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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT CHARTER ON HUMAN AND MINORITY RIGHTS AND CIVIL LIBERTIES OF SERBIA AND MONTENEGRO

by

Mr Jan E. HELGESEN
(Member, Norway)

1. On 6 February 2003, the Commission was requested by the Commission for Drafting a Constitutional Charter of the State Union of Serbia and Montenegro - better known as the Constitutional Commission – to provide its opinion on the draft Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro (hereinafter referred to as "the draft Human Rights Charter" or "the draft Charter").

2. Before giving any comments on details of this text it seems to me appropriate, and even necessary, to pay tribute to its high quality. The draft is excellent. It is not only fully in line with international standards but goes beyond them in certain respects. If you adopt this Charter, very few Council of Europe member states will be able to claim that they have a text of the same quality. You can therefore be extremely proud of your work.

3. If any criticism can be made of the text, it is that it may sometimes be too generous in granting rights. Any comments I will make are technical comments, suggestions you may take up or not, but not comments which should prevent you from adopting the existing text as a whole. The only exception is the issue of direct applicability of this Charter. Without it, the Charter would loose a lot of its relevance.

4. I certainly am aware of the fact that some of the issues which I raise, may result form problems of translation.

The direct applicability of the Charter- Article 2

5. The most important issue still open with respect to your discussions is without doubt the question of the direct applicability of the Human Rights Charter. You have two alternative proposals for Art. 2.2. The Venice Commission strongly urges you to stick to the first alternative that Human Rights shall be enjoyed directly. This is not so much an issue of division of competencies between the member States and the State Union but an issue of the effectiveness of human rights.

6. First of all there is the practical aspect. The purpose of direct applicability is to ensure that individuals can rely before any domestic court on the guarantees afforded to them by the Charter. It means that an individual does not have to wait for a decision by a constitutional court or for further parliamentary action in order to enjoy his or her rights in practice. If the Charter is directly applicable, when deciding a case with human rights relevance, each court on the territory of Serbia and Montenegro will have to take this Charter fully into account. This is of enormous practical importance since human rights problems come not up in isolation but within the framework of other procedures, especially criminal or administrative procedures. If courts in such cases do not fully take into account the human rights aspect, human rights protection will not be effective.

7. In addition to this practical aspect the political, and one might say educational, aspect should not be underestimated. It is particularly important that all courts and judges become conscious that human rights are not abstract ideals but have to be applied in everyday life. This can only be achieved if it is part of their professional obligations to concretely apply these rights.

8. In addition, in a democracy not only have the judges to become human rights conscious. All citizens have to become aware that human rights are their rights and exist for them in

practice. This requires introducing human rights into regular court practice, with the courts no longer being part of a state power far from the citizen but having as their task to defend the rights of citizens. In your history you have had many constitutions setting out many rights. The real break with the past will not be to grant even more rights on paper but to practically implement these rights. For this purpose direct applicability is essential.

9. The effective implementation of human rights presupposes that the rights and freedoms are brought out to the cities and to the rural districts. Human rights is not only an issue in Strasbourg, Geneva or New York.

10. Direct applicability seems all the more appropriate since the whole text of the Charter is drafted so well and goes into a lot of detail. You therefore have the opportunity to adopt a text making human rights fully relevant in the daily life of citizens. You should not risk missing this opportunity and falling back to a situation when human rights are a mere political programme and not directly applicable law.

11. As regards the alternative wording given in the draft, it is in no way satisfactory. The text is not very clear but it seems to abolish any hierarchy between the rights granted by this Charter and the laws and constitutions of the member states. This would greatly reduce the importance of the text. The wording also seems to exclude any protection against acts of bodies of the State Union for violation of human rights. While indeed nearly all cases will concern authorities of the member states, protection has also to be provided, e.g. in the case of human rights violations by the army.

