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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* OPINION

(Proceedings before the European Court of Human Rights)

ON THE NATURE OF THE PROCEEDINGS BEFORE THE HUMAN RIGHTS CHAMBER AND THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Comments by

Mr Pieter van DIJK (Member, The Netherlands)
Mr Peter JAMBREK (Member, Slovenia)
Mr Giorgio MALINVERNI (Membre, Suisse)
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COMMENTS:

by Mr Peter JAMBREK
Slovenia

Amicus curiae Opinion on whether the Human Rights Chamber and the Constitutional Court of BiH are international procedures within the meaning of Article 35 para 2 b of ECHR

Some thoughts on the matter drafted by Peter Jambrek, member of the Venice Commission

Are annexes 4 and 6 to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina unilateral undertakings given by Bosnia and Herzegovina or are they international treaties?
Were proceedings before the Human Rights Chamber "domestic" within the meaning of Article 35 § 1 of the Convention or did they amount to "another international procedure" within the meaning of Article 35 § 2 b) of the Convention?
Are proceedings before the Constitutional Court "domestic" within the meaning of Article 35 § 1 of the Convention or did they amount to "another international procedure" within the meaning of Article 35 § 2 b) of the Convention?

1. The three questions address essentially the same issue, while answers are to be applied to the two judicial institutions (HR Chamber, CC). The first question of whether GFA for BiH are or are not international treaties, is in my view well discussed by Gro Nystuen. Given that the three State Parties "shall comply fully" with the provisions of the Annex on Human Rights and on Refugees and Displaced Persons, it seems to me also, that both Annexes are directly binding on the three State Parties. To the degree that annexes must be seen as an integral part of the GFA, they must also be treated as part of international law, thereby contributing to the possible status of "an international procedure" to the HR Chamber of BiH.

2. Article VIII, para 2 b) of Annex 6 states that "the Chamber shall not address any application which...has already been submitted to another procedure or international investigation or settlement." The wording thus corresponds fully to the Article 35 para 2 b) of the Convention. Moreover, it is definiens for the Chamber itself. The same applies to provision in para 2 d): "The Chamber may reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body..." (underlined by PJ)

3. In case of friendly settlement, the Chamber shall forward its report, inter alia, to the OSCE and the Secretary General of the Council of Europe, thereby triggering an international procedure for effecting the resolution of a friendly settlement (Article IX of Annex 6). Chamber's decisions shall also be forwarded to the Secretary General of the CE and the OSCE, while "the Parties shall implement fully decisions of the Chamber" (Article XI, para 5. and 6.). Implementation mechanisms also indicate international character of the Chamber.

4. Prof. Malinverni argued in his Venice Commission Opinion CDL(1997)060 of 8 December 1997 that the concept of "procedure of international investigation or settlement therefore encompasses a variety of procedures functioning in widely differing ways and providing parties with very unequal guarantees." In terms of international legal basis, European Convention and a variety of other human rights' instruments form explicit legal framework for the authority of the Chamber.

5. In conclusion, it seems rather obvious to me, that the Chamber was drafted and established by an international treaty as a "procedure of international investigation of settlement". After that being said, it is equally important to state, that the Chamber was designed and meant to be an Ersatz mechanism, substituting for the Council of Europe monitoring mechanism until BiH would become a Party to the Convention. There was no question of overlapping, or conflict of jurisdiction between the Chamber and the Strasbourg Court while BiH was not yet a member of the CE and its HR controls.

6. That fact was also observed and explicitly noted by the Venice Commission opinion CDL-INF (1998)018e of 6 November 1998. There, the Chamber was described as" a quasi-international sui generis body integrated into the legal order of Bosnia and Herzegovina for a transitional period, until the effective integration of this State has been achieved and has acceded to the Council of Europe, ratified the European Convention on Human Rights and recognised the human rights protection mechanism of the Strasbourg organs." Although the Venice Commission Opinion prudently refers to a "quasi-international sui generis body", it nevertheless does not regard the Chamber "as a court of Bosnia and Herzegovina", in which case it would be subordinated on appeal to the CC of BiH. A contrario, proceedings before the HR Chamber could not be regarded as "domestic" within the meaning of Article 35 para 1 of the Convention. Indeed, Article XIV of the Agreement specifically refers to the transfer of responsibility from the Chamber to "the institutions of Bosnia and Herzegovina."

