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CONTENTS

REFLECTIONS ON THE FUTURE OF THE EU BUDGET, WITH SPECIAL REFERENCE TO THE POSITION OF THE NET BENEFICIARY COUNTRIES

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Abstract: *Starting with individual households through large companies to countries, the preparation of the budget belongs to the most critical tasks and policy areas. It is not enough to agree on general objectives but consensus has to be created also concerning the disposable amount of money and, not less importantly, its adequate distribution among different priorities. Both the identification of objectives and the character of the compromising process largely exceed the area of direct economic issues. Annual and multi-annual budgets provide an excellent picture of the capacity of the society to think in interdisciplinary context and of its ability to reach reasonable compromises.*

Keywords: *EU budget, multiannual financial package, redistribution, budget reform, net beneficiaries*

General remarks: objectives and instruments

The above statement is particularly valid to the budget of the European Union, for in this case supra-national objectives have to be agreed on by member states. Despite the undeniable progress achieved in several areas of the European integration, it is well known that national budgets belong to the most sensitive and „sovereign" sphere of national decision-making. Thus, the consensus on the EU budget represents one of the most comprehensive tasks of the integration. This, however, is by far not a new phenomenon, for without a common agricultural policy that, in a simplified approach had resulted from a widespread agreement between France and Germany in the early sixties, and made expenditures in this field to the largest single item of the EU budget, we could hardly speak today of a functioning European integration. It is another question, that during several decades and particularly due to the rapidly changing global and European environment in the last years, it is just the Common Agricultural Policy that became the biggest barrier to the fundamental reforming of the common budget.

The preparatory and acceptance process of the EU budget has several pitfalls. First of all, the revenue side has to be secured increasingly by member state contributions that could „enrich" the national budgets of the members. Namely, the share of sovereign (community-level) own revenues that had predominated in the starting phase of the integration, turned to be marginal in the last period. Customs and duties imposed on goods imported from third countries amount to hardly 10 per cent of the current budget. In turn, the lion's share of the common budget is provided by VAT-based taxes and national contributions calculated on the basis of the gross national

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income (GNI) of the member countries. In principle, this money could be used for purposes of the respective national economies as well.

Second, both the number of areas to be financed (or kept to be financing) by the common budget and their effective demand for financing have been largely enhanced. Evidently, this is partly the consequence of the fact that the EU grew from a 15- to a 27-member community in the last years, for new members have automatically brought new interests into the integration. It is sufficient to refer to the fact that none of the new member's GDP per capita has reached the average of the EU-15, and most of them remained below the 75 per cent level that qualifies them to receive large structural (and cohesion) transfers. In addition, new global challenges emerged that increasingly call attention to include into the common budget new priorities that are expected to ensure longer-term competitiveness of the EU. Moreover, new financial needs are generated by new community-level policies that started to get clear expression in the last years (common foreign and security policy, neighborhood policy, international aid policy, justice and home affairs, etc.).

Third, and based on the above-mentioned features, well-defined target conflicts have appeared in two aspects. On the one hand, such a conflict is indicated by the imbalance between the financial requirements of the priorities to be supported by the budget and the limited resources available on the revenue side. On the other hand, the disposable amount of money to be spent in the framework of the common budget has started a distribution conflict among different priorities to be financed and among the member countries of the integration.

Fourth, and finally: the acceptance of the common budget needs consensus among all member states. In other words, each member state has veto right. In order to avoid the worst-case scenario that any of the members torpedoes the common budget by making use of its veto right, the community budget has to fulfill special national interests, at least up to the critical minimum of the compromise ability of each member country. This construction is the consequence of the divided competences between the different EU organs. It is true that the Commission is responsible for the elaboration and presentation of the community budget. However, the decision is in the competence of the Council and the Parliament. The weight of the former is decisive, since it is this level where the national veto right can be made use of. The Parliament, as the final approving organ can, and in fact, used to formulate different minor proposals for changing the final amount of the budget or slightly modifying the internal structure (both among main items and among or within the net contributing and net beneficiary member countries). Nevertheless, its influence on the budget is limited provided it would not like to blow up multi-annual financial programs. The final version of the budget requires a simple majority of the members of the Parliament, after having secured the support of each member state in the previous stage.[1]

The current financial package covering the period between 2007 and 2013 is characterized by two new features. In fact, to some extent, they were already present in the previous seven-year budgetary period (2000-2006) as well.

First, a fundamental „philosophical" change took place between the objectives to be financed and the resources available for

[1] *It is a fundamental difference to the mechanism of accepting national budgets, since no simple veto can be applied in order to prevent the budget from being accepted.*

financing. In previous periods, the financial needs of the agreed priorities have substantially affected the amount of money needed on the revenue side of the budget. In turn, after 2000 it were the obvious limits of the income side that defined which areas and to what extent can be supported within the common budget.[2] This „mentality and behavioural pattern" that is manifested not only on the highest level but also in the micro-level cooperation between firms and banks that are expected to finance major investments, is uniquely European and shows clear differences to the American pattern. The latter generally starts from the assumption that promising (profitable) enterprises should not have any financial limit, for the expected income provides the adequate guarantee to bank loans. In turn, the predominant European position is based on uncertainty, flight from risky undertakings and on preferring the status quo situation (the best is if nothing happens). Unfortunately, it is just this mentality that can be identified in two areas of shaping the EU budget. On the one hand, the budget is based on barriers on the revenue side, and, on the other, the implementation of future-building priorities, vital for the global competitiveness of Europe, is experiencing strict budgetary barriers.

Second, the EU has abandoned its previous practice based on the positive correlation between the total amount of the budget and the enlargement process of the integration. Each of the previous enlargements was accompanied by a substantial increase of the common budget, for the enlargement process raised new financial requirements. This was already the case with the first enlargement when the United Kingdom, Denmark and Ireland became members in 1973. More important changes occurred during the inclusion of the Mediterranean countries into the European integration, when new supportive mechanism and funds had to be created in order to start meaningful financial transfers to the less developed new member states. Even the enlargement by three highly developed countries in 1995 (Austria, Finland, Sweden) has increased the expenditure of the common budget (together with its revenues). In contrast, the first (and last) „big-bang" enlargement of the history of the EU was, from the very first moment, embedded into the framework of curtailing the common budget. For various reasons, already the financial framework for the period 2000 to 2006 required a redistribution within the original amounts agreed on in Berlin (March 1999). On the one hand, the original package calculated with the accession of six countries by 2002 and not with ten countries (to be sure, two years later, in 2004). On the other hand, some sources have to be created to include the new members into the direct payment system of the common agricultural policy.[3] The current financial framework (2007-2013) proved to be even more stingy, because not only the upper limit of the willingness of the net contributing member countries to finance the budget became manifest relatively early but also enhanced attention started to be devoted to the

[2] *See in detail Caesar (2006).*

[3] *At the moment of the approval of the financial framework for 2000-2006, accession negotiations were still in their early stage. The predominant position of most member countrties was that the new members should be excluded from the benefits of the direct payment system which, evidently, would have created a second-class membership. Since this situation was both economically and politically unsustainable, a compromise had to be elaborated between the interests of the new members (and of an integration on equal footing) and the possibilities of the budget. In fact, a 25 per cent initial level of direct payment financing (as compared to 100 per cent for EU-15 member countries) was agreed on by the restructuring of the financial resources earmarked for the new members (and not by curtailing the money available for EU-15 members).*

financing of future-oriented community-level priorities within an obviously shrinking budgetary framework. At first glance, this would have, among others, substantially curtailed the structural and cohesion funds that were considered vitally important by the new member countries in their catching-up effort to more prosperous old members. At the end of the day, and after several years of hard and difficult bargain, the new members were able to negotiate a relatively good financial position, especially, if we consider the historically unique external contribution they can rely on in the next years.[4]

Despite the new features, the fundamental dilemma of the future of the community budget did not change at all. This dilemma can be formulated in the following question: is it possible to create and finance a globally competitive Europe (European integration) from 1 per cent of the gross national income of the member countries? In this context, several comparisons can be made. One is the budget of federal States, in which expenditures on the federal level, including income transfers from higher to less developed regions (counties, states), represent a substantial share of the respective GNI (sometimes reaching 10 per cent). Of course, it should not be neglected that in all cases we have to do with political unions (USA, Australia, Canada but also Germany, Austria, Belgium and Spain), a goal from which the European integration is still far away. Another possible comparison is offered in the context of the national budgets of EU members. While the member countries used to centralize 35 to 55 per cent of their national income in the national budget, the EU budget has to function with 1 per cent, or 2 to 3 per cent of the cumulated national budgets of the member countries. This proportion could only be changed if the member countries were able and ready to reassess the relationship between their „national" and EU-level priorities[5] by giving priority to community-level objectives based on the future-oriented and sustainable development of the entire integration (of which, all of them, are members). A third comparison can be based on the evaluation of key scientific analyses and expert documents that, through decades, have been arguing in favour of a much larger EU budget. Depending on the sources, the desirable volume of the common budget was set between 3 to 7 per cent of the aggregate national income of the member countries. It is needless to stress that all these surveys started from the common interests, objectives and values of the European integration and not from the de facto available amount of financial resources. In other words, their key approach was that it is the necessary common tasks that have to define both the size and the structure of the revenue side of the budget and not the limited willingness of the financial contribution by (most) member countries.

Fundamental objectives of the common budget

Following the request of the Council from June 2004, the Commission defined three fundamental criteria of the community budget.

(a) Effectiveness means that, in certain cases, the given objectives can only be reached in the framework of community-level financing.

(b) Efficiency is understood in a way that

[4] *However, a comparison with previously joined less developed countries is by far not as favourable.*
[5] *In fact, most EU-level priorities can (or should) rightly be considered as national priorities as well.*

community-level financing is expected to generate better results and higher value production than those to be reached in case of national financing.

(c) Synergy refers to the fact that projects financed by the common budget generate spill-over effects or improve the framework conditions of implementing national programs, either by stimulating such programs or by complementing national projects.[6]

Key documents of the European integration state that the community-level budget has to finance common objectives that represent common and fundamental values of the integration shared and represented by all member states. Even more importantly, the community budget is responsible to finance the implementation of common policies. At the same time, it is similarly underlined that the common budget is not allowed to (essentially) serve redistribution goals. Based on the current state of EU competences, and following the above mentioned interpretation, three areas are entitled to receive financial resources without any reservation - from the common budget:

- guaranteeing fundamental human rights, including the „European values",
- the competition policy,
- the common external economic policy.

The second largest individual item of the current budget, namely the mitigation of economic gap among differently developed member countries and the support to the modernization and catching-up efforts of the less developed members through structural and cohesion policies fits into the first area, for it represents an important element of „European values". Despite the fact that the common agricultural policy represents a true community-level policy, at least with reference to the criteria mentioned above, it is more difficult to find justification for its incorporation into the common budget, since these resources mainly represent redistribution of income and generate, to a limited extent only, development.

The chance of breaking out of the „trap of redistribution"

Considering the current situation, the contradiction between the original goals and the actual structure of the common budget, on the one hand, as well as subordination of the budget to the willingness to contribute of the member countries, on the other hand, have resulted in a trap situation. While the development of selected community-level policies indicates qualitative improvement and further challenges appear as a result of globalization, the community budget seems to be less and less prepared to appropriately manage the new tasks. Thus, after 2013, the new budget of the EU should return to the original objectives. Unfortunately, at the moment, there is no such sign. It is much more likely that the narrow-minded political bargaining that characterized the previous decade will keep on surviving or even become manifest in a more acute form. Evidently, any budgetary breakthrough is conditioned on the long-term financial security that would require the fundamental restructuring of the revenue side of the budget. In this process, three basic principles have to be taken into account, even if, in any compromise package, none of them could be fully represented and some mutual allowances have to be made. These principles are: equality, efficiency and solidarity.

[6] *European Commission (2004).*

Although it still belongs to the realm of fantasy, it is not superfluous to deal with another factor of a potential budgetary breakthrough. Such a situation could be generated both by global and European developments in the next decade. Moreover, a similar trend can already be observed in the changing philosophy of the EU-member Scandinavian countries. According to this experiment (or, may be better, an already established experience), the traditional redistributional functions of the State have been weakening, while the State does not leave the sphere of economic policy-making. Just the opposite, it starts strengthening its active role in creating competitive conditions for the long-term and sustainable development. In consequence, the pattern of the „developmental State" will be established. Is it unlikely that a similar development may take place in the EU budget, and the classic redistributional tasks would be replaced by a future-oriented, development-centered community budget? No question that some basic structural changes, particularly the drastic reduction of the financial resources for the common agricultural policy (but also the much more transparent and stricter definition of the structural and cohesion fund) would provoke fierce resistance by several member countries. Moreover, the annual budget of a „developmental integration" would need much higher revenues than the current amount. It is fully understood that none of these preconditions is given today. Nevertheless, it cannot be ignored that the factors likely to force a change in favour of a „developmental budget" are already working and on different levels.

On the level of the member states, mainly the efforts of the net contribution countries have to be mentioned. They did not necessarily aim at freezing the budget but at fundamentally restructuring it. In accordance with the Lisbon goals, it is imperative to strengthen the innovative environment of the EU, to upgrade the quality of education and training, as well as to provide more community-level support to research and development. It has to be stressed that such goals should not only be supported by the current net contributors but by all member countries that are fundamentally interested in strengthening European competitiveness in the global scale. A further justified demand can be identified in supporting the dynamic catching-up process of the less developed member states, since it represents an equally vital factor of sustainable competitiveness and stability in Europe. However, in this context, structural and cohesion resources have to be much more oriented towards developmental and less towards (social) distributional objectives. In other words, these funds have to contribute to the accelerated catching up to the basic Lisbon goals. Therefore, the innovative potential available in the less developed member countries has to be mobilized not only in order to speed up the catching-up process but, and basically, in the interest of the all-European competitiveness as well. As a further, although still rather speculative element, the reforming of the national budget of selected member countries from the EU budget, with partial and evidently transitional character, can be mentioned. At first glance, such a requirement clearly contradicts the fundamental objective of a „developmental integration", because it would, apparently, channel money into redistribution processes. However, in some special cases, just such a support could bring the budget of some member countries out of the „trap situation of status-quo-oriented

redistribution" and give impetus to the transition towards a „developmental national budget". It is well known that large-scale reforms (pension funds, education, health care, public administration) generally do not produce extra income in the first stage of implementation. On the contrary, the initial costs of the reforms not only in social but also in economic and narrow budgetary terms may be higher than in the last period of the „status-quo-budget". Provisionally, some new expenditures are likely to appear in the budget, starting from the obligatory compensation payments to laid-off manpower (mainly in the public administration) up to some social compensation mechanism in order to break the resistance (or buy the tolerance?) of the „loosing" part of the population. Without the implementation of such transitional instruments all fundamental budgetary reforms would bear a very high risk to fail. There are not only new but also several old member countries whose national budget would require large-scale, quick and radical reforms. In case of delaying or half-heartedly implementing such reforms, the factors impeding the full-fledged implementation of a „developmental integration" could hardly be abolished (or minimized).

On the level of the European integration, we can identify a large number of future-oriented tasks that either require or recommend a more active participation of the community budget. In this context, two basic fields can be outlined.

One area includes the financing the further development of current community policies. Some of them are in the process of qualitative enrichment, while their successful development requires the increasing „communitization" of related policy fields. Community resources may be playing a determining role in this process, partly in solving (or mitigating) conflicts and contradictions, and partly in speeding up changes, even by overtaking eventual and transitional extra costs generated by the given „breakthrough" process. As a concrete example, the full-fledged liberalization of the internal market can be mentioned. Liberalization has to be extended to all areas that are still considered by some member countries as „sacred cows" (e.g. energy, transportation, selected financial services). Another example may be provided by the future development of the monetary union. The current duality that seems to characterize the European integration, can hardly be sustained for a longer period. Namely, on the one hand, we have a functioning monetary union with the participation of 13 countries, while, on the other hand, fiscal policies have definitely remained under national competence. The sustainability of the common currency increasingly needs an essential coordination of national fiscal policies as well as a level of economic policy convergence well beyond the nominal convergence criteria established in Maastricht. However, the biggest challenge the community budget may be facing in the future, can be produced by the critical mass of „competitiveness gap" among the EMU member countries, due to the long-run non-functioning of real convergence. In such a situation, some member countries (as well as the EU) would have to choose between two alternatives. Either some countries struggling with huge competitiveness problems leave the monetary union or the EU and, more importantly, the community budget would be forced to prevent the breaking down of one of the most important achievements of the European integration.[7] In this context,

[7] *In the last five years, the difference in unit production costs between Germany and Italy amounted to almost 20 per cent (in favour of Germany). Although the critical level of the „gap" can hardly be quantified, 20 per cent seems to be not very far from this limit.*

not only the future of the integration but also Europe's global interests and perspectives would be at stake. Since the European Monetary Union includes countries on different levels of development and, in consequence, with different degrees of (sustainable) competitiveness, market mechanism only is not necessarily convenient to manage such differences in every case. Thus, a compensation mechanism, similar to the national budget of each member country characterized by regional differences, may become desirable. This, however, would force the EU and its member countries to a complete rethinking of the amount and the internal structure of the community budget. Nobody should have the illusion that the costs of managing this potential „time bomb" could be covered within the limits of the current budget (not even with the major possible restructuring of the individual items). Experience of federal countries (characterized both by monetary and political union) indicate that such costs could be several times higher than the total expenditure directed to the big bang „Eastern" enlargement. Therefore, such a situation would definitely create a completely new environment for the future structuring of the community budget.

The other area, in which the demand for enhanced support from the community budget is expected, includes the strengthening of several community policy fields. Obviously, it has to cover the expected costs of further (potential) enlargements as well. However, due to the long-term horizon of the enlargement process, it is more timely and realistic to concentrate on such issues as environmental protection, the shaping of a common energy policy, the upgrading of justice and home affairs, common external border control, the reassessment of neighborhood policy, new challenges to the common foreign and security policy, or even the establishment of the first stage of a common defense policy. Let alone more resources to be channeled into research and development, education and training, as already partly reflected in the current budgetary structure. Moreover, the development of the transeuropean transportation network, a vital area for sustainable European development would also need large additional sums from the community budget.[8]

Finally, discussion about the future of the community budget cannot disregard the growing role of global challenges. European answers with budgetary implications can be identified in two levels. First, in the form of passive adjustment that would imply the (successful) management of some negative phenomena or crisis situations (e.g. critical economic situation, facing growing external competition or common actions against international migration). A concrete form of such a passive step can be seen in the „solidarity fund" included into the current budget.[9] Not less important are, however, active steps to be undertaken by the European integration, as one of or the most important player in the international economy (trade, capital flows, and international aid). If the EU wants to preserve its current global economic position, this effort has to find its clear expression in the community budget as well. As a result, the financial background of all areas has to be fundamentally reinforced

[8] *This is a particularly important issue for the new member countries, due to the underdevelopment of their physical infrastructure, both on the national and on the cross-regional levels. Unfortunately, these projects regularly used to be the loosers in the intra-EU budgetary compromises. The financial resources still available in the community budget are just a fraction of the originally projected amount.*

[9] *This Fund, provided with an annual amount of Euro 500 mn, is entitled to finance the rapid adjustment of companies that may have become the losers of globalization.*

that are expected to keep or further strengthen the global player status of the EU in the coming years. Among the concrete fields can be mentioned the „soft" security policy, as a special „European value", the reassessment of the EU's external aid policy, as well as the already indicated areas of environmental protection and neighborhood policy, with all of their extra-EU, i.e. international implications. Not less importantly, the financing of the basic objectives of spreading „European values" in other parts of the world and of creating a special „European image" attractive to third countries and in peaceful competition with other „images" have to be added to the agenda to be financed from a (to be) reformed EU budget.