12. I take this opportunity to focus on the fact that direct applicability of the HR Charter does not mean that the competences of the State Union are extended to the detriment of the member states. The member states fully retain their powers in all areas not assigned by the Constitutional Charter to the State Union. They only have to respect human rights when exercising these powers and this should be acceptable for everybody. If you wish to underline the role of the member states, you can add a further paragraph stating that the member states will respect and implement the rights guaranteed by this charter. But please keep in addition the direct applicability.

13. Indeed, the text of the Constitutional Charter of the State Union shows that, when you adopted the Constitutional Charter, you were already conscious of the importance of direct applicability. Article 10 provides that international human rights treaties are to be directly enforced. It would not be logical and coherent to provide for the direct applicability of international texts and not to give the same status to your own text.

14. Moreover, the Constitutional Charter sets out the aims of the State Union. The first aim listed in Article 3 is respect for human rights, the second aim to preserve and promote human dignity, equality and the rule of law. To achieve these aims the State Union clearly needs an effective human rights charter. As set out above, effectiveness requires direct applicability.

15. The Charter (Article 7) may also be seen as presupposing its own direct applicability.

16. Therefore direct applicability is a must.

Protection of Human Rights by the Court of Serbia and Montenegro- Article 9

17. Paragraph 2 of this Article provides for the possibility of a direct constitutional appeal to the Court of Serbia and Montenegro if human rights were violated. This proposal certainly has the sympathy of the Venice Commission and, indeed, it was contained in the proposal by the Venice Commission for elements to be included in the Constitutional Charter. However, we have to acknowledge that Article 46 of the Constitutional Charter, defining the jurisdiction of this Court, provides for a constitutional complaint only against decisions of institutions of the State Union and not against decisions of the member states.

Right of Property – Article 23

18. Article 23 provides for the right of ownership and inheritance. Paragraph 2 sets forth the obligation for the public authorities to compensate at market value not only deprivation of property – which is in accordance with international standards – but also any lawful (i.e. carried out in the public interest and in accordance with the law) *restriction* to the use of property. This provision is far too broad, and would result in the public authorities being *de facto* prevented from regulating the use of property in any form. Pursuant to the criteria developed by the Strasbourg organs in respect of paragraph 2 of Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter: ECHR), restrictions to the use of property should be possible whenever carried out in pursuit of a legitimate aim in accordance with the law and provided that the restriction is proportionate to this legitimate aim. It is to be noted that proportionality might, in certain but not in all cases, require compensation.

19. Accordingly, in my opinion, Article 23 § 2 of the draft Charter should be modified to exclude lawful restrictions to the use of property. It would further be advisable to add a provision similar to paragraph 2 of Article 1 of Protocol No. 1 to the ECHR.

Suggested technical or textual amendments to Chapter II

20. Further, I would propose certain technical or merely textual (possibly depending on translation inaccuracies) amendments:

- In Article 1 the right to protection is guaranteed "provided that he/she does not violate the rights of others". At a general, abstract level, it is a quite reasonable statement; my rights should not violate other persons' rights. At the operational level, however, such an expression may be misinterpreted to the effect that the rights and freedoms are restricted for those who trespasses on laws and regulations.

- In Article 9 § 2, the word "omission" should be added after "an act or undertaking"

- In Article 12 § 2, the concept "to dispose freely with …. life" is too wide. It may be seen as entering into the different areas of abortion, euthanasia and the problems relating to sophisticated medicine.

- Article 14 § 2 should read: No one shall be [] deprived of liberty [] *save* in cases and in the manner set out …

- In Article 14 § 4, the expression "his/her other rights" is too vague.

- In Article 14 § 5, "his/her closest relatives" should be replaced by "a person of his choice".

- Article 15 § 3 should read: A person *arrested under reasonable suspicion of having committed*…

- Pre-trial detention should be possible, besides when necessary for conducting criminal proceedings, for other legitimate purposes such as preventing the person from committing further offences or fleeing after having done so.

