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**PROCEDURES FOR RESOLVING
THE KOSOVO PROBLEMS**

by Michael Reisman, Monica Hakimi and Robert Sloane

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"The medium is the message"
Marshall McLuhan

"The United Nations' experience in Bosnia was one of the most difficult and painful in our history." With those words, Secretary-General Kofi Annan concluded the report (issued on November 15, 1999)² on the fall of Srebrenica. The difficulty and pain encountered in Bosnia-Herzegovina, far from being unusual, increasingly characterize more and more United Nations' missions. In Kosovo, in particular, the problems are aggravated because (i) the mission is based on a political mandate from the Security Council that is diametrically opposed to political objectives of some key local elites, whose cooperation is indispensable for advancing toward a diplomatic settlement; (ii) the international community is generally reluctant to add military force to back-up diplomacy and, in any case, has concluded that applications of military force are unlikely to appreciably improve chances of diplomatic settlement; (iii) the situation on the ground is unstable and, in terms of many of the international community's goals in Kosovo, deteriorating; and (iv) a short international attention focus and a rolling fatigue with old issues leads to popular insistence on rapid results to problems that ultimately depend on major social and psychological changes in the population which, under the best of circumstances, do not lend themselves to speedy accomplishment.

Diplomacy is often tasked with difficult if not impossible situations. It accepts the possibility that many initiatives will fail, but is expected to develop others, until some formula works, because it proves to be the "right" one or because the interests of local and external elites have changed and now coincide in securing a momentary or longer-term settlement. What more impatient outside observers may characterize as a sequence of failures may, if seen in context, be appreciated as stabilizations of the situation on the ground, the reduction of the expectation of violence, and enhancement of conditions necessary for productive economic activity. In some circumstances, merely establishing and maintaining diplomatic lines of communication that have no immediate outcome but that hold the promise of being used effectively at a more propitious moment in the future can be viewed as an accomplishment. In like fashion, initiating processes that adjust the perspectives of reciprocally hostile elites to incorporate minimum toleration for each other and to begin to understand the needs of the other may, themselves, be considered accomplishments.³ Achievements such as these are unlikely to register as diplomatic successes or to be nominated for peace prizes, since they often occur (perhaps must occur) at levels of consciousness so deep that the participants themselves are unaware of them. This is not to suggest that merely scurrying about and engaging in diplomatic exercises is always beneficial or that we should accept the illusion of progress as a substitute for real progress, but simply that apparent failure to achieve larger

² Report of the Secretary-General pursuant to General Assembly Resolution 53/35, A/54/549, 15 November 1999 at page 108.

³ One thinks, in this regard, of the remarks of George Mitchell at what appears to be the successful conclusion of the negotiations he mediated in Northern Ireland.

breakthroughs in rapid fashion does not necessarily mean that the diplomatic process has failed, especially when viewed over a broader time period.

Our assignment has been to consider the procedural dimensions of international efforts to ameliorate the situation in Kosovo. We therefore accept as givens the essential guidelines established by Security Council Resolutions 1199, 1239, and 1244,⁴ and, in particular, "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia",⁵ as well as the Rambouillet Accords on the Interim Agreement for Peace and Self-Government in Kosovo.⁶ Since the resolutions and Accords also call for return of refugees, they imply the need for institutional arrangements that permit the peaceful co-existence of the diverse ethnic groups of Kosovo within the Yugoslav Federation. Many students of this problem have remarked on the contradiction between facilitating dissolution of a multi-ethnic state into more ethnically homogeneous new states, but then insisting that each new state replicate the conditions of multi-ethnicity that caused the initial breakup of the now defunct composite state. We note that many reports suggest, until now, a general failure to replicate a tolerant and self-sustaining multi-ethnicity in many of the new states that have emerged from Yugoslavia.

In the first part of this paper, we review principles with respect to the design of procedures and, in their light, propose, for group discussion, a network of procedures and initiatives. Given the political mandates we have reviewed, we do not anticipate a quick and efficient procedure and we think it unwise to create expectations of the possibility of such a nice and tidy outcome. Yet we think that the principles at stake make the fashioning and implementation of some procedures, even those unlikely to produce results, urgent. More generally, we would submit that merely establishing procedures may serve to secure some of the policy goals. Hence our adoption of McLuhan's famous apothegm that "the medium is the message". In the annex to this paper, we have assembled reviews of procedures and outcomes in other international initiatives in this century that may be instructive for Kosovo.

General Principles

There are many different possible procedural configurations. Since the purpose of our paper is to provide background and stimulus for an examination and appraisal of various options, it may be useful to identify a number of operating principles and considerations that may have to be addressed in any set of procedural arrangements:

1. Incorporating the Inter-state Dimension: Some internal conflicts are essentially endogamous, in the sense that they do not engage outside states. International criticism notwithstanding, East Timor was essentially a conflict between a central government that

⁴S.C. Res 1199, Sept. 23, 1998, 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1239, May 14, 1999, 40003d mtg., U.N. Doc. S/RES/1239 (1999); S.C. Res. 1244, June 10, 1999, 4011 mtg., U.N. Doc. S/RES/1244 (1999).

⁵S.C. Res. 1244.

⁶Interim Agreement for Peace and Self-Government in Kosovo [Rambouillet Accords], June 7, 1999, U.N. Doc. S/1999/648 (1999).

desired to retain a peripheral province and the elite and rank-and-file of that province that wished to separate. But other internal conflicts are inseparable from their relation to other states. Resolution of the Cyprus problem cannot be conceived without the active participation of, at the minimum, Greece and Turkey. The apparently successful first steps in the settlement of the Northern Ireland problem could not have been achieved without the active participation of the United Kingdom and the Republic of Ireland. The Republic of Ireland's disavowal of its constitutional claim to Northern Ireland perforce changed the objectives of the IRA and Sinn Fein from "enosis" with Ireland and transformed their program into one of improvement of the condition of Catholics in the province, while the statement by the United Kingdom that northern Ireland was not vital to it from a strategic standpoint had a comparable effect on both the Unionists and the IRA.

Under some circumstances, "internationalizing" facilitates the resolution of essentially internal conflicts, as for example, President Nixon's incorporation of negotiations with China and the USSR as part of the settlement of - and United States extrication from --- the war in Vietnam. Security commitments from the United States to Israel are vital in shaping Israel's perception of the range of options available to it in negotiation with its neighbors.

Since the end of NATO's military campaign in Kosovo and Serbia, attention has sometimes focused on relations in the province between Kosovars and the shrinking Serbian and Romani populations. But accommodations on the intergovernmental level are just as indispensable to any stabilization, let alone amelioration, of the situation within the province. In contrast to Northern Ireland, however, the international dimension is larger, more complex, and more unstable. It must include the major states of western Europe, the United States, and Russia, without whose minimum agreement, accommodations can hardly be imagined. Such agreement seems unlikely at the moment because of significantly different geostrategic objectives pursued by many of these actors. In addition, as a minimum, the governments of Yugoslavia, Albania, Macedonia and Greece must be involved, in varying degrees. Some of these governments are unstable; others have their ambit of negotiation constrained by internal forces; and some have little control over significant parts of their own territories, which could be exploited as bases for paramilitary actions that threaten to undermine international efforts within Kosovo. Since the Security Council Resolutions seek the maintenance of existing borders and affiliations, but some local and regional actors do not necessarily share those views, participation of key states in the international system, through guarantees and the enforcement of various military servitudes, could be vital. Hence, any procedures must address the intergovernmental dimension and provide, in some fashion, for the incorporation of indispensable external actors.

