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IN THE EUROPEAN COURT OF HUMAN RIGHTS
BEFORE THE FOURTH SECTION

Application No: 41183/02

B E T W E E N :-

MS JELIČIĆ RUZA

Applicant

-and-

BOSNIA AND HERZEGOVINA

Respondent

WRITTEN COMMENTS BY F. JAVIER LEON DIAZ AND RALPH ROCHE ON BEHALF OF THE INTERNATIONAL COMMITTEE FOR HUMAN RIGHTS (ICHR) PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULE 44 § 2 OF THE RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS

FRANCISCO JAVIER LEON DIAZ

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I INTRODUCTION

1. These written comments are respectfully submitted by the International Committee for Human Rights (ICHR)[1] pursuant to leave granted by the President of the Chamber section 4 in accordance with Rule 44 § 2 of the Rules of Court.[2]

2. The ICHR is an independent and non-profit human rights organisation based in Spain with offices in Sarajevo, Bosnia and Herzegovina. A central component of ICHR's work is the support of individuals and organisations in human rights litigation through legal representation or advice in selected cases that exemplify a systemic pattern of abuse before international human rights mechanisms. Thus ICHR is currently the Legal Representative for the applicant in the case *Blečić v. Croatia* before the Grand Chamber of the European Court for Human Rights (application no. 59532/00).

II 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?

3. The ICHR considers that the answer to this question should be that Annexes 4 and 6 to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina are binding obligations, unilaterally assumed by Bosnia and Herzegovina.

(a) General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP)

4. The Bosnia Proximity Peace Talks were held at Wright-Patterson Air Force Base, in Dayton, Ohio, from November 1 to November 20, 1995, under the auspices of the Contact Group. The signatories to the agreements reached were: President Izetbegovic, for the Republic of Bosnia and Herzegovina, President Tudjman, for the Republic of Croatia, President Milosevic, for the Federal Republic of Yugoslavia and for the Republika Srpska[3], and President Zubak, for the Federation of Bosnia and Herzegovina.

5. At Dayton the participants discussed and agreed on the Framework Agreement and its Annexes, consenting to be bound through their signature without delay. On the 21st November 1995 the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, "*recognizing the need now for a comprehensive settlement to bring an end to the tragic conflict in the region*", signed the "Agreement on Initialling the General Framework Agreement for Peace in Bosnia and Herzegovina" which entered immediately into force[4].

6. The Dayton Peace Accords were signed in Paris on 14 December 1995. The General Framework Agreement for Peace in Bosnia and Herzegovina (the "GFAP"), was signed by the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina'), the Republic of Croatia ('Croatia') and the Federal Republic of Yugoslavia. By signing the GFAP the parties endorsed the various annexed agreements and undertook to 'respect and promote fulfillment' of their provisions.

7. The annexed Agreements were, mainly, signed by Bosnia and Herzegovina and the two Entities i.e. the Republika Srpska and the Federation of Bosnia and Herzegovina (which are not parties to the General Framework Agreement) as they relate to issues mainly within the internal affairs of Bosnia and Herzegovina, such as Annex 6, which involves actions which are within the competence of Bosnia and

1 http://www.ichr-law.org/english/index.asp.

2 Pursuant to a letter dated 23 May 2005 issued by Registrar, Paul Mahoney.

3 The Preamble to the General Framework Agreement makes reference to an Agreement of 29 August 1995 'which authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republika Srpska, the parts of the peace plan concerning it, with the obligation to implement the agreement that is reached strictly ...'.

4 Article II of this Agreement provides that the consent of the Parties to be bound by the peace agreements is expressed by their initialling, while Article I provides that the agreements enter into force and have operative effect upon signature in Paris.

