The Venice Commission on Certain Aspects of the Application of the European Convention on Human Rights *Ratione Personae*

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Summary

I. Introduction

The European Commission for Democracy through Law, as the Venice Commission is officially named, is an institution of the Council of Europe with a function that greatly resembles the advisory function of the *Raad van State* of the Netherlands or – better known, although of more recent origin[1] – the *Conseil d'État* of France. It gives opinions on (draft) legislation – including (draft) constitutions – of member States of the Council of Europe and other participating States, on (draft) conventions of the Council of Europe, and on any (other) legal question within its mandate,[2] submitted to it by a competent person, body or institution.[3] The Venice

[1] This year (2006), the Netherlands *Raad van State* will commemorate its establishment by Emperor Charles V in 1531, while the French *Conseil d'État* dates from the year VIII (1799).

[2] The Commission's Revised Statute was adopted by the Committee of Ministers of the Council of Europe on 21 February 2002, Resolution (2002)3, CDL(2002)27. Art. 1, para. 1, states that

Commission performs mainly a preventive and facilitating task in the broader framework of the supervision, within but also outside the Council of Europe, of the protection of human rights and freedoms, and of the other fundamental values on which the Council of Europe has been built: Democracy and the rule of law. It also plays a role in the promotion, drafting and interpretation of human rights standards and of principles of democracy and the rule of law. In performing that function, the Venice Commission both distinguishes itself from, and supplements and facilitates the task of, the European Court of Human Rights. The two institutions do not duplicate but endorse and complement each other's work. The Venice Commission very often refers in its opinions to the case law of the Court, while the Court has indicated its preparedness to use the expertise of the Commission as *amicus curiae*.

Thus, in connection with Application no. 41183/02, *Ruza Jelicic v. Bosnia and Herzegovina*, the Court allowed, and indeed invited, written submissions of the Venice Commission concerning the legal character of the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, and the international status of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina.[4] And on 13 December 2005, the Court requested the Venice Commission to prepare an opinion on the issue of whether and to what extent the financing of political parties by foreign political parties is prohibited by member States, and whether and to what extent such prohibition is allowed.[5]

Because of the close links between the two institutions of the Council of Europe, it would seem appropriate for a person like the present author, who has had the privilege of serving both institutions, in this publication in honour of the outgoing President of the Court to shed some light on the work of the Venice Commission, which has been in existence for more than fifteen years but is still not very well known to a broader public. He does so in sincere appreciation of the Court, and of the significant contribution that LUZIUS WILDHABER has made to

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the Commission's specific field of action "shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives: strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the working of democratic institutions and their reinforcement and development".

Who may put requests to the Commission will be discussed *infra*, in section 3.

Opinion no. 337/2005, *Amicus Curiae* Opinion on the Nature of the Proceedings before the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, CDL-AD(2005)020, 15 June 2005. The views expressed in the Opinion were adopted by the Court: *Ruza Jelicic v. Bosnia and Herzegovina* (App no 41183/02) ECHR 15 November 2005, The Law, para. V.2.

Opinion no. 366/2006, Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, CDL-AD(2006)014, 31 March 2006.

the authority and achievements of the Court, first as a member of the "old" Court, and the last eight years as President of the "new" Court.

It is not the purpose of this contribution to present a survey of the activities of the Venice Commission in the sixteen years of its existence.[6] For this, the interested reader may be referred to the Annual Reports of the Commission. The present contribution deals with three recent Opinions of the Commission concerning the application of the European Convention on Human Rights *ratione personae*, which may have a considerable impact on the role of the Convention in the areas of peace-keeping and the fight against terrorism. For a better understanding of the general background, character and authority of the Opinions of the Venice Commission, beforehand some general information on its origin, composition, function and working method will be given.

II. Origin and Composition of the Venice Commission

The Venice Commission was established in 1990, shortly after the fall of the Berlin wall. This dramatic event also marked its main original purpose and goal: To assist the States which separated from the Soviet Union or, more generally, from the communist system, in the process of their reform towards democracies according to the European model, and in doing so to help in preparing them for membership to the Council of Europe. This process included the drafting of new constitutions or fundamental adaptation of the existing ones, as well as creating a legal basis and infrastructure for a democratic order, based upon the rule of law and respect for human rights. In addition, a great number of laws had to be drafted or amended. The Venice Commission has played an important role in this so-called "emergency constitutional engineering", in close cooperation with the governments and parliaments of the States concerned. In general, its "intervention" in this very sensitive area of newly regained sovereignty was accepted and its Opinions, with sometimes very critical observations and far-reaching recommendations, were to a large extent adopted. On the one hand, this may be explained by the fact that the Commission unites an arsenal of expertise in the fields of constitutional, administrative and criminal law as well as public international law, human

[6] The author has recently done so in a Dutch publication commemorating the fifty-fifth anniversary of the European Convention on Human Rights: P. VAN DIJK, De Europese Commissie voor Democratie door Recht ('Venetië Commissie'); Het stille geweten van de Raad van Europa [The European Commission for Democracy through Law ('Venice Commission'); The silent conscience of the Council of Europe], *NJCM Bulletin* 2006, pp. 83-92. Part of the information contained therein is used for the present article.

rights law and humanitarian law. In those first years, as a consequence of [illegible] restrictions in education and research and the limitations of practical experience, such expertise was rare in the countries concerned. On the other hand, the Commission's acceptability may be explained by the guarantees of independence and impartiality which it offers.