7. On 10 November 2000, pursuant to Article XIV, the Parties to the Human Rights Agreement extended the mandate of the Human Rights Chamber until 31 December 2003, when its mandate ended. The European Convention was ratified by BiH and entered into force on 12/07/2002. The issue therefore seems relevant as to the character of the Chamber between the dates of the entry into force of the ECHR for BiH and the end of the Chamber's mandate, that is between 12/07/02 and 31/12/2003. The Venice Commission Proposal (CDL-INF (2001)20 of 23 October 2001) foresaw the situation in the following terms: "...after the accession of Bosnia and Herzegovina to the Council of Europe and the ratification of the European Convention of Human Rights... it will no longer be possible to consider the (Human Rights) Chamber as a quasi-international judicial institution embodied in the judicial system of Bosnia and Herzegovina. The Chamber will have to be regarded as a "court" in Bosnia and Herzegovina, within the meaning of Article 6.3 (b) of the Constitution..."

8. As to the issue of a possible recourse to the Strasbourg HR Court after seizing the BiH HR Chamber, implied in the amicus curiae opinion, it would appear to me, that the Chamber could for that purpose be regarded as a domestic court, and not a bar for an application to the European Court as "another international procedure." An argument for that opinion is the transitional and substitute character of the Chamber before BiH's accession to the Strasbourg mechanism, and its basically domestic function in the absence of the possibility to apply to a stronger, better staffed in the truly international tribunal in Strasbourg.

9. As to the proceedings before the Constitutional Court of BiH, they are in my opinion "domestic" within the meaning of Article 35 para 1 of the ECHR.

COMMENTS

By Mr Pieter van DIJK
The Netherlands

Some elements for the *Amicus curiae* brief concerning Bosnia and Herzegovina

Question 1: Are annexes 4 and 6 to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina unilateral undertakings given by Bosnia and Herzegovina or are they international treaties?

I agree with Nystuen that, although the annexes to the General Framework Agreement had not the same signatory parties as the GFA itself, while only one of the signatory parties to these annexes was a State (the Republic of Bosnia and Herzegovina), the annexes are to be considered as an integral part of the GFA. It was the clear intention of the Contracting Parties to the GFA that these annexes would give substance to the GFA as a framework agreement. Indeed, the Contracting Parties formally "endorse" and undertake to "comply fully" with these annexes. Therefore, these annexes, and in particular annexes 4 and 6, are to be considered treaty law, and consequently there character and interpretation are governed by international law, in particular the Vienna Convention on the Law of Treaties.

Question 2: Were proceedings before the Human Rights Chamber "domestic" within the meaning of Article 35 § 1 of the Convention or did they amount to "another international procedure" within the meaning of Article 35 § 2 b) of the Convention?

The answer to question 1 does not necessary imply, that institutions established by these annexes share their international character. That depends on the intention of the Contacting Parties. In the case of the Human Rights Chamber, notwithstanding its partly international composition (Article VII (2) of Annex 6|), it was the intention and perception, both of the Contracting Parties of the GFA and of those that signed Annex 6, that the Chamber would be established and function as a domestic court within the legal system of the Republic of Bosnia and Herzegovina. It was part of the Commission on Human Rights to supervise the implementation of the human-rights obligations as provided in the European Convention on Human Rights, and related obligations provided for in other international agreements listed in the Appendix to Annex 6 (Article II of Annex 6). However, its supervision did not concern obligations between States, but obligations undertaken by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska; it exercised its supervision within the national boundaries of Bosnia and Herzegovina. Therefore, it had to be considered "as being part of the whole system of protection of human rights and fundamental freedoms in Bosnia and Herzegovina" (Decision of 26 February 1999 of the Constitutional Court in case U 7/98). And, although it was perhaps not a domestic court in the normal sense (see the same Decision of the Constitutional Court), it was undoubtedly an institution endowed with domestic jurisdiction comparable to the jurisdiction of the Constitutional Court, in the area of human rights. In fact, these two institutions were the only judicial institutions at the level of the central State.

Consequently, the requirement that the Ombudsman could refer applications to the Human Rights Chamber only after all "domestic remedies" had been exhausted, must be understood as referring to remedies at the level of the Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.

There are also no indications that the Human Rights Chamber was meant to operate as some sort of "trailblazer" for the European Court of Human Rights, which would loose its jurisdiction as soon as the latter Court would be entrusted with jurisdiction *ratione loci.* The decision to abolish the Human Rights Chamber five years after the entry into force of the Dayton Agreement, or rather to "merge" it into the Constitutional Court, was not an automatic one related to the moment the European Convention on Human Rights would enter into force for Bosnia and Herzegovina; in fact, the Chamber continued its examination of cases after the European Court of Human Rights had obtained jurisdiction.

Therefore, proceedings before the Human Rights Chamber were to be considered as "domestic" within the meaning of Article 35 § 1, and not as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights.

