INCORPORATION OF HUMAN RIGHTS TREATIES INTO DOMESTIC LAW PRIOR TO THEIR RATIFICATION

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On 5 May 1992 the Parliamentary Assembly of the Council of Europe adopted and submitted to the Committee of Ministers a number of proposals as to how non-member States might make use of the machinery provided for in various Council of Europe conventions. The main thrust of the proposals was that the European Court of Human Rights and the Committee of Experts of the European Social Charter could provide opinions at the request of the countries concerned, and that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment might extend its remit to include these countries. The Committee of Ministers referred these proposals for opinion to the bodies concerned and to the European Commission of Human Rights.

In February 1993, with the war in Bosnia having taken a turn for the worse, the Assembly adopted, for the attention of the Committee of Ministers, a second, amended, proposal. The Committee of Ministers had already called for work to be set in train on the first proposal when the Assembly recommendation was submitted to it. Finally, on 9 March 1993 the Committee of Ministers adopted Resolution 93(6) preparing the ground for the establishment of institutions for the protection of human rights in countries not yet members of the Council of Europe

Shortly after its adoption, consideration was given to the idea of applying Resolution 96(3) in respect of Croatia, but that idea was then abandoned in favour of alternative legal forms. The first echo to the Resolution came from the Washington Agreement of 1 March 1994 which laid the foundations for the creation for the Federation of Bosnia and Herzegovina. This was the first time that international human rights instruments had been incorporated into a national legal system with a view to their direct application. However, this was largely theoretical: the establishment of the Court of Human Rights provided for in the Agreement had been put on hold pending the outcome of the invitation by the Federation made up mainly of Bosnian Croats and Bosniaks calling upon the Serbs to join them, which meant that it was necessary to wait and see how the situation might develop[1]. However, participation by the Bosnian Serbs did not materialise and the war went on unabated for over a year with the Bosnian Croats

[1] Communication from the Committee of Ministers – Interim reply to Recommendation 1204(1993) and Recommendation 1219(1993) on establishing a mechanism for the protection of human rights in European States not members of the Council of Europe (Doc. 7113).

and the Bosniaks joining forces and winning back territory from the Bosnian Serbs. The Croat-Bosniak federation finally became one of the two components of the future State of Bosnia and Herzegovina.

As a result of the Dayton and Paris Peace Agreements concluded on 14 December 1995, the ECDH finally became part and parcel of the domestic law of the State of Bosnia and Herzegovina. This meant that the rights guaranteed by the Convention were directly applicable outside the member States of the Council of Europe. In the matter of discrimination, a whole series of other international law conventions were also directly applicable. The ECHR could not be ratified by Bosnia and Herzegovina as it was not a member State of the Council of Eur USA, Berlin 2002 (Italian translation: I due Occidenti. Stato, nazione e religione in Europa e negli Stati Uniti, Roma 2004) Neue Zürcher Zeitung of 15 October 1997ope, whose organs were consequently unable to take action in that country. However, Annex 6 of the Peace Agreement provided for two institutions particularly responsible for dealing with the application of international legal instruments, namely an Ombudsperson and a Human Rights Chamber.

Based on Resolution 93(6) of the Council of Europe, the Human Rights Chamber comprised six Bosnians and eight international members, the latter being appointed by the Committee of Ministers of the Council of Europe, while the Ombudsperson was appointed by OSCE after designation by the international community. I had the honour of being the first person to take up this post, hence the use of the term "Ombudsperson". Although answerable to the international authorities for an initial five-year period, which was later extended to eight years, these organs are both institutions of the State of Bosnia and Herzegovina. The Human Rights Chamber came under the ambit of the Council of Europe and the Ombudsperson under that of the OSCE, thus providing what might be termed a Council of Europe-OSCE joint venture. The two institutions came into operation at the end of March 1996.

The terms of reference of the Human Rights Chamber are comparable to those of the organs of the ECHR, in the form they took until Protocol No. 11 came into force. The Ombudsperson has a very broad remit including not only the publication of reports on individual applications along the lines of what used to be done by the European Commission of Human Rights, but also the traditional role of mediation and the publication of special reports on matters selected by the Ombudsperson proprio motu. However, in the initial phase, my office focused on the first of the above items. In 1996 the country was not yet ready for an ombudsperson of the traditional type, since, for informal mediation to be able to take place between complainants and the public authorities, it is necessary to have at least some degree of viable administrative procedures.

The Ombudsperson's activity largely concerned the somewhat formal processing of individual applications, along the lines of the European Commission of Human Rights, and the effect of this was to flesh out the combined role of the two bodies as set out in Annex 6, i.e. that of a Council of Europe-OSCE joint venture, in that, when processing such applications, the Human Rights Chamber and the Ombudsperson followed the procedures of the Strasbourg organs of the ECHR. A

further consequence of this was that it speeded up the incorporation of new international legal instruments into legal life in Bosnia.