Herzegovina alone, as they involve matters closely related to the administration of justice. Other agreements were entered into only by the two Entities (i.e. the Agreement on Arbitration (Annex 5) and the Agreement on Bosnia Herzegovina Public Corporation (Annex 9)). The Republic of Croatia and the Federal Republic of Yugoslavia endorsed by their signature two of the Annexes, namely the Agreement on Military Aspects of the Peace Settlement (Annex 1-A) and the Agreement on Inter-Entity Boundary Line and Related Issues (Annex 2) and therefore explicitly undertaking the obligation to particularly guarantee these two Agreements. Both countries also signed the agreement on regional stabilization (Annex 1-B) and the Agreement on Civilian Implementation of the Peace Settlement (Annex 10).

8. The GFAP is a very specific form of agreement between States, reflecting the unique and specific circumstances prevailing in Bosnia and Herzegovina at the end of the conflict in 1995. It may appear unusual that States would assume such obligations over the internal matters of a neighbouring State. In this connection, reference must be made to the peculiarities of the background to the signing of the GFAP, characterised in particular by a high level of involvement of the States contiguous to Bosnia and Herzegovina in its internal affairs and their *de facto* control over large parts of the population of Bosnia and Herzegovina, i.e. the Bosnian Serbs and the Bosnian Croats as recognised by the Republic of Croatia and the Federal Republic of Yugoslavia in their side letters to the Dayton Peace Accords.[5]

9. The state of affairs prevailing at the time of the signature of the GFAP, coupled with the appropriate realisation on the part of those who initiated and facilitated the negotiations leading to its signature, was such that it was deemed necessary for the Federal Republic of Yugoslavia and the Republic of Croatia to express themselves as they did in the GFAP.

10. It is submitted that the GFAP's aim was the cessation of hostilities and as such should be considered as a traditional peace treaty consisting of a cease-fire, arms reduction, and boundary demarcation agreements, the essence of Annexes 1-A, 1-B and 2 signed by both the Republic of Croatia and the Federal Republic of Yugoslavia who are not parties to the remaining annexes and as such should be considered as third parties to them[6]. It is thus submitted that for the remaining annexes, including annex 4 and 6, the GFAP should be considered to be a form of Treaty of Guarantee[7], where the Republic of Croatia and the Federal Republic of Yugoslavia act as "guarantors" of the various annexes, guaranteeing the respect and promotion of the fulfilment of certain obligations assumed by Bosnia and Herzegovina.

11. Annexes 4 and 6 are considered in more detail below.

(b) <u>Annex 4 to the GFAP</u>

12. Annex 4 contains the Constitution of Bosnia and Herzegovina. It is not formally signed by the Republic of Bosnia and Herzegovina, and the two Entities which form part of that State (the Federation of Bosnia and Herzegovina and the Republika Srpska). Instead, each of them has made

5 Both the Federal Republic of Yugoslavia and the Republic of Croatia addressed a set of identical side-letters, to the United States, Russia, Germany, France and the United Kingdom. These letters referred to the Agreement on the Military Aspects of the Peace Settlement and the Agreement on Inter-Entity Boundary Line and Related Issues, which constitute Annex l-A and Annex 2 to the GFAP which were signed and endorsed by both of them. Both countries pledged to take 'all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina": - For the Federal Republic of Yugoslavia: "to ensure that the Republika Srpska fully respects and complies with the provisions' of the aforementioned Agreements." - For the Republic of Croatia: "to ensure that personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects and comply with the provisions of the aforementioned Annexes." Further, both the Republic of Croatia and the Federal Republic of Yugoslavia in their letters from November 21, 1995 to the Secretary General of the UN further committed, "in order to facilitate accomplishment of the mission of the multinational military Implementation Force ("IFOR") referred to in Annex l-A (…)" to "strictly refrain from introducing into or otherwise maintaining in Bosnia and Herzegovina any armed forces or other personnel with military capability."

6 With the exception of Annex 10.

7 See references to "treaty of Guaranty" in Paola Gaeta, `The Dayton agreements and international law', 7 *European Journal of International Law* (1996)147-163.

unilateral declarations of approval of the Constitution, and this is due to the fact that the Constitution of Bosnia and Herzegovina is the sole text of the Annex. These declarations are, it is submitted, undertakings to abide by the terms of that Constitution, which includes onerous obligations on Bosnia and Herzegovina and its Entities. An example of such an obligation is Article XII.2, where the Entities undertake to amend their Constitutions to accord with the terms of the Constitution of Bosnia and Herzegovina. This obligation is, in legal terms, solely within the competence of the respective Entity and more particularly a matter for it to resolve in accordance with its international constitutional and administrative arrangements.