In sum: several member-country-related, community-level and global factors can be found in order to promote the breakthrough of the common budget in the direction of representing and supporting a „developmental integration". However, considering the deeply-rooted structures of the old system as well as the narrow-minded („national") interests that seriously limit the revenue side of the budget, it is impossible to make any reliable forecast whether, and if yes, when, such a qualitative change is likely to happen. Still, it is a fundamental interest of Europe and it should be that of all member countries to speed up and successfully implement this process.

Risk factors net beneficiaries may be facing

Irrespective of the approach whether we insist on the more likely scenario of muddling through or try to outline the future of the community budget on the basis of „developmental integration" accompanied by several positive surprises, currently net beneficiary countries have to face a number of risk factors and will be forced to formulate and implement adequate answers in order to keep their actual position at least in the medium term. In this context, answers have to be found not only on selected real processes of the integration and their consequences but also on, conclusions drawn and recommendations proposed several member countries and experts, even if they seem to be erroneous and unjustified. Moreover, also expectations of large part of the societies in at least on the paper net beneficiary countries and partly deeply-rooted „automatism" of subsidy mentality in the public opinion have to be adequately addressed.

The first question that needs clarification is whether, and if yes, to what extent the community-level financial mechanism is efficient in the context of supporting the catching-up process of less developed members. Several experts, both coming from the EU and, even more, from international organizations (markedly from The World Bank) consider that the current redistribution of resources is characterized by low-level efficiency, and does not help the sustainable catching-up process. In turn, it generates large-scale subsidy mentality and behavioural patterns. This view seems to be supported by the fact that, despite massive financial transfers, the original differences in development (as measured in per capita GDP terms) between prosperous regions and those that became the main object of target-oriented community-level financing did not really change in the last decades. In some cases, previously registered and historically established „gaps" have been frozen and, consequently, reconsolidated (e.g. between Catalonia and Extremadura in Spain, Northern Italy and the

Mezzogiorno, let alone the really specific situation of the former East Germany). One should not wonder that the resulting suggestion is to abolish each kind of regional transfers and to bring back such programs into the national development plans (renationalization of regional support). In other words, radical representants of this view underline that each member state should assume responsibility to its own development policy and shape such a financial framework that takes note both of the possibilities of the national budget and the given level of economic development. Another, more balanced opinion suggests that regional resources (or a reduced amount of them) should be transferred to the target country without any conditionality and they should be used in the best and most efficient way according to the decision-makers of the beneficiary country. Obviously, the idea of renationalizing (part of) the community budget stems from the experience with the common agricultural policy. However, as of today, it has spread to other areas of the community budget linked to any kind of „redistribution". Furthermore, the extremely low level of efficient absorption capacity of the East German Laender provides an additional argument to those favouring dramatic cuts in the structural (and cohesion) funds.[10]

It is a fundamental common task of all net beneficiary countries, particularly of those that joined the EU in 2004 and 2007 to prove that regional and cohesion funds can be used efficiently. In this context, some points connected with the decade-long experience of the European integration have to be highlighted.

(a) It is evident that some countries and regions could highly benefit from community resources (Ireland, Catalonia, Lisbon and neighboring regions, Burgenland in Austria, etc.).

(b) It is true that in some cases the original development gap could not be reduced between different regions of the same member country. However, original development differences among member countries (at least measured in per capita GDP terms) have considerably decreased. In other words, the income-based and most probably also social cohesion of the Union has been increasing.

(c) The (efficient) absorption capacity of selected countries and regions needs careful analysis. On the one hand, there have been substantial differences in the absorption capacity across countries and, even more, across regions. On the other hand, differences in absorption capacity can be motivated by a large number of different reasons (part of them being time-dependent).

(d) Finally and most importantly: it has to be constantly proved by the new net beneficiary countries (and regions) that they do dispose of a larger and more effective absorption capacity than previous net beneficiary countries and regions. No opportunity should be lost to emphasize that any comparison with the East German Laender is fundamentally mistaken and misleading.

As a second approach, the new net beneficiary countries have to prove that they were able to absorb EU resources efficiently already in the last years. Special factors that enabled these countries to use EU funds (PHARE, pre-accession money) more efficiently have to be singled out. Particular

[10] *The new German Laender used to get in the last 16 years an annual amount of financial transfer from the German budget that is almost equivalent to the total annual budget of the EU. Despite this historically unprecedented financial injection, Eastern Germany is clearly lagging behind the Central European countries both in structural change and, even more, in international competitiveness.*

attention should be given to the character and speed of economic liberalization, the unprecedented pattern of transformation, the tolerance of the society and, last but not least, the extremely profitable activities of international capital in Central (and partly also in Southeastern) Europe.[11] It is the common responsibility of each new member country to create the most effective environment to the highest possible absorption capacity, starting from the functioning of the institutional system through the preparedness of the entrepreneurial sector to the quickest and broadest utilization of the spill-over (multiplier) effects of EU-financed projects. If any of the new members failed this exam, the negative consequences would immediately spread to the other members as well. We should not have any illusion. Both net contributing and previous large net beneficiaries that tend to be relative losers of the „Eastern" enlargement are keen to identify such failures in order to provide additional arguments in favour of reducing (or stopping to redistribute) regional and cohesion transfers from the community budget.

As a third requirement, the ongoing cross-country debate over distribution vs. efficiency, we should not stop underlining that these criteria are not necessarily contradicting each other. In contrast, in several cases they are mutually supposing and reconfirming themselves. In addition, efficiency is a relative category, since the results can always be measured as compared to different other objectives. In the simplest and most „radical" form, efficiency can be considered as a microeconomic category, as measured by the performance of a given company. This, however, cannot necessarily cover macroeconomic efficiency, let alone efficiency (partly) based on non-economic considerations. Another comparison is based on the direct economic benefits of the net contributing countries. If EU-financed developments in a net beneficiary country result in significant income growth and, consequently, in expanding consumption, additional export markets will be generated that, as overall experience in the EU indicates, will mostly be used by companies located in the more competitive and higher developed net beneficiary member states. As a result, not only the social cohesion will be fostered in the net beneficiary country but the overall welfare level of the European integration will be increased. Much more difficult is any attempt to quantify the impact of financial transfers on the political stability and security of the target-country (region). Evidently, there is also adverse experience in the EU based on resource transfers that have shaped subsidy mentality that can easily become serious political, economic and mental barriers to longer-term development. At the same time, member countries lacking the critical minimum of socio-political stability would need extremely high levels of crisis management transfers without any real alternative to sustainable growth.[12] Finally, EU transfers have to be interpreted in the framework of global challenges. All transfers that are able to filter out potential negative impacts but supports efficient preparation for global

[11] *It has to be stressed that the inflow of FDI into selected Central European countries (notably the Czech Republic, Hungary and also Slovakia) has reached in some years (much) higher levels than the officially fixed maximum of annual EU resource flow equal to 4 per cent of GDP as a maximum. This fact clearly refutes the argument that at least some of the new members were not be able to efficiently absorb annual amounts of transfers higher than 4 per cent of their GDP (a lot depends on the conditions of having access to the available funds).*

[12] *The current history of and experience gathered in the last years with the Western Balkans is illustrative.*

competition can be approved, irrespective of the fact that the resources are flowing to more or less developed member countries.

Fourth: adequate answer has to be found to the argument that the annual growth of the common budget, although indicating a rather modest increase, is still exceeding the annual growth of the national budgets of the member countries. Therefore, the growth of the EU budget should be reduced (or stopped), so that national contributions could start to decrease. In this context, the first remark is that community and national budgets cannot be compared, not only due to the highly different amounts but also because of their share in aggregate EU and individual national GDP terms as well. Despite higher growth rate of the EU budget, in absolute terms the national budgets are growing stronger. In addition, the already mentioned new community-level objectives can be referred on. Moreover, the importance of the internal cohesion of the European integration in global competition should not be forgotten.

The fifth task consists in using each occasion in order to make all involved interest groups aware of the fact that it is absolutely mistaken to start from the narrow interpretation of net contributing and net beneficiary positions. On the one hand, the European integration is characterized by multi-channel income redistribution processes. Among them the different primary budgetary positions represent one channel only, even if this is the most visible one that can be communicated easily, and linked to messages containing different interests.[13] On the other hand, resource redistribution on the community level shall not miss the inclusion of a number of other elements with fundamental impact on the macroeconomic redistribution of benefits. Trade, international investments as well as rapidly growing private remittances (in new member countries with high level of emigration) belong to this package.[14] Just to mention a concrete example. EU financial transfers to Hungary amount to Euro 22.6 bn in the current seven year financial framework. This is about one-third of Hungary's annual total import and half of its import from EU countries. In consequence, any balanced analysis of the transfer flows has to include all basic channels of economic interaction. Simultaneously, we have to keep stressing that the European integration is a „win-win-game", which benefits every participant. It is very likely that any country that, for whatever reason, would have liked to abandon the integration framework would be facing serious macro-economic (and other) losses.

Sixth: in the last years, the revenue side of the EU budget and, consequently, the financial maneuvering room of the integration have become substantially limited by making reference to the Maastricht criteria. Interestingly, the six net contributing countries that formulated their famous-infamous letter in December 2003, where highly differently affected by this factor. Thus, the common legal basis of this reference can be seriously questioned. In fact, France and Germany were struggling with the budgetary criterion of Maastricht (better to say, with the non-fulfillment of this condition). In turn, Austria and the Netherlands were far from having such a problem. Moreover, the United Kingdom and Sweden were not part of the monetary

[13] *No doubt that this possibility is widely used not only by politicians of the net contributing but also by those of the net beneficiary countries alike.*

[14] *Moreover, also EU resources not distributed into "national envelopes" have to be considered. Generally, they used to benefit larger and net contributing countries more than net beneficiary ones.*

union (while both have been continuously complying with the Maastricht conditions). Therefore, we have to be aware of the concrete situation and prevent each country from „mixing together" facts or trends that do not have any correlations or if such a situation is principally the consequence of mistaken community-level policies.

Seventh: with the highest level of probability, it has to be avoided that net beneficiary countries make use EU resources to finance explicitly social redistribution instead of channeling such funds into development. On every instance, we have to stress that EU resources do not only help narrow existing development gaps,[15] but they initiate modernization processes. On the one hand, they are expected to create a sustainable environment for longer-term development. On the other, and not independently of the first process, they are able to contribute to the strengthening of global competitiveness of the European integration. In consequence, it could be recommended to link, directly or indirectly, most financial transfers to the achievements of the Lisbon goals. Moreover, this linkage should be communicated towards politicians of the net contributing countries, as well as to the business community interested in the strengthening of the international competitiveness of the EU.

Eighth: we definitely need documents and proposals with a long-term and clear concept (certainly not excluding different, but always transparent scenarios) that could bloc any discussion about the next budget starting in 2014 that, almost from the very beginning, could become the hostage of the „horse-trading practice" of the two previous financial periods. Already now, it should be made clear to each of the member countries that inglorious short-sighted political games experienced around the budget in the last decade do not improve the bargaining position of any of the member countries,[16] while they definitely worsen the international reliability of the integration. Furthermore, in the longer run, such a practice may easily undermine the still strong or even strengthening international confidence in the EU.

Ninth: one of the most complicated tasks of the new member countries consists in not becoming the hostage of the traditional beneficiary structure of the EU's budget. Such a situation has to be avoided even if, for several years, the given country tends to profit a lot from the given rules of the (redistribution) game. This statement particularly holds for the common agricultural policy in general, and for the direct payments to farmers, in particular. Namely, these payments will be approaching (and reaching) the level of the EU-15 countries by the end of the current financial framework, just in the period when serious negotiations on the post-2013 budget will be launched. Based on our current projection, one of the most uncertain and hottest discussed elements of the budget starting in 2014 will be the future of the direct payment system. Even if a radical restructuring of the future budget will fail, the current system is unlikely to be maintained. Thus, it would be fundamentally mistaken if the new member countries, most of them with economically important (and politically sensible) agrarian sectors were insisting on this item of the budget instead of focusing on several other more important and prospective areas, without giving up or endangering their

[15] *According to official statistics, this can be reached by simple redistribution, as the not-to-be-followed example of Eastern Germany obviously (and, unfortunately) proves.*

[16] *This statement holds even if politicians tend to return from budgetary, and other EU-related negotiations with "victory reports".*

relevant net beneficiary status (but not as a result of agricultural payments).

Realistic scenarios concerning the maneuvering room and the structure of the post-2013 budget

Within the period of the current financial framework, a budgetary revision will take place in 2008 and 2009. However, based on our current level of information, it will hardly introduce essential changes into the structure and annual amounts fixed until the end of 2013. However, the results of the revision period are likely to have relevant impacts on the next financial period starting in 2014. Therefore, it is convenient to start discussion already now on concepts, objectives and potential instruments beyond the year 2013. In other words, national preparation for the new financial period has to be started immediately.

In this context, the following framework conditions, hypotheses and recommendations may be helpful.

(a) The first hypothesis is that the current EU budget will not be seriously challenged by the accession of one or more new members. Based on the current state of negotiations and pre-negotiation talks, Croatia only has the realistic hope for joining before 2013. However, the financial coverage of Croatia's entry is included into the current financial structure, similar to the financing of Bulgaria and Romania after 2009.[17]

(b) In spite of increasingly „vociferous" critics, we do not believe that any fundamental change could be started in the current structure of the common agricultural policy, as negotiated between France and Germany until the end of 2013. This is an unwelcome development to the new members as far as the quick and (almost) full-fledged „renationalization" of the agricultural policy would be the more advantageous to the new members the earlier it would occur. Namely, the old member countries would be deprived of the massive direct payments when the new members would not yet reach the EU-conform upper limit of such contributions (70 per cent at least coming from the common budget, with maximum 30 per cent national co-financing). Most probably, the relative, and certainly shrinking but still existing competitive advantages of the agricultural sector of most new members could be best exploited (even if, without further investments, in the short run only). This, however, cannot be considered a real perspective. Thus, we have to accept that the full-fledged or partial renationalization of the agricultural sector can only take place after 2013. However, the agricultural strategy of the new members has to start preparing for the likely new situation already now.

(c) According to our current view, the new EU budget starting in 2014 requires clarification in two key questions linked to the shaping of the longer-term strategy of the integration:

- What should determine the future system of national contribution to the common budget: the redistribution of the available (and nationally restricted) resources or the financial requirement of the new objectives of the integration?
- What should be financed from the community budget and what should remain (or return) to the national budgetary framework?

(d) In which time period should the next

[17] *It is known that Bulgaria and Romania dispose of an annual budget until the end of 2009, while for the second part of the current budgetary period, the national envelopes have not yet been „filled", in contrast to the new members that joined in 2004. However, the money is available within the current financial framework.*

budget be placed? Should we insist on prolonging the current pattern of the seven-year financial framework or should be opt for a shorter (e.g. five-year) period?

(e) How should be define the conditions of „automatic access" to EU funds? Should and could the presently valid entitlement levels of 75 and 90 per cent, respectively, be kept (for regional and cohesion funds)? Or, taking into account the income constraints of the budget and the financing needs of new community policy areas, should the above criteria be modified? Obviously, the answer partly depends on the future structure and size of the revenue size of the common budget that could guarantee adequate and stable (sustainable) conditions for longer-term financial planning. Despite all justified critics (and not less important and justified resistance) it cannot be ruled out that, in certain situations, the EU budget would be financed by external credits, provided that the loans would be offered by the European Investment Bank, the „domestic bank" of the integration.

(f) Net beneficiary countries are advised to develop a double strategy. On the one hand, and evidently, they cannot give up their demand for negotiating on and keeping the highest possible level of EU resources in the future. On the other hand, and based on the experience to be gathered after 2007, they have to analyze the „efficiency function" between the theoretically available amount of EU resources and the conditions (rules of the game) of having access to such funds. It can absolutely not be ruled out that in some cases the improvement of the access conditions offers larger benefits than the bargaining on higher amounts of money but with very difficult terms of accession to it.

(g) One issue, that, unfortunately, could not be accepted during the negotiations on the 2007-2013 financial framework,[18] has, imperatively, become a vital point during the budgetary negotiations from the very earliest stage of bargaining over the new financial package after 2014. The main point is that the new member countries of 2004 and 2007 (and, similarly, those expected to join later) are not only less developed than the EU-15 but, in contrast to Ireland, Greece, or the Iberian peninsula, they do not form the geographic periphery of Europe. On the contrary, they represent a geographically compact region with several common continental borders. Therefore, their catching-up process must not be constrained to financial transfers put into „national envelopes". All of them need a cross-border, regional development fund in the coming EU budget that is devoted to finance large-scale infrastructure and environmental projects in Central, Eastern and Southeastern Europe. As long as the development of transeuropean corridors remains at (or is pushed to) the periphery of the EU budget, there is a real danger that any cut in the financial resources, whatever its motive, would first of all negatively affect this region (and these countries) of the enlarged integration. In consequence, the establishment of a new trans-border regional fund should become a vital element of the new EU budget. As a result, the amount available in the national envelopes may be somewhat reduced, but the new approach could generate substantial additional and favourable conditions. First, it could certainly improve the efficiency of infrastructural developments in the entire region, of which intra-European trade and financial (investments) flows could substantially benefit. Second, it could strengthen the cohesion among the new

[18] *In fact, despite the definitely common (but not recognized) interest, it has not even been tried to be brought on the negotiation table by the new member countries.*

member countries with favourable impacts on the European economy, starting from positive multiplier impacts to higher level of socio-political stability. Third, such a budgetary item could hardly be questioned by any member country, since the region is an unprecedented geographic-historical-economic unity within the enlarged EU. Fourth and finally, both for geographic and strategic considerations, the regional approach to the development of infrastructure would incorporate countries of the Western Balkans, with membership promise by Brussels but with high uncertainty of the timing of accession. Just this new network could contribute to keeping membership expectations alive and, at the same time, improve the concrete conditions of adjustment (e.g. enhanced trade and investment flows). Beyond the direct participants in the project, in fact, the whole continent could enjoy the positive impacts of such a development, since all Central, Eastern and Southeastern European new (and prospective) members have a relevant transit role in trade and capital flows not only within the (enlarged) EU but also towards neighbouring countries of Eastern Europe and the Middle East.

(h) During the preparatory period for the next budget, relevant analysis is needed concerning the benefits and costs of eventual transition to a system of direct transfers. Today, it is not yet possible to take a clear position on the proposal of replacing the current regional-support-based financing of the budget by a direct support system. In addition, it is fully unknown what would be the position (support or rejection) of the individual member states. Still, it would be appropriate and timely to deal with this issue by trying to set up a first cost-benefit-balance.

(i) Finally, all new member countries have to elaborate their own plan and recommendations with respect to the future revenue side of the common budget. Special attention has to be devoted to the already known ideas and new suggestions addressing the increasing independence of the common budget from budgetary considerations of the respective member states, namely the two most important current sources (VAT-based and GNI-based contributions).