After sixteen years this process is still not completed and takes up much of the capacity of the Commission. However, the "emergency constitutional engineering" has been broadened towards "constitutional engineering" for the whole area of the Council of Europe, although the "old democracies" of Western Europe appear less inclined to approach the Commission for advice and to submit their draft legislation to scrutiny by international experts.

The Commission has been allied to the Council of Europe from its very origins, but was initially based upon a so-called "partial agreement".[7] This meant that only those member States of the Council of Europe that were parties to the agreement, could participate in its activities. The United Kingdom, for instance, became a party only in 1999. Meanwhile, the partial agreement has been transformed into an "enlarged agreement", with the result that even States that are not members of the Council of Europe may participate in the Commission.[8] This has not changed the position of the Commission as an institution of the Council of Europe. In the Action Plan of the Third Summit of the Council of Europe, which took place in Warsaw on 16 and 17 May 2005, the Commission is expressly referred to as a "specialised body" and the member States are called upon "to make use of the advice and assistance of the European Commission for Democracy through Law (Venice Commission)".[9]

At present, all 46 member States of the Council of Europe participate in the Commission. Belarus, which has been a candidate for membership of the Council of Europe for several years, has the status of associated member within the Commission. So far, Kyrgyzstan, Chile and South Korea have been admitted as non-member States. Israel has applied for admission quite some time ago, but the Committee of Ministers has not yet taken a decision due to lack of consensus. Japan and Mexico have also shown an interest in admission. The latter three States have the status of observers, together with Argentina, Canada, the Holy See, Kazakhstan, Uruguay and the United States of America. Finally, a special relationship

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7 Resolution (90)6 of the Committee of Ministers of the Council of Europe of 10 May 1990.

8 See the preamble of Resolution (2002)3 of the Committee of Ministers of the Council of Europe adopting the revised Statute of the Commission, *supra* (note 2).

9 CM(2005)80, paras I.3 and IV.1.

exists with South Africa, the European Union[10] and the Organisation for Security and Cooperation in Europe (especially the Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner on National Minorities).

Every State that participates in the Commission has one member and one substitute member in the Commission. They take part in its activities and decision-making without instructions from their governments. In that respect, Article 2, first paragraph, of the Statute of the Commission[11] stipulates as follows: "The members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions", and: "The Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science". By far most of the members are judges of constitutional courts and other high courts, professors, retired civil servants and members of parliament, but some of them are members of national governments or ambassadors, which requires special diligence on their part to act independently and impartially.

III. Function and Working Method of the Venice Commission

The Commission mainly gives opinions about drafts of constitutions, of constitutional provisions or of constitutional amendments, and drafts of constitutional or ordinary statutes or their amendments. In most cases requests for opinions do not originate from the government or parliament of the country concerned but from the Parliamentary Assembly of the Council of Europe, usually within the framework of the latter's monitoring function. In addition, the Commission may give an opinion on drafts of conventions of the Council of Europe and on the interpretation of existing conventions, albeit the latter is considered less appropriate if a special body has been assigned for the interpretation and supervision of the convention concerned. The Commission may also be asked to give an opinion on a legal question on which there is disagreement within or between member States, or on which the Committee of Ministers, the Parliamentary Assembly, the Secretary General or the Court wishes greater clarity. The European Union or the Organisation for Security and Cooperation in Europe may also request an opinion from the Commission as an "international organisation or body participating in

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10 In the Action Plan of the Third Summit the Venice Commission is expressly mentioned as one of the institutions through which cooperation between the European Union and the Council of Europe may be enhanced; *supra* (note 9), para. IV.1.

11 *Supra* (note 2).

the work of the Commission".[12] Both have done so, for instance, in relation to the conflict in Ukraine concerning Transnistria. In connection with conflicts like this, the Commission does not act as an instrument of dispute settlement or conciliation, but tries to contribute to the resolution of the conflict by explicating the national and international legal context and applicable standards and rules, by recommending legal procedures and by proposing legal solutions.

A new role for the Commission that recently emerged is that of *amicus curiae*. The first request came from the Constitutional Court of Georgia concerning "the relationship between the freedom of expression and defamation with respect to unproven defamatory allegations of facts".[13] A second request came from the Constitutional Court of Albania concerning "the interpretation of Articles 125 and 136 of the Constitution of Albania (appointment of highest judges)".[14] And, as was already mentioned in the introduction, these requests by national courts were followed by two requests from the European Court of Human Rights.[15]

Requests for opinions or studies may be addressed to the Commission by the governments, parliaments (not individual political parties or coalitions) and constitutional courts[16] of the participating States,[17] and from the part of the Council of Europe by the Committee of Ministers, the Parliamentary Assembly, the Secretary General, the Congress of Local and Regional Authorities, and the European Court of Human Rights. The opinions of the Commission are not binding, but in practice they prove to enjoy great authority and are followed in almost all cases, also by governments, parliaments or organisations that have not themselves asked for the opinion.[18]

The procedure followed by the Commission is usually the following. Requests for an opinion or study are discussed at the plenary meetings of the Commission, which take place four times a year in Venice. If the request is accepted, at the pro-

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12 Art. 3, para. 2, of the Commission's Statute, *supra* (note 2).

