to secede from the states in which they had lived throughout the communist era and to create their own homeland - taking with them part of the territory of the old state -, or to unite with states where their ethnic kin lives. Such a tendency has led to the emergence of a new nationalism and irredentism, which have already brought about the dissolution of the former USSR, Czechoslovakia, and Yugoslavia. The appearance of this tendency may be attributed to what one might call the "benign" neglect by the communist regimes of the real needs and expectations of people living in multi-ethnic, multicultural communist states. Indeed, one can easily trace the degree of indifference that these regimes had showed vis-à-vis ethnic populations living under their authority, as regards power sharing, equality of treatment and opportunities and a fair distribution

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<sup>1</sup> Concerning their integration in European institutions see, *inter alia*, Flauss, J-F, "Les conditions d'admission des pays d'Europe Centrale et Orientale au sein du Conseil de l'Europe", *European Journal of International Law*, 401 et seq (1994); Gelin, E "Les critères d'admission des nouveaux États indépendants au Conseil de l'Europe" *Revue de Droit International et de Droit Comparé*, 339 et seq (1996).

## **Christos Rozakis**

of wealth. The obvious discrimination that some people experienced during the communist period at the hands of some leading political elites, usually with distinctive ethnic characteristics, not only did not result in the extinction of the suppressed identity of ethnically different people, but in fact transformed that identity into a symbol, reflecting the social, political and economic resentment of the populations discriminated against; and when a more propitious climate prevailed, the symbol of distinct ethnicity or nationality became the banner of the quest for secession and independence from the state which had neglected segments of its population.

The third element, which is the result of the same phenomenon that I described above, is the emergence of strong claims for minority protection. In certain cases and for a variety of reasons, the centrifugal tendencies have not reached, at least not as yet, the threshold of severity dictating to certain populations their secession from a state. But, they have been limited to a sometimes amorphous, sometimes more elaborate search for a new equilibrium of co-existence between ethnically different populations within the same state. In these circumstances, the long-dormant question of protection of minorities in Europe, which had been superseded in the recent past by the development of the protection of individual human rights in the West and by the so-called equalitarian policy applied in the communist states, has reappeared as a major priority. It seems that some minority populations in a number of countries are still prepared to live together with ethnically different compatriots, provided that they start to enjoy rights safeguarding their distinct identity, such as their distinct language, religion and culture.

The phenomena I have briefly described give rise to new challenges for European integration, but also new threats. Indeed the centrifugal trends which are still very strong in certain parts of the former communist world may be seen as a natural corollary of the process of European integration and not as a return to the introspective policies of the 19<sup>th</sup> century. In the sense that some populations seem to wish, before they embark on the adventure of integration, first to be freed from the dysfunctional links of the past with people with whom they no longer feel prepared to share the future. In other words, the acute nationalism in today's Europe does not necessarily contradict European unification, but may be considered as a prerequisite

## **The Protection of Human Rights in Europe**

for its attainment, for those geographical areas where past geopolitical considerations had led to counterproductive cohabitation.

On the other hand, these claims for independence, secession, or even an increased degree of minority protection, may become a clear threat to the political stability and the peace of Europe. The example of Yugoslavia is an illustration of how a quest for clear solutions, based on the ideology of nationalism, may end up in the destabilisation of a state and, ultimately, of a whole region; it also shows that the solution of ethnic distinctiveness is not the proper antidote for dysfunctional unions. The example of Yugoslavia indicates that Europe should search for other solutions to satisfy the needs of those populations and ethnic groups who consider that the amelioration of their living conditions, the attainment of their goals and the quest for happiness are inexorably linked to the search for a separate national roof. There may be alternative means to reach the same targets, and Europe is exploring today alternative avenues.

### **Integrating Europe through the Protection of Human Rights**

Let us look closely at these efforts, but also at the problems they may present.