13. It should be noted that the intention of the drafters i.e. Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska was that the Constitution enter into force with the signature of the GFAP as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina (i.e. the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974, as amended)[8]. Indeed, the parties saw in Annex 4 an act of continuation with the internal legal order of Bosnia and Herzegovina. The Constitution stipulates that it is "determine[d]"[9] by the citizens of Bosnia and Herzegovina i.e. by its constituent peoples, the Bosniaks, the Croats, and the Serbs (along with Others) and intended to preserve and continue Bosnia and Herzegovina's legal existence under international law as a state, (…) with its present internationally recognized borders.[10]

14. On December 12, 1995, the legislature of the Republic of Bosnia and Herzegovina ratified the constitution as the Parliamentary Assembly at a joint session passed a Constitutional Law on Amendments and Additions to the Constitution, *Official Gazette of RBiH*, 20 Dec. 1995, at 540.[11]

15. The question must be considered, however, of whether the fact that the Constitution is contained in Annex 4 to the GFAP changed the nature of the agreement, especially as the GFAP was signed by a number of States.

16. The relevant article of the GFAP is Article V. This Article reads as follows:

    "The Parties welcome and endorse the arrangements that have been made concerning the Constitution of Bosnia and Herzegovina, as set forth in Annex 4. The Parties shall fully respect and promote fulfilment of the commitments made therein."

17. The use of the terms "welcome" and "endorse" must be interpreted as meaning that the signatories of the GFAP are not themselves undertaking any specific obligations. This is reinforced by the use of the passive voice in the text. In addition, the statement that the Parties "shall fully respect and promote fulfilment of the commitments" made in Annex 4 further tends to indicate that the Parties' role is one of encouragement and support, rather than one of obligation.

18. It is also appropriate to consider the amendment article of Annex 4 to the GFAP. Article X of Annex 4 establishes the amendment procedure and it provides for amendment to the Constitution by a "decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives." Thus, contrary to what is provided in the Vienna Convention on the Law of Treaties, agreement between the parties is not required[12].

19. In conclusion, it is submitted that Annex 4 to the GFAP is a unilateral undertaking of Bosnia and Herzegovina.

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8 Article XII of the constitution states that "[t]his Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina."
9 Constitution, preamble, last clause.
10 Constitution, art. I(1).
11 The Assembly elected in 1990 had the mandate to continue its functions until the peace agreement on Bosnia and Herzegovina was reached and implemented, see Constitutional Law of 30 March 1994, art. 4, Official Gazette of RBiH, 6 Apr. 1994, at 127.
12 See Article 39 General rule regarding the amendment of treaties and Article 40 Amendment of multilateral treaties.

(c) Annex 6 to the GFAP

20. The arguments set out above in respect of Annex 4 to the GFAP apply *mutatis mutandis* to Annex 6.

21. Article VI of the GFAP states that the Parties thereto "welcome and endorse the arrangements that have been made concerning the establishment" of, *inter alia*, a Commission on Human Rights (of which the Human Rights Chamber formed part). In addition, the Parties agree to "fully respect and promote the fulfilment of the commitments made therein".

22. Article VII of the GFAP contains different wording than that contained in Article V. In Article VII, the Parties state that they "agree to and shall fully comply with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6." Chapter One of the Agreement set forth at Annex 6 consists of a list of internationally recognised human rights and fundamental freedoms. The obligation assumed in Article VII must be assumed to be an obligation assumed individually by each Party as a separate State and in relation to its own conduct, rather than as a joint and several obligation.