2. Laying the Basis for a Culture of Negotiation: A structural prerequisite for intergroup negotiation is understanding and acceptance of the culture of negotiation, *i.e.*, the shared expectation that there are reciprocal advantages to the mediation of subjectivities with adversaries with the common willingness to make adjustments in objectives and timetables for their fulfillment; that such negotiations and agreements between distinct and reciprocally hostile groups can lead both sides net better off; and that agreements once concluded between them are to be kept. These struts of political culture are the precondition for agreement. Actors who have internalized these cultural expectations may, on occasion, refuse to

negotiate or intentionally defer agreement for tactical advantage, yet they still understand the culture of negotiation and, when it is convenient for them, they can participate jointly in them. But other participants, who have been characterized as actors in "war systems,"⁷ have not internalized these expectations. Hence, the efforts of outside actors who are trying to initiate negotiations with a view toward short-term or longer-term accommodations encounter very special problems and may require different strategic approaches.

Even where a culture of negotiation exists, acute ethnic conflict can seriously erode it, to the point where negotiators' first target must be to reestablish it. But in a highly tribalized and ethnically diverse territory, without effective hierarchical institutions that can enforce peace, a micro-war system may ensue, in which group security and spatial rights are sustained by threats of violence such as the vendetta and the belief in the culture of negotiation wanes. It is particularly difficult to forge consensual arrangements in such circumstances, precisely because of the absence of a culture of negotiation.

In some circumstances, negotiations initiated by outsiders can incorporate members of the elite who are more familiar with the culture of negotiation and assume that any agreements they conclude can be sold to the rest of the elite and rank-and-file. That assumption presumes a degree of organization in the group concerned that may not obtain. If it does not, precisely those elite members who may appreciate the advantages of negotiated settlement also understand that espousing that view may undermine their position within their own group.

3. Legitimizing United Nations and NGO "Governance": One of the daunting features of the Kosovo situation is that the United Nations, through UNMIK, purports to govern the province. From the Yugoslav perspective, that activity may be viewed as a usurpation of the Yugoslav Republic's sovereignty. From the perspective of the KLA, as well, it may be viewed as obstructing what its members believe are its entitlements and the fulfillment of its political aspirations. Over time, the question of the legitimacy of U.N. governance may become more acute, for any erosion of United Nations' authority could seriously undermine internal and external support for the activity and raise the costs of making it effective. Hence one negotiating objective, unrelated to the longer-term solution of the problem, must be to legitimize (at least) interim governance of the province. If some scenarios contemplate a longer-term U.N. governance, legitimization becomes all the more urgent. Legitimacy must be established among a wide range of actors: local groups, regional state actors, the NGO aggregate concerned with Kosovo, the media, etc..

4. Restoring Infrastructure and Providing Vital Services: Conceptually, one might expect the reconstruction of infrastructure and the provision of vital services as a set of activities that would follow the conclusion of negotiations. But in Kosovo these activities are already underway, are vital for the survival of major parts of the population and are, in many ways, a precondition for negotiations. Currently, the restoration of the infrastructure and the provision of vital services to the population are provided by UNMIK and a network of inter-governmental and non-governmental agencies, as well as by political factions within Kosovo. As many of these activities will be viewed by both inhabitants as well as interested states

⁷ Cite to private armies with quote of definition of war systems

within and outside the region as effecting or having the potential for effecting changes in the political situation, the issue of the legitimacy of these activities is as important as their day-to-day efficiency. In a situation of protracted negotiations, attention must be given to this dimension.

5. Inducing Outside Economic Assistance: Related to the preceding considerations is the need for the introduction of foreign assistance. Given the limitations on international public funds and the competition for them in many other areas of international concern, the necessary funds for minimum economic activities must also be raised from the private sector. Hence whatever the ongoing procedures that are envisaged must be structured to take into account the concerns and provide for the participation of international financial agencies, the private sector, and non-governmental organizations.

6. Dealing with the Putative Delinquency of One of the Parties: Establishing negotiating procedures with respect to Kosovo is further complicated by the indictment for war crimes and crimes against humanity of key and indispensable parties. The Government of Yugoslavia - in some formulations, the person of Slobodan Milosevic - have been characterized as internationally delinquent. Indeed, some external participants have conditioned economic cooperation with Yugoslavia on the removal of the Milosevic government from power. Yet Yugoslavia, with its current government, is an indispensable party in both short-term and longer-term negotiations and figures importantly in the achievement of many of the principles elaborated here. For example, the revival, in the most rapid and economic fashion conceivable, of many critical economic activities in Kosovo requires reestablishing links with Serbia. Given the international mandate to maintain Kosovo as a part of Yugoslavia, many infrastructural components in Kosovo are, and will remain, recognized parts of governmental, para-statal or corporate entities in Serbia. These internally inconsistent features exacerbate the relations between the United Nations and Serbia and make the incentives for negotiation among these and other parties more complex and uncertain. The United Nations, given its mandate and interests, would benefit from cooperation, at technical levels, by Serbian governmental actors; this would, moreover, be consistent with the continuing status of Kosovo as part of Yugoslavia. Yet, given other policy and strategic positions taken by the international community, any initiatives that legitimized the official position of Milosevic and others who have been indicted by the Former Yugoslav Tribunal could disserve other United Nations' purposes. Conversely, negotiations with the leadership of the KLA, with respect to performance of governmental functions within Kosovo may legitimate them, despite the fact that this consequence may impede the fulfillment of other United Nations' objectives, as well as intensify Serbian opposition.

. All this creates a difficult procedural situation, but it is not unprecedented. In the Cyprus talks, the posture of United Nations or European officials ab initio has been that Turkey is delinquent. In many of the negotiations over Afghanistan, a comparable delinquency on the part of the Soviet Union was assumed by many of the negotiators. And, of course, negotiations with Iraq over Oil for Food or U.N. supervised disarmament must include representatives of Saddam Hussein.

In some circumstances, parties still have incentives to negotiate, despite a prior presumption of delinquency. For the putative delinquent, negotiation may present an opportunity to erode or change that presumption, or at least to put it in context. In Kosovo, ironically, Yugoslavia may have an incentive to participate, given the ground-rules that affirm continuing Yugoslav sovereignty.⁸ Non-participation could erode that assumption. Yet any procedures that reestablish infrastructure and social and economic processes within Kosovo are likely to enhance the position of the KLA and its supporters. From the standpoint of the Government of Yugoslavia, any participation in (even interim) arrangements in Kosovo promises incremental gains in terms of general governmental authority, as well as influence within the province. But given the position of the United Nations, increases in incremental authority of the Government of Yugoslavia could, in general, increase the costs of achievement of other U.N. programs.