The first antidote to the disruptive trends, which threaten stability and peace in the former communist world, has been the reinforcement of the protection of civil and political rights in this part of the world. Western European states, with the fervent support of most of their Central and Eastern European interlocutors, have established during this decade, a number of mechanisms designed to promote and to monitor respect for human rights by « new democracies ». Obviously, these mechanisms have not been created from scratch; they emerged out of the transformation of existing European institutions, which were called upon to assume a new role. In a division of labour which does not seem to be always very successful (because of the overlap that it entails), three institutions have undertaken the task of promoting human rights in the Eastern part of the continent : the Council of Europe, the Organisation on Security and Co-operation in Europe and the European Court of Human Rights.

## Christos Rozakis

The Council of Europe, as is well known, is the traditional political organisation, which has as its aim the promotion of democracy, the rule of law and human rights throughout the territory of its member states.<sup>2</sup> Its main work has always been - since its inception 50 years ago - to identify the areas of discord and divergence existing in European countries in matters of application of the democratic principles and the rule of law, and to make efforts to streamline the basic approaches of its members with regard to these matters, with the ultimate goal of creating a uniform model of democracy in Europe. This goal is pursued through research into the causes of differences, through resolutions indicating the directions to be followed by individual states, through adoption of international conventions, *in loco* investigation of the structural deficiencies of certain states, assistance in the adoption of new legislation, monitoring of the progress of the newcomers with respect to their human rights obligations and other related activities. Playing its role now in another part of the continent has rejuvenated this Organisation, which has played an active role in the integration of traditional Western European states into a uniform system of democracy. It is impressive but true that, over a period of nine years, it has admitted as members all of the former communist states, with the exception of Yugoslavia and Belarus, and has extended its jurisdiction to areas which were hardly considered European in the past, the most pronounced example being Georgia, which has recently been admitted as the 41<sup>st</sup> member of the Council of Europe.<sup>3</sup>

The other mechanism, which has been activated in order to assist democratisation of the newcomers, is, as mentioned above, the Organisation on Security and Co-operation in Europe.<sup>4</sup> This international forum has since the late eighties shifted its priorities from bringing East and West together - something which became superfluous after the dramatic political changes - to integrating the former socialist

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<sup>2</sup> For a recent publication see, Conseil de l'Europe, *Les Enjeux de la Grande Europe: Le Conseil de l'Europe et la Sécurité Démocratique* (Strasbourg: La Nuée Bleue, 1996). See also Valticos. N., "La et les droits de l'homme", 35 *Annuaire Européen*, 53 et seq (1987).

<sup>3</sup> Georgia was admitted on the 24<sup>th</sup> April 1999. There are some other states which are still waiting to be admitted as members of the Council of Europe: one of them is Monaco, whose geographic position as a European territory has never been questioned; while Armenia and Azerbaijan, former federal entities of the USSR, also candidates for accession to the Council of Europe, were not considered, in the past, as European states.

<sup>4</sup> Decaux. E., Sicilianos, L.A. (ed), *La CSCE: Dimension Humaine et Règlement des Différends* (Paris: Montchrétien, 1993); Heraclides. A., *Security and Cooperation in Europe: The Human Dimension, 1972-1992* (London: Frank Cass, 1993); Sicilianos, L.A., *L'ONU et la Démocratisation de l'Etat* (Paris: Pedone, 2000) particularly pp. 90 et seq. Hereinafter OSCE.



## The Protection of Human Rights in Europe

countries into the wider European family. Its relative advantage over the Council of Europe is its very good knowledge of the Eastern European world in all its respects, as a result of its previous involvement in the area. On the other hand, unlike the Council of Europe, the OSCE had never developed activities aimed at political and social integration, or rigid mechanisms for the protection of human rights.

The restructuring of the OSCE took place mainly during the early 90's. The constitutive documents upon which its new existence rests comprise, among others, the Charter of Paris for a new Europe, the 1992 Helsinki Follow-up Meeting, the Concluding Document of the 1994 Budapest Review Conference.<sup>5</sup> These fundamental texts have determined the basic orientation for the newcomers regarding the consolidation of democracy. At the same time, mechanisms monitoring the developments in these fields have been created, with particular emphasis on the compliance of the states with human rights commitments. It is to be noted that the constitutive texts of the OSCE contain extensive reference to human rights and fundamental freedoms which states are bound by internally.