23. In addition, the existence of a specific Article of the GFAP concerning Chapter One of Annex 6 serves to distinguish that Chapter from the other chapters contained in Annex 6. This is because of the fact that Chapter One, as set out above, involves the assumption by the Federal Republic of Yugoslavia, the Republic of Croatia and the Republic of Bosnia and Herzegovina of specific obligations. Consequently, those States wished to distinguish the other Chapters of Annex 6, which involve obligations assumed solely by Bosnia and Herzegovina (and the two Entities of which Bosnia and Herzegovina is comprised).

i Application of Article 31 of the Vienna Convention on the Law of Treaties

24. Article 31(2) of the Vienna Convention on the Law of Treaties sets out the general rules regarding interpretation of Treaties. Article 31(3)(b) refers to any subsequent practice in the application of the Treaty. Since the conclusion of the GFAP on 14 December 1995, the accepted practice has been that the Constitution of Bosnia and Herzegovina (Annex 4) and the Human Rights Agreement (Annex 6) are matters related solely to the internal administration of Bosnia and Herzegovina. Neither of the other Parties to the GFAP has, to the knowledge of ICHR, played any executive role in the implementation of those instruments. The Peace Implementation Council and the High Representative have, on many occasions, made reference to the obligations assumed by Bosnia and Herzegovina and its Entities in the implementation of the obligations arising from Annexes 4 and 6. No reference has been made to any such obligations on the part of the Federal Republic of Yugoslavia and the Republic of Croatia. [13]

(d) Conclusion

25. It is therefore submitted that the intention of the signatories of the GFAP and the subsequent practice of those Parties was that Annexes 4 and 6 thereto are unilateral obligations assumed by Bosnia and Herzegovina.

13 E.g. Report of the Peace Implementation Conference "Bosnia and Herzegovina 1997: Making Peace Work" held in London on 4 and 5 December 1996, at paragraph 2 of the section entitled "Human Rights and War Crimes": this paragraph contains a reference to the commitments of the authorities in Bosnia and Herzegovina to "meet their human rights commitments in the Peace Agreement, in particular through: - full cooperation with the Ombudsman and the Human Rights Chamber by authorities at all levels, and implementation of their conclusions and decisions." E.g. Communique of the Ministerial Meeting of the Steering Board of the Peace Implementation Council held at Sintra, Portugal on 30 May 1997, where it is demanded of "the Governments of Bosnia and Herzegovina, the Federation and the Republika Srpska, to fulfil their obligations under the Peace Agreement by ensuring full cooperation with … the Commission on Human Rights …."

III 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?

26. The ICHR considers that the answer to the question is that the proceedings before the former Human Rights Chamber ("the Chamber") were "domestic" within the meaning of Article 35 § 1 of the Convention.

(a) Convention

27. Article 35 § 1 and 35 § 2 (b) of the Convention are relevant as they set out certain of the criteria for admissibility of cases before the European Court of Human Rights ("the Court"). According to Article 35 § 2(b), "the Court shall not deal with any application submitted under Article 34 that (…) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

(b) Case law of the Court

28. The rule regarding exhaustion of domestic remedies is crucial to the proper functioning of the Convention system and as such is of fundamental importance. There is an extensive jurisprudence of the Court and other international human rights bodies as to the definition of "domestic remedies".[14] However, the question of the distinction between a "domestic remedy" and an "international procedure" has not been examined with the same degree of scrutiny.

29. Article 35 of the Convention does not define the terms "domestic" and "international" however the Commission's case law in relation to former Article 27 § 1(b) of the Convention is of guidance as it contained similar wording to Article 35 § 2(b). The Commission has previously stated that in order to determine the scope of "another procedure of international investigation or settlement", a qualitative assessment of the procedure in question was necessary in order to ensure that it fulfilled certain criteria.

30. In the *Lukanov* case[15] the Commission had to assess whether the Human Rights Committee of the Inter-Parliamentary Union could be regarded as "another procedure of international investigation or settlement". The Commission found that it could not and explained that the term "another procedure" referred to "judicial or quasi-judicial proceedings similar to those set up by the Convention" and that the term "international investigation or settlement" referred to institutions and procedures set up by States. In the *Varnava* and others case[16], which concerned the United Nations Committee on Missing Persons in Cyprus, the Commission took into account the limited nature of the committee's investigative capacity and the fact that the committee could not attribute responsibility for the deaths of any missing persons.