Short remarks on potential interest alliances

It is obvious that none of the 27 member countries has a bargaining power that would be sufficient to let its special interests and priorities accepted by or, even more, imposed on all the other members. In turn, as long as the acceptance of the budget requires unanimity, each country is able to bloc any budgetary proposal by making use of its veto right. However, based on previous experience, this is usually not the way of implementing national interests.[19] Most conflicts of interest have been regularly settled in the EU on the basis of a long-established „compromise culture". This is particularly characteristic of the different stages of discussing the financial frameworks covering several years and is represented by different „interest alliances". Concerning the new budget starting in 2014 the following scenarios can be anticipated.

(a) As a constant element, interest groups will be organized along „developed" and „less developed" countries, as well as according to the net budgetary position („contributors" and „beneficiaries") of the individual member countries. However, it is by far not sure, that such groups will be or

[19] *Making use of or, more frequently, threatening with the use of the veto right was much more the instrument of large net contributors (Germany, United Kingdom) or large net beneficiaries (Spain, later Poland) than that used by smaller and „more flexible" countries.*

remain homogeneous. First, there are substantial differences among countries classified according to the above features, since some members are major contributors than others as well as some members are larger beneficiaries than others. Let alone the fact that the budgetary position of any country is carved in stone and, in the post-2013 period the previous position of some countries may be changed.[20] Second, any structural change in the composition of the budget is likely to modify interest-based relations among the net contributing countries.

(b) In the enlarged EU, larger role is expected from interest communities based on a given geographic region. Regional features first appeared on the level of community policies following the Mediterranean enlargement.[21] A second regional circle was formed after the accession of Finland and Sweden (Northern dimension of the EU). The „Eastern" enlargement of 2004 and 2007 resulted in further regional cooperation forms (Visegrad Group, but also the much loser „cooperation propensity" of the countries located in the Danube region or the even broader „Central European Initiative"). Based on partly global, partly European developments, in the next years new lasting or tactical interest alliances are expected to emerge that will be organized according to regional considerations (e.g. the strengthening of the Atlanticist, pro-USA line or more transparent interests concerning the Western Balkans).

(c) Further alliances may be generated by member country interests in line with special community objectives. In this context, one major alliance-building factor is the future of the common agricultural policy (between supporters of and opponents to the current system and central place of the agricultural policy in the EU budget). Another alliance can be outlined with respect to the Lisbon objectives, with particular emphasis on key factors belonging to the „competitiveness package". In conformity with the development of community policies and the enrichment of the acquis communautaire, several new interest groups and alliances are likely to appear. Among others, they may be organized in the following fields:

- Common energy policy,
- Management of the massive migration waves (mainly from the South),
- Cooperation among countries sharing Schengen borders,
- Environmental protection,
- Finally, all priorities that can be linked to the Lisbon strategy (research and development, education social issues and labour market reforms).

Looking at the different policy areas indicated above it is rather difficult to identify any interest alliance with the same member country composition. Different areas of the European integration are expected to produce alliances consisting of different countries. This, however, could make the crystallization of transparent alliances more difficult, particularly in the first stage of debating on the future of the budget. At the same time, just this „colourful" picture enables or even forces member countries to look for reasonable compromises. Evidently, such a position can only be expected from the individual countries if they can clearly define their short and longer-term interests and are

[20] *Particularly some currently net beneficiaries (mainly regions) may stop getting EU funds.*
[21] *The EU's Mediterranean policy or the Barcelona process can be mentioned as telling examples.*

aware of the similar or diverging interests of their partners.

When discussing and forecasting tactical and strategic alliances, one should not ignore the role of the Commission deeply interested in the comprehensive reform of the budget, including the stabilization of the budgetary incomes (i.e. its separation from the national budgets as much as possible) as well as in the twin priority of solidarity (cohesion) and competitiveness-related objectives. All new member countries have to be fundamentally interested in involving the Commission and secure its support in protecting and implementing well-defined and shared interests.

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CHALLENGES OF THE PATH TOWARDS AN ENLARGED EUROPE: SOUTH EASTERN EUROPE INEQUALITY AND SOCIAL EXCLUSION

Iulian Oneaşcă*

Abstract. *"Challenges of the path towards an enlarged Europe: South Eastern Europe" is a series of articles dedicated to support the improvement of the national strategies for mitigating poverty and promoting social inclusion. It aims to make a better use of existing theories and studies, as well as of the national experiences and to support the co-operation on these topics between the transition countries in the region. This paper opens the series of articles, introducing the inequality and social exclusion problem. An overview of the issue is presented and the challenge of the path towards EU integration is analysed with a strong political focus. The main assistance programmes are identified and the challenge termed: regional learning process on a common social inclusion strategy. Sharing the transition and accession experiences in the region helps countries to strengthen the strategic dimension of their policies. It is a political project that takes into account the density of the developed strategic frameworks and the diversity of social economic trends and traditions in the region. It also considers the proximity of the EU and the transition and accession experience of its member states in the region. General policy guidance and some practical rules of thumb shed some light on policy recommendations.*

I. The context

1.1 Scope of work

"Challenges of the path towards an enlarged Europe: South Eastern Europe" is a series of articles intended for both political and academic audience. Its immediate objectives are to:

- Feed public debates and contribute to the improvement of the national strategies for mitigating poverty and promoting social inclusion,
- Make a better use of existing theories and studies, as well as of national experiences, and support identification of the good practices of transition countries in the region,
- Support the co-operation on these topics between the states in the South-Eastern Europe and encourage the exchanges.

The policy recommendations aim at originating national papers, designed and fed into the policy debate and decision-making process. The overall aim is to address the issues of inequality and social exclusion with a strong policy focus, to raise debates and discuss policy recommendations, and to advance the social policy reform. The entire work is proposed as a contribution to the European framework strategy on equality and social inclusion.

1.2 Some definitions

"As a multidimensional phenomenon, poverty is defined and measured in a multitude of ways. Given the complexity of

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the issues, the best introduction to poverty is through the multifaceted nature of the phenomenon and the different concepts of it. We need to describe[1] the different concepts of poverty and attempt to distinguish between poverty and other closely related concepts. From the perspective of indicators, these distinctions are important since poverty measurement and subsequent policy/program implications depend on what facets or angles of poverty are being addressed[2]".

The understanding of poverty has evolved over the years. The poverty concept used by the EU defines the poor as those whose "resources (material, cultural and social) are so limited as to exclude them from the minimum acceptable way of life in the Member States in which they live"[3]. Accordingly, poor have been identified with those whose incomes fall below half of the average income of their respective country. After 1998, the EU has understood as "poor" a person whose net disposable income is below 60% of the median income in their country.

While the economic aspects of a measurable inequality are still dominating and known in a variety of definitions and merely financial and monetary expressions ("less than US $4 a day"), a human dimension is developing. Deficiencies of human capabilities, lack of social capital, vulnerability, are just a few examples of how the poverty paradigm is enriching. However, strategies and policies insufficiently target a human-centred comprehension of poverty.

Whereas poverty refers to different forms of deprivation that can be expressed in a variety of terms (i.e., income, basic needs, human capabilities), equity[4] is concerned with distribution within a population group. Despite the clear distinction between the two concepts, analysis of poverty often employs indicators of equity because of inherent linkages between the two. Equity matters in so far as it influences the degree of poverty reduction generated by growth.

Recent studies have concluded that in certain country contexts it is easier to reduce poverty under relatively egalitarian conditions.

1.3 Regional and sub-regional background

"The fall of the Berlin Wall in November 1989 signalled the beginning of the end of a forty five year social experiment variously termed communism or socialism in Central and Eastern Europe and the Soviet Union. Alongside new freedoms post-1989, however, the expected improvements in people's welfare and security did not occur. On the contrary, for much of the region there was a renewed instability in terms of violent nationalist conflicts or else increased social miseries brought about by a new social experiment sometimes termed 'shock therapy'"[5].

The region of Central and Eastern Europe and the Soviet Union was made up by nine countries in 1989. One of these, the German Democratic Republic, became part of a unified Germany. The process of fragmentation of Czechoslovakia, Yugoslavia and the Soviet Union transformed the other eight in 28 countries in transition. The establishment of new nation states is still an ongoing process. One of the countries of the region, Republic

[1] *Lok-Dessallien, R., UNDP 2000*
[2] *UNDP, Human Development Report, 1997, Oxford University Press, New York, 1997, p 16.*
[3] *Council of Ministers of the European Communities, Decision of 19 December 1984.*
[4] *Lok-Dessallien, R., UNDP 2000*
[5] *Gerovska Mitev and Stubbs, 2004, commissioned by Save the Children (UK)*

Montenegro, formerly part of Serbia and Montenegro, gained independence on June 3, 2006. Another state, Bosnia-Herzegovina, has a weak central state structure with most power at the level of sub-state entities. In addition, the status of Kosovo, technically territory of Serbia, looks as a UN protectorate, evolving towards an independent entity.

Twelve countries of the Former Soviet Union, excluding the Baltic States (Belarus, Moldova, Russia, Ukraine, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan), have experienced some of the most dramatic and sustained declines in social well-being[6]. They lie beyond the scope of our concern.

Of the initial 28 transition countries, the remaining sixteen form the Central and Eastern Europe (GDR not included here). Ten of them became member states of the European Union in a two stage enlargement process. The first stage was concluded on the 1st of May 2004 and concerned the former Visegrad group (Czech Republic, Hungary, Poland and Slovakia), the Baltic states (Estonia, Latvia and Lithuania) and Slovenia. Bulgaria and Romania completed the enlargement and joined the EU on the 1st of January 2007. The others, the Former Yugoslav states minus Slovenia plus Albania, are collectively known as the Western Balkans. Together they form the core of this paper, as South Eastern Europe.

Croatia (18th June 2004) and the Former Yugoslav Republic of Macedonia (17 December 2005), have secured candidate status with the European Union. "Albania, Bosnia-Herzegovina, Serbia and Montenegro are the laggards in this process, faced with considerable problems in terms of political stability, sovereignty, as well as economic and social deficits[7]". As noted, the status of Kosovo, formally part of Serbia, currently remains under discussions.

II. Inequality and social exclusion

2.1 Overview of South Eastern Europe

1. The situation in the South Eastern Europe is primarily an outcome of the countries' low overall level of economic performance. The average GDP[8] per capita of the transition countries in the Central and Eastern Europe with a high human development is rising to 14434 US$, expressed in PPP US$, meaning 54.3% of the average of the high human development countries. At the same time, the countries of the SEE, less Croatia and Bulgaria, all with a medium human development, register approximately 6775 US$ GDP per capita in PPP (25,5% of the average mentioned above, or 46.9% of the ten transition countries with high human development). This shows how low on the economic development scale the countries of the SEE really are. The transition years haven't brought much, from this perspective. Between 1990 and 2004[9] the average growth rate was largely insignificant for the majority of the countries in the SEE, or even negative in the case of Macedonia. An exception is Albania with an average GDP per capita growth rate of 4.8%.

Only to a lesser extent can the reality be described as a problem of a skewed distribution of the output across households. This result emerges from the analysis of the Gini index (a measure of inequality), which is not particularly high in the SEE. The

[6] *Milanovic, B. (1999), 299-341*
[7] *Gerovska Mitev and Stubbs, 2004*
[8] *HDR 2006*
[9] *HDR 2006*

average Gini index varies between 26 and 31, as shown in the Table 1, Inequality in Income or Consumption, according to HDR 2006. Such coefficients fall in the range of 26 to 32 in transition countries and most of the OECD, but they are occasionally higher in for example Latvia (37.7%), Macedonia (39%), Russia (39.9%) and the United States (40.8%). More than most regions, SEE thus presents a combination of low living standards and moderate inequality, which justifies the conclusion that economic growth is a sine qua non for any lasting improvement.

2. Table 2, Human Development Indices and Rankings, provides the latest indices and rankings of Human Development, Gender Development and Gender Empowerment for 15 countries of the CEE, according to the HDR of 2006. The indices reveal a diversity of situations. Croatia is the only SEE country registered with a high HDI and not yet member of the EU, while Bulgaria and Romania, recently joining the EU, are separated by the medium development line.

The most remarkable characteristic of the Table 2 is that, consistently, the countries of Central and South-Eastern Europe are ranked higher on the HDI than their per capita GDP rankings. This shows reserves of a development potential. The differences recorded are ranged between 1 place in the case of Slovenia, to 16 places in the cases of Macedonia and Bosnia and Herzegovina and full 26 places in the case of Albania. The rank order of the countries is the same in relation to each other for GDI indices, while the GEM and GDP per capita indices register periodical fluctuations that modify the ranking order. However the GDI and the GEM indices, ranging between ranks 24 and 59, are compact as compared to HDI or GDP per capita, which indicates that gender is much less of a problem. Still, gender inequality in economic activity indicates a growing female economic activity rate since 1990 in Macedonia and Albania, while Bosnia and Herzegovina reveals a strong tradition, maintaining a reduced female activity rate (43.1% in 2002) over the same period of time. It must be mentioned that Serbia and Montenegro are countries without HDI value and ranking, in part because of lack of GDP data.

3. Inequalities in education and health between the poor and non-poor modulate from country to country. As the main causes of inequalities, it could be outlined the influences of household resources, community factors and system determinants.

Income and assets, whose inequalities vary widely in the region, are a key component of household resources. Higher income is associated with more frequent and more intensive use of education and health services. The poor households are disadvantaged. The human assets of knowledge, literacy, and education, whose levels tend to be lower among the poor, tend to reproduce and influence household decisions with regard to health and education.

Priorities in public spending[10] reveal that only 2.8% to 4.2% of the GDP have been allocated for education between 2002 and 2004 in the countries of the SEE, Croatia being an exception (4.6%). This is beneath the expenditures of the high human development countries. Other CEE countries go up to 6% (Slovenia and Hungary), or nearby (Poland 5.8%, Estonia 5.7). In health, Croatia has the highest expenditure per capita, at 40% of the European Union average, while Albania has

[10] *HDR 2006*

the lowest expenditure at per capita. Health spending as a percentage of GDP varies between 2.7% (Albania) and 6.5% (Croatia).

4. Poverty in SEE is an important issue, affecting a large part of the population. Table 3, Human and Income poverty and nutritional status, based on HDR 2006, provides some statistical data. Between 1996 and 1999, 22% and 23% of the populations of Bulgaria and respectively Romania lived with an income below the poverty line of 4 US$ a day. The poverty is largely situated in rural areas. Unemployment, low education and living in rural areas are the main factors of poverty. Although the situation may have improved over the last years, in Albania 66 percent of the poorest quintile and 61 percent of the second quintile are rural households. Their main source of income (37 %) is small-scale agriculture followed by wage employment (27 %)[11]. Bosnia-Herzegovina shows a similar picture. In spite of a low degree of extreme poverty, households in rural areas are especially vulnerable. Moreover, poverty is positively correlated with low educational levels, limited access to health services and unemployment and it is concentrated among internally displaced people and large families. Among households with three and more children below 14, poverty-rate is 56 % or nearly three times higher than the average[12]. In Macedonia two thirds of poor households live in rural areas. Here the headcount index is nearly twice as high as in the capital (25% in comparison to 13.9 %[13]). Serbia and Montenegro also suffer from a high poverty in rural areas, among the unemployed and among the poorly educated.

5. In addition to poverty there is an ethnical problem. The Roma are strongly over-represented among the poorest quintile[14] in Bulgaria. Pockets of poverty which are ethnically determined are also one of the problems of Croatia. Among the poor who mainly live in rural areas the non-Croats are over-represented: Serbs, Albanians, Roma and Bosnian Muslims[15]. As well as in Bulgaria, poverty among the Roma is disproportionately high in Macedonia. The same is true for Romania. Three out of five Roma live in extreme poverty and only one Roma, out of 5, is not poor[16].

6. The children[17] in the countries of the SEE are confronted with severe problems, as nutritional status indicates. In Albania 14% of the children under age 5 were under weight for age, between 1996 and 2004. Under height there were 35%. The situation is less dramatic for the other countries but is still a bad one, the percentages varying between 1 and 5 for Croatia and Serbia and Montenegro and between 4% and 10% for the other countries in the region.

2.2 The challenge

South Eastern Europe has earned the attention and has enjoyed the support of all the major international and supranational institutions including the OECD, the European Union and United Nations' agencies, as well as the World Bank and International Monetary Fund. Macroeconomic and structural policy instruments have been developed and complemented by strategies for human

[11] *World Bank, (2003a), p. XIII*
[12] *World Bank (2003b), p. III*
[13] *Government of the Republic of Macedonia (2000), p.2*
[14] *World Bank (2004a), p.2*
[15] *World Bank (2001), p. VIII*
[16] *World Bank (2003d), p. II*
[17] *HDR 2006*

development, employment generation and poverty reduction.

The social-economic difficulties, grown on a common legacy, differentiate the countries' perspectives on the short run. What all countries in the region share, nevertheless, is a European aspiration. It is based on their needs and hopes, but also on the generous promise and reliable commitment of the EU, which undertook to draw South Eastern Europe "closer to the perspective of full integration ... into its structures"[18]. Countries wishing to be admitted must, however, first meet the conditions defined by the EU Council in 1993 concerning democratic, economic and institutional reforms (Copenhagen criteria). Euro-Atlantic integration was also promised to the countries in the region.

The fight against poverty and social exclusion is sustained by multiple external assistance programs supported by international and European institutions, of which most of the countries of the SEE benefit. The international organizations and institutions promote two main programs and the European Union one, which are briefly introduced hereupon. The technical assistance and the funds, grants or loans, are vectors of the specific, sometimes contradictory, policy options of their promoters. The result is a sum of fragmented programs, tributary to the distinct policy platforms and frameworks, underpinned by different assumptions, and, to some extent, undeniable national efforts to comprehend and integrate them.

1. The international institutions, especially the International Monetary Fund and the World Bank, promote a strong policy framework for aid and development, addressed to countries confronted with diverse poverty and exclusion problems, all over the globe, in Asia, Africa, Latin America and Europe. Their universalistic prescriptions are frequently criticized for their controversial reasoning and limited successes. Country driven and nationally owned programs have lately been considered and now are being implemented.

Poverty Reduction Strategy Papers are an attempt to produce a coherent and effective approach to aid and development. They are national plans for poverty reduction and economic growth on medium-term. "PRSPs are based on participatory processes of stakeholder consultation, including the voices of civil society in their formulation, implementation and monitoring"[19]. The Washington Consensus principles of the IMF and the World Bank are clearly discernible on the documents and contrasting with the EU line, in the rejection of European social policy models of labour regulation and universal social policies in favour of deregulation and income-based targeting[20].

The formulation of Poverty Reduction Strategy Papers has effectively become compulsory for many developing countries if they are to continue to receive loans and credits from the IMF and the World Bank[21].

There are some critical[22] opinions with regard to the philosophy of smaller, more efficient government and public spending austerity, which is advocated by

[18] *Stated in the founding document of The Stability Pact for the South Eastern Europe, adopted in Cologne on the 10th June 1999, at the EU's initiative*
[19] *Gerovska Mitev and Stubbs, 2004*
[20] *Redmond, G., 2004*
[21] *"A new form of conditionality imposed by the Bretton Woods Institutions." (World Health Organisation, 2001)*
[22] *The IMF and the Millennium Goals. Failing to deliver for low-income countries. Oxfam Briefing Paper, September 2003, cited by Arandarenko, M., 2005.*

the IMF and the World Bank. Such a philosophy may well represent an in-built constraint to achieving longer term and large-scale advances in poverty reduction. Similar criticism is expressed in the Report of the Millennium Project to the UN Secretary-General[23], which also calls for a scaled up international development assistance to make low-income countries with widespread extreme poverty meet the Goals by 2015.