Question 3: Are proceedings before the Constitutional Court "domestic" within the meaning of Article 35 § 1 of the Convention or did they amount to "another international procedure" within the meaning of Article 35 § 2 b) of the Convention?

What was said in reply to question 2 concerning the Human Rights Chamber, applies *a fortiori* to proceedings before the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court was devised as a domestic court for the Republic of Bosnia and Herzegovina, based upon its Constitution, and not as some international tribunal. This is abundantly clear from the regulation of its function in Article VI (3) of the Constitution.

The Constitutional Court is, therefore, also not to be considered as a "domestic remedy" within the meaning of Article 35 § 1 nor as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights.

COMMENTAIRES

de M. Giorgio MALINVERNI
Suisse

Avis préliminaire sur la demande d'*amicus curiae* concernant la Bosnie-Herzégovine

Question 1 Les accords de Dayton comprennent le « General Framework Agreement » (GFA), qui est relativement bref puisqu'il ne compte que 11 articles, et 11 annexes, qui le complètent, et qui en font partie intégrante. Les signataires du GFA lui-même sont la République de Bosnie Herzégovine, la République de Croatie et la République fédérale de Yougoslavie, à savoir des Etats souverains. Les signataires des Annexes 4 et 6, en revanche, sont la République de Bosnie-Herzégovine et les deux entités qui la composent, ces deux dernières n'étant pas des Etats au sens du droit international.

En dépit de cela, il faut admettre que le GFA et les annexes forment un tout indissociable. Pour preuve les très nombreuses références qui sont faites aux annexes dans de nombreux articles du GFA. Ce dernier n'aurait pas de signification et serait incompréhensible sans les annexes.

Il faut donc en conclure que, quand bien même les annexes n'ont pas été signées exclusivement par des Etats, elles font partie du traité international qu'est le GFA. Les règles contenues dans les annexes 4 et 6 doivent ainsi être considérées comme des règles relevant du droit international régies par la Convention de Vienne sur le droit des traités.

Question 2 La Chambre des droits de l'homme est instituée par l'art. II par. 1 de l'Annexe 6, comme étant l'une des deux composantes de la Commission des droits de l'homme, l'autre étant le Bureau du Médiateur.

En prévoyant quelle doit être la composition de la Chambre, l'art. VII de l'Annexe 6 dispose que, sur un total de 14 membres, 4 sont désignés par la Fédération, 2 par la Republika Sprska et les 8 autres sont désignés par le Comité des Ministres du Conseil de l'Europe. Il en résulte que les membres « internationaux » sont majoritaires à la Chambre (8 sur 14).

En dépit de cette caractéristique, la Chambre doit être considérée comme un organe « de recours interne » au sens de l'art. 35 par. 1 CEDH et non comme une « instance internationale » au sens de l'art. 35 par. 2 let. b) CEDH.

Cela résulte du fait que la Chambre est appelée à assurer le respect des droits de l'homme exclusivement sur le territoire de la République de Bosnie-Herzégovine (Art. II et VIII de l'Annexe 6). De ce point de vue, elle s'apparente clairement à un tribunal interne, les tribunaux internationaux ayant une compétence territoriale qui s'étend à plusieurs Etats. L'obligation d'épuiser les instances qui figure à l'art. VIII par. 2 let. a) doit donc être entendue comme se référant aux instances internes des deux entités qui forment la République de Bosnie-Herzégovine.

L'art. VIII par. 2 let. b) est plus problématique à cet égard, en ce qu'il prévoit que la Chambre ne doit pas entrer en matière sur un recours qui porte sur une affaire qui a déjà été soumise à un autre mécanisme international. Cette formulation, qui rappelle celle de l'art. 35 al. 2 let. b) CEDH, pourrait laisser croire que la Chambre est elle-même un organisme international. Le même raisonnement peut être fait à propos de l'Art. VIII par. 2 let. d), qui se réfère lui aussi à d'autres organes internationaux de sauvegarde des droits de l'homme et interdit les recours dits « simultanés » ou « parallèles ».

La Commission de Venise ne s'était donc pas trompée lorsqu'elle avait souligné le caractère hybride de la Chambre, la qualifiant « d'organe quasi-international *sui generis* » (avis CDL-INF (98)18).

Il me semble toutefois que les éléments permettant de qualifier la Chambre d'organe interne l'emportent : sa compétence *ratione loci* limitée au territoire de la République et l'intention des parties signataires du GFA et de l'Annexe 6 que sa mission devait être celle d'un organe interne fonctionnant dans le cadre de l'ordre juridique de la République de Bosnie-Herzégovine. Les obligations juridiques découlant de l'annexe 6 incombent en effet à la République de Bosnie-Herzégovine, à la Fédération de Bosnie-Herzégovine et à la Republika Sprska, mais à aucun autre Etat (voir, dans ce sens, l'arrêt du 26 février 1999 de la Cour Constitutionnelle dans l'affaire U7/98).