13 Opinion no. 289/2004, CDL-AD(2004)011, 17 March 2004.

14 Opinion no. 312/2004, CDL-AD(2004)034, 7 December 2004.

15 See *supra* (notes 4 and 5).

16 For an example, see Opinion no. 296/2004, Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, CDL-AD(2004)024, 29 June 2004, requested by the Turkish Constitutional Court.

17 A request by a non-participating State, for instance a State with observer status, is also possible but requires the consent of the Committee of Ministers of the Council of Europe; Art. 3, para. 3, of the Commission's Statute, *supra* (note 2).

18 Here, as well, exceptions prove the rule. A rather blunt, but not unexpected rejection of an Opinion of the Commission came from the Prince of Liechtenstein, who did not accept the Commission's views and recommendations concerning his proposed constitutional changes for the Principality; Opinion no. 227/2002, Opinion on the Amendments to the Constitution of Liechtenstein Proposed by the Princely House of Liechtenstein, CDL-AD(2002)32, 16 December 2002.

posal of the Bureau (the President and three or four Vice-Presidents) one or more members or substitute members are appointed as *rapporteurs*, or a broader working group composed of members and, if needed, external experts is established.[19] A request will, as a rule, be honoured unless it originates from a person or body that is not entitled to address the Commission, or the subject of the request is outside the Commission's mandate. The Commission feels free to reformulate the request to phrase it in more legal terms. At the next plenary, a draft Opinion, based upon the individual opinions of the *rapporteurs* or members of the working group, will be discussed or the Secretariat and/or *rapporteurs* will report on the progress made. If adopted by the Commission, the Opinion or study is sent to the person or body who has requested it, as well as to the Committee of Ministers and Parliamentary Assembly of the Council of Europe, and is made public. The Commission presents an annual report of its activities to the Committee of Ministers, which discusses it in the presence of the President of the Commission.[20]

The three Opinions summarised in the present article do not deal with draft legislation or draft conventions, but with legal questions submitted to the Commission concerning, *inter alia*, the application of the European Convention on Human Rights *ratione personae*.

IV. Opinion on Human Rights Review Mechanisms in Kosovo

On 13 May 2004, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the Venice Commission's opinion on the human rights situation in Kosovo. In particular, the Commission was asked to address the following three issues: (a) what State or other entity is responsible under international law for the protection of human rights in Kosovo; (b) would it be possible to place the international authorities and provisional institutions in Kosovo within the jurisdiction of the European Court of Human Rights; and (c) would it, instead, be preferable to establish some form of human rights chamber and, if so, how might such a body be constituted?[21]

Pursuant to Security Council Resolution 1244 (1999) of 10 June 1999, the United Nations Interim Mission in Kosovo (UNMIK) was set up to promote the

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19 Art. 14 of the Revised Rules of Procedure of the Commission as amended, CDL-AD (2004)050, 16 December 2004.

20 See, for example, The Venice Commission in 2004; Annual Report of Activities, containing at pp. 9-12 the presentation by President LA PERGOLA on 7 July 2005.

21 Opinion no. 280/2004, Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD(2004)033, 11 October 2004, paras 1 and 2.

establishment of substantial autonomy and self-government in Kosovo and perform basic civilian administrative functions where and for as long as required, to maintain civil law and order, and to facilitate a political process designed to determine Kosovo's future status. UNMIK was also to perform a legislative function through its regulations. In addition, a NATO-led Kosovo Force (KFOR) was set up to establish and maintain security in Kosovo. For the gradual transfer of autonomy and self-government, pending an ultimate political settlement, local Provisional Institutions of Self-Government were established, *inter alia* the Assembly, the President of Kosovo, the Government and a court system.

Resolution 1244 (1999) recognised that Kosovo still formed part of the then Federal Republic of Yugoslavia. However, the consequence of Resolution 1244 (1999) was that the authorities of the Republic and of the subsequent State Union of Serbia and Montenegro did not have, and Serbia still does not have at the present moment, any effective, if indeed legal, authority over the territory. Consequently, although the State Union of Serbia and Montenegro ratified the European Convention on Human Rights on 3 March 2004 and did not make a territorial reservation with respect to Kosovo, the European Court of Human Rights does not have jurisdiction *ratione personae* with respect to Serbia concerning acts committed in Kosovo; the alleged victims of such acts cannot be said to be within the jurisdiction of Serbia in the sense of Article 1 of the Convention. The only exception would be alleged violations of the Convention in respect of the Kosovo people committed by organs or persons for whose action Serbia could be held accountable. Be that as it may, the Provisional Institutions of Self-Government do not belong to those organs and persons, since they are not responsible to any authority of Serbia, but to the Special Representative of the Secretary General of the UN for Kosovo as head of UNMIK. The European Court of Human Rights also lacks jurisdiction *ratione personae* in relation to UNMIK and KFOR, since the United Nations and NATO are not parties to the European Convention on Human Rights. Moreover, under Sections 2 and 3, respectively, of UNMIK Regulation no. 2000/47 of 18 August 2000, KFOR and KFOR personnel, and UNMIK and UNMIK personnel "shall be immune from any legal process". Thus, although the European Convention on Human Rights has been ratified with respect to Kosovo, and although the pertinent UNMIK regulations provide that both the international presence in Kosovo[22] and the Provisional Institutions of Self-Government[23] are under the obligation to observe internationally recognized human rights standards as reflected in, *inter alia*, the European Convention on Hu-

[22] Art. 1.3 of UNMIK Regulation 1999/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo, amended by UNMIK Regulation 2000/54 of 27 September 2000.