The European Court of Human Rights is the judicial arm of the complex system of protection of human rights in Europe and, in the special circumstances of its Eastern part, an indispensable tool for the acceleration of democratisation of the states in the area.<sup>6</sup> Unlike its predecessor tripartite institution, it is not a flexible institution where political considerations or conveniences may play a role.<sup>7</sup> The Court is a rigid organ and applies the law with equal severity regardless of whether the respondent state comes from the West or from the East of the continent. It is, indeed, an irony of

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<sup>5</sup> See, inter alia, Heraclides, A., *op cit*.

<sup>6</sup> Recent writings on the Court (more particularly on the 11<sup>th</sup> Protocol) are numerous. See, inter alia, Drzemczewski, A., "A Major Overhaul of the European Human Rights Convention Control *Collected Courses of the Academy of European Law* (Volume VI, 1997), pp. 121 et seq., Mahoney, P. "Speculating on the Future of the Reformed European Court of Human Rights", *Human Rights Law Journal* (1999), pp. 1 et seq.

<sup>7</sup> The tripartite institution of protection under the European Convention of Human Rights was composed of: the European Commission of Human Rights, as the filtering organ for all interstate and individual applications, as a semi-judicial organ; the European Court of Human Rights as the judicial organ; and the Committee of Ministers of the Council of Europe, as both an organ supervising the execution of the judgments rendered by the Court, and an organ determining whether a violation of the European Convention had taken place in all cases submitted to it by the European Commission for its final determination. This latter aspect of the procedure provided for by the European Convention attributed a political character to its application; taking particularly into account that the great majority of cases submitted to the European Commission had never been submitted to the European Court and had been finally determined by the Committee of Ministers.

## **Christos Rozakis**

history, that the more flexible, more politically oriented system which preceded the present Court, was replaced by the latter, at a moment when a great number of states had recently joined the system being unprepared by reason of their infrastructure to cope with the particular exigencies of its legal rigidity. One could conclude by studying the peculiarities of the political transition of the Central and Eastern European states to democracy, the rule of law and the protection of human rights, that the tripartite system instituted in the fifties to serve comparable situations with those existing at the end of the century, could have been more commensurate with the demands of today's enlarged Europe.

In any event, the European Court of Human Rights complements the two other organisations which work for the attainment of the same goal, affording redress to individuals for any violations of human rights protected by the European Convention on Human Rights and contributing to the gradual harmonisation of human rights law in the whole of Europe. We may consider that the second attribute of its jurisdiction is more precious than the first one and more particularly in the circumstances of the former communist states. The judgments of the Court have a direct impact upon the law of the states parties. The way the Convention is construed by the Court constitutes the authoritative interpretation of the rules of protection of human rights, to which states parties must conform in order to avoid further violations of human rights and the repercussions emanating from such violations which, in the event of serious violations, may not be only pecuniary. Hence the Court, by its judgments, prepares the ground for a uniform development of the content of a certain rule of human rights protection and contributes, as a consequence, to the gradual rapprochement of the various legal systems of Europe to the one which is what we call the «public order of Europe».<sup>8</sup>

Apart from these three European institutions which, more or less directly, aim to prepare the newcomers for a transition from authoritarianism to mature democratic governance and respect for human rights, there are two other Organisations for whom democratic development is a key factor for the admission of new member states; these

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<sup>8</sup> See *Loizidou* judgment of 23 March 1995. The European Court of Human Rights made specific reference to the European public order, while discussing substantive or territorial restrictions to the applicability of the European Convention on Human Rights (Series A, no 310, p.50).

## **The Protection of Human Rights in Europe**

are the European Union and NATO. Although both of them are highly specialised organisations, serving specific aspects of European co-operation and integration, both still look at the condition of democracy as a fundamental element for the attainment of their goals. This is particularly true of the European Union which has become an "all-embracing" organisation with the patent aspiration to become the locomotive of European political integration and which, as it is known, does not only require democracy and respect of human rights as a precondition for accession to it, but also extends this requirement to the establishment of any institutional relation between a non-member state and the organisation.<sup>9</sup> It goes without saying that such a precondition for admission to these two European/Atlantic mechanisms, which are considered by the former communist states as the most desirable goals for realising their European vision, is a crucial incentive for the populations of the East to invigorate their efforts for a speedy transition to full democracy.

