



DPI Roundtable Meeting: Constitution Making in a Divided Society

24th – 26th June 2012





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Democratic
Progress
Institute

August 2012



Published by
Democratic Progress Institute
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London WC1N 1DH
United Kingdom

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First published, 2012

ISBN: 978-1-905592-49-4

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Contents

Foreword	6
Roundtable on Constitution Making in a Divided Society:	
Sunday 24th June 2012 –	
Arrival at Oxon Hoath Manor	8
Monday 25th June 2012 –	
Constitution making in a Divided Society:	
The Turkey Experience with Professor Dr. Mithat Sancar and Professor Dr. Sevtap Yokuş	9
Constitution making in a Divided Society:	
The South African Experience with Professor Jack Spence OBE	18
Tuesday 26 th June 2012 –	
Internal Evaluation and Dinner at Oxon Hoath Manor, Kent, United Kingdom	46
Appendix	
Participants from Turkey:	47
Participants from the United Kingdom:	48
DPI Board and Council of Experts	49

Foreword

The Democratic Progress Institute aims to foster an environment in which different parties share information, ideas, knowledge and concerns connected to the development of democratic solutions and outcomes. Our work supports the development of a pluralistic political arena capable of generating consensus and ownership over work on key issues surrounding democratic solutions at political and local levels.

We focus on providing expertise and practical frameworks to encourage stronger public debates and involvements in promoting peace and democracy building internationally. Within this context the Institute aims to contribute to the establishment of a structured public dialogue on peace and democratic advancement, as well as to create new and widen existing platforms for discussions on peace and democracy building. In order to achieve this we seek to encourage an environment of inclusive, frank, structured discussions whereby different parties are in the position to openly share knowledge, concerns and suggestions for democracy building and strengthening across multiple levels. DPI's objective throughout this process is to identify common priorities and develop innovative approaches to participate in and influence the process of finding democratic solutions. The Institute also aims to support and strengthen collaboration between academics, civil society and policy-makers through its projects and output. Comparative studies of relevant situations are seen as an effective tool for ensuring that the mistakes of others are not repeated or

perpetuated. Therefore we see comparative analysis of models of peace and democracy building to be central to the achievement of our aims and objectives.

This report details the activities and roundtable discussions experienced during our visit to Kent, United Kingdom, from 24th June to 26th June 2012. This activity focused on the subjects of constitution making processes in South Africa and Turkey, with a view to discuss ideas as to how Turkey may improve its constitution making process. Further activities will be conducted on similar topics in locations such as South Africa and elsewhere in the future. With special thanks to Heena Shah and the staff of DPI for their assistance with this report. DPI also gives special thanks to the Oxon Hoath Manor for their hosting of the visit.

Cengiz Çandar, Yılmaz Ensaroğlu, Professor Dr. Mithat Sancar, Professor Dr. Sevtap Yokuş, Bejan Matur, Kerim Yıldız

Democratic Progress Institute Council of Experts

August 2012

Sunday 24th June 2012 – Oxon Hoath Manor¹

The delegation is warmly welcomed to Oxon Hoath Manor, Kent, United Kingdom.



Delegation outside Oxon Hoath Manor, Kent, United Kingdom

1 Oxon Hoath Manor is located in Kent, south-east of London, and is over 600 years old. It was built by Sir John Culpeper during the reign of King Edward III, as a Royal Park for oxen and deer. The original family, the Culpeper's, lived in Oxon Hoath Manor for 400 years and continue to live one mile from the house, initially moving into the house in 1213. Catherine Howard, the fifth queen of Henry VIII, lived here and was beheaded after less than two years of marriage to Henry, on the grounds of treason, for committing adultery while married to the King.

The Geary family lived here for approximately 200 years. They were politicians and were very heavily involved in the Conservative government at the time. The front gates of Oxon Hoath Manor were taken from the Houses of Parliament when Westminster Parliament was remodelled, approximately 200 years ago.

Every family that has lived in Oxon Hoath Manor has remodelled the house extensively. The current owner bought the house 12 years ago and took one year to restore and rebuild it to its current position. It is currently used for people as a retreat, not a hotel. There are no televisions, no radios or newspapers here; just peace and tranquillity from everyday life.

Monday 25th June 2012 – Seminar and Roundtable, with Professor Dr. Mithat Sancar and Professor Dr. Sevtap Yokuş, Oxon Hoath Manor, Kent, United Kingdom

Presentation and Roundtable Discussion:

Constitution Making in a Divided Society: The Turkey Experience

With

Professor Dr. Mithat Sancar² and Professor Dr. Sevtap Yokuş³

Moderated by Catriona Vine, Deputy Director - Director of
Programmes, DPI



*Catriona Vine, Professor Dr. Sevtap Yokuş, Professor Jack Spence and
Professor Dr. Mithat Sancar speaking at the Roundtable meeting at
Oxon Hoath Manor, Kent, United Kingdom*

2 Professor Dr. Mithat Sancar is a Professor of Law at the University of Ankara, expert and an author on constitutional citizenship and transitional justice, and columnist for Taraf newspaper.

3 Professor Dr. Sevtap Yokuş is Professor of Law University of Kocaeli, an expert on constitutional law and human rights law and a practitioner in the European Court of Human Rights.



*The delegation at the Roundtable meeting at Oxon Hoath Manor,
Kent, United Kingdom*

Professor Dr. Mithat Sancar: Constitution making in a divided society is an important topic. International literature defines a ‘*divided society*’ as a society where social polarisation is rigid and social divides are deep. Therefore, one might assert that democracy building and constitution making in this type of society is a very challenging feat.

**in a divided society, constitution making
requires special attention**

Due to the axis of polarisation, when discussing divided societies, one must be aware that there may also be an internal conflict arising out of social or class conflicts. In this type of divided society, rebuilding the political order and re-integrating the broken parts of society as a whole are very important tasks.

In a divided society, constitution making requires special attention. In Turkey, we need to evaluate whether it has a divided society or not. Turkey experiences conflict on a regular basis, as social divisions are deep and indeed, within international literature, Turkey is listed by many as an example of a divided society. During the constitution making process in this type of society, two important considerations must be taken into account: firstly, what type of process will overcome such a conflict? Secondly, following this process, strategies for further social integration need to be devised.