In deciding to engage in any type of negotiations, latent costs and benefits to the parties are always calculated. Procedures with respect to Kosovo will be no exception.

The Advantage of "Consultations" over "Negotiations"

Given these considerations, we would propose, as specific goals and as the overall design for procedures, the development of a negotiating system that will, at once, establish foundations for a culture of negotiation, begin a real exchange of views, and engage the participation of the indispensable actors, while structuring their participation in ways that can avoid participatory constellations likely to produce deadlock.

The characterization of these procedures themselves may therefore involve a delicate choice of terms, but diplomacy has been creative when obscurantist terms were deemed to be procedurally advantageous. Witness the invention of the term "non-paper" in international multilateral negotiations. The word "negotiations" imports certain assumptions about the participants and the longer-term objectives of the procedure. Precisely because participation and objectives are so complex, it may be preferable to seek a more ambiguous term to characterize the proceedings. For example, the word "consultations" or "preliminary consultations" might provide the United Nations and other actors with more room to maneuver with respect to contacts with Yugoslavia and the KLA and its supporters. At the same time, it would facilitate their participation, since "consultations", with their preliminary and provisional implications, are less prejudicial to many of their exclusive objectives. Maneuverability might be further enhanced by using "without prejudice" formulas in the initial invitations and in the introduction to discussions. The words "provisional" or "interim" can modify any interim arrangements that could be agreed upon in the consultations. Since resistance may be expected in some quarters even to consultations, initial efforts might seek an even more ambiguous title, such as "informal inquiries" or "informal contacts".

Multiple, Simultaneous, Restricted Participatory Consultations

A wide range of international, regional and local actors must be incorporated in procedures,

⁸ It may also have a tactical interest in obstructing negotiations and administration in order to exacerbate the situation on the ground, stretch the resources of the UN and the other agencies operating in Kosovo and fatigue the international community.

yet many of them view others as abominable or their mere presence at a negotiating table as itself a loss. As recently as the negotiation of the Algiers Accords between Iran and the United States, mediated negotiations, without principals meeting face-to-face, have produced agreements, but this mode of procedure does not contribute to the consolidation of a culture of negotiation. Where the parties can be insulated from one another without losing procedural effectiveness, compartmentalization or cameralization recommends itself. Where ostensibly technical issues can be delimited, progress may be made, even though none can be achieved on larger and more comprehensive issues. In general, smaller groups may be able to operate more efficiently than very large, heterogeneous ones.

One procedure which strikes us as worth exploring would be to establish multiple simultaneous consultations, with different actors and different agendas. Since some of the actors in each consultative circle would be inclined to try to obstruct the processes, cameralizing or compartmentalizing the processes could insulate some consultations from others. The complex objectives of the United Nations in Kosovo and the need to engage many different categories of participants suggest that multiple, simultaneous consultations, each with a different group of participants and a different agenda, may prove most feasible. Thus, one may envisage consultations at the intergovernmental level concerning the status of Kosovo, relations with nearby states and larger constitutive issues with respect to the governance of the province. Simultaneously, a set of consultations would engage participants within Kosovo with respect to daily administration, reconstruction of infrastructure and economic processes. These consultations, in turn, would themselves be broken into different working groups, many of which would have different sets of participants, some recruited from local levels; the subject matters would range the gamut from economic and privatization issues on through to protection of religious places and procedures. Another set of consultations would involve non-governmental organizations, the private sector and international financial agencies, with respect to the provision of finance and development. The broad scope, objectives and, at times, potential incompatibility, of the policies identified above - maximal participation, political legitimacy and efficiency (in particular, effective governance) - reaffirm the need for a process of consultation that minimizes conflict between the interested parties. For this reason, negotiation should proceed along separate and parallel tracks that include at least two principal committees, several strategic working groups and participation by various advisory boards. The cameralization of procedures could facilitate the negotiation process and permit the simultaneous realization of the key policies outlined earlier.

In a very preliminary fashion, it might be useful to sketch in possible committees.

Consultative Committee on Interstate Matters

The first committee, which we will refer to as the "Consultative Committee on Interstate Matters", could assume responsibility for the diverse issues that have serious repercussions on international order. Given the history and circumstances presently prevailing in Kosovo, this Committee must include those parties already involved in the region, namely, the United Nations, NATO (in particular, the United States, France and the United Kingdom), Russia, the Federal Republic of Yugoslavia (Serbia and Montenegro) and Albania. This Committee would consider the short-term, mid-term and long-term goals for Kosovo in connection with

military, social, political and economic relations. Solving problems of refugee return and family reunification, forestalling cross-border arms trades, establishing and policing military servitude, promoting long-term stability in the region and ensuring internationally guaranteed protections would be among the Committee's paramount objectives.

There is little reason to expect rapid progress in the First Committee on many of these issues. Its latent benefits would be the availability of a forum for states on these matters, familiarization of personnel with the issues and with each other and, hopefully, the solution of interim problems

Consultative Committee on Provisional Internal Administration.

The second committee, which may be referred to for convenience as the "Committee on Internal Administration", would have a consultative jurisdiction over all matters currently discharged by UNMIK: for example, establishing uniform customs policies,⁹ restoring and maintaining postal and telecommunications systems,¹⁰ establishing civilian emergency services to provide humanitarian relief and assist in rebuilding Kosovo's devastated infrastructure,¹¹ recruiting and training new judicial and public prosecutorial authorities,¹² and regulating the sale and dissemination of petroleum products in Kosovo.¹³ Additional working groups would consider issues of local governance, infrastructure - including roads, water, airports, electricity, trusteeship of public utilities - and, perhaps most critically, law. As this issue is of central importance, we consider it briefly.

Pending an ultimate political settlement, maximizing stability and peaceful coexistence in Kosovo requires establishing or reestablishing the rule of law. Under the law of belligerent occupation, which "envisions eventual return of the territory to the antecedent power",¹⁴ the belligerent-occupant has been expected to continue to enforce the *status quo ante* legal regime. Modern international law similarly recognizes that "[e]xecutive and administrative powers may be exercised by alien authorities under the rules of belligerent occupation in time of war and by forces taking enforcement action under Chapter VII of the United Nations Charter".¹⁵ At the same time, the paramount concern with protecting the human rights of Kosovo's inhabitants - codified in the mandate of Security Council Resolution 1244, which authorizes the Secretary-General to establish an interim administration charged with, *inter alia*, "[p]rotecting and promoting human rights",¹⁶ - requires certain fundamental changes to

⁹UNMIK/REG/1999/3, Aug. 31, 1999.

¹⁰UNMIK/REG/1999/12, Oct. 16, 1999.

¹¹UNMIK/REG/1999/8, Sept. 20, 1999.

¹²See UNMIK/REG/1999/5, Sept. 4, 1999 (establishing an ad hoc court of final appeal and public prosecutor's office); UNMIK/REG/1999/6, Sept. 7, 1999 (creating an advisory commission to advise the Secretary-General on matters relating to the structure and administration of the judiciary in Kosovo); UNMIK/REG/1999/7, Sept. 7, 1999 (creating the "Advisory Judicial Commission", empowered, *inter alia*, to recommend candidates for judicial appointment to the Secretary-General).

