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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

Adopted by the Commission
at its 63rd plenary session
(Venice, 10-11 June 2005)

On the basis of comments by

Mr Pieter van DIJK (Member, The Netherlands)
Mr Peter JAMBREK (Member, Slovenia)
Mr Giorgio MALINVERNI (Member, Switzerland)
Mr Franz MATSCHER (Member, Austria)

I. Introduction

1. By a letter dated 11 April 2005, the European Court of Human Rights (Second Section) (hereinafter "the European Court") granted the Venice Commission leave to make written submissions under Article 36 § 2 of the Convention in the proceedings pending before it in respect of the case Jelićič v. Bosnia and Herzegovina.

2. The Court asked the following questions:

A. 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?

B. 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?

C. 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?

3. A working group composed of Messrs Van Dijk, Jambrek, Malinverni and Matscher was accordingly set up. The rapporteurs submitted their comments on these matters to the Commission at its 63rd Plenary Session (Venice, 10-11 June 2005). The Commission instructed the Secretariat to prepare a consolidated opinion on the basis of these comments, and to submit it to the European Court.

II. Whether Annexes 4 and 6 are unilateral undertakings or international treaties

4. The Dayton Peace Accords are composed of the "General Framework Agreement" (GFA) and the 12 annexes, which supplement it.

5. The GFA was signed by three sovereign states – the (then) Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. It is thus subject to international law pursuant to Article 1 of the Vienna Convention on the Law of Treaties.[1]

6. Annexes 1A, 2, 3, 6 and 7 were signed by the Republic of Bosnia and Herzegovina and by the two territorial entities making up the Republic - the Federation of Bosnia and Herzegovina and the Republika Srpska. Annex 4 was not signed by the parties : declarations on behalf of the Republic of BiH, the Federation of BiH and the Republika Srpska "approving" the Constitution were attached to it. Annexes 5 and 9 were only signed by the Entities. Annexes 1A and 2 were also "endorsed" by the Republic of Croatia and the Federal Republic of Yugoslavia. Annexes 1B on regional stabilisation and 10 on civilian implementation were signed by the Republic of BiH, the Entities, the Federal Republic of Yugoslavia and the Republic of Croatia.

7. The Federation of Bosnia and Herzegovina and the Republika Srpska not being "states" from the standpoint of international law, the issue arises, and was raised by the European Court, as to whether or not the Annexes to the GFA are subject to the rules of international law.

[1] Article 1 of the Vienna Convention reads: "The present Convention applies to treaties between States".

8. The Commission notes that the GFA only contains 11 articles, which mostly set out the obligation for the three parties thereto to "welcome and endorse" and to "fully respect and promote fulfilment of the commitments" made in the annexes; to "agree to and comply fully" with their provisions (Articles VI, VII and VIII GFA); to "co-operate fully with all entities involved in the implementation of this peace agreement" (Article IX GFA).

9. The substance of the commitments is contained in the Annexes: it is therefore clear, in the opinion of the Venice Commission, that the Parties to the GFA intended the latter to constitute a framework agreement, and the Annexes to provide its substance.[2]

10. The Commission observes that the Constitutional Court of Bosnia and Herzegovina itself had recourse to the Vienna Convention in order to interpret the Constitution (Annex 4).[3]

11. In conclusion, the Commission is of the opinion that the Annexes to the GFA are to be considered an integral part thereof, so they must be considered as international treaties. Their character and interpretation are therefore governed by international law, in particular the Vienna Convention on the Law of Treaties.

III. Whether the proceedings before the Human Rights Chamber were "domestic" within the meaning of Article 35 § 1 of the Convention or "international" within the meaning of Article 35 § 2 b) of the Convention

12. The above conclusion that the Annexes to the GFA are "international treaties" does not necessarily imply that the institutions established by these annexes share their international character. This depends on a number of factors, which will be listed and examined hereafter.

13. Some elements seem to indicate that the Chamber was an "international body".

14. Firstly, the composition of the Human Rights Chamber is partly, in fact in the majority, international. Under Article VII (2) of Annex 6, of the 14 members of the Chamber, 4 are appointed by the Federation of Bosnia and Herzegovina, 2 by the Republika Srpska and 8 by the Committee of Ministers of the Council of Europe.