New constitutions are normally created in divided societies, though in some societies the revolution has not always been led by the majority (such as in former Yugoslavia). On the other hand, in relation to Bosnia and South Africa, both of these divided societies have had new constitutions created in the last two decades, where the revolution *was* led by the majorities, and both are prime examples of progressive democracy building. In both cases, special methods were applied in order to achieve this social and political revolution and to ensure that the constitution was to be accepted. In more integrated societies, however, making a new constitution means making a fresh start rather than rebuilding and reverting to the society before the revolution.

The constitution making process in former socialist states also follows democratic processes, such as founding a Parliament or creating a constitution which is approved by Parliament and

followed by a referendum. However, in those countries, it is a lot more difficult to effect such a change, with the laws and the constitution being more declaratory or descriptive in character. In divided societies, such as in South Africa, the need to re-evaluate social structures was obvious and was supported by large parts of society. As opposed to a fresh start, since the creation of the constitution in 1996, the society in South Africa is being re-established, though some may argue that the success of democracy building has been overshadowed by the success of the constitution making process itself.

In divided societies, the creation of a new constitution usually follows an act, or several acts, of conflict, though in some societies this process may be more harmonious. The aim is either to put an end to the conflict and the violence or to re-establish society in a new fashion. The most important, and perhaps most relevant, example of a divided society today is South Africa. South Africa is an example of both of these scenarios; the aim of making a new constitution in South Africa was both to end the conflict and to begin the re-establishment of society. Turkey has looked to South Africa in this respect, and uses these innovative constitutional discussions as a tool to resolve the conflict. Turkey's former constitutions were made by a certain literary power; the power, or group, prepared a draft of the constitution and society was obligated to accept it, and until 1982, constitutions were made under this model. The constitution of 1982, a pre-designed model translated into a constitutional text was, for the first time,

approved by a referendum, though it is true that the people of Turkey were not involved in the negotiation process. This meant that the majority of society was excluded from the discussions and negotiations which led to the making of the constitution.

A significant step in Turkey–European Union relations came in December 2002, with the Copenhagen European Council, followed by agreement, in December 2004, to start accession negotiations with Turkey from October 2005. Following this, new efforts were made to make a civilian constitution; one that was not imposed by the military but where society would be involved and elected bodies would be appointed to create the constitution. It was at this point that the basis of discussion for a civilian constitution was posed; the fact that the government, the Justice and Development Party of Turkey (hereafter the ‘AKP’), pioneered this process has made the constitution making process more meaningful. Unfortunately, by 2002, it was clear that this attempt to create a democratic society had failed. With an upcoming election in 2011, Parliament began to institutionalise laws in order to make another constitution, and sought that the new constitution process would be carried out by Parliament and through parliamentary structures. It remains to be seen whether this new structure for the constitution is sufficient to overcome the social divide in Turkey, but there are many who doubt the legitimacy of this new, democratic process.

Thank you.

Professor Dr Sevtap Yokuş: Thank you. Our colleagues in Turkey are continually working towards ensuring that the new constitution which is being proposed in Turkey goes through a fair process, and they have studied its proposed content thoroughly. As opposed to providing you with a detailed description of the newly proposed constitution, I will summarise certain determining factors of what I believe a truly democratic constitution needs to include.

Firstly, I would like to remind you of some important points within the constitution making process: in Turkey, one always begins with the question, *‘why do we need a new constitution?’* Even in the courts, this issue is discussed openly, with the prevailing view that the constitution of 1982 has been amended several times with ‘important’ amendments; therefore there is no reason for it to be amended once again. The reason I would like to remind you of this key point is that the existing constitution in Turkey was prepared under undemocratic circumstances. Before the literary groups prepared it, many anti-democratic laws were enacted to enable the constitution to be prepared in a way which was ‘consistent’ with the laws of Turkey. Therefore, the underlying undemocratic philosophy of our constitution remains: the official ideology is flawed and underpins a practise which ignores individual rights and hails a non-liberal constitution. These are points that most of you are aware of, but as a reminder, the system of limitation and prohibition remains deeply ingrained in our current constitution, in particular, in sections 13, 14 and 15 of the constitution.

Article 13 is a generally restrictive article, giving the power for all articles in the constitution to be subject to restrictions and limitations. Article 14 provides a general prohibition on two main subjects; the first being the indivisible integrity of the individual and state and the second being the indivisible integrity of the secular public. This is what is enshrined in Article 14 and is repeated in different articles within the constitution, as a justification for prohibition. Article 15, finally, contains a prohibition about suspension; the words used are ‘stopping’ or ‘halting’, and relate to the suspension of liberties under certain circumstances, as determined by the government.

The constitution of 1982 was drafted to contain numerous prohibitions of liberties and remains that way today. The emphasis on the state is illuminated in the preamble, which begins with the sentence, ‘Holy state of Turkey’, though in 1995, this was changed to ‘The great Turkish State’, but the original meaning remains intact.

How did this regime operate in Turkey? Applicants from ‘state of emergency’ regions, who have found that domestic remedies were not effective, applied and were directly accepted in the European Court of Human Rights (hereafter the ‘ECHR’), highlighting that many human rights were being violated in Turkey. After the 1999 Helsinki Summit, which produced the accession partnership document for Turkey, Turkey prepared a national programme which included significant constitutional amendments in 2001 and in 2004. However, unfortunately, the mentality of

the 1982 constitution had not changed and the undemocratic laws underpinning the constitution remain intact, leaving Turkey with serious issues regarding civil rights and liberties.

the question remains whether a constitution created in undemocratic circumstances can ever truly be democratic?

After 2004, a new approach towards the constitution was adopted, and was considered, by many, as a way out of the discrimination and conflict which was rife in Turkey. Today, the expectation of the new constitution is that it will benefit from this new conflict resolution process that have been used in other divided societies, in particular in South Africa. In addition to this, when the Turkish Parliament began drafting the constitution, a conciliation committee was formed, in which all Parliamentary parties were represented equally. Despite these measures being put in place, however, there still remains the issue of new conflicts on the rise in Turkey, with some groups opposing the creation of a truly democratic constitution. The effects of the new constitution will be realised in the future, but the question remains whether a constitution created in undemocratic circumstances can ever truly be democratic?

if the constitution is ever to be truly democratic, all barriers of freedom of expression must be eliminated and the law should be very clear on this

At the beginning of my political involvement in Turkey's new constitution making process, I participated in a Parliamentary debate in relation to the methodology used within this process, and one feature was emphasised: if the constitution is ever to be truly democratic, all barriers of freedom of expression must be eliminated and the law should be very clear on this. Unfortunately, almost nothing has been done so far.

Thank you for your time.