(c) Argumentation

31. In light of the foregoing, it is submitted that the examination under Article 35 § 2(b) is thus not limited to a formal verification but extends to ascertaining whether the nature of the supervisory body, the procedure which it follows and the effect of its decisions are such that the Court's jurisdiction is excluded by Article 35 § 2(b).[17] It is thus appropriate to examine in detail the nature of the Chamber in

14 *Azinas v. Cyprus* (56679/00 [2004] ECHR 189) judgment by the Grand Chamber of 28 April 2004, at paragraph 38.
15 *Lukanov v. Bulgaria* (no. 21915/93, decision of 12 January 1995, DR 80, p. 108.
16 *Varnava and others v. Turkey* (nos. 16064-66/90 and 16068-73/90, decision of 14 April 1998, DR 93, p. 5.
17 See Decision of the Grand Chamber of 2 June 2004 on "the competence of the court to give an advisory opinion" at para. 31 *in fine.*

order to assist in the determination of whether it was, in effect, a domestic judicial institution of Bosnia and Herzegovina or an international mechanism for the resolution of disputes.

32. It is submitted that the proceedings before the Chamber, as well as the outcome of its cases, differed substantially from those of the European Court of Human Rights. Although the proceedings before the Chamber were guided by Article X of Annex 6 and by the Chamber's Rules of Procedure, which were modelled on the European Court of Human Rights[18], contrary to the European Court of the Human Rights, the Chamber operated in a different environment and dealt with claims arising from extraordinary circumstances. The Chamber was established in the aftermath of an armed conflict in which a massive number of claims arose demanding justice for continuing violations generated by the conflict itself (such as displacement, property dispossession or missing persons).

33. A key objective of the International Community in BiH was to redress persistent patterns of discrimination resulting from a war which main feature was the ethnic cleansing policies. The Chamber although designed as an individual complaints-based system was to transform in order to address the problem of mass claims and its increasing backlog[19]. The Chamber in its 2002 Annual report stated that: "As to the mandate to give priority to allegations of systematic violations of human rights, the Chamber has noted that most of the cases it deals with are individual instances of systematic (at least in the sense of widespread) violations of human rights. This is, e.g., the case of obstruction of the refugee return process resulting in violations of the right to respect for a person's home and property".[20] The report explained that [the Chamber] "gives priority to applications which either (a) raise novel legal issues of particular relevance for Bosnia and Herzegovina (…) ; or (b) are particularly important for the promotion of the rule of law in Bosnia and Herzegovina. This departing from its original mandate as contained in Article VIII(2)(e) of the Dayton Agreement.[21]

34. Thus, for instance in the *Vujicic* case[22] where the applicant had been reinstated into possession of his pre-war apartment in Sarajevo after nearly four years of proceedings before the domestic authorities, the Chamber explaining that it has an obligation to give particular priority to allegations of especially severe or systematic violations and of discrimination, observing that there were over 10,000 undecided applications pending before it, and that this number is growing month by month, at an increasing rate and noting the significant progress in the return and property law implementation process in Bosnia, stroke out the application without further considerations. It is also pertinent to examine the significant difference between the practice of the Chamber and the European Court of Human Rights in orders made upon the finding of a violation. The European Court of Human Rights often refrains from ordering any pecuniary or other relief upon a finding of a violation. The Chamber, however, invariably made an award of a monetary nature, for example compensation for pecuniary and other damages[23]. Such awards were directly effective, requiring no adoption or other act by any national authority to render them effective. This practice, it is submitted, is indicative of the fact that the Chamber saw its role as a domestic court within the legal system of Bosnia and Herzegovina, rather than an international court or tribunal.