¹³UNMIK/REG/1999/9, Sept. 24, 1999.

¹⁴Henry H. Perritt, Jr. & John M. Sheeib, *Rebuilding Kosovo: UNMIK as a "Trustee Occupant"* (unpublished article, on file with author), at 8.

¹⁵IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 380 (5th ed. 1998).

¹⁶S.C. Res. 1244, para. 9(j); see also UNMIK/REG/1999/1, July 25, 1999, para. 2 (□In exercising their

the law of the former Yugoslavia, which precipitated the current problem. For example, UNMIK Regulation No. 10 expressly repeals discriminatory legislation in effect in Kosovo prior to NATO's action.¹⁷ And UNMIK Regulation No. 1, pursuant to which the former regulation was issued, sets forth the general framework for an interim legal regime in Kosovo, stipulating that,

[t]he laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2 [which sets forth "internationally recognized standards"], the fulfillment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.¹⁸

The concept of preserving an occupied territory's antecedent laws and institutions, while implementing changes consistent with essential legal commitments of the administrator, is not new to international law. After the dissolution of the Ottoman Empire, for example, Britain administered the Palestinian West Bank as a "trustee-occupant",¹⁹ since its sovereignty remained ambiguous. The British administering authorities therefore promulgated regulations that provided that, in general, the law of the Ottoman Empire would remain in force, except insofar it violated certain principles of British common law.²⁰ Similarly, Bosnia-Herzegovina's legal reconstitution after Dayton preserved the law of the former Yugoslavia but nullified those laws that contravened fundamental precepts of international law and human rights law.²¹

But in Kosovo, the belligerent-occupant rubric does not adequately capture the political dynamic that UNMIK or any other interim administration faces - namely, mediating between, on the one hand, a commitment to long-term protection of the international human rights of

functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards□).

¹⁷UNMIK/REG/1999/10, Oct. 13, 1999 (repealing discriminatory legislation respecting housing and property rights).

¹⁸UNMIK/REG/1999/1, July 25, 1999, para. 3 ("Applicable law in Kosovo").

¹⁹See Perritt & Scheib, *supra* note __, at 6-11 (citing Allen Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1 (1973).)

²⁰Article 46 of the 1922 Palestine Order in Council stated, "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions".

²¹ General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo, Dec. 14, 1995 [hereafter GFA], *reprinted at* 35 I.L.M. 75 (1996); *see also* Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Republic of Bosn. & Herz.-Federation of Bosn. & Herz., Nov. 10, 1995 [hereafter Dayton Agreement], *reprinted at* 35 I.L.M. 170 (1996).

Kosovo's inhabitants, and, on the other, Security Council Resolution 1244's express reservation of sovereignty over Kosovo to the Federal Republic of Yugoslavia. The circumstances of Kosovo's interim administration are rather analogous to a "trustee-occupancy", whereby territory is administered first and foremost for the benefit of the inhabitants.²² Kosovo's interim legal regime would appear to have to incorporate the law of the Federal Republic of Yugoslavia, but only insofar as it conforms to fundamental principles of international law.

The working group devoted to developing the legal regime has the attendant function of establishing and training a competent police and judiciary to preserve public order during transition, a project already underway, but without a consultative procedure. Additional working groups will consider, *inter alia*, issues regarding minority rights, public health and the preservation of religious sites. In view of the substantial effects that decisions of the working groups will exert on Kosovars' lives, participation must include, not only UNMIK, whose knowledge and provisional authority will help guide transition to an ultimate political settlement, but also Serbs, Kosovar Albanians and other organized political groups residing in the region.

Beyond the two core committees, and in order to maximize efficient participation, several advisory boards might also be established to counsel the relevant working groups. A religious council with delegates from the major traditions in the region might be established to mitigate the exacerbation of tensions or, at the very least, attempt to establish lines of communication between the several religious elites. Similarly, given the diverse difficulties associated with Kosovo's socio-economic development, an "International Development Council" could be established to recommend policies conducive to reconstruction. Given the many financial sources that will be needed for reconstruction, this Council could be comprised of delegates from financial agencies, the World Bank, economically-oriented NGOs, the International Monetary Fund, and the private sector. Finally, an NGO advisory council, including international humanitarian, human rights and public health organizations, could be created to lend support on these issues. We comment briefly on each of these consultative procedures.

International Development Council

Alan Gerson, a senior Fellow at the Council on Foreign Relations in New York, has been leading a group concerned with clarifying the role of the international financial agencies in the reconstruction of states or regions that have been disrupted by internal conflict. His starting point, like that of Boutros Ghali's Agenda for Peace, is that the move from merely stopping wars to establishing a self-sustaining and productive peace requires the recreation or creation of an economy sufficiently robust and with sufficient opportunities to persuade people that they are net better off in a system of minimum order than in one of disruption. Since private capital is understandably wary of political uncertainty, the initial investments

²²Perritt & Sheib, *supra* note __, at 7, quoting Gerson, 14 HARV. INT'L L.J. at 40 (noting that in a trustee-occupancy, unlike a belligerent occupancy, the occupant may implement changes in the laws and institutions of the territory, provided these are in the best interests of its inhabitants, "since the *raison d'etre* for requiring adherence to the *status quo ante* - preservation of the ousted legitimate sovereign's or reversionary interest - would no longer be relevant").

must come from the international financial agencies. Yet its officials often operate from perspectives of economic feasibility that are unfulfilled in situations of severe internal disruption. Hence, he adopts the James Wolfenson approach of the "partnering" of the international financial agencies with the institutions charged with the maintenance of international security to incorporate the financial institutions in the indispensable process of reconstruction. But even with an institutional link, there are simply not enough international public funds for the tasks. Hence Gerson proposes the incorporation of the private for-profit sector in the process of reconstruction. This is no easy task, for public funds are needed precisely because private investment, being risk averse, is unwilling to invest in situations of such profound uncertainty. Gerson proposes a council, composed of all these factors, whose members can conduct explorations of possible political and public financial arrangements that can induce private foreign investment as an indispensable part of the process of economic reconstruction.

Gerson's proposal seems particularly pertinent to the situation in Kosovo. As many of the factors are already present, it is essentially a matter of the World Bank taking the initiative. Reference is made, in this regard, to the study of the World Bank of November 3, 1999, "Kosovo: Building Peace Through Sustained Growth, The Economic and Social Policy Agenda".

Religious Groups in Kosovo

It would, of course, be a grotesque over-simplification to conceive of the Kosovo problem as a religious war, but religious identities contribute to the problem and may be a potential instrument for ameliorating it. Religion creates a shared history that informs social choices and values and that defines individual and community identities. It is part of the social fabric that binds the members of a community and often isolates that community from its neighbors. The working group of religious representatives, comprised of persons from the major traditions in the region, should have a two-fold mandate: as an advisory council for the other negotiating bodies and as its own working group with tasks that focus on issues relating to religion. Its latent function would be simply to establish communication links between the communal religious leaders. In addition, this working group could address problems of restoration, maintenance and access to religious sites. It may seem fanciful at the moment, but the religious council might address the ways in which members of different religions can peacefully coexist.