- The six months' time-limit in § 5 is promising, long periods of detention is an issue of great concern to the international supervisory bodies. On the other hand, such an absolute limit may also have negative effects. The prosecutor could be tempted to bring the case before the court too early, which again could lead to wrong decisions (in both directions). Thus, the credibility of the courts could be jeopardized.

- Article 16 § 5 could be formulated in a clearer manner.

- Under Article 24, interferences with the right to respect for one's correspondence should be made possible, besides for the needs of conducting criminal proceedings or for national defense, for other aims such as the protection of the rights and reputation of others or public safety (see paragraph 2 of Article 8 ECHR).

- Article 26, in my opinion, should provide for the possibility of restricting – lawfully and to the extent that it is necessary in a democratic society in the pursuit of certain legitimate aims (see paragraph 2 of Article 9 ECHR) – the freedom to manifest one's religion or beliefs.

- In Article 27 § 3, the right for religious communities to found religious schools should be provided on the condition that it is "in accordance with the law" (similarly to the provision of Article 43 of the draft Charter).

- In Articles 29, 31, 32, and 37, it might be useful to include amongst the legitimate aims "the prevention of crime" (as in paragraph 2 of Articles 10 and 11 ECHR and Article 2 of Protocol No. 4 to the ECHR).

- In Article 32 § 4, it should be added that prohibition of organizations pursuing illegitimate aims should be done *by decision of a competent authority against which there must be an effective remedy.*

- Article 35 should be formulated as follows: "A citizen of a Member State may not be deprived of his/her citizenship *except in accordance with international law*. He or she may not be expelled from the State Union of Serbia and Montenegro or extradited to another country *unless* in accordance with international *treaties in force*.

- In Article 37 § 2, the words "and to reenter" should be added after "the right to leave".

- Article 40 provides that the right to work shall be *guaranteed*. In my opinion, this is a – potentially – very far-reaching guarantee, which might not be realistic. It might be more appropriate to provide instead for the *protection* of the right to work.

- As regards the right to social and health insurance in Article 42, it seems to me unclear whether provision is made for the right to *participate in* those insurance schemes *in accordance with the law* – which would seem to me reasonable - or for the right to *benefit from* those schemes – which seems to me, in the absence of further specifications, too far-reaching a guarantee (See para. 12 of Part I of the European Social Charter : "All *workers* and their dependents have the right to social security"; para. 13: "Anyone *without adequate resources* has the right to social and medical assistance".)

Minority rights – Chapter III

21. Chapter III of the draft Charter (Articles 47 to 58) is devoted to "Special Rights of the Members of National Minorities and Obligations of the State Union of Serbia and Montenegro".

22. It is to be recalled that Article 9 § 2 of the Constitutional Charter provides that "the attained level of human and minority rights, individual and collective and civil freedoms may not be lowered". Similarly, Article 58 § 1 of the draft Charter provides that "the achieved level of human and minority rights, both individual and collective, must not deteriorate. According to paragraph 2 of Article 58, "the Charter shall not revoke or *change* the rights of national minorities acquired through regulations which were in force before the Charter came into effect".

23. In this connection, it must be recalled that minority protection in the former Federal Republic of Yugoslavia was regulated by the "Law on protection of rights and freedoms of national minorities" (published in the Official Gazette of FRY No. 11 of 27 February 2002 – hereinafter "the Law on national minorities"), which continues to be in force.

24. In my opinion, Article 58 § 2 of the draft Charter is far too restrictive. While it is certainly necessary to provide that the achieved level of protection must not be diminished, it seems to me excessive and unwarranted to limit the possibility to interpret the scope of application of certain provisions similar to those existing in the Law on national minorities in the light of the changed and evolving political context.