Question 3 La Cour constitutionnelle est instituée par l'art. VI de l'Annexe 4. Tout comme la Chambre, elle a aussi une composition internationale, même si celle-ci est ici moins accentuée. Il résulte toutefois ici aussi de l'art. VI par. 3 que sa compétence territoriale est limitée aux frontières de la République de Bosnie Herzégovine. Prévue par la Constitution de la République de Bosnie-Herzégovine, la Cour constitutionnelle apparaît ainsi clairement comme étant un tribunal interne, au sens de l'art. 35 par. 1 CEDH et non comme « un mécanisme international » au sens de l'art. 35 par. 2 b) CEDH.

COMMENTS

By Mr Franz MATSCHER
Austria

The Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina in the light of Art 35 § 1 and 35 § 2 (b) of the ECHR

We are confronted with a problem of interpretation of Art 35 § 1 and of Art 35 § 2 (b) ECHR. In the present context three items are at issue:

1. Are Annexes 4 and 6 to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina unilateral undertakings given by Bosnia and Herzegovina or are they international treaties?

2. Were proceedings before the former Human Rights Chamber „domestic" within the meaning of Article 35 § 1 of the Convention or did they amount to „another international procedure" within the meaning of Article 35 § 2 (b) of the Convention?

3. Are proceedings before the Constitutional Court „domestic" within the meaning of Article 35 § 1 of the Convention or do they amount to „another international procedure" within the meaning of Article 35 § 2 (b) of the Convention?

The question whether there is identity („substantially the same") of persons, of facts and of the object of the application may be set aside, supposing that this question is undisputed.

ad 1) The construction of the Dayton Agreement 1995 which, as such, is incontestably an international agreement is a very complex one. Annexes 4 and 6 are unilateral undertakings of the constituent parties of the Republic of Bosnia and Herzegovina; they constitute acts of execution of the Art 5 and 6 of the Agreement, designated there as „arrangements" and „welcomed and endorsed" by the Parties of the Agreement.

But the situation is not so clear as far as the position of the Human Rights Chamber is concerned (infra, ad 2).

ad 2) The situation of the Human Rights Chamber is rather ambiguous. On the one hand, the Chamber, as a part of the „Agreement on Human Rights", has been laid down in the Arrangement between the constituent parties of the Republic and which has been included in the Dayton Agreement (Art VI) as Annex 6.

This approach would lead to the idea that the Chamber is a special Institution of the Republic.

On the other hand, following Art XIV of the Arrangement, the Chamber is not an institution of the Republic and therefore rather an international body. An argument for this characterisation of the Chamber as an international body can be found also in the fact that the majority of its members (eight from fourteen) shall be appointed by the Committee of Ministers of the CoE. This is also the point of view of the Constitutional Court.

To note, that the Venice Commission has called the Chamber a „quasi-international sui generis body“ [opinion 16 – 17 October 1998, CDL-INF (98) 18].

Furthermore, it seems that the Chamber has mainly been considered not as a domestic, but as an international body.

But I agree, that this point of view, to which I would like to subscribe, is contestable.

From this point of view the (previous) session of the Chamber would not be a requirement in order to exhaust the domestic remedies in the sense of Art 35 § 1 ECHR, the application to the Chamber not being a domestic remedy.

Consequently, the fact that an issue has been submitted to or decided by the Chamber may constitute a bar for an application before the European Court within a meaning of Art 35 § 2 (b) ECHR.

For the two aspects described before, the situation would be inverted if we consider the Chamber as a body of the Republic.

ad 3) The Constitution of Bosnia and Herzegovina has been laid down in the Arrangement between the constituent parties of the Republic. Even if this Arrangement has been incorporated in the Dayton Agreement (Art V) as Annex 4 the Arrangement in question is an unilateral act of the Republic and therefore the Constitution, including the Constitutional Court (Art VI), is an institution of the Republic.

In this sense the (previous) session of the Constitutional Court has to be considered as a domestic remedy to be exhausted before bringing a case before the European Court (provided that in the instant case complaints to the Constitutional Court would be admissible) in the sense of Art 35 § 1 ECHR.

Consequently, the fact that an application has been submitted to or decided by the Constitutional Court would not bar an application to the European Court within the meaning of Art 35 § 2 (b) ECHR.