15. Secondly, the Chamber was not "domestic" in the ordinary sense of this term. Indeed, the Constitutional Court in this respect stated: "the Chamber is an institution of a special nature. According to Article II.1 of the Agreement on Human Rights, the Chamber is one of the two parts of the Commission on Human Rights for Bosnia and Herzegovina. According to Article XIV of the Agreement on Human Rights, the Commission on Human Rights will only function in its present form during a transitional five-year period, unless the Parties to the Agreement agree otherwise. In the legal terminology of the Agreement on Human Rights, the Chamber is neither a court nor an institution of Bosnia and Herzegovina. Indeed, Article XIV of the Agreement specifically refers to the transfer of responsibility to "the institutions of Bosnia and Herzegovina"". The Court added: "It is significant that the Constitution of Bosnia and Herzegovina refers to the concept of a "court in Bosnia and Herzegovina" not only in Article VI.3 (b) but also in Article VI.3 (c). The latter provision provides for the jurisdiction of the Constitutional Court over issues referred by "any court in Bosnia and Herzegovina" concerning whether a law, on whose validity its decision depends, is compatible, in particular, with this

[2] See Gro Nystuen, Striking a balance between achieving peace and protecting human rights: conflicts between norms regarding ethnic discrimination in the Dayton Peace Agreement, Leiden 2005. Gro Nysuten was legal advisor to the European Union at Dayton.

[3] See Constitutional Court of Bosnia and Herzegovina, Partial Decision U 05/98 I of 30 January 2000, § 15.

Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. It is quite certain that the authors of this provision did not intend the Human Rights Chamber to be included among those institutions which should be competent to refer human rights issues to the Constitutional Court of Bosnia and Herzegovina for preliminary consideration.""[4]

16. The Venice Commission itself previously expressed the opinion that the Chamber was "a quasi-international *sui generis* body integrated into the legal order of Bosnia and Herzegovina for a transitional period[5], 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".[6] The Commission considered therefore that the Human Rights Chamber was not to be regarded as a "court of Bosnia and Herzegovina within the meaning of Article VI, para 3 (b) of the Constitution of Bosnia and Herzegovina."

17. The Commission also expressed the view that, pending the accession of Bosnia and Herzegovina to the Council of Europe and the ratification of the ECHR by it, the Human Rights Commission[7] represented "a provisional monitoring mechanism reproducing the Strasbourg bodies (the European Commission and Court of Human Rights) in Bosnia and Herzegovina." Indeed, Annex 6 expressly refers to Resolution (93)6 of the Committee of Ministers of the Council of Europe.

18. The circumstance that the Human Rights Chamber was designed to operate as some sort of "trailblazer" for the European Court of Human Rights explains a number of features of the Chamber, but does not mean that it was an *international court*.

19. In the Commission's opinion, in fact, other elements are decisive for concluding that the Chamber was a national, not an international body.

20. It is to be noted, in the first place, that Committee of Ministers Resolution (93)6 underlined that specially appointed qualified persons[8] would sit "on a court or other body responsible for the control of respect for human rights set up by this state *within its internal legal system* (emphasis added)".

21. It was in fact 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 body within the legal system of Bosnia and Herzegovina.

22. Indeed, the HR Chamber 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.

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[4] See Constitutional Court of BiH, Decision U 10/98 of 26 February 1999.

[5] The mandate of the Human Rights Chamber, originally foreseen for a period of five years, was extended, by an agreement of 10 November 2000 between the Parties to Annex 6, until 31 December 2003, when it ended.

[6] See Venice Commission opinion on the admissibility of appeals against decisions of the Human Rights Chamber of Bosnia and Herzegovina, CDL-INF(1998)018 of 6 November 1998.

[7] Composed of the Human Rights Ombudsman and the Human Rights Chamber.

[8] See Committee of Ministers Resolution (96)8, "Appointment of eight members of the Human Rights Chamber for Bosnia and Herzegovina and designation of its president" of 12 March 1996.

23. The conditions for the jurisdiction of the Chamber, listed in Article VIII § 2 [in particular sub (a) (previous exhaustion of domestic remedies and six-month time-limit), (b) (ban on examination of matters already submitted to "another procedure of international investigation or settlement") and (d) (possibility of deferring consideration if the matter is pending before "any other international human rights body")] must be understood in connection with this role of temporary monitoring mechanism "anticipating" the functions of the European Court of Human Rights. The obligation to exhaust domestic remedies must be interpreted as referring to the need to exhaust the remedies which were available *in each Entity*.