[23] Chapter III of the Constitutional Framework for Provisional Self-government in Kosovo, UNMIK Regulation 2001/9 of 15 May 2001.

man Rights, the supervisory mechanism provided for in the Convention is not applicable. No other international supervisory mechanism (for instance the Human Rights Committee provided for in the International Covenant on Civil and Political Rights) is applicable, due to the same lack of competence *ratione personae.*

Moreover, within the judicial system of Kosovo, for cases of alleged human rights violations, at present there is no access to court in the sense of Article 6 of the European Convention on Human Rights nor any other "effective remedy" in the sense of Article 13 of the same Convention. The Special Chamber of the Supreme Court, provided for in Chapter 9.4.11 of the Constitutional Framework[24] (which has not been established so far), would not be competent to review human rights cases with respect to the Provisional Institutions of Self-Government, while in respect to UNMIK and KFOR the above-mentioned immunity rules would apply.

This situation raises the issue of (lack of) domestic ensurance and international supervision of human rights protection in Kosovo. Several reports from, *inter alia*, the Mission of the Organisation for Security and Cooperation in Europe (OMIK),[25] the International Committee of the Red Cross (ICRC),[26] the Ombudsperson for Kosovo,[27] the United States of America[28] and Amnesty International[29] indicate that the population of Kosovo had been facing and continued to face serious human rights problems in the area concerning, *inter alia*, personal freedom and security, freedom of movement, the right to life and physical integrity, the right to a fair trial, and protection of property rights.[30]

The Venice Commission recognizes in its Opinion that the immunity of international organisations from legal process by courts of members States and other international organisations is in accordance with general international law. The purpose of this rule is to ensure that international organisations may perform their tasks without undue and uncoordinated interference by courts from those States and international organisations with their respective different legal systems. This does not imply, of course, that all that an international organisation does, can be presumed to be legal so that there is no need for independent review. The Venice Commission indicates, in that respect, that, as to the necessity of immunity, a distinction has to be made between the immunity of the international organisation itself and that of the persons who are presumed to act on its behalf. It points to

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[24] See the previous note.

[25] OMIK, Human Rights Challenges following the March Riots, 25 May 2004.

[26] ICRC, Book of Missing Persons in Kosovo, 3rd edition.

[27] See the Ombudsperson's Third Annual Report (2002-2003).

[28] US Department of State, 2003 Report on Human Rights in Serbia and Montenegro.

[29] Amnesty International, Report on Serbia and Montenegro (Kosovo) – The legacy of past human rights abuses (EUR 70/009/2004).

[30] For details, see the Opinion of the Venice Commission, *supra* (note 21), paras 24-61.

UNMIK Regulation no. 2000/47, which regulates immunity and which provides that the immunity "is in the interest of KFOR and UNMIK and not for the benefit of the individuals themselves. The Secretary General [of the UN] shall have the right and the duty to waive immunity of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to UNMIK". In fact, some staff members of UNMIK have been convicted and sentenced by the Kosovo judiciary, and others by the judiciary of their home State. The core issue in relation to the application of the European Convention on Human Rights is, however, the immunity of the organisation, since the Convention deals with obligations and responsibilities of public authorities, and only *via* their responsibility with the behaviour of individuals. The Venice Commission concludes from the purpose of immunity of UNMIK and KFOR themselves, and from the character of the immunity of their personnel, that the establishment of an independent mechanism to review their acts for their conformity with international standards is not excluded, provided that the establishment of such a mechanism has the consent of the organisation concerned. Indeed, immunity is not the rule, but a restriction to the rule: The rule of independent review of public action as a basic right (access to court) and as one of the core elements of the rule of law. Like any restriction of a human rights rule or principle, it must not affect the rule or principle in its essence, and its application must meet the requirements of necessity and proportionality. One of the important elements of proportionality is the availability of alternative possibilities of review and/or redress.[31]

This brings the Venice Commission to its proposal to establish two human rights mechanisms for Kosovo, one as an immediate solution and one for the medium term; both awaiting the ultimate solution of the status of Kosovo, including the issue of territorial sovereignty. The medium term solution proposed concerns the establishment of a human rights court of international composition for Kosovo, with jurisdiction to apply the human rights treaties referred to in Article 1.3 of UNMIK Regulation 1999/1 and in Chapter III of the Constitutional Framework in reviewing decisions and acts of UNMIK and KFOR authorities and personnel, and of the Provisional Institutions of Self-Government, and to annul any or certain decisions and acts that it holds to violate a provision of any of those treaties. The instrument establishing the court ideally would be an agreement between the United Nations and NATO, on the one hand, and the Council of Europe, on the other hand, which would include the provision that the court should base its decisions on the case law of the European Court of Human Rights. The agreement

[31] See *Al-Jedda v. the United Kingdom* (App no 35763/97) ECHR 2001-XI 79, paras 52-67. On the issue in general, see VAN DIJK/VAN HOOF/VAN RIJN/ZWAAK, Theory and Practice of the European Convention on Human Rights, 4th edition, Antwerp/Oxford, 2006, section 10.4.6.2.

could also contain appropriate provisions to protect the vital interests of the Mission in Kosovo.