### **The Protection of Minorities**

While all Europeans, almost without exception, agree that democracy and respect for human rights are paramount values, which must be observed sacrosanctly, the same does not apply with regard to a pan-European protection of minorities. Although there is wide acceptance that one of the main sources of unrest and instability in certain parts of Europe is the existence of minorities which are not satisfied with the way majorities behave towards them; and, furthermore, that a better understanding of minority problems, and satisfaction of their legitimate expectations could reduce the risks of unpleasant political developments, Europeans do not seem to be bold enough to propose measures of effective international control.

We are not, of course, today at the stage of what I referred to earlier as the « benign neglect » that existed fifteen years ago with regard to minorities' claims. But what has

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<sup>9</sup> See, inter alia, Part B: Explanatory statement of the Committee of Foreign Affairs, Security and Defence Policy Report (prepared by Y. Roubatis). A4-0000/98. A major development in the field of protection of human rights by the European Union is the preparation of a Charter of Fundamental Rights, which seems to be designed to become the main constitutive document of protection of human rights in the Europe of 15. Its preparation being in process, no concrete information exists with regard to its final form and its legal force and its linkage to the European Convention on Human Rights and the European Court of Human Rights.

## Christos Rozakis

been produced over the last ten years with regard to their international protection is inadequate if compared to the actual demands of most of the minorities and to the threats that the minorities' dissatisfaction may represent to European security. The institutional achievements during the nineties are limited to one European framework agreement on the protection of national minorities, adopted by states of the Council of Europe and one agreement on minority languages.<sup>10</sup> These two agreements contain provisions codifying the main rules on the protection of minorities that had been shaped by the international community in the interwar period and also develop new rules enshrining the rights of minorities to greater autonomy within the state in which they live, the assistance of the states for the attainment of their goals to preserve their identity and discerning features and the ability of individuals to determine themselves as belonging to a certain minority group. Against that background, it is expected that minorities enjoying the rights provided for by these conventions, will be prepared to renounce any claim to secede from the state concerned, and express their loyalty to the state in which they live.

It is indeed indisputable, and it is expressly made so in the text of the agreements, that these rights may be exercised by the minorities and that the states should abide by them, as a « compromise » in exchange for the abandon by the minorities of any claim to external self-determination. In other words, the protection of minorities has been traded off with the right of a state to its territorial integrity and political independence.<sup>11</sup>

What is still missing in the new institutional framework concerning protection of minorities is a real and effective international mechanism of protection : a mechanism of implementation and supervision. Unlike the protection of human rights where, as we have already seen, the substantive rules are coupled with international mechanisms designed to follow closely respect for the rules, in the field of minorities protection,

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<sup>10</sup> See Hartig. H., "Elaboration de la convention cadre dans le contexte des travaux du Conseil de l'Europe en matière de protection des minorités" Bredimas. A., Sicilianos. A.L., *The Protection of Minorities*, (Athens: Sakkoulas, 1997); Kovacs, P. "La protection des langues des minorités ou la nouvelle approche de la protection des minorités?" *97 Revue Générale de Droit Internationale Public*, pp. 411 et seq (1997).

<sup>11</sup> See the Preamble and Articles 20 and 21 of the European Convention on National Minorities.

## The Protection of Human Rights in Europe

respect is left solely to the states concerned.<sup>12</sup> This fact undoubtedly weakens an effective implementation of the relevant obligations. It also shows how Europeans are still hesitant to allow foreign states and authorities to interfere with minority matters within the territory of their own state.<sup>13</sup> It is an indication of a state of mind that gives rise to certain misgivings, particularly today as our world is witnessing the tragic events taking place on our doorstep in the Balkans; misgivings that are further underpinned by clear evidence that in Europe intolerance, racism and xenophobia have assumed worrying dimensions. What gives cause for concern is that the hesitations of European states to protect their minorities more efficiently reflect a rather widespread reticence in their societies to accept all the consequences that egalitarianism in a multicultural structure of a state implies. And since the protection of minorities is not simply a matter of adequate or inadequate legal texts but is heavily interwoven in the everyday life of the societies within which these minorities live, negative social behaviour may be influential to any legal efforts to sustain minority rights; and vice versa. It is undeniable that the problem of minorities is a complex socio-political and economic problem that is not limited to the satisfaction of the minorities insofar as their rights of distinctiveness are concerned, but goes beyond that, to the ability of a society to incorporate within its boundaries all of the elements making up its human resources. It is also undeniable that legal texts effectively protecting minorities and effectively applied by the state itself have a direct pedagogical impact upon the way that the given society within that state perceives the treatment of the minorities living therein.