35. ICHR also considers the following matters to be of particular relevance:

    (a) the Chamber was established as a constituent part of the Commission on Human Rights ("the Commission"), by the signature of the Human Rights Agreement by Bosnia and Herzegovina and its constituent Entities (Chapter Two, Part A, Article II.1 of Annex 6);

18 The first set was adopted in December 1996, modified in May and September 1998 and again in March 2001.

19 From the March 1996 where the Chamber held its inaugural session to 31 December 2003 (end of its mandate), the Chamber decided 6,243 of the approximately 15,200 applications lodged before it, out of which only approximately 400 decisions were on the merits.

20 See: http://www.hrc.ba/ENGLISH/annual_report/2002/strategies.htm.

21 By which the Chamber "shall endeavor to accept and to give particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds."

22 Case no. CH/99/2198, *Vujicic v. the Federation of BiH*, decision to strike out of 10 October 2002. In addition,

23 See e.g. case no. CH/98/756 *Dj. M. v. Federation of Bosnia and Herzegovina*, decision on admissibility and merits delivered on 14 May 1999 at paragraphs 98 to 104.

(b) the fact that the salaries and expenses of the Commission were, *per* Chapter Two, Part A, Article III.2 of Annex 6, to be borne by Bosnia and Herzegovina, although in practice the situation was that these costs were funded in part by Bosnia and Herzegovina and in part by a range of bilateral and multilateral donors;
(c) the fact that the respondent Parties in proceedings before the Chamber were Bosnia and Herzegovina and its Entities. It is submitted that the fact that subservient administrative units of a federal state were capable of being respondent parties reflects, *inter alia*, the fact that the Chamber was a purely domestic judicial institution and
(d) it is of particular importance to mention that according to Article XIV of Annex 6, the continued operation of the Commission was to transfer to the institutions of BiH, unless otherwise agreed by the Parties, five years after the entry into force of the DPA. On 10 November 2000, the Parties, i.e. Bosnia and Herzegovina and its two entities[24], signed an Agreement pursuant to Article XIV of Annex 6, extending the operation of the Chamber in its current capacity until 31 December 2003.

36. The fact, however, that the Chamber was composed of 14 members, eight of whom were not nationals of Bosnia and Herzegovina or of a neighbouring State, must also be considered. These members were appointed, in accordance with Chapter Two, Part C, Article VII.2 of the Agreement, by the Council of Ministers of the Council of Europe. The term of these members was five years. After this period, it was intended that the responsibility for the continued operation of the Commission would, in accordance with the provisions of Chapter Three, Article XIV of the Agreement, be transferred to Bosnia and Herzegovina alone, as opposed to the interim solution of it being a shared responsibility of Bosnia and Herzegovina and its Entities.

37. The ICHR is of the opinion that the high level of international membership of the Chamber foreseen for an initial period was a recognition of reality on the ground in Bosnia and Herzegovina at the time. Due to the consequences of the most bitter and bloody war fought in Europe since the Second World War, and to the widespread discrimination practised by all levels of authorities in the country, the level of trust between members of the various ethnic and religious groups which form the majority of the population in Bosnia and Herzegovina was effectively non-existent. A human rights court composed solely of nationals of Bosnia and Herzegovina was, it must be recognised, doomed to failure. In addition, there was a severe lack of jurists in the country with the requisite knowledge of the Convention and its case law. Therefore, experienced international jurists, with experience of the Convention, were deemed to be necessary, in order to reinforce the appearance of impartiality on the part of the Chamber, and also to train the members appointed from Bosnia and Herzegovina in the practice and procedure of the Convention.

38. Many of the institutions established in the GFAP, or by agreements annexed thereto, are characterised by international membership, and indeed some of those institutions are completely international in composition. For example, the Implementation Force ("IFOR") established under Annex 1A to the GFAP was composed completely of forces from outside Bosnia and Herzegovina. The Provisional Election Commission, established under Article III of Annex 3 to the GFAP, was composed of, *inter alia*, the Head of Mission of the Organisation for Security and Cooperation in Europe Mission to Bosnia and Herzegovina.

39. In addition, the State Court and the State Prosecutor's Office in Bosnia and Herzegovina have a number of judges and prosecutors who are foreign nationals, appointed by the High Representative to Bosnia and Herzegovina. This fact alone does not change the fact that these institutions are institutions of Bosnia and Herzegovina.