Since the preparation and conclusion of such an agreement will take a considerable amount of time with an uncertain result, the Venice Commission also proposes a short-term solution for UNMIK and KFOR separately, and for the Provisional Institutions of Self-Government. For UNMIK it proposes the establishment (through an UNMIK Regulation) of a Human Rights Advisory Panel, composed of independent experts, to examine complaints about violations of fundamental rights by UNMIK in cases where the Ombudsperson has found a breach but UNMIK has not recognised responsibility. For KFOR the Commission proposes to extend the existing Office of the Legal Advisor with two independent lawyers to an Advisory Board to review detentions by KFOR Troops for possible human rights violations. Finally, in relation to the Provisional Institutions of Self-Government it recommends that the Special Chamber of the Supreme Court on Constitutional Matters be actually established and composed of a mixture of local and international judges, to review laws for their conformity with the human rights treaties. It also recommends that the Chamber's jurisdiction be extended to individual human rights cases relating to acts of the Provisional Institutions of Self-Government.

After some evident reluctance in United Nations circles to accept the Opinion of the Venice Commission and to follow-up its recommendations, which made the Commission decide to reopen consultations before adopting its Opinion, the Special Representative of the Secretary General of the United Nations in Kosovo promulgated, on 23 March 2006, Regulation no. 2006/12 on the Establishment of the Human Rights Advisory Panel, which reflects the Opinion of the Venice Commission for this part.[32] Section 2 of the Regulation provides that the Advisory Panel shall have jurisdiction over the whole territory of Kosovo and over complaints relating to alleged violations of human rights that have occurred not earlier than 23 April 2005, or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights. Complaints may be submitted as from 23 April 2006.[33] The restriction to cases that have been examined by the Ombudsperson has not been included in the Regulation; section 3.1. provides in general that all other available avenues for review of the alleged violations must have been pursued before the Advisory Panel may deal with the matter, which leaves it to the Panel to develop "case law" on what these "available avenues" are. However, if the Ombudsperson has been seized of the matter brought before the Panel, the Panel may invite the Ombudsperson to submit writ-

[32] UNMIK/REG/2006/12.
[33] Section 21 of the Regulation.

ten observations. The Panel may extend such an invitation also to other institutions and organisations as *amici curiae*.[34]

The Advisory Panel shall consist of three international lawyers – of whom at least one has to be a woman – with a demonstrated expertise in human rights, particularly the European system, to be appointed by the Special Representative of the Secretary General upon the proposal of the President of the European Court of Human Rights.[35] There will be a full-time secretariat.[36] Requests for the appearance of UNMIK personnel before the Panel or for the submission of United Nations documents shall be decided on by the Special Representative of the Secretary General, who shall take into account the interests of justice, the promotion of human rights and the interests of UNMIK and the United Nations as a whole.[37] The Advisory Panel shall submit its findings and recommendations to the Special Representative of the Secretary General, who shall have exclusive authority and discretion to decide whether to act on the findings. The findings and recommendations of the Advisory Panel and the decision of the Special Representative of the Secretary General shall be published promptly in English, Albanian and Serbian.[38] It is to be regretted that the Regulation does not provide that the Advisory Panel shall be guided by the case law of the European Court of Human Rights and by the jurisprudence and practice of bodies competent for other relevant human rights treaties, since this creates the risk of a diverging interpretation of those treaties. However, the Advisory Panel may include a provision to that effect in its rules of procedure, or just expressly or impliedly undertake the commitment to be so guided. In any case it may be expected that the President of the European Court of Human Rights, when nominating candidates for the Panel, will take their familiarity with the Court's case law into account.

As far as KFOR and the Provisional Institutions of Self-Government are concerned, no follow-up has yet been given to the recommendations of the Venice Commission.

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[34] Section 13 of the Regulation.

[35] Sections 4 and 5 of the Regulation.

[36] Section 9 of the Regulation.

[37] Section 15.3 of the Regulation (note the order in which the interests to be taken into account have been put).

[38] Section 17 of the Regulation.

V. Opinion on Remedies against Decertifications of Police Officers in Bosnia and Herzegovina

By letter of 8 December 2004, the Prime Minister of Bosnia and Herzegovina requested the Commission's opinion on the possibility of review of some of the decisions taken by the United Nations Mission in Bosnia and Herzegovina on decertification of police officers in the framework of a reorganisation of the police forces.[39] The decision to refuse or remove the certification of a police officer had as an effect that the person in question was prevented from exercising that profession for life. In fact, 598 officers have been decertified, of which 150 have challenged the decision before national courts. However, in most cases these courts held that they did not have jurisdiction *vis-à-vis* decisions taken by a United Nations body. The former Human Rights Commission of Bosnia and Herzegovina, which was a judicial body of international composition with final competence on human rights issues, confirmed the position taken by the national courts.[40]

Although Bosnia and Herzegovina ratified the European Convention on Human Rights on 12 July 2002, the European Court of Human Rights does not have jurisdiction *ratione personae* in respect of the decertification issue. Even though the ultimate decisions concerning dismissal were formally taken by the domestic authorities, the latter did not have any competence to annul, revise or ignore the decertification decisions of the United Nations International Police Task Force (UN/IPTF). Consequently, the European Convention does apply but no review by the European Court of Human Rights of the issues concerned is possible. The Human Rights Commission did indeed base its decisions on the European Convention on Human Rights and declared Article 6 to be applicable.[41] However, it

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[39] Opinion no. 326/2004, Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia and Herzegovina, CDL-AD(2005)024, 24 October 2005, para. 1.