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<sup>12</sup> We are, of course, referring to the European Convention on Human Rights which, as we have seen, provides for a rigid system of judicial protection and settlement of disputes. Unlike this convention, the European Convention on National Minorities or the European Charter for Regional and Minority Languages do not provide for a compulsory system of settlement of disputes or examination of individual complaints.

<sup>13</sup> The reticence of Europeans to allow international protection of minorities can be easily witnessed not only through the absence of international (European) mechanisms of protection, but also, from the very slow pace in the ratification of the two basic conventions, referred to in previous notes. As an example, albeit not a typical one (because of the peculiarity of the French legal system on minority issues) is the decisions taken by the Conseil Constitutionnel on the question of the ratification of the European Charter for Regional and Minority Rights, and more particularly on the question of the compatibility of

## **Humanitarian Intervention**

Our discussion up to now has been limited to an enumeration of the means through which Europe has attempted to absorb the great shock created by the fall of the communist regimes in the field of democratisation and protection of human rights. All these are peaceful, non-forcible means of integration, limiting the sovereignty of the states involved on the basis of their consent to such limitations. Yet the history of transition from authoritarianism to democracy in the nineties is not fashioned only by consensual, peaceful moves of the states concerned. In exceptional circumstances, it is true, forcible, non-peaceful means have been employed against recalcitrant states massively violating elementary human rights in Europe. We are basically, of course, referring to the case of Yugoslavia where in two instances, in Bosnia in 1995 and in Kosovo in 1999, the United Nations in the first instance, NATO in the second, intervened in order to impose a solution to terminate massive violations of human rights and to curtail conflictual relations threatening international peace and security.<sup>14</sup> The second instance, that of Kosovo, presents a greater interest than the first one, Bosnia, in that NATO intervened with military forces, on humanitarian grounds, without any concrete decision of the Security Council under Chapter VII of the UN Charter and without an invitation from the sovereign state specifically calling for assistance.<sup>15</sup> We are hence confronted here with a situation which, although not totally new, is of an unprecedented magnitude on our continent.<sup>16</sup>

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the Charter with the French Constitution. See 93 *American Journal of International Law* pp.83 et seq (1999).

<sup>14</sup> The literature on the Yugoslav crisis is already immense. See, inter alia, for documentation of the critical moments of the crisis: Weller, H. (ed.) *International Documents and Analysis*, Vol. 1: *The Crisis in Kosovo, 1989-1999 : From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*; Vol. 2, *The Kosovo Conflict: Conduct and Termination of Hostilities and the Renewed Search for Settlement* (Great Eversden: Cambridge, 1999).

<sup>15</sup> There is no formal explanation on the part of NATO of the legal grounds on which the aerial campaign against Yugoslavia took place. Discussions within NATO circles or of a doctrinal nature have shown a clear preference for justifying the campaign as a result of a threat to international peace and security posed by the Yugoslav treatment of the Albanian minority in Kosovo, and as a humanitarian intervention. See, again amidst a vast literature, Valticos N. "Les droits de l'homme, le droit international et l'intervention militaire en Yougoslavie", *Revue Générale de Droit International Public*, 5 et seq (2000 - 1); also the very interesting editorial comments of Henkin L. Wedgwood R., Charney J.I., Clinkin, Ch.M., Falk R.A., Franck, T.M., Reisman, W.M., in 93 *American Journal of International Law* 824 et seq (1999).

<sup>16</sup> Indeed in the European context military intervention in the last part of the twentieth century is limited to two instances : the Soviet interventions in Hungary (1956) and in Czechoslovakia (1968). Both incidents were justified by the USSR as responses to requests by the governments of the states concerned.