2. The Millennium Development Goals define specific targets in terms of reducing poverty, gender equality, school enrolments, child mortality, maternal health, disease, and access to water to be met by 2015. Millennium Project Report looks at the PRSPs as the major vehicle to achieve these Goals. It is recommended that the MDG-based poverty reduction strategy should become a detailed, operational document, attached to a medium-term expenditure framework, which translates the strategy into budgetary outlays. Countries already having a PRSP (all in the SEE, less Croatia), should revise it so that it is ambitious enough to meet the Goals. Where the Goals are already within reach and greater progress is sought, countries are recommended to adopt an 'MDG-plus' strategy, with more ambitious targets. In essence, the PRSP is the 'national roadmap' for reaching MDG targets through short/medium term policy reforms and budget restructuring.

3. The European institutions have developed and exercised policies mainly for the benefit of the EU countries, considerably richer as compared to the SEE. An increased awareness and solidarity, sensed over the last decade, challenged by enlargement complex issues, are directing European policies towards considerable concerns of poverty and exclusion. The 'European Social Model' is based on the threefold commitment preserving generous benefits, relative wage and income equality and coordinated bargaining[24]. In the efforts to modernize and redesign ESM, following the Lisbon Summit, the EU Member States have completed several rounds of National Plans for Social Inclusion; there have been Joint Reports on Social Inclusion, and the new Member States have drawn up Joint Inclusion Memoranda (JIMs). This process offers considerable scope for mutual learning and for the transfer of the best practice. The aim of JIMs is to prepare candidate countries for their full participation in the open method of co-ordination on social inclusion as of the date of accession. The EC supports the efforts of the candidate countries to translate the EU social objectives into their national policies, taking account of their particular situations[25].

The above programs represent three independent approaches, made under different assumptions and having separate targets. The main challenge is how to make these strategies complement and re-enforce each other, rather than compete and crowd out one another. We claim that it is possible and serves the best interests of the countries of the SEE.

And there is another issue that needs to be addressed[26] - is there any room for the development of a regional social inclusion strategy, given the density of the already existing or soon to be developed strategic

[23] *Investing in Development. A practical plan to achieve the Millennium Development Goals Overview. Millennium Project, New York, 2005.*
[24] *Trubek, D. & Mosher, J., 2003*
[25] *Draft outline of the Joint Inclusion Memoranda, EC DG for Employment and Social Affairs, 23 May 2002.*
[26] *Arandarenko, M., 2005*

frameworks, and the diversity of social economic trends and traditions in the region? Would such a strategy, if prepared, remain substantiated as soon as Bulgaria and Romania joined the EU in 2007 and Croatia followed the suit a few years afterwards? The answer should be yes, if the term 'strategy' is used loosely enough to mean a more comprehensive, less formal and perhaps more flexible and innovative 'open method of coordination' for the countries in the South Eastern Europe.

III. Policy Recommendations

3.1 General policy guidance

A world-wide learning process on scaling up successful efforts to mitigate poverty and promote social inclusion confirms much of what is already known on how to get politics and economics right. However, it also sheds sufficient light to determine major institutions and governments to reconsider or refine some of their policies.

1. The countries in the SEE are in a profound process of change, transition towards democratization and market economy. Therefore, their core institutions and structures are in continuous motion and flexible and the people are open to change. The change must be systematically pursued. Changing is at the heart of sustained economic growth and flourishing enterprises: modernizing institutions - rules, norms, behaviours and organizations - is very much needed to prepare and conduct a process of change. The international community is called to act as a collective agent of change.

2. Successful change requires a process of experimentation, adaptation and learning. Immediate action is needed to legitimate and exercise these. The transition process is rich in good practices and not so good ones. However it is rare that some policies experiments and evaluations are carried out in the SEE, or that a systematic regional learning process is embodied. This should be improved. In order to avoid expensive policy mistakes, the governments need to ensure that their decisions are based on a realistic analysis of the likelihood that a proposed policy would be possible to implement as intended and the expected outcome would be secure.

3. Networking is essential in identifying relevant internal and external support. The governments can no longer afford to work in isolation. Strategic partnerships and broad cooperation are looked for to take advantage of the changing international aid architecture. The destinies of present and future generations are at stake. The idea of successful technocratic governments, relying only on external assistance, is not plausible anymore. Policy effectiveness depends on the input of a whole range of agents international and national, including private sector and civil society as well as on the healthy functioning of societal and institutional structures in which they operate[27]. A lucid anticipation of the region's future would credit a more intensive collaboration within the SEE.

Important resources can be drawn towards each of the countries in South Eastern Europe, both from the inside and from the outside. Most of them do not have sufficient strength and adequate structures to mitigate poverty and promote inclusion on their own. Supportive and stimulating environment is also required to drive political commitment and to challenge good governance.

4. Democratization and empowerment are fundamental to fragile transition economies. A democratic political process, involving the empowered masses, opens

[27] *Inspired by Klugman, J., 2001, p.1*

political competition and creates conditions for large-scale performances and stability. The system refines itself with each step of the way and positive effects are incorporated.

Civil society can play a major role in articulating the concerns of the poor. Certain mechanisms need to be created to provide special representation to the disenfranchised groups. Particular education is also required to organize the poor and create awareness of issues. Civic organizations and trade unions can be strengthened and encouraged to exercise and support democracy and to play a more active role in representing the interests of the low-paid, insecurely employed and unemployed, who form an important recuperative segment of the poor.

A widespread inclusive consultation process in SEE is an important goal that politicians should continue to aim for, in order to:

- contribute to the formation of new attitudes, shifting from liberty and rights to liberty and responsibilities,
- promote transparency and accountability,
- open up the possibility for stronger civil society participation in future years (itself an act of empowerment).

5. Good governance is essential to reach social-economic performances, and likely to support pro - poor policies. The accent falls on the rule of law, transparency and accountability, decentralization and devolution (de-concentration). Shortages of the reforms are pointing out some serious deficiencies in these fields that need to be dealt with.

a) The rule of law signifies the application of laws, equally and transparently. The state's institutions observe and uphold the law. In the SEE this is an equivocal process. While inconsistencies and confusions are sometimes unavoidable, due to the overcharged legislative process, unfair laws and inequitable application and enforcement of law are tolerated. There is considerable evidence of weakness and usurpation of power; dissolution of the state is publicly asserted. In the SEE, states are perceived in incapacity to defend their citizens, physically or legally (Transparency International, 2002).

b) Transparency and accountability are new values for the ex-socialists regimes, opposed to discretionary actions of the ruling class, old and new "nomenclature". Excessive opacity and illegal actions are perpetuated in various ways in the SEE. Accessing freely the public information, setting up objective criteria for the decision-making and explaining it are deficient and insufficiently exercised. Equitable and impartial allocation of funds is difficult to observe. The non-involvement of the stakeholders preserves bad habits.

c) Decentralization and devolution (de-concentration) are considered to be most powerful ways of increasing people's participation and empowering the poor. There is sufficient evidence on the positive effects brought about through:

- Promoting genuine fiscal decentralization and true fiscal autonomy,
- Building up the capacity of local governments,
- Specializing services and bringing them closer to people, to where they live and work.

3.2 Some Practical Rules of Thumb

1. A general coherence and consistence of economic and social strategies is imperative. The countries of the SEE have the possibility to re-design the

existing structures and institutions and to set them on sound principles that would constitute solid bases for future requirements, generated by changing conditions and altered objectives. Their strategies should be improved and completed by a system of social-economic predictability (integration with budgeting systems, monitoring and evaluation and so on). The know-how in the field and the computing capacity considerably evolved. Complex econometric models allow a wide variety of exercises and evaluations. Elaboration of various scenarios on both the evolution of the economy and of the social need, would help clarify and found macroeconomic options.

2. The countries are confronted with a trade-off between macroeconomic stabilisation - which favours the poor in the long run, and poverty-reduction, which becomes more difficult in the short run. There is no easy escape. What governments can do is to get as much scope as possible for well targeted income subsidies through a strengthened fiscal revenue- and expenditure-management and to pursue consequently macro-economic stability.

3. The private initiative of the entrepreneurial class is essential to stimulate economic growth. Such a quality is not given forever and to all. It can (and sometimes it must) be learned. The same is true for private responsibility and the willingness to take risks. Individual mentalities like these are prerequisites for growth and they must be trained. The private initiative is the engine of growth, within a competition market with a healthy functioning of societal and institutional structures. Time is over in which the state was considered the "caretaker" for social welfare. The government still has to take some regulative responsibilities within the framework of a "strong but limited state". But it is well advised not to intervene into markets for private goods and not to dictate what individuals should desire[28].

4. A mature attitude of the trade unions, based on information and full-grown perspective, would benefit the entire society. There is a real need to review the trend development of trade unionist movement. While participatory development is strongly advocated and the benefits of the social dialogue in the region are in no way questioned, there is a need of democratization of trade unions, requiring in-depth assistance and development of a specialized expertise.

5. The development of trans-national blocks, such as the EU, is an expression of globalization that would lead, sooner or later, to the introduction of supra-national standards and regulations. The countries of the SEE have to accept it and prepare to become compatible with EU structures and regulations, in order to facilitate future integration.

6. Strategies and policies, laws and regulations, are predominantly designed by the cities and for the cities. The direct consequence is that the living conditions are largely favourable in cities, while rural areas, accommodating an important part of the population, lack minimal conditions. This is also separating SEE from EU and should change.

[28] *Sautter, H. 2004*

Table 1. Inequality in Income or Consumption
Central and Eastern Europe, HDR 2006

HDI rank	Country	Survey Year	Share of income or consumption (%)				Inequality measures		
			Poorest 10%	Poorest 20%	Richest 20%	Richest 10%	Richest 10% to poorest 10% a	Richest 20% to poorest 20% a	Gini index b
High Human Development									
27	Slovenia	1998-99c	3.6	9.1	35.7	21.4	5.9	3.9	28.4
30	Czech Republic	1996c	4.3	10.3	35.9	22.4	5.2	3.5	25.4
35	Hungary	2002d	4.0	9.5	36.5	22.2	5.5	3.8	26.9
37	Poland	2002d	3.1	7.5	42.2	27.0	8.8	5.6	34.5
40	Estonia	2003d	2.5	6.7	42.8	27.6	10.8	6.4	35.8
41	Lithuania	2003d	2.7	6.8	43.2	27.7	10.4	6.3	36.0
42	Slovakia	1996c	3.1	8.8	34.8	20.9	6.7	4.0	25.8
44	Croatia	2001d	3.4	8.3	39.6	24.5	7.3	4.8	29.0
45	Latvia	2003d	2.5	6.6	44.7	29.1	11.6	6.8	37.7
54	Bulgaria	2003d	3.4	8.7	38.3	23.9	7.0	4.4	29.2
Medium Human Development									
60	Romania	2003d	3.3	8.1	39.2	24.4	7.5	4.9	31.0
62	Bosnia and Herzegovina	2001d	3.9	9.5	35.8	21.4	5.4	3.8	26.2
66	Macedonia TFYR	2003d	2.4	6.1	45.5	29.6	12.5	7.5	39.0
73	Albania	2002d	3.8	9.1	37.4	22.4	5.9	4.1	28.2
Without HDI Rank									
	Serbia and Montenegro	..	..	..	..	..	..	..	..

Because the underlying household surveys differ in method and in the type of data collected, the distribution data are not strictly comparable across countries.

Notes:

a. Data show the ratio of the income or expenditure share of the richest group to that of the poorest. Because of rounding, results may differ from ratios calculated using the income or expenditure shares in columns 2-5.

b. A value of 0 represents perfect equality, and a value of 1 00 perfect inequality.

c. Data refer to income shares by percentiles of population, ranked by per capita income.

d. Data refer to expenditure shares by percentiles of population, ranked by per capita expenditure.

Source:

column 1: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 2: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 3: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 4: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 5: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 6: calculated on the basis of data on income or expenditure from World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 7: calculated on the basis of data on income or expenditure from World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

column 8: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C.

Table 2. Human Development Indices and Rankings
Central and Eastern Europe, HDR 2006

Country		Human development index	GDP per capita PPP US$		Gender-related development index GDI		HDI rank minus GDI rank	Gender Empowerment measure GEM	
HDI rank		2004	Value	Rank minus HDI rank a	Rank	Value	b	Rank	Value
High Human Development									
27	Slovenia	0.910	20,939	1	24	0.908	1	32	0.603
30	Czech Republic	0.885	19,408	4	28	0.881	0	28	0.615
35	Hungary	0.869	16,814	4	30	0.867	1	41	0.560
37	Poland	0.862	12,974	11	33	0.859	0	30	0.610
40	Estonia	0.858	14,555	4	34	0.856	2	31	0.608
41	Lithuania	0.857	13,107	6	35	0.856	2	25	0.635
42	Slovakia	0.856	14,623	1	36	0.853	2	34	0.599
44	Croatia	0.846	12,191	7	40	0.844	0	33	0.602
45	Latvia	0.845	11,653	9	41	0.843	0	27	0.621
54	Bulgaria	0.816	8,078	12	44	0.814	1	37	0.595
Medium Human Development									
60	Romania	0.805	8,480	3	49	0.804	1	59	0.492
62	Bosnia and Herzegovina	0.800	7,032	16	..	..	..	..	..
66	Macedonia, TFYR	0.796	6,610	16	54	0.791	0	43	0.554
73	Albania	0.784	4,978	26	59	0.780	0	..	..
Without HDI Rank									
	Serbia and Montenegro	..	..	..	..	..	..	..	..

Notes:
a. A positive figure indicates that the HDI rank is higher than the GDP per capita (PPP US$) rank, a negative the opposite.
b. The HDI ranks used in this calculation are recalculated for the 136 countries with a GDI value. A positive figure indicates that the GDI rank is higher than the HDI rank, a negative the opposite.
Source:
column 1: calculated on the basis of data in columns 6-8; see technical note 1 for details. (should be linked)
column 2: World Bank. 2006. *World Development Indicators 2006.* CD-ROM. Washington, D.C. , unless otherwise noted; aggregates calculated for the Human Development Report Office by the World Bank.
column 3: calculated on the basis of data in columns 1 and 5.
column 4: determined on the basis of the GDI values in column 2.
column 5: calculated on the basis of data in columns 3-10; see the technical note 1 for details.
column 6: calculated on the basis the recalculated HDI ranks on the GDI ranks in column 1.
column 7: determined on the basis of GEM values in column 2.
column 8: calculated on the basis of data in columns 3-6; see the technical note 1 for details.

Table 3. Human and Income Poverty and Nutritional Status
Central and Eastern Europe, HDR 2006

HDI rank	Country	**Probability at birth of not surviving to age 60** (% of cohort) 2000-05 a	**Population living below $4 a day** (1990 PPP US$) 1996-99 b	**Population undernourished** (% total) 2001-03 c	**Children Under weight for age** (% under age 5) 1996-2004 d	**Children under height for age** (% under age 5) 1996-2004 d
High Human Development						
27	Slovenia	11.8	<1	3	..	..
30	Czech Republic	12.1	<1	<2.5	1e	2e
35	Hungary	18.3	<1	<2.5	2f	3e
37	Poland	15.1	10	<2.5	..	..
40	Estonia	21.7	18	3	..	..
41	Lithuania	20.6	17	<2.5	..	..
42	Slovakia	14.9	8	6	..	..
44	Croatia	13.1	..	7	1	1
45	Latvia	21.5	28	3	..	..
54	Bulgaria	16.6	22	9	..	..
Medium Human Development						
60	Romania	19.0	23	<2.5	6e	10
62	Bosnia and Herzegovina	13.6	..	9	4	10
66	Macedonia, TFYR	13.3	..	7	6	7
73	Albania	11.4	..	6	14	35
Without HDI Rank						
	Serbia and Montenegro	14.9	..	10	2	5

This table includes Israel and Malta, which are not Organisation for Economic Co-operation and Development (OECD) member countries, but excludes the Republic of Korea, Mexico and Turkey, which are. For the human poverty index (HPI-2) and related indicators for these countries, see table 3. † Denotes indicator used to calculate HPI-2; for details see Technical Note 1.

Notes:

a. Data refer to the probability at birth of not surviving to age 60, multiplied by 100.
b. Data refer to the most recent year available during the period specified.
c. Data refer to the average for the years specified.
d. Data refer to the most recent year available during the period specified.
e. Data refer to a year or period other than that specified.
f. UNICEF (United Nations Children's Fund). 2005. *State of the World's Children 2006.* New York. , Data refer to a year or period other than that specified, differ from the standard definition or refer to only part of the country.

Source:

column 1: calculated on the basis of survival data from UN (United Nations). 2005b. *World Population Prospects 1950–2050: The 2004 Revision.* Database. Department of Economic and Social Affairs, Population Division. New York.
column 2: Milanovic, Branko. 2002. Correspondence on income, inequality and poverty during the transition from planned to market economy. March. World Bank, Washington, D.C.
column 3: UN (United Nations). 2006c. Millennium Indicators Database. Department of Economic and Social Affairs, Statistics Division, New York.[http:// mdgs.un.org.]. Accessed July 2006. , based on data from the Food and Agriculture Organization (FAO).
column 4: UN (United Nations). 2006c. Millennium Indicators Database. Department of Economic and Social Affairs, Statistics Division, New York.[http:// mdgs.un.org.]. Accessed July 2006. , based on data from the Food and Agriculture Organization (FAO).
column 5: UN (United Nations). 2006c. Millennium Indicators Database. Department of Economic and Social Affairs, Statistics Division, New York.[http:// mdgs.un.org.]. Accessed July 2006. , based on a joint effort by the United Nations Children's Fund (UNICEF) and the World Health Organization (WHO).
column 6: WHO (World Health Organization). 2006a."Core Health Indicators." Geneva.[<a href="www3.who.int/whosis/core/core_select.cfm>www3.who.int/whosis/core/core_select.cfm.]. June 2006.

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CAN SELF DETERMINATION SOLVE THE KASHMIR DISPUTE?

Amir A. Majid*

Abstract: *Rather than looking inwards and nursing exclusively European interests, one of the recent laudable actions of the European Parliament has been its focus on the tragic fate of Kashmiris. The Parliament has decided that it ought to help humanity by contributing to the end of this festering dispute, categorised as "A Dynamite under the South Asian Peace." In this article the author examines the genesis of the Kashmir dispute and, using his expertise in International Law, scrutinises various arguments surrounding this dispute. The upshot of his analysis is that the Master Anomaly in the arguments is that deniers of self determination to Kashmiris wish to eclipse the "rule of law", and avoid applying the partition rules (patently regulating the division of the Indian subcontinent on religious lines). They hijack the discussion to secularism and democracy in India versus military rule and religious fundamentalism in Pakistan clearly post-partition developments. The Master Anomaly has clouded the legal force of the UN resolutions and the legal effect of binding pledges of the competent heads of State, undermining the "pacta sunt servanda" principle.*

Key words: *Kashmir, European Parliament, human rights organizations, pioneers of Indian liberation*

Introduction

One of the recent laudable actions of the European Parliament has been its focus on the tragic fate of Kashmiris. This body has proved to be a progressive collection of Members with beating hearts. Rather than looking inwards and nursing exclusively the European interest (a perfectly valid approach to take for an "European" institution), the Parliament has decided that it ought to help humanity by contributing to the end of this festering dispute, categorised by this writer in his address to the London Guildhall University in the aftermath of the atomic explosions of India and Pakistan in May 1998, as "A Dynamite under the South Asian Peace."