[40] Human Rights Commission, Decision on the merits of 7 May 2004, *Dzaferovic v. Federation of Bosnia and Herzegovina.*

[41] In its first decision on the matter (see the previous note) the Human Rights Commission ignored the *Pellegrin* case law of the European Court of Human Rights that Art. 6 does not apply to decisions concerning appointment and dismissal of a certain category of civil servants, among whom the police: *Pellegrin v. France* (App no 28541/95) ECHR 1999-VIII, para. 66. Thus, the Human Rights Commission extended the protection beyond the Convention in accordance with Art. 53 of the Convention. However, in a subsequent Decision on admissibility and the merits of 10 September 2004, *Lagonije v. Federation of Bosnia and Herzegovina*, the Human Rights Commission considered it to be appropriate to follow the *Pellegrin* case law. It nonetheless assumed *arguendo* that Art. 6 might apply, and expressed the view that the issue of the possible responsibility of Bosnia and Herzegovina was "a serious issue that affects the protection of hu-

reached the conclusion that Article 6 had not been violated in view of the inherent limitations allowed.[42] As a consequence, there was no effective possibility to seek judicial review of the decertification decisions before the Bosnian courts, while any international remedy was also lacking.

In its Opinion, the Venice Commission, in accordance with its Kosovo Opinion, takes the position that the immunity of international organisations from legal proceedings in courts of member States and other international organisations is generally compatible with public international law, as international organisations have to be able to perform their tasks without undue and uncoordinated interference by courts from those States and international organisations with their respective different legal systems. However, the Commission refers to the case law of the European Court in the area of immunity of jurisdiction of international organisations,[43] in which it is held that the compatibility of immunity with the right of access to court depends, *inter alia,* on the existence of adequate alternative means for determining the claims concerned; "adequate" implying compliance with the European Convention on Human Rights by providing sufficient guarantees in terms of independence and impartiality, and offering adequate procedural guarantees that could be said to fulfil the general requirements of Article 6 or Article 13, as the case may be.[44] If that minimum condition is not fulfilled, the Contracting State concerned may not be exempted from its responsibilities under the Convention. As compliance with human rights standards is so important that no international mechanism or procedure may be allowed to circumvent it, the Contracting States may neither engage in international obligations, nor rely on these as a justification for any action or omission, if these obligations result in such circumvention. However, in the case at hand, the State of Bosnia and Herzegovina had not itself transferred powers in the field of police reorganisation to the United Nations; these powers were derived directly from the General Framework Agreement for Peace in Bosnia and Herzegovina, and that State could not revoke these powers.

Therefore, the Venice Commission concludes that compliance with international human rights standards can only be ensured by the United Nations itself. In the opinion of the Commission, the fact that the United Nations considered the inadequacy of the police apparatus in itself to represent a potential threat to the

man rights in Bosnia and Herzegovina" and that it consequently had to examine whether there had been a violation of the applicant's right to a fair hearing.

[42] *Supra* (note 40), paras 89-101.

[43] See in particular, in respect of labour disputes, *Waite and Kennedy v. Germany* (App no 26083/94) ECHR 1999-I, paras 67-68.

[44] See also *A.L. v. Italy* ECHR 11 May 2000 (Decision on admissibility, not published), in respect of the NATO Appeals Board.

stability and integrity of the State and, as such, to international peace and security, which made the vetting process imperative, does not explain why, in that process, the police officers concerned were not heard and allowed to make submissions or challenge allegations against them, and were also not provided with access to their files and the evidence adduced against them. Even an organisation as the United Nations cannot, within the framework of peace-keeping, perform functions that are similar to those of a State administration and at the same time be exempted from any independent legal review. Here, again, the Commission repeats its observation of the Kosovo Opinion that immunity of international organisations from domestic and international judicial procedures has to be considered as a restriction of the right of access to court.[45] The compatibility of such a restriction depends on certain factors such as the existence of adequate alternative means for determining the claims. The Commission, therefore, recommends that the United Nations carry out a review process of the decertification decisions that have been challenged before the Bosnian authorities after the end of 2002 and, to this end, set up a review body of independent experts, entrusted with reviewing the approximately 150 decertification cases concerned. The appropriate national authorities of Bosnia and Herzegovina should be given the power to implement the finding of the independent panel that the original recommendation on decertification in a particular case should be reversed, by annulling their own previous decision on decertification in that case.

Until the present moment (May 2006) no official reaction has been given to this Opinion, neither by the United Nations as such nor by the Office of the Special Representative. On 18 April 2006, in an address to the Security Council, Prime Minister TERZIC of Bosnia and Herzegovina requested the Security Council to debate as soon as possible the issue of the decertified police officers and take a decision that will preserve the fundamental values of the United Nations Charter. He pointed at the far-reaching consequences of the decertifications for the persons concerned, and indicated that the Security Council was the only competent body to provide an adequate solution. The Security Council was officially requested by the authorities of Bosnia and Herzegovina to debate appropriate possibilities for ensuring the right of appeal and setting up a review mechanism for the certification processes in cases where that was justified. In Prime Minister TERZIC'S conversation with the Under-Secretary General of peace operations, the latter expressed the willingness of the Secretary General to intensify the cooperation with the authorities of Bosnia and Herzegovina in defining the mechanisms that will help to resolve the issues, and explained that the Office of the High Representative and the European Union would make joint efforts with the domestic

[45] *Supra* (note 21), para. 69.

authorities to that end.[46] Whether, and if so in what direction, things have moved since then is not known to the present author.