## **The Protection of Human Rights in Europe**

It is indisputable that the Kosovo affair - as was the case previously with Bosnia - has been seen as a matter of international concern for the protection of human rights. The tandem “threat to international peace and security” and “humanitarian intervention” has been used interchangeably to justify the military action. There does not seem to exist any incompatibility with regard to the cumulative or alternative use of these terms. Indeed the proponents of the military campaign in Kosovo supported the idea that the activities of the Federal Republic of Yugoslavia vis-à-vis the Albanian minority living there (as a local majority), by committing gross violations of human rights of the Albanian population, constituted a threat to international peace and security, which justified the intervention of the international community; and that the military intervention could be identified as a humanitarian intervention insofar as it primarily served the protection of human rights of the Albanian population. Yet, one may also consider that in the minds of those who intervened, the humanitarian aspect *stricto sensu* was not the only element that justified intervention. There is no question that concern was expressed in some quarters that international peace and security was not only threatened by the violation of human rights perpetrated by Yugoslav military and paramilitary forces; but that it was also threatened by the generally aggressive behaviour of the Yugoslav government, which was attempting to impose Serbian rule in the area of the former Federal Republic of Yugoslavia, causing a serious problem to other ethnic populations and a potential redistribution of the demographic balance in the Balkans. The repercussions of a massive exodus of Albanians from Kosovo - and later on of other ethnic groups living in the new Yugoslav state - could have been extremely dangerous for the geopolitical stability of the area. The possible involvement of other neighbouring states in the problem could easily have ended up in an interminable international conflict and resulted in the spreading of instability in the area.

Despite the linkage made by the proponents of intervention with the UN principles it is difficult to contend that the military campaign of NATO was lawful. Criteria which have been enunciated as distinguishing features legitimising these armed activities have not convinced the majority of international lawyers and the public opinion of the various countries involved that the major impediment to legality, namely the absence of UN Security Council authorisation under Chapters VII and VIII of the UN Charter was overcome. The arguments that the Security Council was blocked, because of the

## Christos Rozakis

veto; that the international community had to act despite the blockage; that the NATO activity was not the result of the whim of one state, but collective measures taken by a regional organisation; that the campaign was not prohibited by the Charter because it did not contravene the Article 2 (4) conditions - it did not violate the territorial integrity and the political independence of Yugoslavia -; that the UN did not oppose and eventually endorsed ex post facto the NATO actions, all had their merits but did not meet the strict requirements of the UN Charter. After all, this is the main reason which led a number of international lawyers to propose either legislative changes of a major or minor character to the requirements of the Charter, or a careful delimitation of the boundaries of this intervention in order for it to be considered as an exception to the prohibitive rule on military intervention, not authorised by the Security Council.<sup>17</sup>

In any event the international community was faced - and is still faced - with a basic problem of successfully balancing the primordial values of the post-cold war world order: the value of the territorial integrity and political independence of states and the prohibition of the use of force as enshrined in the UN Charter on the one hand and the value of the protection of human rights as a matter of international concern, which may justify actions taken by the community against a perpetrator on the other. The law as it now stands does not always offer a bold answer to the protection of the latter value. And it does not offer an answer because the procedures provided for by the UN Charter -an international constitution drafted under totally different political circumstances than the present ones- do not allow an effective interference of this organisation, through the use of force, in the domestic affairs of a state that allegedly violates fundamental human rights of people living within its jurisdiction. The virtually exclusive competence (primary responsibility) of the Security Council in matters of undertaking or authorising collective use of force, either through its auspices or through actions of a regional organisation, is the core issue; since a decision of the UN to intervene with military force does not solely require the majority vote of the members of the Security Council, but also unanimity of the permanent members. Although in some recent situations such a majority did in fact become possible, in the Yugoslav situation it was still impossible to attain. Diverging

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<sup>17</sup> See, inter alia, the proposals made by the writers of the editorial comments in *the American Journal of International Law* (*op cit*, note 15)