It is interesting to note that many staff from international agencies on human rights assignments in Bosnia were at first unfamiliar with this highly legalistic approach of the two institutions set up under Annex 6, and with the direct application of the prevailing international law. This applied not only to Americans and Canadians, but also to Europeans, which is quite understandable, since this was the first time that the ECHR was being directly applied outside the membership of the Council of Europe through bodies specially set up for that purpose. What was surprising, however, is that numerous international officials on human rights monitoring duties sometime showed total ignorance of the Strasbourg machinery and the associated case-law. Indeed, many of them seemed unable to grasp the fact that norms of international law could be directly applicable and especially the corollary of that fact, namely the inapplicability of domestic legal norms at variance with them.

It seemed that some international officials failed to understand the European dimension of human rights protection, namely that slowly but surely, international protection of human rights is gaining strength. In the initial phase international organisations draw up declarations and policy statements that serve as a frame of reference for political action. In the following stage these policy statements are translated into international treaties, signed and ratified by States, but whose implementation - at least at international level - remains a political matter. In the third stage, a right of individual petition to a body, which then makes recommendations to the State concerned, is added to the treaties. Finally, in the fourth stage, there emerges a remedy of individual petition, leading to judgments which have binding force under international law.

What has happened in Europe may be termed the “judicialisation” of human rights protection. Until Additional Protocol n° 11 came into force, the Council of Europe was active in the third stage, during which the Dayton and Paris Agreements came into force. Since then, Europe has moved definitively on to stage four where all individual applications may lead to a judgment which is binding under international law. The OSCE continues to operate in stage one, which entails the attainment of common policy objectives. The rationale for this difference also lies in the fact that, for the OSCE, human rights are significant especially when failure to observe them threatens the stability of a region or a state. The activities of the two organisations in Bosnia and Herzegovina and in particular their co-operation in the context of this institutional joint-venture clearly demonstrated the different approaches taken by the two organisations.

Europe's leading position in implementing human rights is currently being drawn into the discussion about globalisation and deregulation. In an age of deregulation, the view prevails that, in the economic field, conflicts of interest are better resolved through short-term compromises than through full-scale settlements. This trend towards deregulation is even beginning to play a role in the human rights sphere and as a result what Europe has achieved in the political and legal field is under threat. This problem was already raised in 1997 – shortly after we had begun working in Bosnia and Herzegovina -, for example by Helmut Schmidt, the

former German chancellor : “Today, close on half a century after the Universal Declaration of Human Rights, the over-riding moral imperative it lays on the shoulders of Mankind and its 200 sovereign States is under threat, for the fact is that some Western politicians, especially in the United States, use the expression 'human rights' not so much as a rallying call, but rather as a war cry or an aggressive means of exerting pressure in the field of foreign policy, more often than not in a selective manner ...”[2].

However, as the effects of globalisation have long since spilled over from the economic into the cultural and political spheres, both culturally and politically Europe has found itself a player on the world stage. Hence the usefulness and even the need for European human rights circles to become aware of the differences and to keep a watchful eye on the different stages of development in human rights protection, as well as on the gradual process of consolidation underway throughout the world as a whole. Europe's achievement in the political and legal fields with respect to human rights lies in the removal of the protection of those rights from the sphere of day-to-day political bargaining between Governments, whose role is henceforth restricted to supervising the execution of judgments. In contrast with that prevailing in Europe, human rights protection in its earlier stages relies far more on deregulation or - to express it more correctly in historical terms - efforts in Europe have led to a higher degree of “judicialisation” of human rights, since the process of consolidation has basically been a movement from the political sphere to that of the law. What brooks no doubt is the fact that the politicisation of human rights in the international move towards improving their protection is a retrograde step. Europe has already seen off attempts to politicise human rights by another means, namely the enforcement machinery of the European Convention on Human Rights.

Another problem with regard to Bosnia and Herzegovina was the fact that most individual applications concerned the ownership of housing. The Dayton Agreement set up national structures along more or less ethnic lines and the return of refugees therefore appeared to be problem linked to individuals’ willingness to return instead of a problem that should have been solved by the national authorities. As a result, all the obstacles to the return of refugees became a human rights problem [3].The machinery set up under the Dayton Agreement finally played a role in the discussion on Bosnia and Herzegovina’s official accession to the Council of Europe. The US Department of State made several representations to the Council of Europe asking it not to precipitate membership, claiming that the jurisdiction of the European Court for Human Rights could be detrimental to the work of the human rights protection machinery set up by the Dayton Agreement [4]. This well-known view illustrates the United States’ rather strict rejection of international mechanisms.

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2 Helmut Schmidt in “Die Zeit” of 3 October 1997

3 For a more detailed analysis, see Gret Haller, The limits of Solidarity, State, Nation and Religion in Europe and the USA.

4 Berlin 2002 (Italian translation: I due Occidenti. Stato, nazione e religione in Europa e negli Stati Uniti, Roma 2004) Neue Zürcher Zeitung of 15 October 1997

It has since become obvious that the application of human rights machinery in non-member States of the Council of Europe will continue to be an exception - indeed Bosnia and Herzegovina will probably be the only case -, as, meanwhile, most central and eastern European countries have become member States of the Council of Europe.