VI. Opinion on Secret Detention Facilities and Inter-State Transport of Prisoners

By letter of 15 December 2005, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the Venice Commission's opinion on the legality of secret detention centres in the light of the international law obligations of member States of the Council of Europe. The request in particular raised the issue of the member States' responsibility if they – actively or passively – permit illegal detention or abduction by a third State, and the issue of their legal obligations regarding transports of detainees by third States through their territory, including airspace.[47] Although the request evidently had as a background the examination, by the Committee on Legal Affairs and Human Rights, of allegations about the existence of secret detention facilities in Europe, used by the United States for the detention and interrogation of persons charged with involvement in terrorist activities, and about the transport of such persons by the CIA through the territory (including the airspace) of certain member States, the Commission decided that it could and should not act as a fact-finding body but would restrict itself to identifying the obligations of member States of the Council of Europe under public international law in general and human rights law in particular, if such events would occur.

In its Opinion, the Venice Commission refers to the rule of general international law that arresting or detaining a person on the territory of another State, or transferring a person to or over the territory of that other State, without the latter's consent, is in violation of that State's sovereignty and creates international responsibility and the obligation to make full reparation.[48] Such an arrest, detention or transfer also affects the individual right to personal security of the person

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[46] Bosnia Daily, 20 April 2006, p. 5.

[47] Opinion no. 363/2005, Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transport of Prisoners, CDL-AD(2006)009, 17 March 2006, para. 1.

[48] See Art. 31, para. 1, of the Draft Articles on Responsibility of States for internationally wrongful acts, Report of the International Law Commission on the work of its fifty-third session, [2001] Ybk Intl Law Commission vol. II Part 2, UN Doc. A/56/10 [hereinafter, Draft Articles on State Responsibility].

concerned, as laid down in *inter alia* Article 5, paragraph 1, of the European Convention on Human Rights.[49] Consent, even if given *ultra vires*, may make the arrest, detention or transfer lawful, unless the consent is manifestly in violation of a rule of internal law that is of fundamental importance.[50] On the contrary, consent given in violation of *jus cogens* does not, and cannot have such an effect.[51] More generally, any consent to commit an act that, if committed by the consenting State, would be internationally wrongful, and any consent that in itself is in violation of the State's international legal obligations, in particular its human rights obligations, makes the consenting State (co-)responsible under international law, even if it has not itself participated in the act.[52]

If permission or consent has been given by a State, or by a person, body or service under its responsibility – even without governmental knowledge – to arrest and detain a person on its territory against his will and outside of the ordinary judicial or administrative procedures, for a member State of the Council of Europe this will in all likelihood amount to a manifest violation of a rule of internal law of fundamental importance. Consequently, such permission or consent cannot be relied upon by a third State. In any case, such consent would violate the member State's obligations under the European Convention on Human Rights, namely the obligation to prevent any detention in breach of Article 5 and the obligation to effectively investigate any substantiated claim that an individual has been taken into unacknowledged custody and/or is treated as detainee in a manner in breach of Article 3. And if a member State of the Council of Europe provides transit facilities to another State, that may amount to providing assistance in committing a wrongful act, for instance an act of torture or inhuman or degrading treatment or punishment, if the former State is aware of the wrongful character of the act committed by the third State. Both situations of consent or assistance may make the former State (co-)responsible for the wrongful act by the latter State.[53]

A State may not, as a justification, rely on any of its other international obligations, unless perhaps an obligation resulting from a binding decision of the UN Security Council.[54] Not even the obligation to cooperate in fighting terrorism con-

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[49] See *Öcalan v. Turkey* (App no 46221/99) (Grand Chamber) ECHR 12 May 2005, para. 85, referring to the Opinion of the former European Commission of Human Rights of 12 October 1989, *Stocké v. Federal Republic of Germany* (App no 11755/85) (1989) Series A no 199, para. 167.

[50] Art. 7 of the Draft Articles on State Responsibility, *supra* (note 48), and Art. 46 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

[51] Art. 26 of the Draft Articles on State Responsibility, *ibid.* and Art. 53 of the Vienna Convention on the Law of Treaties, *ibid.*

[52] Art. 16 of the Draft Articles on State Responsibility, *ibid.*

[53] *Idem.*

[54] See Art. 103 of the United Nations Charter.

stitutes such a justification.[55] As the European Court of Human Rights held on many occasions, even in the most difficult circumstances, such as the fight against terrorism and organised crime, the European Convention on Human Rights prohibits in absolute terms torture and inhuman or degrading treatment or punishment.[56] And since the responsibility of the member States of the Council of Europe is at stake here, the opinion of the third State about the scope and possible limits of the absolute character of the prohibition of torture and inhuman treatment or punishment is not relevant.[57] The foregoing leads the Venice Commission to the following conclusions:

The duty of member States of the Council of Europe under Article 1 of the European Convention on Human Rights to "secure" to everyone within their jurisdiction "the rights and freedoms ... of this Convention" includes the duty to protect persons under their jurisdiction against infringements of their rights by (organs of) third States operating on their territory. This amounts to the positive obligation to investigate any substantiated claims of such infringement, to prevent or stop it, and to prevent it from happening in the future.