Monday 25th June 2012 – Seminar and Roundtable with Professor Jack Spence, OBE

Presentation and Roundtable Discussion: *Constitution Making in a Divided Society: The South African Experience*

With: Professor Jack Spence OBE⁴

Moderated by Catriona Vine, Deputy Director - Director of Programmes, DPI



*Professor Jack Spence and Professor Dr. Mithat Sancar
speaking at the Roundtable meeting at Oxon Hoath Manor,
Kent, United Kingdom*

⁴ Professor Jack Spence is highly regarded as an expert in the field of Constitutional Law and was awarded an OBE in 2003. He has been teaching in the Department of War Studies, King's College London, since 1997 and has specialised in a Post-Graduate course on Diplomacy. He was the Academic Advisor to the Royal College of Defence Studies, London, between 1997 and 2008 and still continues to teach there.

Professor Spence is a past President of the African Studies Association UK and past Chairman of the British International Studies Association. He is a past editor of *International Affairs*, the *Review of International Studies* and the *Journal of Southern African Studies*. He has published six books on South African issues and some 60 articles in learned journals.

Professor Jack Spence: Thank you for this opportunity to speak to you and I hope that we can learn a lot from each other, in relation to democracy building.

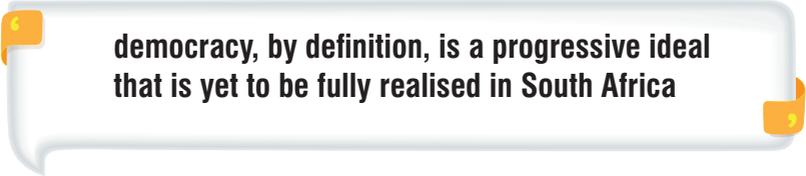
I would like to talk to you about the process in which South Africa negotiated a new, democratic constitution, over a period of four years. Creating a new constitution takes time and this is the first lesson to be learned from the South African experience.

One or two years ago, Professor David Welsh, a retired colleague, and I, published a book in an attempt to explain the history of apartheid, its impact on various ethnic communities and what led to its eventual demise. In this, we discussed the domestic circumstances, internal and external pressures that led to a set of negotiations.

I had a marginal role in the constitution making process in South Africa and have spent the majority of my academic life writing about apartheid, making my opposition to it very clear. I think it is important to make it clear where you stand on such a controversial issue, especially if you are campaigning for change. My wife and I took a significant risk by joining, as members, the South African anti-apartheid movement, but this is something that we strongly believed in and felt that we needed to be part of.

I would like to, first, provide you with some preliminary context; before Nelson Mandela was released from prison in

1990, and before the African National Congress (hereafter the 'ANC'), was given legal status, I had been involved in discussions with the ANC in London to find out what compromises would be possible. I was also a member of the Goldstone Commission, where Justice Goldstone, who has had a very literary career after retiring as a judge, set up the Commission in 1991 to see if certain structures could be devised within a military setup.



democracy, by definition, is a progressive ideal that is yet to be fully realised in South Africa

The Goldstone Commission had some success, but not as much as many hoped it would have had. I have, from personal experience, been both an academic and a participant in the constitutional structure of South Africa and am of the opinion that democracy, by definition, is a progressive ideal that is yet to be fully realised in South Africa.

During the constitution making process, certain conditions must prevail; there must be general conditions and a criterion for constitution making. One must be careful not to assume that the negotiation of new constitutional arrangements derives from a universally valid set of conditions, all of which must be present to guarantee a good outcome. There are some lessons to be learned from the success in their application elsewhere, but one must avoid assuming that they are all neatly and decisively applicable to each and every case.

What was very surprising about the South African constitution making process was that most of us were astonished when, finally, the change occurred. When it did, in February 1990, the President of South Africa made a speech and declared, to our astonishment, that he was going to release Nelson Mandela from prison, was going to legalise the ANC and committed the South African government to amending the constitution. It was astonishing, partially because it is easy to forget that all societies change, however imperceptibly. It may have been difficult to understand how significant these changes are at the time, but one must remember that societies are not static organisations. A series of changes took place in South Africa from 1976 onwards, which suggested that fundamental change, and the end of apartheid, would come sooner rather than later.



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The end of the Cold War was also an important point in history, because people began to realise that Russia was not going to take over. As a South African government, we had prepared for a total onslaught, which required a total strategy to cope; however, Russia could not match the capacity of the United States of America. The President's recognition that this was the case, and that there would have to be a real acknowledgement of this, paved the way for the changes implemented in 1990s. This gave Frederik

Willem de Klerk, the seventh and last State President of apartheid-era South Africa, a degree of flexibility which he previously did not have. By recognising that Russia was not going to invade South Africa, South Africa was forced to come to terms with the growing backlash against apartheid. It was an extraordinarily brave thing to do and it most certainly took most people by surprise.

One advantage that South Africa and the oppressed black majority had as a law making state was that South Africa had been the pariah of constitution making. Apartheid was one of the most cardinal crimes of international relations. Over 50 years, both within and outside of South Africa, huge anti-apartheid groups, pressures, isolations and sanctions were focused on South Africa. Soon, these external pressures built up and, suddenly, the world was interested in ending apartheid. One important thing to bear in mind is that, no politician could defend racial discrimination at this point; racial discrimination was regarded as one of the great crimes of the 20th century. Apartheid had been a major issue of international concern for many decades after World War II. Together with the Holocaust, apartheid and its practise contributed to the establishment of new international norms, specifically, racial equality within and between states and the issue of intervention, where state abuse of human rights was no longer tolerated. Therefore, South Africa suddenly found itself isolated and soon came to the conclusion that it could no longer organise a society based on racial discrimination.

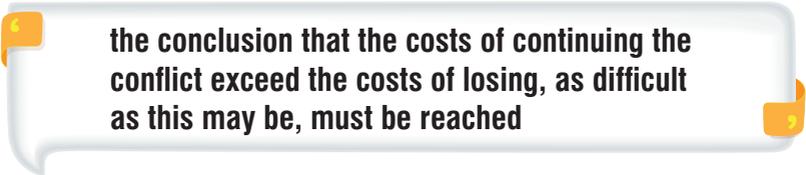
Throughout the 1950s to the 1980s, the ANC, in exile, established itself as the spokesperson for all ethnicities in South Africa. The ANC contrived to keep the South African issue salient in the thinking and behaviour of the government and politicians. Through global campaigns and sanctions, it also tried to fight the war of liberation, though not very successfully, and this forced the South African state to engage in successive waves of opposition, which generated more pressures on the state to change the situation. The government reacted with harsh measures, imposing successive states of emergency following outbreaks of protest and their forceful repression which, in turn, generated yet more internal conflict.