NGOs

In the contemporary international community, it is obvious to the participants convened by the UNA and the Institute for International Affairs that non-governmental organizations (NGOs) exert substantial influence. Their presence and effective lobbying during the continuing negotiations for the establishment of an International Criminal Court exemplifies their prominent role in contemporary international law-making and their work on the ground in peace reconstruction is manifest. NGOs today perform crucial (at times indispensable) functions, providing resources, information, and practical assistance to political actors and elites, as well as to the constituencies they represent. Processes of negotiation and reconstruction in Kosovo present strategic difficulties that span the full range of issues to

which NGOs devote attention, including, *inter alia*, economic development, human rights monitoring and protection, humanitarian and refugee assistance, public health, education, and cultural preservation. NGOs are already heavily involved in the management and initial reconstruction of Kosovo. Given the limited financial resources available to UNMIK, the foreseeable depreciation in political will to devote and maintain a high level of governmental funding for Kosovo, and UNMIK's diverse human resource needs, it would be shortsighted to neglect the potential for exploiting the potential advice, resources and assistance that NGOs can provide. Some inter-governmental conferences have become weary of NGO activity, but it would be judicious to maximize the participation of NGOs in committees and working groups to which they can offer pertinent expertise, as well as to draw upon their (human and financial) resources subsequently.

At the same time, while we often speak of a monolithic "community" of NGOs, it bears emphasis that NGOs, no less than governmental (or quasi-governmental) actors represent diverse ideologies and champion different objectives and, at times, pursue goals in tension with one another. Similarly (and again no less than governments), some maintain inflexible agendas which could obstruct, rather than facilitate, the negotiation processes. The role for NGOs must therefore be carefully delineated to maximize their constructive participation in committees and working groups that may benefit from their presence, while constraining their ability to hamper negotiations elsewhere. We suggest, consequently, the possibility of establishing an NGO advisory council to mediate among the competing agendas and objectives of NGOs, as well as to cooperate with UNMIK in order to maximize their potential for contributing information, expertise and resources to the continuing negotiation and reconstruction processes.

Initiatives to Improve Personal Relations

A critical part of the Kosovo problem is, of course, the interpersonal relations of Serbs and Kosovars. The enmity between them has historical roots, severely aggravated by events over the past decade and continuing to the present. It may seem quixotic to try to improve the psychological and emotional perspectives of members of these groups, but until that process is set in motion, the maintenance of minimum order will depend on substantial external military and police investments or the removal of one of the groups from the territory. Hence any consideration of procedures should include the development of situations in which contacts can be established and attitudes examined. Yale's Fermeda workshop for Somalis and Ethiopians in 1969, for example, undertook to use T-group methods in the midst of a vicious boundary conflict in order to crack stereotypes and open participants to the possibilities for as of then unexplored integrative solutions.²³ It was unsuccessful, but the essential idea should be part of the agenda of consideration of procedures for resolving the Kosovo problem.

The Problem of Irresolvability and Second-Best Solutions

Ours is a world in which a pillar and testament of civilization is that human beings

²³ Doob, et al, Resolving Conflict in Africa: The Fermeda Workshop (1970).

solve problems. We believe they can be solved and we want them solved quickly so that we can go on to others. It is a hubris so fundamental for us that recurring failure is denied at deep levels of consciousness and never permitted to be incorporated and to correct our sense of reality. In international politics, the reality is that the community often lacks the power and the ideas for the solution of certain problems quickly. The collision of at least short term irresolvability of key problems with our hubris that problems can be solved means that second best solutions (a euphemism obscuring a range of various forms of stabilization of situations extending from reasonably satisfactory to quite unsatisfactory) often develop themselves, without being explicitly planned, provided for and appraised in terms of other feasible, but manifestly second-best solutions and in terms of the costs of changing them at some propitious moment in the future. Second-best solutions are solutions of a sort, in the sense that they stabilize a situation and permit the international community to turn its attention elsewhere, but they develop their own dynamics and some may prove as hard to change as the original problems for which they purport to be *ersatz* solutions. As the French say, *il n'ya plus permanente que la provisoire*. Hence the imperative to plan and act procedurally, even when the possibility of achieving highly successful outcomes may seem remote.

Annex

In this section, we have reviewed the negotiating procedures and arrangements of a number of international problems that bear some similarity to the Kosovo situation. There are no precise "cases in point", as lawyers say, but some of the features of these cases may be useful for purposes of discussion.

Aaland Islands:

Upon Finland's independence from Russia, Sweden pressured the international community to determine whether the Aaland Islands were a part of the new Finnish State or whether they should belong to Sweden because of their population's Swedish heritage. A series of unsuccessful negotiations forced the issue upon the League of Nations, which also could not resolve the matter diplomatically and which therefore set up two commissions to determine the islands' fate. The first commission, the Commission of Jurists, considered the legal arguments of each side. Finland argued that the Aaland Question was a domestic issue and therefore outside the scope of the Commission's jurisdiction. Sweden argued for the self-determination of the Islands' primarily Swedish population. The Commission adopted the Swedish view, explaining that Finland's territorial domain had not yet been definitively delineated.¹

The second commission, the Commission of Inquiry, rejected the argument for the Aalanders' self-determination and instead decided in favor of Finland. Three main factors compelled its decision. First, the Commission considered Finland to be an independent State with rights of sovereignty over its territorial domain; it refused to acknowledge that a minority within a state had the absolute right of secession. Second, the islands connect geographically to Finland and therefore play a role in Finnish national security. Finally, Finland's behavior suggested that it would not necessarily accept a League decision in Sweden's favor; the Commission wanted to avoid potential conflict and to maintain its perceived effectiveness. The League of Nations accepted the proposals of the Commission of Inquiry.² It recognized Finland's sovereignty over the Islands but required Finland to ensure Aaland autonomy, to preserve the islanders' Swedish culture, and to "guarantee, to the Swedish people and to all the countries concerned, that the Aaland Islands will never become a source of danger from the military point of view".³

Bosnia-Herzegovina: Dayton (1995):

¹ See JAMES BARROS, *THE AALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS* (1968).

² *Id.*

³ Agreement between Finland and Sweden relating to Guarantees in the Law of 7 May 1920 on the Autonomy of the Aaland Islands, Resolutions Adopted by the Council of the League of Nations at its Thirteenth Session, LEAGUE OF NATIONS O.J. Supp. 5, at 24 (1921), in *DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS* 142 (Hurst Hannum, ed. 1993).