25. I wish to stress that no definition of "national minorities" is contained in the draft Charter, whereas such definition is contained in Article 2 of the Law on national minorities. I am of course cognizant of the notorious difficulties in reaching a commonly acceptable definition of what is a "national minority", and of the choice, made *inter alia* by the drafters of the Framework Convention, to adopt a pragmatic approach to this matter. I do not think that it is generally indispensable to give such a definition in order to achieve a satisfactory level of minority protection. I consider nevertheless that in the case of Serbia and Montenegro, the absence of a definition in the draft Charter might create problems. In my view, Article 58 § 2 of the draft Charter, as it stands now, renders the definition in Article 2 of the Law on national minorities binding upon the Constitutional Commission. Yet, in the absence of an explicit reference to it, in future doubts might arise or differences be invoked

about the addressees of minority protection in Serbia and Montenegro. Accordingly, it would be preferable to clarify this point at this stage, by either including the same definition as contained in Article 2 of the Law on national minorities, or by amending or deleting Article 58 § 2 of the draft Charter.

26. The draft Charter (Article 47) recognises collective rights in addition to special individual rights for persons belonging to national minorities. Recognition of collective rights goes beyond the present state of positive law[1]; minority rights, as part of human rights, in international law are accorded only to individuals who may exercise such rights also in community with other individuals. It is evident, however, that certain rights, such as those relating to radio and television broadcasting, may only be meaningful in terms of individuals acting in community. In this respect, therefore, the draft Charter appears to be rather progressive. It is to be underlined that such recognition of collective rights was already contained in the Law on national minorities (see its Article 1 § 1). In my view, however, the scope of application of paragraphs 3 and 4 of Article 47 of the draft Charter is rather unclear.

27. In my opinion, provision should be made for funds to be made available at both State Union and Member States levels for the implementation of the rights under Article 52 of the draft Charter.

28. As regards the terminology used in Chapter III, the title refers to the rights of *members of national minorities;* however, given that collective rights are also recognised, it would be more correct to refer to the rights *of national minorities* (as is done in the Law on national minorities).

29. Always with respect of terminology, a footnote to Article 47 indicates that the Commission will have to choose between "national minorities" and another term. The term "national communities" appears to me to be a good possibility.

30. Paragraph 5 of Article 47 authorizes the public use of other terms (including "minority national communities" and "ethnic communities") in addition to the term "national minorities". In my view, it is rather odd that the Charter should address a similar matter. Assuming that the aim of this provision is to make the Charter applicable to minorities irrespective of how they are referred to, it would be preferable that it be phrased in a manner similar to Article 2 § 2 of the Law on national minorities.

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[1] The Framework Convention on the Protection of National Minorities (hereinafter "the Framework Convention"), the Council of Europe's main instrument of minority protection, does not recognize collective rights, but only the possibility of joint exercise of individual rights and freedoms (see Articles 1 and 3 § 2 of the Framework Convention and paras. 31 and 37 of the Explanatory Report). Similarly, Article 27 of the International Covenant on Civil and Political Rights provides that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture (…)". The Human Rights Committee General Comment No. 18, 3.1 and 6.2 makes clear that this article "relates to rights conferred on individuals as such" and protects "individual rights." The 1990 OSCE Copenhagen document refers to "persons belonging to national minorities" when addressing their rights and further states that "to belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice". The UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities (1993) also refers to "persons belonging to…" and in its article 3(1) states that "Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination".

31. In Article 54 of the draft Charter, the expression "same nation in other States" should be avoided. The use of the term "nation", while not being in contradiction with international standards, suggests that these minorities belong to another nation than that living inside the State's border, thus making an implicit but rather overt reference to their kin-State. In my opinion, it would be preferable to draw inspiration from Article 17 § 1 of the Framework Convention. Similarly, expressions like "minority nations" should be avoided.

32. Finally, I would suggest the following technical/textual changes:

- In Article 49 § 3, the term "constitutional rights" should be replaced with "rights".
- throughout the Draft Charter, "members of" should be replaced by "persons belonging to" national minorities, in order to avoid any possible contradiction with the principle of subjective identification (to the extent that the concept of membership may imply an act of official recognition or acceptance by a group).