The interesting feature of the pre-formal discussions was that, in the 1980s, a series of meetings, secret and non-governmental, took place, which included all sorts of people; businessmen, academics and politicians. These people went to South Africa to meet the ANC in exile and to find out what their minimum and maximum demands were. There ensued a host of discussions between politicians and business people. One famous story is about the first group, led by businessmen from South Africa. These businessmen were dressed in linen and met with the ANC, who were dressed in formal business attire. The humour in this contrast of attire broke the ice between the two groups and allowed both sides to get to know each other.

The success of these discussions only came because both sides recognised that the art of diplomacy, orthodox diplomacy,

depends on both sides agreeing on, in the words of the late Hedley Bull, ‘an overlapping interest’, which brings them together in finding a solution. This took four years of hard graft, involving meetings between the ANC, businessmen, the media and academics, and this had the effect of building up trust between the parties, and indeed a degree of goodwill also. There was, too, a critically-important agreement on both sides that the forthcoming constitution had to reflect the values, norms and conventions of the kind that pertain in Western democracies. These meetings between the ANC and businessmen were all designed to see if there was an ‘overlapping interest’.

By 1990, it was clear, however, that both sides had reached a ‘mutually unacceptable stalemate’. Neither could win nor lose outright; true, the cumulative pressure of violence and sanctions might, over the very long run, have produced massive internal dislocation. However, neither the ANC nor the government welcomed the prospect of a slow collapse of state capabilities, leading to the former inheriting an economic and social wasteland.



the conclusion that the costs of continuing the conflict exceed the costs of losing, as difficult as this may be, must be reached

Recognition by both sides that they were facing a ‘mutually unacceptable stalemate’ was crucial in this situation. When two sides in a conflict find themselves unable to win or lose, there comes

a point where leaders on both sides must acknowledge that the time has come to talk. The conclusion that the costs of continuing the conflict exceed the costs of losing, as difficult as this may be, must be reached. In that period of the 1980s, the cost of winning was unacceptable. To get to that ‘right’ moment, in the literature of conflict resolution, you need a type of external pressure, advice and guidance. What you may find useful is a content group of disinterested states who keep an eye on conflict and who gain experience and knowledge, engage in secret diplomacy with the protagonist, and try to get protagonist to see clearly.

This moment arrived on 11th February 1990, when Nelson Mandela was released from prison. Mandela was, and remains today, an icon of enormous magnitude and influence; I have met him on several occasions and his impact is very extraordinary. He has immense charisma, is very polite and has a way of talking to you that makes you feel like you are the only person in the room. Mandela sat in jail for 27 years and throughout this period, he was constantly being held up as leader of the banned ANC. The government was scared that he would die in jail and so let him out, however, he fooled them more by living on, even today. Mandela’s iconic status meant that once both the opposition parties agreed to talk, the world focused its attention on both sides to reach a conclusion. That external pressure, the outside world, was very important. One must remember here, that whenever there was a conflict, crisis or massacre and the whole business of negotiation appeared to have collapsed, it was very difficult to get people

back around the table to talk again. Diplomats from all over the world came, from America, Britain and France, to persuade the protagonists to go back to the table to negotiate. As the years went by, the protagonists discussed, negotiated and realised that if they let the negotiations collapse, the world would think that South Africa was doomed.

During the negotiations, there were mishaps and near disasters, but the end result - universally acclaimed, both at home and abroad - was the establishment of a Government of National Unity (hereafter the 'GNU') in which all of the political parties, at the time amounting to 20 or more, won parliamentary representation according to a proportional representation formula. This also gave all the major parties seats in the Cabinet, depending on the number of votes cast for the party in the 1994 election; five per cent of the popular vote entitled the party to one seat in the GNU.

The GNU did not last indefinitely, but while it did, minorities - both white and black - derived a sense of security from its creation, easing the eventual transition to full-scale majority rule by the ANC.

In the immediate aftermath of the election, the Truth and Reconciliation Commission (hereafter the 'TRC') was established and this had both positive and negative effects on society. It did ease the pain inflicted by apartheid on those who gave evidence, but

the government was accused of a double standard by not including testimony of abuse from some of its own members.

Once the constitution was devised and an interim Parliament was elected, the South African government found it advantageous to continue constitutional negotiations and settle on an agreeable constitution. Firstly, South Africa has always had a tradition of strong and oppressive statehood. It kept the black majority down and would not give any rebellion any significance. Therefore, acknowledging the majority's desire for equality was straightforward. Secondly, South Africa has always had a parliamentary system of government. Admittedly, it was unrepresentative and exclusive, but the business of making policy and implementing legislation was carried out according to what Parliament said. Thirdly, South Africa had a judicial system, although battered by apartheid; nonetheless the notion of the rule of law was kept alive and mattered. South Africa even has a constitutional court, which will strike down legislation which is unconstitutional. Fourthly, South Africa also had a very lively civil society, relatively free press and organisations that made noise about apartheid and political matters. It had an effective business community; planes flew on time and the telephones worked, but in a narrow and exclusive way, and it had a respectable infrastructure.

These advantages meant that the new 1994 constitution, insofar as these structures were incorporated in it, was autochthonous, in that it was embedded in historical experience and not simply a

structure devised in the abstract, without reference to the country's past record of governance - both good and bad. This also made the constitutional making process much easier; if one considers the idea of implementing this strategy in Iraq or Afghanistan, it would not be the same case or completed with the same ease.

It is features such as these of the South African political and legal systems that led to the making of a new, democratic constitution and which have stayed in place.

Catriona Vine opens the floor for questions:

Catriona Vine: Thank you to Professor Spence and to all the speakers. Your presentations have raised many thoughts and questions in our minds, so I would like to open the floor for questions.

Question: If, in South Africa, the whites were the majority and blacks were the minority, do you think the results would have been the same?

Professor Jack Spence: I am not sure I have an answer for that! It is interesting that the ANC purported to speak on behalf of all Africans, whether Asian, black or coloured; groups who were considered minorities in the broader membership of the ANC were represented. Members of the ANC were a curious mixture of liberals, communists and socialists, and most were educated in schools and universities in South Africa and elsewhere, which

emphasises the wickedness of racism. I am sorry for not being able to provide a satisfactory answer as to whether, if roles were reversed, the result would be same, I am not sure of this.