## The Protection of Human Rights in Europe

views among the permanent members of the Security Council -Russia and China were, it appears, against UN action in Yugoslavia- led NATO to proceed with the campaign; its member states did not even try to raise the issue before the Security Council, being of the conviction that its discussion would result in an impasse, making intervention more difficult and politically more reprehensible.<sup>18</sup>

The Kosovo affair clearly demonstrates the major changes occurring in the international order with regard to the protection of human rights. Although the concept of humanitarian intervention is, by no means, a new one, its application in Yugoslavia bears certain features that make it distinguishable from the traditional picture that lawyers have in mind when they refer to it: first and foremost the military campaign in Yugoslavia was not intended either to protect citizens of the intervening state (as an ultimate refuge of diplomatic protection) or to promote their national interests ; its main, irrefutable goal was to safeguard the rights of the Albanian minority and maintain international peace and security.<sup>19</sup> Secondly, it was an action of a regional organisation, of the kind provided for by Chapter VIII of the UN Charter, and not an action by a state or a group of states of the unorganised international community.<sup>20</sup> Moreover this regional organisation is composed of a number of states which are influential in international relations (and, hence, their role in international

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<sup>18</sup> NATO's members who were at the same time members of the UN Security Council considered that submission of a request for military intervention to Yugoslavia was a futile exercise given the indications that they had with regard to the position of Russia and China on this matter. Indeed Russia and China, during the discussions in the Security Council of the measures against Yugoslavia, had indicated that they were against any use of force - including use of force to protect the OSCE verifiers. Three days after the beginning of the campaign Belarus, India and Russia prepared a draft resolution claiming that the NATO bombing violated Articles 2(4), 24 and 53 of the UN Charter (UN Doc. S/1999/328, March 26, 1999).

<sup>19</sup> For a further discussion on this matter see, again, the editorial comments in the *American Journal of International Law* (op cit., note 15).

<sup>20</sup> Chapter VIII in its Article 53(2) provides that "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional actions, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations". NATO clearly comes under the definition provided for by the Charter, but this does not automatically make it able to undertake military action such as provided for by Chapter VII of the Charter; since para 2 of Article 53 provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council". As Wedgwood says (op cit, p. 832, note 21) "Many commentators disputed this reading of the uncertain text, since it suffers the hazard that Council authorisation will not be forthcoming. A choice of interpretation may depend on one's attitude toward legal ambiguity in international affairs, and relative confidence that a frequently stymied Council can preserve an adequate framework of security."

## Christos Rozakis

law-making is of particular importance)<sup>21</sup>, including three out of five of the permanent members of the UN Security Council. It should finally be added that the military activity took place in Europe, had as a target a European state, had as its aim to protect European citizens and the European states that are Yugoslavia's neighbours, and was conducted by Western states, who were in their majority European states. These elements and more particularly the last one, may answer to a certain extent criticisms coming from various quarters on the selectivity of NATO's intervention in Yugoslavia. The intervention was, of course, selective, but its selectivity was founded on discernible grounds: that the human rights violations and the humanitarian outrages had occurred in a region of the world with a high degree of sensitivity in matters of human rights protection and with a concern for the maintenance of political and social stability, whose undermining could have adverse consequences for the whole continent. One may reach the sad conclusion that, under these circumstances, the situation is dissimilar to that, e.g. of Rwanda or even to that of Chechnya, both from a conceptual and a strategic point of view.<sup>22</sup> It is obvious that despite the importance given to the universality of human rights and its protection, some areas of the world benefit less than others from that international concern.

The re-entry of the concept of humanitarian intervention into the human rights discourse is a development, which cannot, and should not, be underestimated. It is, of course, commonplace today that NATO's campaign clearly overstepped the boundaries of lawfulness under positive international law. Even the most fervent proponents of the intervention hesitate to discard summarily the accusations of illegality; and make efforts either to interpret the existing law from a different angle

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<sup>21</sup> All states are, of course, equal before the law and they all equally participate in the international law-making through their practice (coupled with their *opinio juris*) and their participation in international conventions. Yet, it is obvious that some States, because of a number of factors, influence heavily the law-making by their acts or omissions. This is the case of, at least, the three States, permanent members of the Security Council, who, at the same time, constituted the hard core of NATO's interventionist forces.