The 1995 Dayton Agreement⁴ that established a precarious peace in Bosnia-Herzegovina "was the culmination of some 44 months of intermittent negotiations, always at the initiative of and with the help of outsiders, between the states and entities principally engaged in the Bosnian conflict".⁵ Negotiations faced the nearly intractable problem of mediating between the territorial claims of Bosnian Muslims, Serbs and Croats, while simultaneously "respect[ing] the international personality and territorial integrity of Bosnia-Herzegovina, which was an important condition set by the international community".⁶ To facilitate negotiations, the United Nations and the European Community created the International Conference on the Former Yugoslavia (ICFY) in 1992, and this body drafted the so-called Vance-Owen plan in 1993, which would have provided for the cantonization of the territory of Bosnia-Herzegovina. But the Bosnian-Serbs rejected this plan in May.⁷ Subsequently, the United States, Russia, France, Germany and the United Kingdom formed a "Contact Group" that consulted with the ICFY and with representatives of the *de facto* constituent entities, the Bosnia-Herzegovina Federation and the Republika Srpska (the Bosnian-Serb republic). The initial 51-49 territorial division proposed by the Contact Group also suffered rejection by the Bosnian Serbs. But the United States subsequently succeeded, through "a combination of military and political threats and promises" in securing agreement from the Republika Srpska to delegate its negotiating authority to a joint Republika Srpska/Federal Republic of Yugoslavia delegation, headed by Serbian president Milosevic. Under the auspices of the Contact Group, and with substantial U.S. pressure, the GFA was concluded on December 14, 1995.

The Dayton Agreement divided the Republic of Bosnia-Herzegovina into two *de jure* entities, the Bosnia-Herzegovina Federation and the Bosnian-Serb Republic. Each constituent entity exercises the vast majority of traditional government functions - including judicial functions, policing, legislation, education and military affairs - and relegates to the Republic only responsibility for foreign affairs, foreign trade and currency.⁸ Moreover, even those powers delegated to the Republic remain subject to extensive checks and balances, rendering the "federal" government of the Republic virtually innocuous. To forestall further ethnic conflict, the GFA provides for an "Inter-Entity Boundary Line", which divides the Federation of Bosnia-Herzegovina and the Republika Srpska and, during a "transitional phase", will be policed by international forces.⁹

Human rights receive protection under the new Constitution, which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms and

⁴General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo, Dec. 14, 1995 [hereafter GFA], *reprinted at* 35 I.L.M. 75 (1996); *see also* Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Republic of Bosn. & Herz.-Federation of Bosn. & Herz., Nov. 10, 1995 [hereafter Dayton Agreement], *reprinted at* 35 I.L.M. 170 (1996).

⁵Paul C. Szasz, Introductory Note to the GFA, 35 I.L.M. 75, 75 (1996).

⁶*Id.*

⁷*See id.* at 75-76.

⁸*See* Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COMMENT. 145, 147-48 (1996).

⁹*See* Agreement on Inter-Entity Boundary Line and Related Issues, Republic of Bosn. & Herz.-Republika Srpska, GFA, Annex 2.

its Protocols by reference and gives them priority over all other law.¹⁰ The Constitution also requires the Republic to accede to fifteen international human rights agreements.¹¹ Finally, a separate "Agreement on Human Rights",¹² creates an Ombudsman, appointed by the OSCE, and a Human Rights Chamber, comprised of two Croats, two Bosnian Muslims, two Serbs and eight foreign members, who are appointed by the Committee of Ministers of the Council of Europe.¹³ The Chamber is empowered to review complaints filed by individuals or the Ombudsman and to issue binding decisions; under the Dayton Agreement, however, "administration of the human rights machinery . . . revert[s] to the central government" in the year 2000.¹⁴ Several additional agreements regulate, *inter alia*, railroad and communication facilities and the preservation of public monuments. In each case administration rests with a board comprised of delegates of the Federation of Bosnia-Herzegovina and the Republika Srpska, mediated by a "neutral" international presence (in the former case, a delegate from the European Bank for Reconstruction and Development and, in the latter, by the Director-General of UNESCO).¹⁵

Cyprus:

The end of British rule over Cyprus instigated half a decade of fighting between the islands' majority Greek population (78%) and its minority Turkish one (18%). Because Cyprus had neither a modern history of independence nor a cohesive national identity, the fighting seemed unlikely to produce any workable model of order. Thus, in 1959, the prime ministers of Greece and Turkey met in Zurich to negotiate the island's fate. They drafted three initial agreements: a Basic Structure of the Republic of Cyprus; a Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom; and a Treaty of Alliance between Cyprus, Greece and Turkey. Although no Cypriot representatives participated in drafting these agreements, a representative from each of the two Cypriot communities joined leaders from Greece, Turkey and Britain in London to finalize them. All three agreements were adopted with only minor modifications.¹⁶

The Basic Structure created a bicomunal constitutional system designed to maintain an immutable balance between the Greek majority and the Turkish minority.¹⁷ It created strong component communities within a weak central government, with government positions delineated along ethnic lines.¹⁸ The Treaties of Guarantee and Alliance bound the key interested outside states to protect Cyprus' constitutional balance. Under Article IV of the

¹⁰See BOSNIA-HERZEGOVINA CONST., art. II, ¶ 2.

¹¹See Morrison, *supra* note __, at 152. These include the Genocide Convention, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. *See id.*

¹²GFA, Annex 6, reprinted at 35 I.L.M. 130 (1996).

¹³See Morrison, *supra* note __, at 152.

¹⁴*Id.* at 153.

¹⁵See *id.* at 154-55.

¹⁶Thomas D. Grant, *Internationally Guaranteed Constitutive Order: Cyprus and Bosnia as Predicates for a New Nontraditional Actor in the Society of States*, 8 J. TRANSNAT'L L. & POL'Y 1 (1998).

¹⁷CYPRUS CONST.

¹⁸See, e.g., *id.* Art. 46 (providing for three of the ten Ministers on the Council of Ministers to be Turkish and seven to be Greek).

Treaty of Guarantee, Greece, Turkey and the United Kingdom agreed consult with each other in regards to any threat to the island's constitutional balance.¹⁹ Should concerted action prove impossible, each of these three States has the power to act unilaterally in order to reestablish the constitutional balance.²⁰ Provisions of the Treaty of Alliance complemented Article IV by granting Greece and Turkey the right to permanently station troops in Cyprus.²¹ Overall, the three agreements created in Cyprus an internal structure that recognized the inevitability of ethnic tensions and that sought to remedy these tensions through international guarantees.

Danzig (1920-1939):

Danzig, an ethnically German city bounded by Polish territory, had been part of Poland for approximately 350 years, but in the late-18th century, the partition of Poland placed it within the sovereign jurisdiction of Prussia.²² After the Allied victory in World War I, Danzig became an autonomous province under international supervision, a status that it retained throughout the nearly twenty year-period between its establishment by the Treaty of Versailles²³ and its annexation by Nazi Germany in 1939. While neither Danzig's inhabitants nor the nascent State of Poland desired autonomous status for the City,²⁴ the drafters of the Treaty sought to mediate between Poland's demand for sea access and Danzig's hostility to incorporation by Poland.