The British Member of the European Parliament, Baroness Emma Nicholson (Vice Chairperson of the Foreign Affairs Committee) produced a report on the disputed territory of Jammu and Kashmir as a Rapporteur of the European Parliament. In her report "Kashmir, Present Situation and Future Prospects" she observes that the continuing demand for a plebiscite on the final status of Jammu and Kashmir is not reflective of the current needs of the local people. Nicholson observes in her report that the plebiscite demand is, in fact, damaging to Kashmiris' interests.

The report was criticized by experts in International Law and the Kashmir Dispute was considered to be totally flawed.

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The most significant opponent of the tenor of the report was Mr. Sajjad Karim, Baroness Nicholson's fellow Liberal Democrat MEP. His amendments (based on his 3 separate visits to the region in the previous year and on reports of human rights organizations such as Amnesty International), constituted a "brilliant intervention", according to the European Parliament Press Release.[1] The Kashmir dispute was the one about which many British MEPs had heard, first hand, episodes of rape and extrajudicial killings, etc., directly from the relatives of the victims living in their constituencies. Rather than viewing the report as a great asset to contribute to an informed debate, illogically, it was criticized (not reflecting well on those who wished to discover the truth). To suppress the legitimate debate, this author must say unsuccessfully, Baroness Nicholson said, "it is a pity that the British are washing their dirty linen in public. Most of the MEPs interested in the Kashmir report are British who have large Pakistani, Indian and Kashmiri communities in their constituencies back home." [2]

On the 27th of February 2007, the European Parliament's Foreign Affairs Committee, in an extraordinary session in the European Union's capital, rejected 16 compromise amendments presented to this report by Baroness Nicholson since they did not remove the assertion that the Kashmiris do not have the right to self-determination. Rejecting the rapporteur's assertions on the Kashmiris right to plebiscite, James Elles, the head of the All Party Group for Kashmir in the European Parliament, said that, by denying Kashmiris their birthright to determine their future, Nicholson demonstrated double standards and attempted to undermine the United Nation resolutions on Kashmir." [3]

Incorporating in the report "the primacy of the UN, including the principle of democratic right of self-determination of the Kashmiri people", The European Parliament passed the report on 21 March 2007. The amended report had many other modifications, rigorously resisted by many MEPs (some of them describing themselves as friends of India).

One cannot but admire the political versatility of Baroness Nicholson who, in the perspective of getting every "compromise" amendment rejected on 27 February 2007, was still able to muster a smile and comment on the passage of the report, "I am very pleased indeed that we succeeded in having the vote." Expressly noting that the "central concern" of Kashmiris' right to "democratic self-determination" is embodied in it now, the Liberal Democrat party welcomed the passage of the amended report. [4]

One hopes that not cynically, the amended report admires India as the "world's largest secular democracy" because later on it calls on the Indian government to "put an end to all practices of extrajudicial killings, 'disappearances', torture and arbitrary detention in Jammu and Kashmir." India is party to the 1966 International Covenant on Civil and Political Rights (ICCPR), a move which illustrates a State's fidelity to the Rule of Law. But it has entered reservations to Articles 9 (right

[1] *"European Parliament AFET to vote on Kashmir amendments", Brussels, 27 February 2007, theparliament.com - Press Releases - http://www.eupolitix.com/EN/Forums/ICHR+Kashmir+CentreEU/PressReleases/200703/c8a54a6a-91d7-427d-a695-c0fb39be2208.htm*

[2] *"Kashmir report sparks debate in European Parliament", New Europe, 3 March 2007 - Http://www.charlestannock.com/pressarticle.asp?ID=1520*

[3] *Supra, Note 1*

[4] *"Foreign Affairs Committee Backs Key Kashmir Report in European Parliament", Press Release issued at 12.00am GMT Wed 21st Mar 2007 - http://www.libdemmeps.org.uk/news/000314.html*

against arbitrary arrest and detention), 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association).

Helpers, like Ms Liz Lynne MEP, of the gloomy people of Kashmir should not be too disappointed by the passage of this amended report. They must know that the obtuse formulations such as "the Committee calls on both governments to allow international human rights groups to access the region for investigations" is truly aimed at which State who is barring bodies like Amnesty International and Human Rights Watch from the area? Even the movements of Mr. Richard Howitt MEP (vice-president of the European parliament human rights sub-committee) were restricted by the Indian government in his visit in February this year to acquaint himself first-hand with the ground realities of Jammu and Kashmir.[5]

Indeed, it is encouraging that this sad dispute has come under the intense gaze of the EU. Many Members of the European Parliament must have learnt more about the plight of Kashmiris. Like this author, they must be wondering why the largest democracy in the world, having a glittering claim to a great ancient civilization, is allowing such serious violations of the human rights in this area. Ms Lynne can now focus on the implementation of the recommendations of this (supposedly pro-India) report; for example when it calls on India "to establish an independent commission of inquiry into serious violations of human rights by Indian security forces."[6]

Are Kashmiris entitled to Plebiscite?

Mahatma Gandhi held a person in a very high regard and complimented him generously by christening him as his "political guru." He was one of the pioneers of the Indian national liberation movement, Mr Gopal Krishna Gokhale (1866-1915, Principal of the Fergusson College, Pune), a former President of the Congress Party who fought for the independence of India.

When the founder of Pakistan, Mohammed Ali Jinnah, was elected to serve as the Bombay Presidency's Muslim representative on the Viceroy's Central Legislative Council, one of his fellow Hindu representatives was Mr. Gokhale. When "India Today" arranged the biographical notes on most eminent personalities of the Indian sub-continent, a Professor of History from the University of California, author of Jinnah of Pakistan and Nehru: A Tryst with Destiny, Stanley Wolpert, was invited to write about Mr. Jinnah. Prof. Wolpert said that Gokhale held Mr. Jinnah in "high regard for Jinnah's integrity, intellect and moderation" and that is reflected in the sobriquet he coined for his junior colleague, "best ambassador of Hindu-Muslim unity."[7]

Jinnah wanted a united India. Pakistan had not entered the political debate at this time in any form or shape. But when the British Prime Minister Ramsay MacDonald called the first Round Table conference of Hindu and Muslim leaders of India on 13th November 1930 (ending in January 1931), the Hindu Congress leaders (Mahatma Gandhi and others) boycotted it.

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[5] *Interview with Richard Howitt, vice-president of the European parliament human rights sub-committee, Member European Parliament, 24 February 2007, Kashmir Observer - http://www.kashmirobserver.com/index.php?id=1917&commentspage=4&PHPSESSID=16a6ba6f78c0db4698fc3d58913fe32*

[6] *Paragraph 23 of the Report, as approved by the European Parliament Foreign Affairs Committee on 21 March 2007 - REPORT on Kashmir: present situation and future prospects (2005/2242(INI)), Committee on Foreign Affairs (Rapporteur: Baroness Nicholson of Winterbourne), EUROPEAN PARLIAMENT - http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0158+0+DOC+PDF+V0//EN*

[7] *"Mohammed Ali Jinnah" By Stanley Wolpert, www.123india.com - Http://www.indiatoday.com/itoday/millennium/100people/jinnah.html*

According to Prof. Wolpert it was Jinnah's idea that the conference should draft such a constitution for independent India which should contain "adequate safeguards" ensuring "separate electorates for its Muslims and other minorities" an idea which did not meet with the approval of the Hindu leaders. [8]

The Hindu leaders participated in the second Round Table Conference (September-December 1931) and the third Round Table Conference (November-December 1932). During the second conference, Mahatma Gandhi insisted to speak for "all of the Indians" and alienated the Muslims who were, according to Mr. Jinnah, "led by either the flunkies of the British Government or the camp followers of the Congress." Mahatma Gandhi continued his approach in the third conference, also.

Based on study of the extensive literature in this field, the upshot of this rift was the grave disappointment of Jinnah and his subscription to the separate homeland for Muslims an idea which was already pursued by some Muslim leaders who were saying that Muslims slaughter the cow and eat it whilst Hindus worship the cow as a Goddess. They argued that the two cultures were miles apart and therefore the separation was the only solution. Mr. Jinnah, addressing the students of the Muslim University Union, later on expressed his profound disappointment about the Round Table Conferences in these words:

> "I received the shock of my life at the Round Table conference.... I began to feel that neither could I help India, nor change the Hindu mentality, nor make the Mussalmans (Muslims) realize their precarious position. I felt so disappointed and so depressed that I decided to settle down in London. Not that I did not love India; but I felt utterly helpless. I kept in touch with India. At the end of four years I found that the Mussalmans were in the greatest danger. I made up my mind to come back to India, as I could not do any good from London."[9]

No division of India would have taken place, if the Hindu leaders had not abused their political supremacy and had come to the first Round Table conference in London with an attitude to accommodating the Muslim concerns. Thus this author agrees with Prof. Wolpert that by creating Pakistan, Jinnah "significantly altered the course of history"; otherwise the "history" was marching in the direction of one India.

However, Jinnah fought for a State in which Muslims could live peacefully and realise their potential fairly and not a "Muslim State" operating on theocratic dogma. In a full-page advertisement for "City FM 89" radio on 11th of August 2006, published in a Pakistani national daily "Dawn", Mr. Jinnah's speech on the independence of Pakistan is quoted. This extract shows his "secular" credentials; a man who has never been accused by any friend or foe of saying things he did not believe in. He said, "You are free to go to your temples; you are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any caste or creed that has nothing to do with the business of the state." [10]

Indeed, many Hindus knew about Mr. Jinnah's secular views and believed that "Pakistan was not supposed to be a Muslim state parse but a state where Muslims would be able to practice their religion freely without interference from the State." [11]

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[8] *Id.*

[9] *"London 1931" - http://www.pakistan.gov.pk/Quaid/politician14.htm*

[10] *"Pictures of the Day: Aazadi Mubarak!" by Adil Najam, Pakistaniat.com - http://pakistaniat.com/2006/08/12/pictures-of-the-day-aazadi-mubarak/*

[11] *Id.*

The movement for a separate homeland for Muslims was spearheaded by Muslim League under the Presidency of Mr. Jinnah. The demand for Pakistan was formalized by the Pakistan Resolution of 23 March 1940.

In addition to the native Indians, the British colonial masters (totally dedicated to "democracy") were not in favor of this division on religious grounds. However, they were forced to devise the proposed division, as there was no other alternative. The key principle for this division was that the regions (mainly in the east of India and in the northwest of India) with Muslim majority would go to Pakistan and the Hindu majority areas would form the new Hindu State. [12]

As an element of this partition plan, it was agreed by the Hindu and Muslim communities that insofar as the princely states having majority of one community but the ruler from the other community were concerned, the state will either have an autonomous dominion status, or it will join the Muslim or Hindu country depending on the wishes of its population. What is interesting here is that the "ruler" is not given a veto in this regard. [13]

Under the above principle, an Indian princely state, Junagadh, joined India despite its ruler being a Muslim because the majority of this state was Hindu. The same, in reverse, should have happened in respect of Kashmir since the majority population was Muslim, although it was ruled by a Hindu Raja. [14]

Indeed, thanks to the Attlee government in London, dedicated to the rule of law, when the Kashmiri Maharajah Hari Singh tried to accede to India (by sending a signed Instrument of Accession) in violation of this rule, the Governor General of India, Lord Mountbatten replied to him in a letter of the 27th of October 1947:

> "Consistent with the policy that in the case of any (native) state where the issue of accession has been subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the state, it is my government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invaders the question of state's accession should be settled by a reference to the people."

That the accession was contingent upon the ascertainment of wishes of the people of Kashmir, is clear from the memorandum of the 27th of October 1947, marked "Top Secret", of the then UK Acting High Commissioner, Mr. Alexander Symon, to the Commonwealth Office. In this memorandum, he communicates to the UK government that Kashmir has requested India to join it but he goes on to say, "I am told that it is conditional upon the wishes of the people, in accordance with the Indian declared policy."

The Indian Prime Minister Pundit Jawahar Lal Nehru re-confirmed this

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[12] *V. D. Chopra, Genesis of Indo-Pakistan Conflict on Kashmir pp10-12 (New Delhi: Patriot Publishers, 1990); M. Burke, Pakistan's Foreign Policy: A Historical Analysis p16 (Karachi: Oxford University Press, 1973)*

[13] *Alan Campbell Johnson, Mission with Mountbatten pp357-358 (London: Robert Hale, 1952) See also Rathnam Indurthy, "Kashmir Between India and Pakistan: An Intractable Conflict, 1947 to Present" pp5-6 of 38 Available from http://www1.appstate.edu/~stefanov/Kashmir%20Between%20India%20and%20Pakistan.pdf. For a comprehensive discussion of the First Kashmir war, UN role, Kashmiri domestic politics and Indo-Pakistani relations during 1947 to 1964, Prof. Rathnam Indurthy refers to: Sisir Gupta, Kashmir (New York: Asian Publishing House, 1966), pp. 1-439; Rajesh Kadain, The Kashmir Tangle (Westview Press, Boulder, 1993), pp. 62-128; Alstair Lamb, Kashmir (Hertingfordbury, UK: Roxford Books, 1991), pp. 83-260.*

[14] *When the Nawab of Junagadh sent his intention to accede his State to Pakistan on 15 August 1947, according to some sources, then prime minister of Pakistan, Mr. Liaquat Ali Khan, had argued that a ruler had the absolute right to so accede without reference to the moral or ethnic aspects of the accession - "Pakistan's lies on Junagadh and Hyderabad" - http://www.rediff.com/news/2002/jan/01arvind.htm. With respect to Mr. Liaquat Ali Khan, it was wrong. The approach of the Indian government, as affected by the Governor General emerging from the land "devoted to the rule of law", was correct.*

situation. On the 2nd of November 1947, in a speech aired on All-India Radio he stated:

> "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it. We are prepared when peace and law have been established to have a referendum held under international auspices like the United Nations. We want it to be a fair and just reference to the people and we shall accept their verdict."[15]

The partition rules do not give any veto to the ruler of a Princely State to accede to either India or Pakistan. It is concluded by many eminent writers that the "Instrument of Accession" was not signed by the ruler of Kashmir and, therefore, it should be treated as of no effect. [16] Whilst the analysis of the validity of the "Instrument of Accession" may reveal conspiracy to annex Kashmir to India (a "conspiracy" this author believes not participated in by Mr. Nehru), the "signing" of a Princely State ruler is irrelevant to the legal disposition of the Jammu and Kashmir. This author has no hesitation in saying that, even if it was properly signed by the ruler, the Instrument of Accession as Lord Mountbatten and Mr. Nehru were quick to comprehend, was illegal the wishes of the citizens had to be ascertained.

As emissary of Jawaharlal Nehru, Mr. V. K. Krishna Menon (1896-1974), a widely and profusely respected Hindu, hold the record of delivering the longest speech at the UN Security Council. It was so long that it took two days of the 762 meeting of the SC 5 hours on the 23rd of January and 2 hours and 48 minutes on the 24th of January 1957. Mr. Menon who was proclaimed by many to be "peace loving" sadly made a negative contribution to resolve the Kashmir dispute by this long speech. He could have finished his speech within a single minute and remind his great intellectual and personal friend, Nehru, the Hindu proverb: "praan jae per wachchan na jae" (it is better to lose life than break a pledge). In this context, Nehru has said on the 2nd of November 1948: "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it." [17]

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[15] *P. L. Lakhanpal, Essential Documents and Notes on the Kashmir Dispute (New Delhi: Council on World Affairs, 1965, p57.*

[16] *A leading historian, Professor Alastair Lamb in his article entitled, "A Reappraisal" records: "It is now absolutely clear that the two documents: the Instrument of Accession and the letter to Lord Mountbatten, could not possibly have been signed by the Maharajah of Jammu and Kashmir on 26 October 1947. The earliest possible time and date for their signature would have to be the afternoon of 27 October 1947. During 26 October 1947 the Maharajah of Jammu and Kashmir was travelling by road from Sringar to Jammu. His Prime Minister, M.C. Mahajan, who was negotiating with the Government of India, and the senior Indian Official concerned in State matters, V.P. Memon, were still in New Delhi where they remained over night and where their presence was noted by many observers. There was no communication of any sort between New Delhi and the travelling Maharajah. Memon and Mahajan set out by air from New Delhi to Jammu at about 10:00am on 27 October; and the Maharajah learned from them for the first time the result of his Prime Minister's negotiations in New Delhi in the early afternoon of that day. The key point, of course, as has already been noted above, is that it is now obvious that these documents could only have been signed after the overt Indian intervention in the State of Jammu and Kashmir . When the Indian troops arrived at Srinagar airfield, that State was still independent. Any agreements favourable to India signed after such intervention cannot escape the change that the false date 26 October 1947 was assigned to these two documents. The deliberately distorted account of that very senior Indian official, V.P. Memon, to which reference has already been made, was no doubt executed for the same end. Falsification of such a fundamental element as date of signature, however, once established, can only cast grave doubt over the validity of the document as a whole." - "The Jammu & Kashmir Cause", theparliament.com - ICHR Kashmir Centre.EU - http://www.theparliament.com/EN/Forums/ICHR+Kashmir+CentreEU/afcf8078-ab66-4c1a-b0c8-2ce2b1acdc5f.htm; Alastair Lamb, "The Indian claim to Jammu & Kashmir: Conditional Accession, Plebiscites and the Reference to the United Nation," Contemporary South Asia (1994), Vol. 3, No. 1, pp. 6772; Alastair Lamb, Kashmir: A Disputed Legacy 1846-1990 pp42 (Karachi: Oxford University Press, 1992*

[17] *Supra, Note 15*

A respected and valued authority on the Kashmir issue, Prof. Bal Raj Madhok (twice elected to Indian Parliament) in one of his over 30 books, "Kashmir: The Storm Centre of the World" (1992) clearly recognises the "plebiscite commitment" of the Indian government. This commentator agrees with the writer of the Foreword to Prof. Madhok's book that the readers of the book will "soon discover that the Kashmir imbroglio was the creation of one and one man only and that was India's Pundit Jawahar Lal Nehru. And unfortunately this very important fact has been kept hidden from the Indian people all these years by acts of omission and commission."

The totally illogical stance of Mr. V. K. Krishna Menon on Kashmir dispute leaves me to admire his unquestionable eloquence and mastery of English language, just like many cannot resist admiring the elegant conduct of another Indian, Mr. Nathuram Godse, who extinguished a brilliant light of the last century on the 30th of January 1948 in Birla House, Delhi, by a point-blank pistol shot. He was a picture of politeness and a thorough gentleman in the court which, he knew because of his cogent confession, was going to order his death by hanging for the murder of Mahatma Gandhi. He said to the judges, "The court was the only place left in India where bribery and favoritism did not exist. He looked forward to the judges to pass their verdict without fear or favor and without allowing any outside factor to influence them." [18] He pointed out to the judges that he had never put any appeal for himself nor would he ever ask for mercy because he had shown no mercy to the Great Man of India he had killed. The only favor he wanted was the permission to have a stroll sometimes during the day before the hanging. Although many of the audience of his final 1544-word speech knew that he was convicted for a wicked murder, they were moved to tears.