In relation to arrests on its territory by a foreign authority this means that a member State of the Council of Europe as "host" State is (co-)responsible under international law for any form of involvement or on the basis of prior information received, unless it can be proved "in the form of concordant inferences" that the foreign authority has acted extra-territorially without the consent of the "host" State and, consequently, in violation of the latter's sovereignty.[58]

In relation to (secret) detention of prisoners on its territory, a member State of the Council of Europe as "host" State is (co-)responsible for any violation of the Convention, in particular its Articles 3 and 5, for, *e.g.*, holding a prisoner *incommunicado* or giving him an inhuman treatment, in case of acquiescence or connivance.[59] And even if the "host" State originally was not aware of the detention, it has the positive obligation to investigate any serious allegations of secret detention and/or inhuman treatment, take measures in its powers to end it, and effectively prevent the disappearance of the prisoner(s) concerned. When the (suspicion of) secret

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[55] See section IV of the Guidelines of the Committee of Ministers of the Council of Europe of 11 July 2002 on Human Rights and the Fight against Terrorism, and para. 8 of the preamble of the Council of Europe Convention of 16 May 2005 on the Prevention of Terrorism. See Council of Europe, The Fight against Terrorism: Council of Europe Standards, 3rd edition (2005), pp. 296 and 165, respectively.

[56] See *Chahal v. the United Kingdom* (App no 22414/93) ECHR (Grand Chamber) 1996-V, no. 22, para. 79. See also Art. 2, para. 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85.

[57] See *Soering v. the United Kingdom* (App no 14038/88) ECHR Series A no 161, para. 91.

[58] See *Ocalan v. Turkey*, *supra* (note 49), para. 90.

[59] *Ilascu and Others v. Moldova and Russia* (App no 48787/99) ECHR 2004-VII, para. 318.

detention concerns a military base, the "host" State must ensure that the treaty or agreement on which its establishment is based, contains provisions for effective inspection.

In relation to the transfer of prisoners, finally, it means that a member State of the Council of Europe is under the duty not to execute, cooperate in, or consent to extradition, expulsion or transfer of a prisoner to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture, inhuman treatment or punishment or another very serious violation of the European Convention on Human Rights, irrespective of whether the State on whose territory the violation ultimately will or may take place, is also bound by the Convention.[60] To what extent the "substantial grounds" for believing that there is a real risk of a treatment in violation of the Convention may be taken away by assurances from the State to which the prisoner is deported, extradited or transferred, is not yet well established.[61] At the very least, they must be worded in unequivocal terms, and reflect the scope of the legal obligation to which the State giving the assurances is bound; and even then the State receiving the assurances must try its utmost to establish factual confirmation. Moreover, the positive obligation entails the duty to effectively use the preventive possibilities of setting conditions for, and registering and inspecting aircraft movements on and over its territory, and abstain from any active or passive assistance in the transfer.

VII. Concluding Observation

This short *resumé* of three rather recent Opinions of the Venice Commission may serve to illustrate that the Commission has a role to play, within and to a limited extent outside the Council of Europe, to give interpretations of domestic and international human rights standards, and make observations and recommendations about their application in concrete situations. The interpretation of the European Convention on Human Rights takes a predominant place in these Opinions.

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[60] See *Soering v. the United Kingdom, supra* (note 57), para. 86.

[61] See, on the one hand, Committee against Torture, Decision of 24 May 2005, *Ahmed Hussein Mustafa Agazi v. Sweden*, CAT/C/34/D/233 and, on the other hand, *Mamatkulov and Askorov v. Turkey* (App nos 46827/99 and 46951/99) ECHR (Grand Chamber) 4 February 2005, para. 76. The Steering Committee on Human Rights of the Council of Europe has set up a Group of Specialists to reflect on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures, to consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements or standards of such diplomatic assurances, and, if need be, to present concrete proposals.

It goes without saying that, in interpreting the European Convention on Human Rights, the Commission painstakingly follows the case law of the European Court of Human Rights with respect to the provisions concerned. The members of the Commission's Secretariat keep themselves well informed of the Court's case law, while several members of the Commission have special expertise in the field. The way the judgments and decisions of the Court are implemented, and the instances where there is a lack of or delay in their implementation, are also closely followed.[62]

Gradually and in certain respects, the exchange of information and expertise follows a two-way street, in the sense that the Court has shown its preparedness to call upon the Commission, as a body of the Council of Europe and as a group of independent experts in the fields of constitutional and human rights law, to give opinions as *amicus curiae*.[63] As a friend of the Court myself, I cannot but welcome this "cross-fertilization" wholeheartedly in the interest of the functioning of the two institutions in the area of the promotion and protection of human rights. As a friend of LUZIUS WILDHABER, and in appreciation of the important role he has played in this respect as well, I was pleased with the opportunity to make this *amicus curiae* more widely known.

[62] See Opinion no. 209/2002, Opinion on the Implementation of the Judgments of the European Court of Human Rights, CDL-AD(2002)34, 18 December 2002.

[63] See *supra* notes 4 and 5).