Negotiations regarding Danzig's subsequent status took place within the "Conference of Ambassadors" established in Paris to handle "all matters concerning the execution and interpretation of the peace treaties".²⁵ The Conference included representatives of the Allied powers - France, Great Britain, Italy and Japan - and received reports from several "delimitations commissions", which consisted of military officers from these states charged under the various treaties with redrawing the frontiers of states in dissolution, transition or reconstitution.²⁶ Pending negotiations between Poland and Danzig, the City remained under the provisional authority of the Principal Allied and Associated Powers, on whose behalf a senior British diplomat and two battalions of Allied troops under his command administered Danzig, "maintaining law and order whilst the implementation of the principles set out in the peace treaty [were] being agreed".²⁷

The Treaty of Versailles placed the so-called "Free City of Danzig" under international supervision, whereby Poland enjoyed rights to access, administer and develop Danzig's ports,

¹⁹ Treaty of Guarantee, Aug. 16, 1960, Cyprus-Greece-Turk.-U.K., 382 U.N.T.S. 3.

²⁰ *Id.* ("In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty").

²¹ Treaty of Alliance, Art. IV, Aug. 16, 1960, Cyprus-Greece-Turk., 397 U.N.T.S. 287.

²² See Note, Susan Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 176 n.60, citing MANFRED LACHS, THE POLISH-GERMAN FRONTIER 15 (1964).

²³ See Treaty of Versailles, June 28, 1919, 11 Martens Nouveau Recueil 3d, 323, Sec. XI, arts. 100-108 [hereafter Treaty of Versailles], reprinted in DOCUMENTS ON AUTONOMY, *supra* note __, at 592-94.

²⁴ See Hannum, *Free City of Danzig*, in DOCUMENTS ON AUTONOMY, *supra* note __, at 591, 591.

²⁵ ALAN JAMES, PEACEKEEPING IN INTERNATIONAL POLITICS, 24-25 (1990).

²⁶ See *id.* at 23-25.

²⁷ *Id.* at 25-26.

to conduct foreign relations on its behalf, to control postal and wire communications and "to provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech";²⁸ Danzig, in turn, retained domestic self-government rights, subsequently implemented by the Constitution of the Free City of Danzig,²⁹ as well as the right to establish an independent judiciary and police force. The Danzig Constitution devoted several articles to ensuring the citizenry certain "fundamental rights and duties", including equality before the law (art. 73), personal liberty (art. 74), freedom of expression (art. 79) and religion (art. 96), and it provided for free and compulsory education.³⁰ The Constitution expressly revoked the sovereignty of the defeated German Empire, though it affirmed that "laws and decrees which are valid in the territory of the Free City of Danzig at the time of the coming into operation of this Constitution shall remain in force in so far as they are not suspended by this Constitution or by legislation".³¹ Under the Treaty of Versailles, although Danzig exercised autonomy and control over most of its affairs, and was often treated in practice as a *de facto* independent state, ultimate sovereignty remained with the League of Nations. Disputes between local authorities of Danzig and Poland were referred to its High Commissioner, subject to an appeal to the Council of the League of Nations,³² which, in turn, would at times request advisory opinions from the Permanent Court of International Justice.³³

Eritrea (1952-62):

After the dissolution of Italy's colonial empire, Britain assumed temporary administration of the region that now comprises the independent state of Eritrea,³⁴ pending a political settlement pursuant to the 1947 Peace Treaty between Italy and the Western victors of World War II (France, the Soviet Union, Great Britain, and the United States).³⁵ At the time, both Ethiopia and the Sudan asserted claims to Eritrea. Britain thus attempted to partition the region between the two, but the United Nations and Eritrea's populace rejected this plan.³⁶ Consequently, under the terms of a joint declaration governing disposition of former Italian colonial territory,³⁷ failure to settle Eritrea's status by the four Western victors invested the

²⁸Treaty of Versailles, art. 104.

²⁹Constitution of the Free City of Danzig (1922) [hereafter Danzig Constitution], *reprinted in* DOCUMENTS ON AUTONOMY, *supra* note __, at 604-27.

³⁰*See id.*, arts. 101-09.

³¹*Id.*, art. 116.

³²*See* Hannum, *supra* note __, at 591-92.

³³*See, e.g.*, Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J., Series B, No. 11 Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, Advisory Opinion, 1931 P.C.I.J., Series A/B, No. 43, p. 128; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J., Series A/B, No. 45, p. 68.

³⁴DOCUMENTS ON AUTONOMY & MINORITY RIGHTS 628 (Hurst Hannum ed., 1993) [hereafter DOCUMENTS ON AUTONOMY].

³⁵Treaty of Peace With Italy, Feb. 10, 1947, 49 U.N.T.S. 139.

³⁶DOCUMENTS ON AUTONOMY, *supra* note __, at 628.

³⁷Joint Declaration by the Soviet Union, United States and France Concerning Italian Territorial Possession in Africa, Annex XI, 49 U.N.T.S. 214 (1950).

General Assembly with authority to prescribe Eritrea's status by resolution. To facilitate its ultimate determination, the General Assembly created the United Nations Commission for Eritrea,³⁸ a five-member board comprised of delegates from Burma, Guatemala, Norway, Pakistan and South Africa.³⁹ Resolution 289 (IV) empowered the Commission to "ascertain more fully the wishes and the best means of promoting the welfare of the inhabitants of Eritrea",⁴⁰ and, subsequently, to make a recommendation to the General Assembly based upon the desires of Eritrea's people, preserving peace and security in the region, and "[t]he rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea".⁴¹

The Commission spent five months in Eritrea in 1950 and solicited the views of, *inter alia*, Eritrea's populace, political representatives, commercial entities with economic interests in the region and religious leaders.⁴² Based upon its inquiries, the Commission recommended a variety of dispositions, including (1) Eritrea's integration into Ethiopia as a "self-governing unit of a federation"; (2) full reunification with Ethiopia, leaving certain western provinces under temporary British authority; and (3) a ten-year "trusteeship" for Eritrea after which Eritrea would become independent.⁴³ Ultimately, the General Assembly adopted the first of these proposals, which it implemented by resolution on December 2, 1950.⁴⁴

Resolution 390A stipulated that Eritrea would become an autonomous region under the sovereignty of Ethiopia. Eritrea would enjoy "legislative, executive and judicial powers in the field of domestic affairs", while Ethiopia would retain power over "defense, foreign affairs, currency and finance, foreign and interstate commerce . . . interstate communications, including ports".⁴⁵ At the same time, the Resolution guaranteed Eritreans "the enjoyment of human rights and fundamental liberties".⁴⁶ Finally, it created the United Nations Commissioner in Eritrea to facilitate the two-year transitional period: Resolution 390A charged the Commissioner to draft the Constitution of Eritrea, or "Act of Federation",⁴⁷ in consultation with the Administering Authority, the Government of Ethiopia and the inhabitants of Eritrea,⁴⁸ and to "prepare as rapidly as possible the organization of an Eritrean administration, induct Eritreans into all levels of the administration and make arrangements for and convoke a representative assembly of Eritreans chosen by the people".⁴⁹ Eritrea's Act of Federation entered into force in 1952, and the newly-created Ethiopian federation with

³⁸G.A. Res. 289 (IV), U.N. GAOR, 5th Sess., Supp. No. 1, at 11, U.N. Doc. A/1287 (1949).

³⁹See Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 484 (1994).