Godse accused Mahatma Gandhi "guilty of absolute irresponsibility" and of committing "blunder after blunder, failure after failure, disaster after disaster." [19] Godse mentions as an example of this Mahatma's choice of common Indian language "Hindustani" which he believed would bind together various communities in new India. In his speech, Nathuram Godse said:

> "Everybody in India knows that there is no language called Hindustani; it has no grammar; it has no vocabulary. It is a mere dialect; it is spoken, but not written. It is a bastard tongue and crossbreed between Hindi and Urdu, and not even the Mahatma's sophistry could make it popular. But in his desire to please the Muslims he insisted that Hindustani alone should be the national language of India. His blind followers, of course, supported him and the so-called hybrid language began to be used. The charm and purity of the Hindi language was to be prostituted to please the Muslims. All his experiments were at the expense of the Hindus." [20]

Kashmir dispute has a very involved history of being before the Security Council of the UN. The upshot of the UN deliberations has been the translation of the Indian Prime Minister Nehru's "pledge" of plebiscite into the UN Security Council resolutions. The mother of all resolutions on Kashmir, containing detailed procedures, is the one passed on the 21st of April 1948.

On the 24th of January 1957, the UN Security Council passed another resolution

[18] *"Nathuram Godse who shot Mahatma Gandhi had brought tears in the eyes of those who heard his statement in court 50 years ago, says a top secret communication made by the then Superintendent of Police CID, to Intelligence Bureau Director", The Hindustan Times, 15th Feb 1999 - http://www.geocities.com/indianfascism/fascism/godsays_last_words.htm*

[19] *"Speech By Nathuram Godse", Newsletter no. 13, Oct - Dec 2006, GandhiServe Foundation - http://www.gandhiserve.org/news/mgnd/news200610301105.html*

[20] *Id.*

which reaffirmed the principles embodied in the 1948 resolution. The Security Council, reaffirming its previous resolutions to this effect, said that "The final disposition of the state of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations." It further declared that "any action taken by the Constituent Assembly formed in Kashmir would not constitute disposition of the state in accordance with the above principles." The last statement means that any "internally held" (however fair and impartial) elections will not decide the future of the state.

India proffers the argument that, since these UN resolutions are old, they are dead-letters. This is a totally fatuous contention and personalities like Mr Charles Tannock MEP, do not do any favors to their image by buying this stance. If this argument was correct, then Communist China could not have Hong Kong back because the UK government, headed by Mrs. Thatcher, could have said, "We have been governing our Crown Colony excellently, with democratic and other human rights values in place (creating an oasis of prosperity in the region), and The Leasing Agreement of the 2nd of April 1898 and the Convention of Peking, signed on 9 June 1898, have become dead-letters and the Chinese argument that our '99-year lease will expire on the 30th of June 1997 is otiose."

India took the Kashmir dispute on the 1st of January 1948 to the UN but now it is against "internationalising" the issue a remarkable approach to logic. Following this argument it says that the Simla Agreement from the 2nd of July 1972 [21], concluded between India and Pakistan after the 1971 war between the two countries leading to the creation of Bangladesh, has made the dispute "bilateral" and the UN resolutions have become irrelevant. This argument is incorrect for the following reasons:

1. Nowhere in the text of the Simla Agreement in 1972 has Pakistan undertaken to resolve the dispute exclusively "bilaterally" without reference to the UN resolutions. It merits commendation of Pakistani negotiators that they did not sell the right of self-determination of Kashmiris, despite the immense pressure they were under to secure the release of nearly 93,000 prisoners of war of whom 79,676 were uniformed personnel. Paragraph 6 of the Simla Agreement of 1972 lists "a final settlement of Jammu and Kashmir" as one of the outstanding questions awaiting a settlement. Paragraph 4(ii) mentions a "Line of Control", as distinguished from an international border. Furthermore, it explicitly protects "the recognized position of either side" who does not know the position of Pakistan?; if the Pakistani diplomats use that language then the other "diplomats" must know what was meant by it. Article 1 (IV) obviously refers to the Kashmir issue when it talks of "the basic issues and causes of conflict which have bedeviled the relations between the two countries for the last 25 years. To take any doubt out of construction, paragraph 1(i) of the Simla Agreement expressly provides that the UN Charter "shall govern" relations between the parties.

2. More importantly, Article 103 of the UN Charter says, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations

[21] *Simla Agreement 1972, Text of this Agreement is available at http://www.stimson.org/southasia/?SN=SA20020114291*

under any other international agreement, their obligations under the present Charter shall prevail." Corollary of this is that the Indians would have been fishing in muddy waters to oblige Pakistani leaders to assume obligations contrary to the UN charter. Thus, the member states cannot undermine the efficacy of the UN by invoking other treaty obligations (sometimes unfairly imposed on a weaker State) to frustrate the will of the UN. Put briefly, a state cannot resile from performing its obligations imposed by the Charter by arguing that it has assumed contrary obligations under a treaty with another state, let alone escaping from the UN Charter obligations unilaterally. Thus, the defiance of India of the substantive Security Council resolutions in 1956, the year in which India started to say that Kashmir was its "integral part", *"atoot ung"*, is manifestly illegal.

Krishna Menon's 7 hours and 48 minutes speech in the UN Security Council was aimed at trying to surmount this obvious illegality. He referred to the irrefutable facts, democratic and secular credentials of India. Mr. Menon was an ardent opponent of the division of the Indian sub-continent and Pakistan was regarded by him to be the creation of the British colonists and propped up by America subsequently. But, as this author has said before, Pakistan was created by the intransigence of the Hindu leaders like Mr. Gandhi and Mr. Nehru who refused to accommodate Muslim concerns. In fact, Mr. Nehru was saying in the 1930s and 1940s that there were only two parties in India, the British and the Congress. He invited the others to "line up" behind one of them an odd insult to Muslims to have the choice of "lining up" behind the British colonial masters. Mr. Jinnah believed that in Hindu-dominated India the Muslims would be treated as "the lowest of the low." He had gone on record to respond to Nehru's invitation by saying, "I refuse to line up."

Mr. Krishna Menon's fans would, this author hopes, be generous and forgive him to link Mr. Menon with Nathuram Godse who was a picture of politeness when he explained his motive to kill Gandhi in the somber atmosphere of the High Court with a gallery full of Hindu nationalist individuals some of whom were willing to cry for him since a cultured and "highly educated" Hindu [22], a 37-year-old Brahmin, a former member of RSS, Rashtriya Swayamsevak Sangh, and the Editor of "Hindu Rashtra", was facing death by hanging. Mr. Godse's patience had run out when Mahatma Gandhi actually went on hunger strike until 55 Crore (550 million) rupees were not transferred to Pakistan as apportioned by the British. He called the creation of Pakistan "vivisection" of mother India and believed in "Hindutva" core of which is the "cultural nationalism" of Hindus, advocating that Hindus in India are a "nation" and Muslim minority is a "community" leaving no space for two-nation theory.

Dr. Navnita Chadha Behera, who has written a well-researched book - *Demystifying Kashmir*? - and deserves commendation for her hard work which she started in 1993, falls in the same fallacy. With respect this author would like to point out to her that, though many millions people, including the Muslims who voted for Congress and trusted the promises of Mahatma Gandhi, Nehru and other candid secular Hindu leaders, India was partitioned on "religious" basis. Thus to say that "you cannot resolve Kashmir on religious lines" is

[22] *Front Page, NathuramGodse.com - http://www.nathuramgodse.com/*

shifting the goal-post. [23] She must be aware of the fact that in August 1947 many towns fell in the respective domains of India and Pakistan, because they happed to be on the wrong side of the border, even though they had overwhelming majority of the leaving community. One point of detail is that, at the time of partition, Jamu had Muslim majority. Sadly, now this town is Hindu majority town because many Hindus (some seeking sanctuary from the violence in other parts of Kashmir) have moved to it. Dr. Behera should not back out of the Indian obligations without any logical justification. Even on the 2nd of January 1952, Mr. Nehru was saying:

> "We have taken the issue to the United Nations and given our word of honor for a peaceful solution. As a great nation we cannot go back on it. We have left the question of a final solution to the people of Kashmir and we are determined to abide by their decision." [24]

This author can fully respect the liberal choice of the Muslims who tied their future to secularism and stayed in India. But most disappointingly he would think about that option twice now with the hind sight that the devotees of "Hindutva" were so powerful in their sentiments they would kill the most candid proponent of secularism, Mahatma Gandhi. Dr. Behera would agree with this author that "Mahatma" of our time, Nelson Mandela, is keen to see peace in Jammu and Kashmir. He had said on the 2nd of September 1998, in his inaugural address to Mr. Nehru's cherished body (Non-Aligned Movement), "All of us remain concerned that the issue of Jammu and Kashmir should be solved through peaceful negotiations and should be willing to lend all the strength we have to the resolution of this matter." [25]

This author may be alone in observing that if Mahatma Gandhi was left to live for a few more years then he would have not allowed the blood of the Kashmiris, as well as the Pakistani and Indian soldiers, to flow for so long.

Sumantra Bose, Professor of International and Comparative Politics at LSE, cannot but receive this author's unqualified appreciation for his sage views to resolve the Kashmir dispute sincerely. His writings [26] do not jump over the logical impediments. Instead, he focuses on the power politics. Pakistan, being a weaker State, must take into account the size and influence of India in advancing its claims regarding Jammu and Kashmir. [27] The

[23] *'You cannot resolve Kashmir on religious lines', Navnita Chadha Behera, Interview on 16 April 2007, http://in.rediff.com/news/2007/apr/16inter.htm. Dr. Behera is in the illustrious but confused company of Prof. MAURICE MENDELSON QC. Without tendering any legal justification whatsoever at any point in his article, for the manifestly illegal defiance of India of the substantive Security Council resolutions in 1956, the year in which India started to say that Kashmir was its "integral part" ("atoot ung"), the learned professor boldly says, "In 1956, following a further deterioration in relations, India withdrew its agreement to a plebiscite." MAURICE MENDELSON, "Self-Determination in Kashmir" 1996 Indian Journal of International Law, pp1-33 at 24.*

[24] *"The Jammu & Kashmir Cause", theparliament.com - ICHR Kashmir Centre.EU - http://www.theparliament.com/EN/Forums/ICHR+Kashmir+CentreEU/afcf8078-ab66-4c1a-b0c8-2ce2b1acdc5f.htm*

[25] *Address of the President of the Republic of South Africa, Nelson Mandela, at the inaugural session of the twelfth Conference of Heads of State or Government of the Movement of non-Aligned Countries, Durban, 2 September 1998 - http://www.info.gov.za/speeches/1998/98902_0x2719810417.htm*

[26] *For instance, "The Conflict in Kashmir - Exploring Peace in Kashmir", Sumantra Bose - http://www.fathom.com/course/10701013/session4.html*

[27] *Since do otherwise will lead to more blood shed, in his writings and oral presentations this author has desisted from encouraging the Pakistani authorities to support military actions of Kashmiri fighters for "self-determination" and highlight the of the exemption contained in paragraph 7 of Resolution on The definition of Aggression 1974. The material words of this Resolution, expressly rendering military support non-aggressive, are, "Nothing in this Definition, (of Aggression) could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ... nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration." (General Assembly Resolution 3314 (XXIX), 14 December 1974, G.A.O.R. 29th Sess., Supp. 21, p. 142; (1975) 69 A.J.I.L. 480.*

learned professor, however, must recognize that India is only great if it adheres to the rule of law and earns honor by discharging its legal obligations meticulously, rather than throwing its weight around against the States it perceives to be less resourceful than itself. In this equation one must not forget that an appallingly poor State, North Korea, is not receiving the threats of the use of force from the almighty United States, but from the non-nuclear rich State of Iran.

The principles of the right to self-determination, prohibition of the use of force, the rule against genocide, crimes against humanity, and the rules against slavery, piracy and racial discrimination are repeatedly mentioned by almost all experts of International Law, as peremptory norms which cannot be deviated from in any circumstance.[28] These fundamental principles are also known as *"jus cogens."* One *jus cogens* which is so obviously important that many authors do not even bother to list is the "principle of good faith." The giants in the International Law field, like Prof. Schwarzenberger, have put it in their enumeration, perhaps to educate the ignorant. If States start to circumvent and infringe treaties by ill interpreting and applying them, I am sure that everyone endowed with the least bit of commonsense would agree with this author we have no hope whatsoever for the prevalence of the rule of law. The chaos will then follow like this: State A signs a treaty in bad faith intending not to comply with it in any respect. [29]

"The Hindu", a prestigious Indian daily, on the 29th of December 2002, in the article "Fear is the key" by Suresh Nambath described the plight of the untouchables (known as "Dalits") as follows:

> "EVERY TIME they want to participate in a local temple festival, every time they want to walk or cycle through upper-caste areas, in short, every time they try to assert themselves, Dalits in Tamil Nadu risk being beaten up. But they rarely prefer a complaint. For, more often than not, the police too are on the side of the upper castes." [30]

The Dalits account for 165 million of India's one billion-plus human population. The population of cows is pegged at 206 million. There are more cows than dalits in India. The cows, therefore, have more rights than Dalits. For instance, you can kill Dalits before thousands of witnesses and get away with it. But the imagined murder of a cow will not be tolerated.

Since the creation of India on the 15th of August 1947, the candid and saintly views of Mahatma Gandhi, supported by laudable secular statements of Mr. Nehru, Mr. Krishna Menon and other Hindu leaders, have been materially undermined by extremist Hindus. Dalits have been target of inexcusable discrimination and, in some well-documented cases, even horrendous acts of downright barbaric atrocities of murder and rape have been perpetrated against innocent Dalits. Looking at the fate of 165 million Dalits in today's India, prescient observers of affairs of South Asia may be forgiven to say, "It was correct for Dalit minority to demand 'separate electorate' in the first Round Table conference (1930-31); and Mr. Jinnah was tangibly a realist to be wary of the future of Muslim minority (today numbering 5

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[28] *For instance, Brownlie, Principles of Public International Law 515 et seq (2001); Judge Cassese, International Law 138 et seq (2002)*

[29] *Kindly see also, Majid, Amir A., "The Military Action against Iraq - The Irreparable Damage to the Rule of Law in International Affairs" 24 Strategic Studies 13-40 at 22 et seq. (2004)*

[30] *"India: Holy Cow - Lynching of Dalits and Conversion Politics" - http://www.onlinevolunteers.org/gujarat/news/holycow/*

million less than the Dalits) living amongst the extremist Hindus."

In a ceremony presided over by Tibet's exiled leader, the Dalai Lama, on the 27th of May 2007, in Mumbai, about 100,000 Dalits converted to Buddhism. The BBC said that it was "easily the biggest mass conversion in India's recent history"; the converts hoped to escape the rigid caste system in which their status is the lowest."

Right-wing Hindus have often opposed conversion, pushing some Indian states to restrict legal changes of faith. Conversion is particularly opposed if it involves Hindus converting to Christianity or Islam. In the first half of May 2007, two Catholic priests were publicly beaten after being accused of trying to bring a group of local people into the Catholic faith. "But converting to Buddhism does not evoke much adverse reaction, as most hard-line Hindu leaders believe Buddhism is an extension of Hinduism." [31]

The partition rules were legal obligations which should have been implemented without clouding the issue by looking at the "democratic and secular" credentials of India, which were not known at the time of the agreement of these rules, prior to the partition in August 1947.

The argument, proffered by some Hindu leaders, that the pronouncements of Lord Mountbatten and Nehru are "unilateral" and do not generate any legal obligations, is untenable in International Law. The Permanent Court of International Justice (PCIJ) dealt with the Legal Effects of the "unilateral Declaration" in the Norway v. Denmark case of 1933. The Minister for Foreign Affairs of Norway had declared on the 22nd of July 1919: "I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question" (sovereignty of East Greenland). About this declaration, the PCIJ said that: "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs."

The International Court of Justice (ICJ) unambiguously confirmed the 1933 PCIJ principle in the Nuclear Tests Case (Australia & New Zealand v. France) in 1974. In this Case, in paragraph 43 of the judgment, the World Court made a comprehensive statement as follows:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was

[31] *"Low caste Indians set to convert" By Zubair Ahmed, Last Updated: Saturday, 26 May 2007, 22:33 GMT 23:33 UK - http://news.bbc.co.uk/1/hi/world/south_asia/6695695.stm*

made."

The Indian Prime Minister, Mr. Nehru, was "very specific" in promising referendum to Kashmiris. In his radio broadcast of the 2nd of November 1947 (available in the archives) he made clear his "intention" in these words, "That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it."

According to the 1995 Report on Kashmir, of the International Commission of Jurists (ICJ), India has been reluctant to classify the dispute in Jammu and Kashmir as "a non-international armed conflict under the Geneva Conventions 1949" for avoiding any possibility of it being branded as an international dispute. The ICJ comments, "It had not allowed the International Committee of the Red Cross (ICRC), a key international organization offering protection and assistance in such situations, to operate in Jammu and Kashmir. This has regrettably prevented access to affected parties and has impeded the quest for assistance and protection of innocent persons."

Some pro-Indians take shelter in technicality and argue that the relevant resolutions are not "mandatory", since they are not passed by the UN under Chapter VII of the Charter. This displays the lack of full comprehension of the dispute and is untenable on the following grounds:

1. The issue was "taken" to the UN by India. It would be ridiculous that the UN would have felt the need to pass a mandatory resolution against a willing party.

2. The proponents of this argument must forgive me for saying that they have woken up rather late. There is no evidence that Mr. Nehru and other Indian leaders ever conceived that they could avoid plebiscite in Jammu and Kashmir on this basis.

"Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom, and conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion", in paragraph 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly resolution 1514 (XV) of 14 December 1960, the UN has declared:

> "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." [32]

The respected analysts have brought into the elaboration of this principle the notions of "ethnically separate" character of the people involved and people occupying a "distinct territory." In fact, the late professor Michael Akehurst and others believed that this elaboration of the principle represents modern International Law. Prof. Brownlie

[32] *The Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960. (G.A. Resn. 1514 (XV). December 14, 1960. G.A.O.R. 15th Sess., Supp. 16, p.66; Harris, D. J., Cases and Materials on International Law 112-113 (Thompson Sweet and Maxwell, 6th Ed.) The text of 1960 Declaration is available from: http://www.unhchr.ch/html/menu3/b/c_coloni.htm*

regards it to be the "most important" exposition of the principle. [33]

Indeed, the 1960 Declaration is very robust in pursuit of its aim of making the distinct people masters of their destiny. Thus, in paragraph 3 it makes clear as follows:

> "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." [34]

Some commentators (motivated to deny self-determination to deserving people) assert that the 1960 Declaration only applies to colonies. This is patently wrong. India, before the 15th of August 1947, was a "colony" (an awful status) and thus the drafters of the 1960 Declaration were pivotally concerned to eliminate this malady with the weapon of "self-determination." It would be odd if the States, which were freed by this Declaration, said that the right is not available to subjugated people who do not unambiguously fall within the status of a colony. Fortunately, whilst specifically referring to colonies, paragraph 5 of the Declaration also directs the UN Members to take "immediate steps" to end foreign domination "in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." [35]

Since the Jammu and Kashmir dispute is rooted in the "territorial disposition" between India and Pakistan under the partition rules, it is most respectfully submitted that paragraph 6 of the Declaration is not relevant. This says that: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." [36] Likewise, paragraph 7 of the Declaration is inapplicable. [37]

The International Commission of Jurists conducted a 5-day fact finding mission and investigated the Kashmir dispute in 1995. Regarding the right of self-determination it concluded that: "The peoples of the State of Jammu and Kashmir acquired a right of self-determination at the time of the partition of India. The right has neither been exercised nor abandoned and therefore remains capable of exercise. Full or limited independence for Kashmir is a possible option. The parties should be encouraged to seek a negotiated solution to be put to the peoples of the state for ratification in a referendum. Both India and Pakistan should recognise and respond to the call for self-determination for the people of Jammu and Kashmir within its 1947 boundaries, inherent in the relevant United Nations resolutions. The United Nations should re-activate its role as a catalyst in this process."