24. The supervisory role of the High Representative, of the Secretary General of the Council of Europe and of the OSCE (Articles IX § 2 and XI § 5) must also be understood in the particular context of Bosnia and Herzegovina, where the involvement of international actors not only in the civilian implementation, but also in respect of the international police force, the return of refugees and displaced persons and the supervision of elections, was very important.

25. In the Commission's opinion, the decisive feature of the Human Rights Chamber ruling out its international nature is that its mandate did not concern obligations *between States*, but obligations undertaken by the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska : the Chamber therefore exercised its supervision *within the national boundaries* of Bosnia and Herzegovina only. 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".[9]

26. The Commission notes with respect to the meaning of "another procedure of international investigation or settlement" in the European Convention, that the European Commission on Human Rights expressed the view that the term "international investigation or settlement" referred to institutions and procedures set up by States.[10]

27. In the Commission's view, the *international jurisdiction* of the institution or procedure is implicit in the requirement that it should be set up by States. Indeed, this was the case with the only bodies which have so far been found by the Strasbourg bodies to constitute other "procedures of international investigation or settlement": the United Nations Human Rights Committee[11] and the Committee on Freedom of Association of the International Labour Organization (ILO).[12]

28. It follows, in the Venice Commission's view, that, notwithstanding certain elements which could suggest that the Human Rights Chamber was an international body (see paras. 14-17 above), the proceedings before the Human Rights Chamber may not be considered as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights. On the contrary, they must be considered as "domestic" within the meaning of Article 35 § 1. It follows that for the period between 12 July 2002, when the European Convention on Human Rights entered into force in respect of Bosnia and Herzegovina, and 31 December 2003, when the mandate of the Human Rights Chamber ended[13], the need to exhaust

[9] See the Constitutional Court of BiH, Decision U 7/98 of 26 February 1999.

[10] See Eur. Ct HR, Decision on the competence of the court to give an advisory opinion, 2 June 2004, § 29.

[11] See, *inter alia*, Eur. Commission HR, Pauger v. Austria, No. 24872/94, dec. 9 January 1995, DR 80, p. 170.

[12] See Eur. Comm. HR, Cereceda Martin v. Spain, No. 16358/90, dec. 12 October 1992, DR 73, p. 120.

[13] The issue could arise in the future of whether the Human Rights Commission within the Constitutional Court of BH, established in January 2005 and mandated to decide on applications received by the Chamber on or before 31 December 2003, constitutes a remedy to be exhausted within the meaning of Article 35 § 1 ECHR.

domestic remedies prior to applying to the European Court made it necessary to apply to the Human Rights Chamber.

IV. Whether the proceedings before the Constitutional Court are "domestic" within the meaning of Article 35 § 1 of the Convention or "international" within the meaning of Article 35 § 2 b) of the Convention

29. 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.

30. Despite its partly international composition (according to Article IV of Annex 4, four of the nine members of the Court are selected by the House of Representatives of the Federation of BH, two by the assembly of the Republika Srpska and the remaining three by the President of the European Court of Human Rights), 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.

31. It is to be noted in particular that, according to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, "the Constitutional Court shall have appellate jurisdiction over issues under this Constitution arising out of a judgment of *any other court* in Bosnia and Herzegovina" (emphasis added). This undoubtedly points to concluding that the Constitutional Court is itself a court of Bosnia and Herzegovina.

32. In addition, similarly to the Human Rights Chamber, the jurisdiction *ratione loci* of the Constitutional Court is limited to the territory of Bosnia and Herzegovina. In this respect, the Commission refers to the reasoning developed above in connection with the nature of the proceedings before the Chamber.

33. It follows, in the Commission's view, that the Constitutional Court may not be considered as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights. It must instead be considered as a domestic remedy to be exhausted before bringing a case before the European Court (provided that in the specific case complaints to the Constitutional Court would be admissible) within the meaning 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.

V. Conclusions

34. Annexes 4 and 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina are an integral part of the said agreement and must be considered as international treaties.

35. The proceedings before the Human Rights Chamber may not be considered as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights. On the contrary, they must be considered as "domestic" within the meaning of Article 35 § 1.

36. The proceedings before the Constitutional Court of Bosnia and Herzegovina may not be considered as "another international procedure" within the meaning of Article 35 § 2(b) of the European Convention on Human Rights. They must instead be considered as "domestic" within the meaning of Art 35 § 1 ECHR.