Question: Could you talk about the constitution that was drafted, and what your views are as to its strengths and weaknesses?

Professor Jack Spence: What was agreed on eventually, after four years of debates, breakdowns and negotiations, was in effect a coalition government. They called it the Government of National Unity, the GNU, and devised a voting system based on proportional representation, which meant that if a party received five per cent of the popular vote, it was entitled to a seat in the coalition government. This was not what the ANC originally wanted; they wanted a ‘win or lose’ government, like in London at the time, but here you had a very complicated system, which they called the ‘list system’. The consequence of this was that although the GNU had representatives from a variety of parties, the majority were from the ANC as the ANC had 60 per cent of the vote. However, other parties who had just five per cent were also entitled to a cabinet seat. For example, the GNU secured four out of five seats because it secured 20 per cent of the vote.

The reason for which the ANC accepted a coalition government was because this was the best option for harmony; *‘everybody has won so all must have prizes’* as is said in *Alice Through The Looking Glass* by Lewis Carroll. The ANC recognised that

if you set up the GNU, and other minority parties got a seat, you then gave people some kind of reassurance that their interests would not be pushed aside. The ANC also recognised that those groups that were minorities in the ANC, the Asian and coloured people, should be given representation, otherwise the disappointment felt might lead to dissatisfaction, to resistance and maybe even to a collapse in government. So the system developed meant that every group would, at least in theory, have their interests protected.

Eventually, however, within five years, everything broke down. The Nationalist party, a party who had been vicious against the black majority, ended up joining the ANC. This was a surprising event as, for example, the Minister for Tourism, a white man, was previously the leader of the Nationalist party. After five years, people accepted that the ANC was the dominant party and so also decided to join it. Therefore, it is evident that the GNU was, in principle, designed to reassure people only.

The real weakness of the South African political system today is that there does not appear to be a viable, major opposition party, which could challenge the governing party. In the United Kingdom, the losing party goes into opposition and opposes the current government. In South Africa, however, the ANC receives approximately 70 per cent of the vote and it has become a 'winner takes all' situation. What is occurring in South Africa today is that the opposition parties have become divided and no single party exists to challenge the state. The Democratic Alliance,

the old liberal party, still has a considerable number of seats in government, but is by no means strong enough to defeat the ANC. What some people think may happen is that the ANC will split into a very left wing socialist political movement and an orthodox centre-right political party and this may give an opening for other political parties to challenge the status quo.

What is striking about the ANC is that there have been four elections since 1994 and each time they have won. Despite promises not being delivered, the black voters still give their vote to the ANC; this shows that the ANC has enormous loyalty from their voters. This is partially because most of the older generation recognise that the ANC kept up a very good fight against apartheid and eventually won. However, the younger generations have not witnessed this and the concern is that their perception is very different. The weakness of the situation is the absence of any opposition to challenge the ANC.

Question: So, are you saying that the weakness of the new South African constitution is also its strength?

Professor Jack Spence: Yes, I am.

Question: In relation to the language issue, there are at least six languages in South Africa. How did the South African constitution formalise these languages?

Professor Jack Spence: There are a large number of languages recognised in South Africa, which is especially evident if you look at South African television. However, despite the large number of languages being given equal recognition, the fact is that English has been, and is, the dominant mode of communication in public life.

Afrikaans speakers feel strongly about this, as those who have ruled South Africa for so long. Their language is something that they are very attached to and they are increasingly concerned as to whether it will survive. Whether the new generation will take it up or not is a question for them, but it is true that other languages encounter difficulties in competing with English.

Question: During times of conflict, you mentioned that the cost of winning can be very high. Relating this concept to Turkey, there are some sections of society who believe that the cost is too high. However, others, especially those in power, do not think that this is so. Some people think that the army cannot beat the Kurdish groups but rather the police can do this. My question is whether there is anything that you can recommend, any practical methods, to highlight to the government, that the cost of winning *is* too high, especially if they continue with violent methods?



The prospect of violent opposition to present government is very real if it does not deliver social and economic options

Professor Jack Spence: The prospect of violent opposition to present government is very real if it does not deliver social and economic options. What is interesting in South Africa is that there is an equivalent to the Arab spring; there have been disturbances and outbreaks of violence in many of the townships in South Africa, which are not motivated by the want of political representation, because they have that already and no one is denied a vote, but is motivated by the failure of the government to deliver economic and social goods quickly enough to satisfy expectations.

Economic and social goods include housing, clean water, electrification, health clinics and infrastructure. What is interesting about South Africa is that, in my opinion, the government has done rather well in the short time that they have been in power: it has built a large number of houses, provided electricity and built health clinics. However, I think the expectation was that the delivery of social and economic goods would have been quicker. Now, people feel that the government has not acted fast enough and while this occurs, there will always be the threat of local violent protests. Unfortunately, the South African state will use force against this, through police and the army, but, so far, nothing like the Arab spring has been fully realised, for example, with the people protesting and the government using *extreme* violence against them.

Question: What about the notion of the cost of winning being too high?

Professor Jack Spence: I think both sides in those negotiations, before they got underway, acknowledged that if they went on fighting one another, the stalemate would strengthen, and though someone would break it eventually, the cost of doing so would leave the winner with an economic wasteland. This persuaded the ANC and governing party to make concessions during negotiations and led to the compromise arrived at.

If you are looking for general criteria for success in constitution making, it seems to me that what you need are leaders, who are willing to take very considerable risks, like Mandela and de Klerk. De Klerk once held a referendum in the middle of negotiations, and the only people entitled to vote were the white supporters. If he had lost it, the entire negotiation process would have collapsed, but he won and this gave him the authority and motivation to continue. Mandela was also a great man and was revered by everyone; people would follow him, but he had to keep his distance from de Klerk and show he had reservations about him.

Another point on leadership in these circumstances, which is very important in constitutional negotiations, is that one must be a risk taker and be willing to defend one's own constituencies. What is interesting about the people who are leaders of that kind, the risk takers, is that very often they are not liberal, left wingers or socialists, but are often right-centres. Think of the former President of the United States, Richard Nixon; no one liked him

because of Nixongate, where in June 1972, there was a break-in at the Democratic National Committee headquarters at the Watergate office complex in Washington, D.C., and the Nixon administration unsuccessfully attempted a cover-up of its involvement. Regardless, Nixon saw to it that China was recognised by the United States and brought into the Security Council, and by doing so, Nixon established himself as a real leader.