24 The Agreement was signed by Chairman of the Council of Ministers Martin Raguz, Prime Minister of the Federation of BiH Edhem Bicakcic and RS Prime Minister Milorad Dodik.

(d) Conclusion

40. The ICHR considers that the balance of the arguments is, therefore, that the Chamber must be considered to have been a *sui generis* judicial body within the national legal system of Bosnia and Herzegovina. Accordingly, the proceedings before the Chamber were "domestic" within the meaning of Article 35 § 1 of the Convention.

IV 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?[25]

41. The ICHR considers that the answer to the question is that the proceedings before the Constitutional Court are "domestic" within the meaning of Article 35 § 1 of the Convention.

(e) Convention

42. Article 35 § 1 and 35 § 2 (b) of the Convention are relevant as they set out certain of the criteria for admissibility of cases before the European Court of Human Rights ("the Court").

(f) GFAP and other national law

43. Reference is made to paragraphs 4 to 19 inclusive, and 24 and 25 above.

(g) Constitution of Bosnia and Herzegovina

44. Article VI.3 and 4 of the Constitution of Bosnia and Herzegovina reads as follows:

> "3. Jurisdiction
>
> The Constitutional Court shall uphold this Constitution.
>
> (a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:
>
> • Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.
>
> • Whether any provision of an Entity's constitution or law is consistent with this Constitution.
>
> Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.
>
> (b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

25 It is assumed that the reference to the Constitutional Court in this instance is solely to the Constitutional Court of Bosnia and Herzegovina and does not include either the Constitutional Court of the Federation of Bosnia and Herzegovina or the Constitutional Court of the Republika Srpska. The reason for this assumption is the wording of question 1 and in particular its reference to Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

(c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

Decisions

Decisions of the Constitutional Court shall be final and binding."

(h) Argumentation

45. In the light of the foregoing, it is appropriate to examine in detail the nature of the Constitutional Court in order to assist in the determination of whether it is, in effect, a domestic judicial institution of Bosnia and Herzegovina or an international mechanism for the resolution of disputes. ICHR considers the following matters to be of particular relevance:

    (a) the Constitutional Court is established by Article VI of the Constitution of Bosnia and Herzegovina, and is charged (Article VI.3) with upholding that Constitution
    (b) the nature of the jurisdiction of the Constitutional Court (as set out in Article VI.3) is such that it is clear that it is a constitutional court in the purest sense, in that it sits atop the constitutional order in Bosnia and Herzegovina
    (c) the range of parties potentially involved in the proceedings before the Constitutional Court is of course much wider, because of the particular nature of the constitutional proceedings, and may include, for example, individual municipalities or cantons (of the Federation)
    (d) as set out at paragraph 37 above, the Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgement of any other court in Bosnia and Herzegovina
    (e) the majority (six out of nine) members of the Constitutional Court are appointed by the Entities which comprise Bosnia and Herzegovina, while the Parties may, after the expiry of the mandates of the first members, effectively decide that all members of the Constitutional Court shall be nationals of Bosnia and Herzegovina.

46. The matters set out above, it is submitted, are conclusive that the Constitutional Court is an integral and crucial part of the legal and constitutional order of Bosnia and Herzegovina.

47. The fact that three of the nine members of the Constitutional Court are appointed by the President of the European Court of Human Rights and that they cannot be nationals of Bosnia and Herzegovina or a neighbouring State does not change its nature. It is submitted that the drafters of the Constitution considered, for essentially the same reasons as in respect of the Chamber set out at paragraphs 29 to 31 inclusive above, that it was desirable to have, at least for an initial period, members who were not nationals of Bosnia and Herzegovina.

(i) Conclusion

48. The ICHR considers that the Constitutional Court is a judicial body within the national legal system of Bosnia and Herzegovina. Accordingly, the proceedings before the Constitutional Court are "domestic" within the meaning of Article 35 § 1 of the Convention.

FRANCISCO JAVIER LEON DIAZ

RALPH ROCHE

16 JUNE 2005