The ICJ Mission consisted of lawyers and was headed by Sir William Goodhart QC, a seasoned Human Rights Lawyer. In this perspective, Baroness Nicholson's

[33] *Brownlie, Principles of Public International Law p554 (OUP, 6th Ed. 2003)*
[34] *Supra, Note 32.*
[35] *Id.*
[36] *Id.*
[37] *Id. Paragraph 7 reads, "All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."*

conclusion that the Kashmiris are not entitled to plebiscite flies in the face of legality.

Even in his "Rivers of Blood" speech on the 20th of April 1968 in Birmingham, Mr. Enoch Powell did not deviate from the quintessential characteristic of an Englishman, i.e. (as George Bernard Shaw has said) you cannot prick an Englishman with a thorn but hang him by the rule. Nowhere in his speech does Mr. Powell infer that England can infringe the "rule of law" and throw out the coloured immigrants; those who were lawfully here could only volunteer.

Baroness Nicholson's report mentioned in the second paragraph above, predicating that the Kashmiris do not merit plebiscite, is certainly running away from the essence of law. With so much infidelity to the rule of law, it cannot be treated legally sound.

The Master Anomaly

When trying to make a concession to India, the UN Representative for India and Pakistan regarding Kashmir, Sir Owen Dixon (1886-1972), a former Chief Justice of the Australian High Court, suggested to the Prime Minister of India, Mr. Nehru, in his message of the 15th of August 1950 that he would confine the plebiscite to some regions of Jammu and Kashmir. Replying to Sir Owen, in his telegram of the 16th of August 1950 (annexed to Sir Owen's Report), Mr. Nehru said, "I must confess...your message surprised me greatly...We have not opposed at any time an overall plebiscite for the state as a whole." So up to the 16th of August 1950, the Indian head of state had not deviated from "an overall plebiscite for the state as a whole." Mr. Nehru remained true to his pledge later, as detailed in the subsequent passages.

The Indian Prime Minister Nehru and Pakistan's Prime Minister, Mohammed Ali Bogra, met in June 1953 at the Commonwealth conference in London and agreed on some points to resolve the intractable dispute of Kashmir. Then, on the 20th of August 1953, both nations agreed to take the issue out of UN's hands and resolve it directly. [38] Subsequently, as Prof. Rathnam Indurthy records, in 1953, to the pleasant surprise of Pakistan, "Nehru, who had already informed Kashmir's new Prime Minister, Bakshi Ghulam Mohammed of his intentions, told Bogra, when he visited New Delhi, that he would conduct a plebiscite in Kashmir. Bogra returned to Pakistan triumphantly." [39]

The failure of Mr. Nehru's offer of plebiscite did not materialise due to Mr. Bogra's "procrastination reportedly brought about by the conspiratorial politics of General Ayub Khan, who was plotting to seize political power and who needed the hostility with India in order to achieve his goal." [40]

This author would view the preposition that the "procrastination" here was brought about by the "conspiratorial politics" of the Pakistani military chief with utmost skepticism because General Ayub Khan only toppled the civil regime in October 1958, five years after this event. Further, the merchants of the "conspiracy" theory are the theological disciples of "democracy". whose candour rapidly disappears when a democratic government

[38] *Apparently, Pakistan had "agreed temporarily" to achieve self-determination for Kashmiris to suspend the UN involvement and accommodate the Indian wish to obviate internationalization of the dispute. Rathnam Indurthy, "Kashmir Between India and Pakistan: An Intractable Conflict, 1947 to Present" pp5-6, Supra, Note 13.*

[39] *Id.*

[40] *Id.*

of their choice is not elected. In this context, the election of Hamas in the Palestinian National authority may be cited an election thought to be thoroughly fair and impartial and intensively monitored by external observers, including the American former President, Jimmy Carter. [41] Algeria can be cited as another example. When the Islamic Salvation Front (ISF) in 1992 swept municipal and later national parliamentary elections, the West rushed to nip the democracy in the bud and supported the installation of a military dictatorship. [42] This intervention led to the most horrible violence in that country. [43]

Emergence of Hamas was the fairest manifestation of democracy in recent times. However, one cannot but say that it led to unimaginable tragedy in the occupied Palestine. Dr. Condoleezza Rice, the American Secretary of State, to undermine the "majority party" (Hamas) against the "minority party" (Fatah) said, "It is the duty of the international community to support those Palestinians who wish to build a better life, and a future of peace." [44] It would have shown some "candour" if she had openly said that in future the US would support "democracy" if the election results were congruent with its own policy goals.

In fact, on the 7th of October 1958, in an unwise move, the civilian President of Pakistan, Iskander Mirza, had declared Martial Law, abrogating the Constitution of 1956, dismissing the ministers, dissolving the Central and Provincial Assemblies, and prohibiting all political activities. In consequence of this, General Muhammad Ayub Khan, at that time the Commander-in-Chief of the armed forces, was made the Chief Martial Law Administrator. When he took the exclusive charge of the country on the 27th of October 1958, he was welcomed as a national hero by the people because of the widespread Corruption within the national and civic systems of administration.[45]

The Master Anomaly in the arguments, as analysed above, is that deniers of self determination to people of Jammu and Kashmir wish to eclipse the "rule of law", and avoid applying the partition rules (patently applicable as the temporal law, regulating the division of Indian subcontinent on religious lines) to the dispute. They hijack the discussion to secularism and democracy in India versus military rule and religious fundamentalism in Pakistan clearly post-partition developments. The Master Anomaly has clouded the legal force of the UN resolutions and the legal effect of binding pledges of the competent heads of State, undermining the *pacta sunt servanda* principle.

Observance of the Rule of Law Pays

It is widely believed that India's observance of the "rule of law" will

[41] *When the minority party, Fatah, established it in the West Bank area of the Palestinian territory, President Bush had 15-minute telephone conversation with its leader, Mr. Abbas, and resumed the severed links with the "majority party" Hamas a ridiculous approach if one is genuinely concerned with the true wishes of the people, expressed by democratic fair and impartial elections. "US, EU restore Palestinian ties", Last Updated: Monday, 18 June 2007, 18:04 GMT 19:04 UK - http://news.bbc.co.uk/1/hi/world/middle_east/6764541.stm*

[42] *The so-called "mother's love" legitimacy of "democracy" stirred "the most basic fears in the minds of the West about the Muslims "The unthinkable now seemed to be on the horizon: an Islamic movement would come to power not through bullets but through ballots, not by violent revolution but by working within the system." - John L. Esposito, John O. Voll, Islam and Democracy Ch.7 "Algeria Democracy Suppressed" p150 (OUP: 1996)*

[43] *For details see, Paul de Bendern, "Algeria hopes for democracy, Islamist rebellion ebbs", Reuters AlertNet NEWSDESK, 06 Apr 2004 20:59:51 GMT.*

[44] *Supra, Note 41.*

[45] *Martial Law Under Field Marshal Ayub Khan [1958-62] - http://www.storyofpakistan.com/articletext.asp?artid=A065)*

guarantee support of many States and leaders for its claim to get a permanent seat in the Security Council. "India feels it should be entitled to have a permanent seat in the Security Council. Chances of that happening would be greatly increased if the issue of Kashmir could be resolved." [46]

In some fora, the behaviour of India has been patently wrong. The conduct of its ambassadors has been totally misguided and thoroughly incongruent with the splendour expected of the intellectuals rising from the land of Mahatma Gandhi. In this context, two international affairs can be mentioned as follows:

Indian Conduct in the Creation of the UNHCHR

India was one of the three main opponents of giving "fact-finding" power to the UN High Commissioner for Human Rights the States which behind the curtain of "sovereignty" did not wish to be examined by an impartial dispatch of mission of enquiry by the proposed office of the Commissioner. It was accompanied by Fidel Castro's Cuba and Saddam Hussein's Iraq in this struggle. [47] Despite the fact that such dispatches were to be made in the context of continuous dialogue between the High Commissioner and governments, after consultation with the Secretary-General, and with the consent of the State concerned, "the concept of fact-finders arriving at the scene of human rights atrocities was portrayed as interference and as being beyond the fringes of the Charter" when the competencies of the proposed UN High Commissioner for Human Rights were considered in 1993. [48]

With hindsight one can see that the fact-finding paragraph had become overloaded with preconditions and caveats. The final version may be vague but it still allows a right of initiative to the High Commissioner. Among other things, it calls for the High Commissioner to play an active role in preventing the continuation of human rights violations around the world. For the first time, the UN now has a human rights official who can take up human rights concerns with governments, without waiting for a mandate from a political body.[49]

Indian Conduct in the Kosovo Crisis

Whilst observing that the NATO military expedition in Kosovo was justified as "a moral action", Judge Antonio Cassese deems it "contrary to current international law", clinically. [50] He says that "It has been claimed by some non-governmental organizations and even governmental officials that under certain exceptional circumstances, where atrocities reach such a large scale as to shock the conscience of all human beings and indeed jeopardize international stability, forcible protection of human rights may need to outweigh the necessity to avoid friction and armed

[46] *India/Pakistan: Kashmir - What are some of the factors behind the continuing tension between India and Pakistan - NGO Committee on Disarmament, Peace and Security - http://disarm.igc.org/index.php (It is noteworthy that the joint author of this article is Ann Lakhdhir, President of the NGO Committee on Disarmament, Peace and Security.)*

[47] *Clapham, Andrew, "Creating the High Commissioner for Human Rights: the outside story" 5 EJIL 4, pp556-568 at 562 (1994) Available from http://www.ejil.org/journal/Vol5/No4/art4.pdf*

[48] *Id.*

[49] *Id. Pp562-563; also A/C.3/48/L.79, 3 December 1993. Prof. Clapham told us "the outside story" because some States did not wish bodies like Amnesty International or Human Rights Watch to come into the building where the debates dealing with the creation of a Human Rights Commissioner were taking place.*

[50] *COMMENT: Antonio Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" Text available - http://www.ejil.org/journal/Vol10/No1/com.html*

conflict. To put it differently, "positive peace", i.e. the realization of justice, should prevail over "negative peace", i.e. the absence of armed conflict." Of course, international lawyers cannot sit on their hands when Milosevic type regimes are actively busy in ethnic cleansing. Thus, this author agrees with Judge Cassese: "Based on these nascent trends in the world community, I submit that, under certain strict conditions, resort to armed force may gradually become justified, even absent any authorization by the Security Council." [51]

In three successive Resolutions (1160, of the 31st of March 1998, 1199 of the 23rd of September 1998, and 1203, of the 24th of October 1998) the Security Council unanimously decided that it was acting under Chapter VII of the United Nations Charter, and in the second and third of these resolutions explicitly defined the situation in Kosovo as a "threat to peace and security in the region". In these circumstances, everyone, including this author, was praying for somebody to intervene in the Kosovo tragedy which was becoming more and more repugnant every day. Thus, the NATO action was not only an antidote to the brutality of the Milosevic regime but a savior for the legitimacy of the UN, rendered impotent by political posturing of various States.

Against this background, for India to sponsor a SC resolution with its "political friend", the Russian Federation, to criticize the NATO action was hideous.[52] Needless to say, the resolution sponsored in the Security Council by Belarus, India and the Russian Federation aimed at condemning NATO's use of force was rejected. The Indian representative called the action to be "senseless violence." The Cuban representative regarded it a "ridiculous claim" to justify the use of force "to coerce a government into fulfilling its obligations" under international law whilst, as its letter dated 24 March 1999 addressed to the Security Council President states (document S/1999/320), the Russian Federation categorized the NATO action an "extremely dangerous situation caused by the unilateral military action of the North Atlantic Treaty Organization." [53]

Whilst totally failing in succeeding to stop the despicable atrocities of Slobodan Milosevic against Kosovars, speaking before the Security Council action on the text of the resolution, the representative of the Russian Federation said that "attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against the text would place themselves in a situation of lawlessness. Indeed, the aggressive military action unleashed by the North Atlantic Treaty Organization (NATO) against a sovereign State was a real threat to international peace and security, and grossly violated the key provisions of the United Nations Charter." [54]

Ambassador Peter Van Walsum (Netherlands) said that after initial positive pressure on the Milosevic regime, "at every critical juncture Russia had somehow succeeded in making the pressure less credible." [55]

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[51] *Id.*

[52] *The Indians can always depend on the Russian support whether it is the Bangladesh war or its explosion of nuclear bomb. When India exploded the nuclear device (Pakistan had yet to respond) the G8 were meeting in the UK. President Yeltsin single-handedly prevented the imposition of sanctions against India. Special Report: India nuclear testing Tuesday, 19 May, 1998, 14:35 GMT 15:35 UK - http://news.bbc.co.uk/1/hi/special_report/1998/05/98/india_nuclear_testing/94721.stm*

[53] *"SECURITY COUNCIL REJECTS DEMAND FOR CESSATION OF USE OF FORCE AGAINST FEDERAL REPUBLIC OF YUGOSLAVIA", SC/6659, Press Release, 26 March 1999 - http://www.un.org/News/Press/docs/1999/19990326.sc6659.html*

[54] *Id.*

[55] *Id.*

Ambassador Robert Fowler (Canada) said that, rather than bringing forward that unproductive resolution, in an attempt to divert attention from the fundamental humanitarian issue, countries like India "might more usefully had directed their energies towards convincing the leaders in Belgrade to stop the violence against their people and to accept the Rambouillet peace agreement. As proposed, the resolution would only serve to grant President Milosevic free rein to finish the brutal job he started last year, and had since continued to such deadly effect." [56]

Ambassador Danilo Turk of Slovenia said he would vote against the draft resolution and gave the following reasons for its inadequacy:

> "It took a selective political view of the situation and lacked the objectivity necessary for Security Council resolutions. It ignored the fact that several months ago, the Council had declared the situation in Kosovo as constituting a threat to regional peace and security. The current text ignored the fact that the Council already spelled out the requirements for removing that threat, as well as the fact that those requirements had been flagrantly violated, including by the ongoing massive defense by the Federal Republic of Yugoslavia military forces affecting the civilian population in Kosovo. All of those reasons were ignored in the draft. He said it seemed that the text was intended to redefine Security Council resolutions. Proceeding from a fundamentally flawed factual assessment, the text tried to invoke some basic norms of the United Nations Charter, but it failed to address the relevant circumstances and ignored the events which had led to the current military action. Moreover, it did not state the reasons for the military action or present any reason to oppose them. The political jargon of flagrant violations could not conceal the lack of a convincing argument." [57]

Commenting on the NATO's action in Kosovo, The Bosnians Representative asked "Did anyone remember the ethnic cleansing and the genocide committed against Bosnians? He asked whether the supporters of the draft resolution believed that an end to NATO's action would produce anything positive for Kosovo, or Bosnia and Herzegovina, or for the region as a whole. Then he observed that "The world community's response to Bosnia was late but it was welcome." He did not now wish to see a response come too late for the Kosovars. [58]

Since nobody wanted to turn a blind eye to the growing humanitarian disaster in Kosovo created by the regime of Slobodan Milosevic and knew that the resolution was patently turning the legal logic on its head, it did not receive any appreciable support in the membership. The Canadian Ambassador had said, "Those who would support the resolution had placed themselves outside of the international consensus which held that the time had come to stop the continuing violence perpetrated by the Government of the Federal Republic of Yugoslavia against its own people." [59] Thus, the draft resolution was rejected by a vote of 3 in favor to 12 against, with no abstentions. [60]

[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

The Indian Representative was too eager to see the resolution succeed. This caused the Canadian Ambassador to have a "second intervention" to clarify that "The representative of India had said that three vetoes had been cast during the vote on the draft. In fact, there had not been any vetoes cast in the morning." This was confirmed, in a second intervention, by the French Ambassador, Mr. Dejammet. [61]

Final Remarks

The activity of the European Parliament is good. This author reiterates what he said before: the friends of the Kashmiris must continue their efforts to solve this dispute. As Mr. Philip Bushill-Matthews, Member of the European Parliament (MEP), belonging to the Conservative Party UK said "that this report shines the spotlight on the problems based on a daily basis of the people of Jammu and Kashmir and that within the European Parliament we should keep that spotlight shining brightly into the future." [62]

This author may request the Indian leaders to resolve the Kashmir dispute according to their wishes. Compliance with the UN resolutions will elevate the image of India and, this author included, observers of the international affairs would feel confident to support the Indian desire of becoming a permanent member of the Security Council. Addressing the 16th Asian Corporate Conference organized by the Asia Society in Mumbai on the 18th of March 2006, dismissing the idea of any regional supremacy, the Indian Prime Minister, Dr. Manmohan Singh, said that "In this globalized world, we are all inter-dependent, and the world will become better only when we all work together." Then he observed that in the 21st century "we should look forward to the dominance of freedom." This kind of opinions give this author palpable reason to be optimistic. Indubitably, the resolution of the Kashmir dispute will be a victory and defeat poverty and violence in South Asia. [63]

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[61] *Id. Of course, favors have to be returned. Using the procedure in the General Assembly resolution 377 A (V) of 3 November 1950 (The procedure used during the Korean War), with the dependable help of Russia and taking the opportunity of Pakistan being undeniably softened by the 1971 war, by Resolution 303the Kashmir dispute was removed from the ongoing agenda of the Security Council (document S/Agenda 1606) in December 1971, citing, the "lack of unanimity of the permanent members" preventing the SC from "exercising its primary responsibility for the maintenance of international peace and security." The result of this overt unfriendly act of Russia towards Kashmirs has been that "The Security Council has not considered the issue since. India originally brought the issue to the Security Council, but it has had no interest in resolving this by having a plebiscite for many years. Pakistan continues to try to have UN involvement." Supra, Note 46.*

[62] *"Kashmir Report Adopted by the European Parliament", Strasbourg, 24 May 2007 , theparliament.com - Press Releases - http://www.eupolitix.com/EN/Forums/ICHR+Kashmir+CentreEU/PressReleases/200705/dd8f2f3d-243a-4eed-b7f8-64ff4807c27f.htm*

[63] *The Indian Prime Minister should start implementing his promise of "zero tolerance for human rights violations" in Kashmir as recommended by the EU report, Supra, Note 6, paragraph 23.*

THE PRINCIPLE OF HUMAN RIGHTS PROTECTION IN VIEW OF THE BERLIN DECLARATION

Oana - Măriuca Petrescu*

Abstract [1]***:*** *„[….] His dignity is inviolable. His rights are inalienable. Women and men enjoy equal rights. [….] We preserve in the European Union the identities and diverse traditions of its Member States. We are enriched by open borders and a lively variety of languages, cultures and regions. […] The European Union will continue to promote democracy, stability and prosperity beyond its borders".*

Thus, Declaration of Berlin on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome, as it was signed on 25th of March 2007 by all 27 members of European Union, is providing among others the principles and values based on respect of fundamental rights, common traditions of the member states, as well as promoting the variety of languages, cultures and regions within the EU. The European Union stresses out again its intention to protect the freedoms of citizens and their civil rights by all possible means, including in front of the courts.