Another example is General de Gaulle who, in 1959, recognised that French colonialism was on a losing path and within a year, most French colonies had obtained independence. He took a risk and it worked. Nixon, de Gaulle and de Klerk; these people are right-wingers, not left wing Marxists, because they did not carry heavy ideological baggage. They were only interested in hanging on to some degree of power. For example, Nixon hoped that by recognising China he would win votes, as he did. De Gaulle accepted this ideology and de Klerk did too. What interested them all was not some ideological blueprint, but hanging on to at least some of the power available. So, the connections between right-wing political views, the willingness to take risks and to antagonise your electorate are the key characteristics of reformers.

Professor Dr. Mithat Sancar: I would like to say that, in South Africa, the regime was not in any way the same again, because after 1990, the Western world did not want to oppose the constitution, due to the high costs involved. Therefore, South Africa ran the risk of remaining alone. A similar example occurred in Chile, when the

Pinochet regime did not expire, but the Junta were only partially withdrawn in 1990. There was not a strong opposition, an armed opposition nor any social mobility. The opposition were oppressed and in international relations, the Pinochet regime received support from international corporations.

Professor Spence, you mentioned that you thought that Mandela did not take risks, but I think he did, by accepting the concept of ‘unity’ and by accepting a coalition government with the white people. Some members of the ANC were opposed to this union and refused to be a part of the peace process, but Mandela remained a true leader at these times. The plight of Mandela and the politicians around him created a very good project; Mandela said persuading the white people was important, but they followed a strategy of bargaining with the white people and black people in favour of the white people. He was very flexible and his negotiated strategy was to ensure that the demands of the white people were accepted by the black people. He did not get into rigid or hard conflicts; it was not easy to make a constitution and, in my opinion, the amnesty process of making the constitution was due to the risks taken by Mandela. There was a provision of amnesty to the racist officials of the apartheid regime and this was turned into a conciliation commission. In this, there was an unconditional amnesty to the government and the negotiations had various dimensions.

Secondly, turning to Turkey, it is dangerous if the government or the Kurdistan Workers' Party, (hereafter the ‘PKK’)

think that the conflict is sustainable. Regardless of whether the negotiations continue, unfortunately, they will believe that they can resort to arms if negotiations fail. The PKK is not trying to change the situation now, because in the Middle East, the situation is being re-established and remade. They are, instead, going to wait and see. It is incredulous that the conflict somehow seems sustainable to both parties in Turkey and it is evident that the counterparts have not taken to the idea that there is a huge cost to winning. I think that we need to have a language or style to explain that if one wins, both will lose.

Professor Jack Spence: Thank you. I cannot make any observations about Turkey and the Kurdish issue; I am not, in detail, familiar with both sides of the conflict.

Your point about Mandela taking risks, yes, I see what you mean, in that he had to take a risk by accepting the notion of a ‘unity’ and a coalition government. However, what I will say is that his lieutenants, those involved with him in the negotiations, people like Thabo Mbeki, also accepted that if you were going to have a measure of order and sustainability in the transition, you had to take a risk and antagonise the supporters at the time. You must also bear in mind that there was a general profound sense of euphoria amongst the black people in South Africa at the time. They would have forgiven Mandela for anything, because he had come out of prison and set the ball rolling. Holding that referendum was a very risky act and he did not know what the outcome would be. I do

accept that he took risks, but I would like to point out that he was also supported by the people who mattered, in the top ranks of the ANC.

As far as dealing with people who were responsible for apartheid, they were told that if they retired earlier or left, they would be compensated very well for leaving. That was an expedient method of effecting change within the government and had to be done if they were to open up the upper level of opposition to the black majority. If you got rid of these people, by bribing them or paying them off, at least you then opened the door for the involvement of black, Asian and coloured people.

Question: In relation to the international dynamics at the time, this was also the case with Northern Ireland. I can fully appreciate that the changing international environment played an important role, though in Turkey, however, the international dynamics do not play the same roles. Another issue mentioned is the problem of the South African system, which does not allow for a viable opposition. Rather than being a systematic problem, the reality is that it is an emerging democracy and now, after 20 to 40 years of independence, we can see that the founding parties are losing and new political parties are emerging. The same can be said of the situation occurring in Iraq, but the political system founded by the parties will perhaps disappear. So, rather than being a constitutional problem, would you agree that it is a political one?

Professor Jack Spence: Some issues enjoy high international salience; apartheid always did, it was always an issue where you could mobilise large amounts of people in the streets of Washington in the United States or in Trafalgar Square in London, and many people would support it. The government was also very influential factor in getting people to think about apartheid. In the case of Zimbabwe, there has been no mention of military intervention or to get rid of Mugabe, but when British interests or Western interests are at stake in Zimbabwe; this will lead to military intervention. Some issues do fall below the radar in the international establishment, in that some people recognise a problem but are not willing to do anything about the problem. So you are right in that the international context matters, and South Africa was fortunate that by law, it was the only country where you could legislate through the means of racial discrimination. This gave South Africa visibility in the international scene, which a county like Zimbabwe does not have. What intervention also neglects is that societies always change; at the end of the day, you may very well have to leave it to local people to get what they want and the outside world may be of somewhat limited assistance.

In the United Kingdom, we had an interventionist Prime Minister, Tony Blair, who got involved in Syria, Kosovo, Iraq and Afghanistan; he was always involved. In the summer of 1999, in Chicago, he was celebrating NATO's 50th anniversary, which was incidentally in middle of Kosovo crisis, and stated that we must recognise the importance of intervening if there is clear evidence of

abuse of human rights and genocide. He also said that the strategic context must be right and that military intervention must have a strong chance of success. Then, almost as an afterthought, he said that, of course, before an intervention, the national interest must be taken into account. This immediately highlighted Blair's mindset of realism combined with liberal sentiments.

Burma is in a similar situation, as was Syria, but Britain did not do much in Burma in the way that it intervened in Syria. Britain assumed that sooner or later, the Burmese people would come to their senses and act for themselves. Societies change and we must try to calibrate these changes. I am not a believer that it is our responsibility to protect where people's human rights are being abused. In Iraq and Afghanistan, there was no such responsibility. Though I accept that there are grounds for doing so, what I do believe in is not so much the responsibility to protect but rather the duty to assist.

Many advised against acting on a duty to protect, saying that the United Kingdom should not intervene with military force, but rather, assist by placing Non-Governmental Organisations (hereafter 'NGO') in that country, or at least get people to offer a modest kind of assistance; food, water and clothing. I believe that we do have an obligation to assist but this is different from the grand notion of taking responsibility for it.