<sup>22</sup> With regard to Chechnya there are probably more reasons which justify the positive discrimination that the traditional Western powers have adopted vis-à-vis Russia. One weighty element in their distinct approach to the matter may be the powerful posture of Russia in international relations. But apart from this, there may also be the need of the former powers to see to it that Russia becomes gradually integrated in the European mainstream. It seems that the European States and the USA consider that Russia merits different treatment because it is manifesting, unlike the Milosevitch regime, a will to develop structures and policies consistent with those of the other European States. The strategic factor is also one which must have influenced European States and the USA to apply a different policy in Chechnya; this factor also embraces the consideration that Chechnya cannot have the same repercussions that Yugoslavia had on the stability of the European continent.

## The Protection of Human Rights in Europe

than the orthodox one, or to raise the ethical issue that apathy vis-à-vis such gross violations of human rights would be catastrophic for the world order. But it is also undeniable that the Kosovo affair has provoked a new discussion on the ability of the international system to cope with human rights violations of a grand scale. Once again states have found a motive for reappraising the workability of the present Security Council structure and the need for more flexible and operational mechanisms on a global and regional scale to deal with matters of protection of human rights. In Europe this discussion remains vivid, and it has been further enhanced by two other incidents which have occurred in the meantime: the Pinochet case and the sanctions of the European Union against Austria.<sup>23</sup> It is apparent that the accumulation of these events, if seen microscopically together with the creation of the single European Court of Human Rights and the preparation of the new European Charter of Fundamental Rights, demonstrate the intense interest of pan-European states in gradually creating a uniform, constitutional order on the continent, overcoming the hurdles of national frontiers and of sovereignty and establishing a regional order of protection on a large scale.

### Conclusion

The aim of this paper was to depict the central role that human rights are playing in this transitional period in Europe. With few, notorious exceptions, European states seem to be prepared to abide by human rights norms and to align their domestic legal orders with the precepts deriving from the various European texts in force.

At the same time, the international mechanisms operating within the European borders function both at the level of assisting the former communist states to speed up their transition to democracy and at the level of monitoring and sanctioning, sometimes with binding force, deviations from the orthodoxy of human rights' respect. The same cannot be said with regard to the protection of minorities, which

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<sup>23</sup> The Pinochet case antedates the Kosovo intervention: General Pinochet was arrested in London by British authorities on the 16<sup>th</sup> October 1998 after a Spanish magistrate issued an international warrant seeking his detention (See Murphy, S. "Contemporary Practice of the United States", 93 *American Journal of International Law* 487, et seq. (1999); but the proceedings concerning his extradition to Spain continued throughout the period of the campaign and thereafter. The sanctions of the European Union against Austria are more recent and started to apply during this year, after the election in Austria which brought to power a political coalition of the parties of the right and the extreme right wing.

## **Christos Rozakis**

although it is at the core of the problem of European stability and integration, has been treated by the majority of states with reluctance. This latter phenomenon comes as a sharp contrast to the readiness of Europeans to intervene forcibly within the domestic order of a third state for the latter's maltreatment of a minority, while they are themselves not prepared to allow non-forcible, consensual control of their behaviour vis-à-vis their own minorities through the intermediary of an agreement.

In any event, it appears that the overriding need for European integration and the willingness of the former communist states to join, as soon as possible, the process of this integration have upgraded the protection of human rights to a paramount priority. Human rights in Europe are not, in any way, any longer merely a domestic matter for its states. State sovereignty is no longer a sanctuary protecting the authorities from international decisions denouncing their failure to respect human rights. It seems that human rights have become so much intertwined, in the minds of Europeans, with the ideas of integration, unification, stability and security that it is difficult for them to become disentangled and separated out. Despite the difficulties that their final achievement may entail, this equation is a success for Europe and a great leap forward for the whole of humanity.

## **About the Author**

Christos Rozakis (LLM, University of London and University of Illinois; JSD, University of Illinois) is a Professor of International Law at the University of Athens and Vice-President of the European Court of Human Rights. He has formerly been Dean of the School of Law at the University of Athens, Member and Vice-President of the European Commission of Human Rights, as well as Undersecretary of State of Foreign Affairs.