Key words: *European Union, human rights, protection of human rights*

I. Introduction

Although it has not been legally regulated by means of the European Communities' Treaties, the principle of human rights protection has become since its regulation under the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), one of the most important principles.

The extremely important value of the fundamental rights was reiterated in 2007, by the *"Berlin Declaration* [2]*"*, occurring in a crisis moment faced by the European integration process, whereas the Constitutional Treaty had been rejected by France and Holland in 2005, as a result of the referendums performed in the said countries on the 29th of May 2005, and 1st of June 2005 respectively. Until the present moment, the Constitutional Treaty has been ratified in accordance with internal proceedings by 18 member states.

Thus, the three Treaties by means of which the European Communities were established[3] did not stipulate provisions regarding the human rights protection throughout the Community's business, such that before the Court of Justice of the European Communities (hereinafter referred to as the Luxemburg Court or CJEC) numerous matters have been raised

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[1] *This paper has been presented at the International Scientific Session: "Challenges of the Knowledge Society", June 7, 2007.*

[2] *Signed by the 27 Member States, during the Conference organized in Berlin by the German presidency*

[3] *The Treaty creating the European Community of Coal and Steal of April 18th, 1951, signed in Paris and coming into effect on the January 1st, 1952, and the Treaties of Rome creating the European Community for Atomic Energy, and the European Economic Community, respectively, signed on the date of March 25th, 1957 and coming into effect on the date of January 1st, 1958.*

regarding the observance and application of the human rights on a communitarian level, by referral to *"the general principles existent on a national level in the common European juridical patrimony"*[4].

Initially, the European Union did not have a catalogue of the fundamental rights, the main sources being represented by the constitutional principles common to the member states and by the European Convention on Human Rights (ECHR), the importance of which arises from the fact that being ratified by all member states, it represents the expression of their common values.

Moreover, protection of the fundamental rights had not, initially, been a matter of specific concern for the European Communities. Aimed at an economical rather than political integration, the European institutions had no power to deal with areas likely to provoke violations of human rights[5]. Under such circumstances, the Court of Justice expressly denied the applicability of the provisions regarding the human rights observance as stipulated in the member states' constitutions[6]. Although in 1962, in the Van Gend & Loos[7] case, the Court of Luxemburg affirmed, without directly referring to fundamental human rights, that *"the community law also created rights on which individuals could directly rely"*, staring with the year 1969 ECHR confirmed its intent of ensuring the protection of the fundamental human rights, because *"the fundamental rights enshrined in the general principles of Community law and protected by the Court of Justice*[8]*"*.

Subsequently, in certain cases[9] the Court affirmed that *"the protection of fundamental rights [our observation*: the protection of which is ensured by the community judge] *was inspired by the constitutional treaties common to the Member States, and the guidelines provided by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories"*. The aspect was also stressed that the protection of fundamental rights *"must be ensured within the framework of the structures and objectives of the European Community*[10]*"*.

However, according to the Report of the Committee for civil freedom, justice and internal affairs[11] in many areas the competencies of the Luxemburg Court are limited (see Title IV in the EC Treaty and article 35 of the EU Treaty) or even inexistent (the second pillar Title V of the EU Treaty),

[4] *Gyula Fabian, Communitarian Institutional Law (Romanian: Drept institutional comunitar), 2nd edition, Sfera Juridica Publishing House, Cluj-Napoca, 2006, p. 86; Damian Chalmers, Giorgio Monti, Adam Tomkins, European Union Law, texts and materials, Cambridge University Press, 2006, p. 232 and the following.*

[5] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf*

[6] *Gyula Fabian, quoted paper, p. 87.*

[7] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf - NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration, case 26/1962, published in 1963, ECR 1963.*

[8] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf - Case 29/1969, Stauder v. Stadt Ulm, ECHR opinion of November 12th, 1969, rec. p. 419.*

[9] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf - Case 29/1969, Stauder v. Stadt Ulm, ECHR opinion of November 12th, 1969, rec. p. 419; case 11/1970 Internationale Handelsgesellschaft; mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel ECHR opinion of December 17th, 1970, rec. p. 1125; case 4 /1973 Nold KG v.Comisie, ECHR opinion of May 14th, 1974, rec. p. 491.*

[10] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf - case 11/1970 Internationale Handelsgesellschaft; mbH vs..Einfuhr - und Vorratsstelle für Getreide und Futtermittel ECHR opinion of December 17th, 1970, rec. p. 1125; Avise dated 28.03.1996, 2/1994, Rec. I-1759.*

[11] *Report regarding the observance of the Charter for fundamental rights in the Commission's legislative suggestions: a systematic and rigorous monitoring procedure, Committee for civil freedoms, justice and internal affairs. Reporteur: Johannes Voggenhuber, (2005/2169(INI)), A6-0034/2007 of February 2nd, 2007, p.4.*

which imposes a larger prudence for the European law giver when providing laws in areas that might affect the protection of fundamental rights. The same standpoint was confirmed by the European Parliament's Resolution of March 15th, 2007 regarding the observance of the Charter of fundamental rights in the Commission's legislative suggestions aimed to a systematic and rigorous monitoring procedure[12].

Enlarge on the matter of fundamental rights protection

The first referral on the *"human rights"* concept was introduced in the Preamble to the Single European Act signed on February 17th, 1986 and entering into effect as of July 1st, 1987, without stipulating the competency of the CJEC in this respect. Subsequently articles 2 and 6 paragraph (1) of the Amsterdam Treaty (the former article F.2 of the Treaty on European Union of 1993) consecrated the ensuring and protection of the fundamental rights within the community legal system"[13].

At the same time, the Community has begun to use its competency provided by the Amsterdam Treaty in respect with adopting anti-discrimination policies in areas such as: gender, race, orientation, age and religion. Also, in the year 2000 in Nice there has been officially designed and "proclaimed" the EU Charter of fundamental rights. By such proclamation the fact was revealed that the fundamental rights protection in the EU would be more visible and transparent for the citizen and that in the future the Court of Justice would also be able to refer to the Charter upon examining the compatibility between a certain act with the fundamental rights, thus providing the Charter with the status of authentic interpretation of the juridical principles stipulated at art 6 in the EU Treaty[14].

At the present moment a vivid debate exists on the significance of the fundamental human rights for the European Union (EU) and on the appropriate objective a human rights policy on EU level should have. Moreover, the fact is admitted that by the Court's praetorian jurisprudence a specific mechanism has been created for protecting the fundamental rights on a communitarian level, as the provisions of the ECHR are of particular influence in such process[15].

Although the EU Charter on fundamental rights proclaimed at Nice in December 2000 represents a catalogue of the fundamental rights applicable within the Union, it is not yet an integrant part of the primary law, however it represents an integrant part of the Treaty on European Constitution, part II (*The Union's Charter on fundamental rights*)[16], ratified according to the national provisions of the member states, by 18 member states of the EU until the present moment.

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[12] *Website: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0078+0+DOC+XML+V0//RO*

[13] *Paul Craig and Grainne de Burga, EU Law, text, cases and materials, third edition, Oxford University Press, 2003, p.317; O. Manolache, Community Law (Romanian: Drept comunitar), fourth edition, revised and completed, All Beck Publishing House, 2003, p.24; Thus, according to art. 2 The Union sets out its objectives […] "of enhancing rights protection […]", Art. 6 par. 1 of the EC Treaty "The Union is grounded on the principles of freedom […] human rights and fundamental freedoms protection […] whilst par (2) of the same article "The Union protects fundamental right as they are ensured by the European Convention on protecting the human rights and fundamental freedoms", […]". Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf*

[14] *Paul Craig and Grainne de Burga, quoted paper, p..317; O. Manolache, quoted paper, p.26.*

[15] *Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf*

[16] *Treaty on creating an European Constitution, text commented and noted, Ministry of External Affairs, October 2004, p. 56 and the following.*

It has been correctly considered by the doctrine[17] that the Constitutional Treaty should "*include the fundamental rights, because among others the document explains the matter of the importance of the European citizenship*". Thus, *"this Charter represents the result of an original and unprecedented procedure in the history of the Union, finalized by signing and official recognition of the Charter, on behalf of their institutions by the chairmen of the European Parliament, Council and Commission on December 7th, 2000 in Nice*[18]".

Hence, according to Art.I 9 (entitled "Fundamental rights") "*The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II*" (par. 1). "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution*" (par. 2). "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*" (par. 3).

There must be mentioned that by the above said article there are clarified both the issue of the juridical value of the Charter of fundamental rights of the EU, and the issue of the Union's adhesion to ECHR, an issue which is not new, given the fact that the jurisdictional Court of Luxemburg is already paying considerable attention to the jurisprudence of the European Court for Human Rights (ECHR) in Strasbourg, however the divergences are not eliminated that exist between the two institutions and between the two juridical instruments for protecting the human rights[19]. Moreover, numerous articles have been undertaken from this Convention, such as: art. 3 forbidding torture; art. 4 par. 1 and 2 forbidding slavery and forced work; art. 5 individual's right of freedom and safety; art. 8 respecting the private and family life etc. In the same time, a series of provisions have been undertaken from the Additional Protocols to the Convention, such as: Protocol no. 1, Protocol no. 2 etc. However, the special rights of the minorities are not included in the Charter, yet there is stipulated that there cannot be admitted by the member states and by the individuals discriminations grounded on their being a part of a national minority[20], also creating the obligation for the European Union to respect cultural, religious and linguistic diversity. In this respect, the Constitutional Treaty stipulates under art. II 82, suggestively entitled "*Cultural, religious and linguistic diversity*" that *"The European Union respects cultural, religious and linguistic diversity"*[21].

Once the Treaty establishing a Constitution for the EU is adopted and comes into effect according to the

[17] *Augustin Fuerea, European Community Law. General Part (Romanian: Drept comunitar european. Partea generala), All Beck Publishing House, Bucharest, 2003, p. 100.*
[18] *Augustin Fuerea, p. 100-101.*
[19] *Website: http://www.mae.ro/index.php?unde=doc&id=28438&idlnk=1&cat=3; Augustin Fuerea, European Community Law. General Part (Romanian: Drept comunitar european. Partea generala), All Beck Publishing House, Bucharest, 2003, p. 144.*
[20] *Article II-81: "Non-discrimination" "(1) Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief ,political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited".*
[21] *The Treaty establishing a Constitution for Europe, commented and noted text, Ministry of External Affairs, October 2004, p. 56 and the following; website: http://www.mae.ro/index.php?unde=doc&id=28438&idlnk=1&cat=3*

constitutional proceedings specific to the member states, the Charter of fundamental rights shall become of binding juridical value, by its being included for the first time in a treaty (namely the Constitutional Treaty signed at Rome in October 2004). At the same time, this charter shall obtain constitutional value by its statute being regulated in the constitutional part of the Treaty draft, which represents a novelty element. Moreover, in the preamble of the Charter it is stipulated that such is aimed to "*reaffirm, with due regard for the powers and tasks of the Union and the principle of subsidiary the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Union Treaty, the communitarian treaties, the ECHR, the Social Charters adopted by the European Council and by the European Community, as well as of the jurisprudence of CJEC and ECHR* [22]".

Although it does not provide a definition for the "fundamental rights", the Charter deems as such all the rights comprised in the mentioned document[23]. The Charter refers to a total number of 53 fundamental rights, representing a minimum level of human rights protection[24]. It is our opinion that this list of fundamental rights is not a limitative one, which means that the individuals in the member states can invoke before the CJEC other rights stipulated in the conventions and international treaties signed by the member states, whereas the European Union is to accede to the European Convention for Protection of the Human Rights and to its additional protocols, as well as to the international conventions and treaties in the field of human rights protection, which it will have to observe and apply.

The member states' protection of the fundamental rights resides in the provisions of art. 7 from the EUT (former art. F1), according to which: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in art. 6 par. 1, and address appropriate recommendations to that state".

Until the present moment, the procedure provided under art 7 of the EUT has not yet been used against any member state[25]. An eloquent example in this respect is the fact that in February 2000, when the Austrian governing was obtained by the Party of Freedom, of right extreme, lead at that date by Joerg Haider, the procedure stipulated under art 7 of the EUT was not used against Austria. In return, the 14 member states entered an extra-judicial agreement according to which they would have no bilateral contacts with the Austrian government. However, such issue was solved six months later, when the "*Committee of Wise Men*" ascertained that the Austrian government had registered a relatively good protection of human rights. Moreover, the committee's report suggested that on the Union's level an agency for human rights should be established, in order

[22] *Gyula Fabian, quoted paper, p.89.*
[23] *Ovidiu Tinca, General Community Law (Romanian: Drept comunitar general), third edition, Lumina Lex Publishing House, Bucharest, 2005, p. 171.*
[24] *Gyula Fabian, quoted paper, p.89.*
[25] *Stephen Weatherill, Cases and Materials on EU Law, sixth edition, Oxford University Press, 2003, p.78-79.*

for the human rights protection in the member states to be monitored[26]. Thus, on March 1st, 2007 the Agency for Fundamental Rights of the European Union[27] was set up, headquartered in Vienna. The mentioned agency follows in its rights the European Observer for racist and xenophobic phenomena[28].

The observance and protection against breach of the fundamental rights are stipulated in the draft of Constitutional Treaty, under Title VI "*Justice*" of part 2 - *Charter on the fundamental rights of the EU* - according to which "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*" (par. 1). "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented*" (par. 2). "*Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice*" (par. 3)[29].

During its activity CJEC has granted protection on a Community level to the following rights, already consecrated in the international juridical order, such as: prohibition of discrimination; right to fair trial and efficient legal aid[30]; protection of private and family life; freedom of speech[31]; right to effective recourse; freedom in performing professional and economical activities; freedom of movement; property right[32]; non-retroactive nature of criminal law; equality principle; religious freedom[33] etc.

According to the CJEC opinion, such admitted rights can only be exercised within specific limits, which must not come against the substance of that law area, which must meet a general interest pursued by the Community and which must not represent a disproportionate intervention compared to the followed aim[34].

In doctrine and in the specialized literature[35] no clear distinction could be made between the human fundamental rights, regulated by the Constitutional Treaty, and other law principles (undertaken from the national constitutions of the member states, from the international treaties signed by such, or the rights stipulated in the EUT), and hence they are applied up to the limits of confusion. Moreover, a series of this sort of general principles have been acknowledged by the Court of Justice, and can also be included in the human rights category, namely:

- Fundamental right to house inviolability (as a common principle found in the juridical

[26] *Damian Chalmers, Giorgio Monti, Adam Tomkins, quoted paper, p. 245.*
[27] *(EC) Regulations no. 168/2007 of the Council of February 15th, 2007 regarding the establishment of the Agency for Fundamental Rights of the European Union*
[28] *(EC) Regulations no. 1035/97 of the Council JO L 151, 10.6.1997, p. 1. Regulation as modified by (EC) Regulations no. 1652/2003 (JO L 245, 29.9.2003, p. 33).*
[29] *Website: http://www.mae.ro/poze_editare/Tratat_Consitutie%20UE.pdf Treaty for establishing an European Constitution, commented and noted text, Ministry of External Affairs, October 2004, p. 70 and the following.*
[30] *Case no. 222/1984 Johnston vs. Chief Constable of Royal Ulster Constabulary, CJEC Collection 1986, p. 1651.*
[31] *Cases 60 and 61 /1984 Cinetheque vs. Federation Nationale des Cinemas Français, CJEC Collection 1986, p.2605.*
[32] *Case no. 55/1988 Wachauf v. Bundesamt fur Ernahrung und Forstwirtschaft, CJEC Collection 1986, p.2609.*
[33] *Case no. 130/1975 Paris v. Ministries Council, CJEC Collection 1976, p.1589.*
[34] *Augustin Fuerea, European Community Law. General Part (Romanian: Drept comunitar european. Partea generala), All Beck Publishing House, Bucharest, 2003, p. 144.*
[35] *O. Manolache, quoted paper, p. 27-29; Gyula Fabian, quoted paper, p. 88; Damian Chalmers, Giorgio Monti, Adam Tomkins, quoted paper, p. 237 and the following.*

systems of all member states, of relevancy being the case of *Hoechst AG v. the Commission*)[36];

- The right to meet and use union labor related rights. Such right was asserted as a law principle, which cannot be subjected to any limitations for the interest of public safety and security, others from those needed in order to protect such interests in a democratic society, nor can it affect the rights ensured by the European Convention for Human Rights of 1950 signed in Rome and by its additional Protocols. In a case of 1995(*Union royale Belge des societes de football association ASBL v. Jean-Marc Bosman and others*)[37] it has been considered that in respect with the arguments based on the principle regarding the freedom of associating, it must be acknowledged that the principle stipulated under art. 11 from the European Convention for human rights and fundamental freedoms protection, also arising from the constitutional traditions of the member states, is one of the fundamental rights, as the Court itself constantly set out and as it is reasserted in the preamble of the Single European Act of 1986 and in art. F2 of EUT, rights protected under the communitarian juridical order. However, the rules drafted by the sport associations regarding the national court cannot be deemed as necessary in order to ensure the use of such right by the mentioned associations, clubs or by their players;
- The right to protection of the private and family life, comprised under art. 8 of the European Convention for Human Rights, also arising from the common constitutional traditions of the member states. Regarding such principle, CJEC has mentioned that this is one of the fundamental rights protected by the communitarian juridical order, no derogations being accepted from the member states' observing such right, especially including the individual's right of keeping the secret of his/her health condition etc.[38]

The protection of human fundamental rights has been reiterated as mentioned above in the Conference of Berlin, when the "Berlin Declaration" was signed by the 27 member states of the European Union (including the last two states acceding to the European Union as of January 1st, 2007, namely Romania and Bulgaria), on the occasion of 50 years anniversary from the signing of the Treaty of Rome by the 6 countries founding the European Communities[39]. This is the most important political statement of the last half of century for the EU history. Moreover, the mentioned declaration reiterated principles and values of special meaning for the Union and for the member states, among which we can mention as examples: freedom, democracy, rule of law, mutual respect, tolerance, justice etc, and also its

[36] *Cases 46/87 and 227/88 Hoechst AG v. the Commission, opinion of 21.09.1989, in ECR, 1989.*
[37] *Case 415/93, Union royale Belge des societes de football association ASBL v. J.M. Bosman and others, opinion of 15.10.1995, in ECR, 1995.*
[38] *O. Manolache, quoted paper, p.27-29.*
[39] *France, Germany, Italy, Belgium, Luxemburg and Holland.*

undertaking of ensuring, respecting and protecting such, prohibiting any individual or member state from breaching them.

Also, Europe is reunified under the sign of European fundamental values, written in the EU Treaty, namely: freedom, democracy and respect for human fundamental rights and freedoms, as well as the rule of law.

Conclusions

The matter of human rights is of extreme importance and has been reiterated upon at the Conference organized by the German presidency of the European Union in the document of strong political and juridical value the Berlin Declaration, signed and undertaken by the 27 member states of the European Union. Under such circumstances, among the priorities of the German presidency of the EU there are: strengthening the European freedom, security and justice area, the protection of the fundamental rights.

Moreover, "Peace and freedom", "democracy and the (ideal) rule of law", "mutual respect and shared responsibility", "tolerance, justice and participation", "equality in rights and social solidarity" are some of the principles and values of the EU listed in the anniversary Berlin Declaration.

One of the future aims of the European Union, mentioned in the Berlin Declaration, is for the EU to become a more powerful voice on the international relations scene, as unique player.

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