Question: I have a question about the drafting process of the

constitution - in the South African constitution, it appears to be one of the most progressive, in terms of gender equality. How has this come about in becoming a priority in the drafting process of the constitution in South Africa?

Professor Jack Spence: If you go to the South African House of Assembly, in the old days, it was dominated by men in grey suits and there were very few women around. Helen Suzman, a very well-known female South African anti-apartheid activist and politician, criticised, argued and debated in the House of Assembly, effectively fighting the battle of apartheid by herself in Parliament. Unfortunately, she died not too long ago. If you go back today, however, there are many female MPs in the House of Assembly. The ANC, to a degree, has delivered on feminist representation; there are several female Cabinet ministers in the ANC and, as always, the Women's League has always existed to protect the rights of women. That commitment to women's rights has influenced the ANC to recognise that you must take positive steps to promote the representation of women in government.

Question: In relation to the conflict environment itself, to what extent is this environment a constituting factor in the constitution making process? In the constitution making process in South Africa, which took four to five years of negotiations and referendums, what were the main ingredients for its success? Do you agree that the constitution was not just written by academics and juries, but was a social process?

Professor Jack Spence: There were many people involved in writing the South African constitution; jurors, civil servants and professors of all kinds. How did they agree on such a document? I put it down to individual personalities and skills. Roelf Meyer, the lead constitutional maker for the Afrikaans side, led the team. Meyer became the South African Minister of Constitutional Affairs and Communication in 1992, placing him in a key position for the Nationalist party in the negotiations that facilitated the transition from apartheid in South Africa. Meyer's ANC counterpart was a very able ex-trade unionist, Cyril Ramaphosa, who was very successful as a trade unionist under apartheid and managed to get very good wages for his miners. These two men were at opposite ends of the political spectrum, but the sheer force of their personalities forced them to recognise that they had something in common; they are both South African, though one is a black trade unionist and the other a white Afrikaans.

It may be a combination of all sorts of factors, but at a time like that; you cannot be timid in negotiating a new constitution in a divided society

What was very interesting about their relationship was that there were several occasions where they bonded and discussed events, such as massacres. One very famous story surrounds a time when Meyer and Ramaphosa once went fishing after such an event. The story unfolds that as Meyer was throwing the line out, the

hook swung back only to hook onto his lip, and Ramaphosa took it out. This situation cemented their relationship, which was very important. It was the belief that they were both South African and both had to deliver on the expectations of South Africa and of people all over the world. That is what I meant when I discussed the role of diplomats, who go back and forth, talking to the protagonists, refusing to let the situation to collapse. It may be a combination of all sorts of factors, but at a time like that; you cannot be timid in negotiating a new constitution in a divided society.

Question: In making the constitution, you mentioned some autochthonous aspects - what were they?



it is very important to take into account the local and political culture

Professor Jack Spence: If you are devising a constitution for a divided society, or for any society, I think it is very important to take into account the local and political culture. You must look at how the locals organise themselves politically and one can devise a political constitutional structure from this. If you think about the American constitution and the way it was devised, this was an extraordinary process; many intelligent people came together: George Washington, James Madison and Thomas Jefferson, though what they all did not realise was that they all drew upon

the experience of British colonial rule. They saw to it that the new structures derived from the British imperial experience with which they had lived with for many decades. So, if you are drawing up a constitution, you must try to take into account local culture.

South Africa had a Parliament, a civil society, a judiciary, judges, courts, the rule of law and a business community. South Africa knew what it was doing, and this was reflected in the new constitution, which drew upon the experiences of apartheid in South Africa, as well as looking towards the creation of a democracy state.



so, if you are drawing up a constitution, you must try to take into account local culture

Traditionally, there was no opportunity for the coloured and Asian people to participate fairly in this process but the notion of doing business through Parliamentary debate was deeply engrained in South African culture. At the very least, the notion of conducting political business through a governmental structure was deeply engrained in South African culture. This also adapts itself well to the new structure, where everyone is entitled to the full vote, with many women in Parliament and in the Cabinet, and in some ways; there is a more relaxed atmosphere of conducting Parliamentary business.

Catriona Vine: Thank you very much to Professor Spence, Professor Dr. Sancar and Professor Dr. Yokuş for your very insightful talks today. I am sure that everyone here has found today's presentations and discussions extremely valuable, and it will no doubt continue.

On behalf of DPI, many thanks for joining us for this roundtable discussion.

**Tuesday 26th June 2012 –
Internal Evaluation and Dinner at Oxon Hoath Manor,
Kent, United Kingdom**

The delegation attended an internal evaluation roundtable meeting before enjoying a final dinner together hosted by DPI at Oxon Hoath Manor.



The delegation met in the library of Oxon Hoath Manor for an internal evaluation roundtable meeting.

Kerim Yildiz thanked all of the delegation for their much valued participation on behalf of DPI, and closed the presentation.

Participants

Participants from Turkey:

- Ali Bayramođlu - Columnist, political commentator at Yeni Şafak daily newspaper
- Ayhan Bilgen - Columnist and Editor in Chief of Günlük daily newspaper
- Bejan Matur - Columnist, poet and writer
- Cengiz Çandar - Writer and Journalist for Radikal newspaper
- Nazmi Gür - Vice President, Peace and Democracy Party (BDP)
- Prof. Dr. Ahmet Insel - Professor, Paris 1 Panthéon-Sorbonne University; Professor, Head of Department of Economics, Galatasaray University. Editor, writer for monthly journal, Birikim. Writer for Radikal Newspaper
- Prof. Dr. Mithat Sancar - Professor of Public Law, Ankara University and Columnist
- Prof. Dr. Sevtap Yokuş - Professor of Constitutional Law at Kocaeli University
- Yılmaz Ensarođlu - Director, Law and Human Rights Studies, SETA Politics Economic and Social Research Foundation

Participants from the United Kingdom:

- Dr. Mehmet Asutay
- Dr. Edel Hughes, Senior Lecturer at the University of East London
- Eleanor Johnson, Project Officer DPI
- Heena Shah, DPI
- Professor Jack Spence, OBE
- Catriona Vine, Deputy Director – Director of Programmes, DPI
- Kerim Yildiz, Director, DPI

Appendix:

DPI Board and Council of Experts

Director:

Kerim Yildiz

Kerim Yildiz is Director of DPI. He is an expert in international human rights law and minority rights, and is the recipient of a number of awards, including from the Lawyers Committee for Human Rights for his services to protect human rights and promote the rule of law in 1996, the Sigrid Rausing Trust's Human Rights award for Leadership in Indigenous and Minority Rights in 2005, and the Gruber Prize for Justice in 2011. Kerim has written extensively on human rights and international law, and his work has been published internationally.