⁴⁰G.A. Res. 289 at 12, *quoted in* Haile, *supra* note __, at 484.

⁴¹*Id.*

⁴²See Haile, *supra* note __, at 485.

⁴³See *id.* at 485, *citing* Report of the United Nations Commission for Eritrea, U.N. GAOR, 5th Sess., Supp. No. 8, p. 33, U.N. Doc. A/1285 (1950).

⁴⁴G.A. Res. 390A, U.N. GAOR 5th Sess., Supp. No. 20, at 20, U.N. Doc. A/1775 (1950).

⁴⁵*Id.*, paras. 2-3.

⁴⁶*Id.*, para. 7.

⁴⁷ERITREA CONST. (1952), *reprinted in* DOCUMENTS ON AUTONOMY, *supra* note __, at 633-61.

⁴⁸See *id.*, para. 12.

⁴⁹*Id.*, para. 11.

Eritrea continued until 1962, when the Eritrean Assembly unanimously terminated itself and reunited with Ethiopia.

Northern Ireland

The negotiations that led to the Good Friday Agreement of 1998 demonstrated the interested parties' willingness to resolve the conflict in Northern Ireland through the use of law and politics, rather than terrorism and violence.⁵⁰ They also demonstrated the recognition that a successful process depended upon the involvement of all the actors already involved in the conflict, including those that had partaken in paramilitary activities. Thus, the negotiating parties included two sovereign governments (Great Britain and Ireland) and eight disparate political parties from Northern Ireland, all of which were guided by an American (George Mitchell), a Finn (Prime Minister Harri Holkeri), and a Canadian (General John de Chastelain).⁵¹

To accommodate the diverse and often conflicting interests of the parties involved and to ensure consideration of all the relevant policy issues, negotiations proceeded within an intricate procedural structure. First, the negotiations entailed an international dimension which brought to them a sense of balance and fairness. In this regard, the support of and suggestions by the Clinton Administration proved to be invaluable.⁵² So, too, did the involvement of the English and Irish Governments. In the British-Irish Agreement, these Governments agree to both the cease-fire of hostilities and the recognition of self-determination as a ruling principle in the region.⁵³

Second, the negotiations provided for the needs of the local population by adhering to principles of self-determination and consent and by creating a formal treaty to this affect. The Multi-Party Agreement between the Irish and British Governments and the local parties in Northern Ireland considered the breadth of local issues involved in the resolution of the conflict. The Agreement provides for alterations Irish Constitution and the British constitutional legislation regarding the status of Northern Ireland; an increased devotion to human rights; measures to promote economic and political equality, both between and among the different jurisdictions involved; and the creation of a North/South Ministerial Council to serve as a link between the two jurisdictions in Ireland and of a British-Irish Council to ensure the continued peaceful involvement of Great Britain and Ireland.⁵⁴

Despite the bifurcation of the negotiating process, the Agreements create one, cohesive end regime. To ensure this result, the negotiators annexed the Multi-Party Agreement to the British-Irish Agreement, and vice versa.⁵⁵ Finally, they allowed for the realization of the stated principle of self-determination by granting the Irish people the right to vote on reasonableness of these Agreements. On May 22, 1998, the people of Ireland, North and

⁵⁰David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L. J. 1206, 1207 (1999).

⁵¹*Id.* at 1207.

⁵²Bertie Ahern, *The Good Friday Agreement: An Overview*, 22 FORDHAM INT'L L. J. 1196 (1999).

⁵³Byrne, *supra* note ___ at 1208.

⁵⁴*Id.*

⁵⁵*Id.*

South, overwhelmingly endorsed the referendums.⁵⁶

Vietnam - Geneva:

In 1954, after one hundred years of colonial rule, Vietnamese nationalist forces defeated French troops at Dien Bien Phu and forced the French into peace agreements. The negotiations that ensued reflected the Cold War strains of the international order. Because the Communist superpowers did not want to anger the United States and its Western European allies so soon after the Korean War, they pressured Vietnam to acquiesce to France's terms. Those terms allowed France a face-saving defeat by temporarily partitioning Vietnam so as to create the pretense that only half of the region had succumbed to Communism.⁵⁷

According to the provisions of the Geneva Accords, Vietnam would hold national elections in 1956 in order to reunify the country. This was particularly important to the Vietnamese since the division along the seventeenth parallel had no cultural precedent. The United States, however, thought that these terms granted too much power to Vietnam's Communist Party. It therefore embarked upon a plan to build a nation out of southern Vietnam. The United States provided massive amounts of military, political and economic aid toward these ends. The new, anti-Communist government in South Vietnam thwarted any effort toward reunification.⁵⁸

Vietnam - Paris:

The negotiations that ultimately ended the Vietnam War - the Paris Peace Talks (1968-1973) - included the United States and the Republic of Vietnam (RVN) on one side, and a coalition between the Democratic Republic of Vietnam (DRV) and its South-based military arm (the National Liberation Front or NLF) on the other.⁵⁹ Until the winter of 1971-1972, the negotiations stalemated.⁶⁰ The DRV and the NLF demanded the unilateral withdrawal of American troops and the reunification of Vietnam under a government chosen by the Vietnamese, which almost ensured communist governance throughout the region. The United States found these demands to diametrically oppose its own interests, which were to preserve the RVN as a separate state and to employ a two-track negotiating system. Under the U.S. negotiating system, the United States and the DRV would settle the South's military outcome, while the RVN and the NLF determined its political outcome. This two-track system would allow both the end of U.S. involvement in Vietnam and the appearance of U.S. accomplishment.⁶¹ In early 1972, when President Nixon demonstrated his ability to escalate the military conflict and when the Soviets and the Chinese withdrew some of their

⁵⁶Ahern, *supra* note ____, at 1197.

⁵⁷ See The Wars for Viet Nam: 1945-1975, <<http://students.vassar.edu/~vietnam/overview.html>> (visited Nov. 26, 1999).

⁵⁸ *Id.*

⁵⁹ See JEFFREY KIMBALL, NIXON'S VIETNAM WAR (1998).

⁶⁰ See Frank C. Zagare, *A Game-Theoretic Analysis of the Vietnam Negotiations: Preferences and Strategies 1968-1973*, in THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS 111 (I. William Zartman, ed. 1978).

⁶¹ See KIMBALL, *supra* note ____, at 105-112; Zagare, *supra* note ____, at 112.

support for the North, the DRV and NLF came to prefer settlement to a continued conflict.⁶² The coalition proposed a settlement to the United States that conceded many of their initial demands. While this settlement pleased the United States, it was less acceptable to the RVN, which felt excluded from the negotiations. Although the RVN resented the U.S. and the DRV for presenting it with a *fait accompli*, it had little choice but to accept their agreement. The key provisions of the agreement called for a cease-fire, the release of all military POWs, and the creation of the National Council of Reconciliation and Concord, which would enable the Saigon Government and its Communist rivals to determine the political future of South Vietnam.⁶³

⁶² See Zagare, *supra* note ____, at 123-25.

⁶³ See KIMBALL, *supra* note ____, at 366-68; Zagare, *supra* note ____, at 129-31.