DPI Board Members:

Nicholas Stewart QC (Chair)

Barrister and Deputy High Court Judge (Chancery and Queen's Bench Divisions), United Kingdom . Former Chair of the Bar Human Rights Committee of England and Wales and Former President of Union Internationale des Avocats.

Professor Penny Green (Secretary)

Head of Research and Director of the School of Law's Research Programme at King's College London and Director of the International State Crime Initiative (ICSI), United Kingdom

(a collaborative enterprise with the Harvard Humanitarian Initiative and the University of Hull, led by King's College London).

Priscilla Hayner

Co-founder of the International Center for Transitional Justice, global expert and author on truth commissions and transitional justice initiatives, consultant to the Ford Foundation, the UN High Commissioner for Human Rights, and numerous other organisations.

Arild Humlen

Lawyer and Director of the Norwegian Bar Association's Legal Committee. Widely published within a number of jurisdictions, with emphasis on international civil law and human rights. Has lectured at law faculties of several universities in Norway. Awarded the Honor Prize of the Bar Association for Oslo for his work as Chairman of the Bar Association's Litigation Group for Asylum and Immigration law.

Jacki Muirhead

Practice Director, Cleveland Law Firm. Previously Barristers' Clerk at Counsels' Chambers Limited and Marketing Manager at the Faculty of Advocates. Undertook an International Secondment at New South Wales Bar Association.

Professor David Petrasek

Professor of International Political Affairs at the University of Ottawa, Canada. Expert and author on human rights, humanitarian law and conflict resolution issues, former Special Adviser to the Secretary-General of Amnesty International, consultant to United Nations.

Antonia Potter Prentice

Expert in humanitarian, development, peacemaking and peacebuilding issues. Consultant on women, peace and security; and strategic issues to clients including the Centre for Humanitarian Dialogue, the European Peacebuilding Liaison Office, the Global Network of Women Peacemakers, Mediator, and Terre des Hommes.

DPI Council of Experts

Christine Bell

Legal expert based in Northern Ireland; expert on transitional justice, peace negotiations, constitutional law and human rights law advice. Trainer for diplomats, mediators and lawyers.

Cengiz Çandar

Senior Journalist and columnist specializing in areas such as The Kurdish Question, former war correspondent. Served as special adviser to Turkish president Turgut Ozal.

Yilmaz Ensaroğlu

SETA Politics Economic and Social Research Foundation. Member of the Executive Board of the Joint Platform for Human Rights, the Human Rights Agenda Association (İHAD) and Human Rights Research Association (İHAD), Chief Editor of the Journal of the Human Rights Dialogue.

Dr Salomón Lerner Febres

Former President of the Truth and Reconciliation Commission of Perú; Executive President of the Center for Democracy and Human Rights of the Pontifical Catholic University of Perú.

Bejan Matur

Renowned Turkey based Author and Poet. Columnist, focusing mainly on Kurdish politics, the Armenian issue, daily politics, minority problems, prison literature, and women's issues. Has won several literary prizes and her work has been translated into 17 languages. Former Director of the Diyarbakır Cultural Art Foundation (DKSV).

Professor Mervyn Frost

Head of the Department of War Studies, King's College London. Previously served as Chair of Politics and Head of Department at the University of Natal in Durban. Former President of the South African Political Studies Association; expert on human rights in international relations, humanitarian intervention, justice in world politics, democratising global governance, just war tradition in an

Era of New Wars and ethics in a globalising world.

Martin Griffiths

Founding member and first Executive Director of the Centre for Humanitarian Dialogue, Served in the British Diplomatic Service, and in British NGOs, Ex -Chief Executive of Action Aid. Held posts as United Nations (UN) Director of the Department of Humanitarian Affairs, Geneva and Deputy to the UN Emergency Relief Coordinator, New York. Served as UN Regional Humanitarian Coordinator for the Great Lakes, UN Regional Coordinator in the Balkans and UN Assistant Secretary-General.

Dr. Edel Hughes

Senior Lecturer, University of East London. Expert on international human rights and humanitarian law, with special interest in civil liberties in Ireland, emergency/anti-terrorism law, international criminal law and human rights in Turkey and Turkey's accession to European Union. Previous lecturer with Amnesty International and a founding member of Human Rights for Change.

Professor Ram Manikkalingam

Visiting Professor, Department of Political Science, University of Amsterdam, served as Senior Advisor on the Peace Process to President of Sri Lanka, expert and author on conflict, multiculturalism and democracy, founding board member of the Laksham Kadirgamar Institute for Strategic Studies and International Relations.

Jonathan Powell

British diplomat, Downing Street Chief of Staff under Prime Minister Tony Blair between 1997- 2007. Chief negotiator in Northern Ireland peace talks, leading to the Good Friday Agreement in 1998. Currently CEO of Inter Mediate, a United Kingdom -based non-state mediation organization.

Sir Kieran Prendergast

Served in the British Foreign Office, including in Cyprus, Turkey, Israel, the Netherlands, Kenya and New York; later head of the Foreign and Commonwealth Office dealing with Apartheid and Namibia; former UN Under-Secretary-General for Political Affairs. Convenor of the SG's Executive Committee on Peace and Security and engaged in peacemaking efforts in Afghanistan, Burundi, Cyprus, the DRC, East Timor, Guatemala, Iraq, the Middle East, Somalia and Sudan.

Rajesh Rai

Rajesh was called to the Bar in 1993. His areas of expertise include Human Rights Law, Immigration and Asylum Law, and Public Law. Rajesh has extensive hands-on experience in humanitarian and environmental issues in his work with NGOs, cooperatives and companies based in the UK and overseas. He also lectures on a wide variety of legal issues, both for the Bar Human Rights Council and internationally.

Professor Naomi Roht Arriaza

Professor at University of Berkeley, United States, expert and author on transitional justice, human rights violations, international criminal law and global environmental issues.

Professor Dr. Mithat Sancar

Professor of Law at the University of Ankara, expert and author on Constitutional Citizenship and Transitional Justice, columnist for Taraf newspaper.

Professor Dr. Sevtap Yokuş

Professor of Law University of Kocaeli, expert on constitutional law and human rights law, practitioner in European Court of Human Rights.



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