

## SECRETARIAT MEMORANDUM

### Overview of the constitutional system in Bosnia and Herzegovina

#### 1. Historical overview of the constitutional situation

The Republic of Bosnia and Herzegovina declared its independence on 15 October 1991, following a referendum.

The war began a few weeks later, followed by the declaration of independence of the "Republika Srpska" made by the Serbian Democratic Party of R. Karadzic. From April 1992 onwards, a large part of the Republic's territory was no longer controlled by the Republican Government but subject to the authority of the Serb breakaway government; at the same time, another part of the Republic's territory fell under the control of the self-proclaimed "Croat Republic of Herceg-Bosna"; finally, throughout the conflict, the international community placed parts of the territory under its protection (safe areas).

The conflict between Bosnians and Croats was halted in March 1994 by the Washington Agreements.

Those Agreements established a Federation integrating the areas under Croat and Bosnian control, divided into ten cantons (Bosnian, Croat or mixed). The Constitution proposed in the Washington Agreements and adopted on 30 March 1994 opened the way for others (supposedly the Serbs) to join the Federation. The Federation Constitution provided for a series of new institutions, only some of which have been established. A number of the Republic's politicians and dignitaries have also exercised their functions on behalf of the Federation. They include the Prime Minister and his cabinet; furthermore the parliaments of the Federation and of the Republic differed very little in their make-up. Generally speaking, the Washington Agreements paved the way for co-operation between Bosnians and Croats in several spheres (including military matters) despite areas of tension between them (city of Mostar).

The Serb Republic was organised as a unitary State seeking integration with the new Yugoslavia (Serbia and Montenegro). Its Constitution is mainly based on the institutional structure embodied in the Serbian Constitution.

The conflict ended with the conclusion of the Dayton Agreements, signed in Paris in December 1995.

The Constitution set out in Annex 4 to the Agreements provides that the Republic of Bosnia and Herzegovina will continue to exist as a sovereign State bearing the name "Bosnia and Herzegovina"; the State thus established comprises two Entities: the (Croat-Bosnian) Federation of Bosnia and Herzegovina, created by the Washington Agreements, and the Republika Srpska.

The institutions of the two Entities continue to enjoy a number of prerogatives.

The peace agreements are based on the principle of freedom of movement throughout the State's territory. Displaced persons must be entitled to re-establish their property rights (or receive compensation) and to vote in their place of origin.

Under the Agreements, elections must be held in the second half of 1996. The OSCE, responsible for organising the elections in accordance with Annex 3 of the Agreements, will soon have to state whether the right conditions exist for the holding of free and fair elections. Should this be the case, elections could be held in September 1996 throughout the territory. Candidates will be elected to:

- the Parliament of Bosnia and Herzegovina,
- the Presidency of Bosnia and Herzegovina,
- the Parliament of the Federation of Bosnia and Herzegovina,
- the National Assembly of the Republika Srpska,
- the Presidency of the Republika Srpska,
- the 10 Cantonal legislatures of the Federation of Bosnia and Herzegovina,
- the municipal governing authorities of the Federation of Bosnia and Herzegovina,
- the municipal governing authorities of the Republika Srpska.

With these elections, the setting up of institutions for the State as a whole and for its Entities will be complete<sup>[1]</sup>.

In the meantime, the constitutions of the two Entities must be brought into line with the Dayton Constitution. Amendments to this effect have been proposed and adopted by the assemblies of the respective Entities; the question of whether these amended constitutions are compatible with the Dayton text is now being considered by the High Representative (the Venice Commission has been asked for an opinion).

#### 2. The constitutional situation in the State of Bosnia and Herzegovina

##### 2.1 The presence of international institutions in the State structure of Bosnia and Herzegovina

A number of "international" institutions, ie organs functioning within the domestic law system but partly or wholly made up of individuals who are not nationals of Bosnia and Herzegovina but employed by international organisations, have been entrusted with the implementation of the Peace Agreements:

- the Provisional Election Commission (see Annex 3), responsible for adopting rules and regulations on elections in order to guarantee the structures and institutional framework required for holding free elections; the Provisional Electoral Commission has just set up a sub-committee for electoral appeals.
- the Commission on Human Rights, comprising an Ombudsman and the Human Rights Chamber, which has the task of examining and ruling on alleged human rights violations (Annex 6). The Ombudsman examines the complaints submitted to him, seeks to reach a friendly settlement and makes recommendations to the authorities concerned. If no settlement is reached, he brings the case before the Human Rights Chamber. The Ombudsperson (Mrs Gret Haller) has already received several complaints and has also started *ex officio* proceedings. No cases have yet been

referred to the Chamber.

- the Commission for Claims for the Return of Property (formerly the Commission for Displaced Persons and Refugees), responsible for ruling on the ownership of real estate property in Bosnia and Herzegovina, in response to claims for the return of property or compensation in place of recovery (Annex 7). This Commission has just been set up but is not yet operational.
- the Commission to Preserve National Monuments;
- the Commission on Public Corporations;
- the High Representative (Mr Carl Bildt) is responsible for monitoring the civilian implementation of the Agreements; in particular, he is to coordinate the continuation of humanitarian aid, the rehabilitation of infrastructures and economic reconstruction, the establishment of political and constitutional institutions, promotion of respect for human rights, the return of displaced persons, and the holding of free and fair elections;
- the International Police Task Force (IPTF).

Implementing the military aspects of the agreements is the task of the NATO Implementation Force (IFOR).

These institutions are provisional and the terms of their mandates vary.

## 2.2 Constitutional State institutions

Article III of the Dayton Constitution lists the responsibilities of the central State authorities, which include foreign policy, customs policy, foreign trade policy, monetary policy, immigration policy and communications. Defence and policing remain the responsibilities of the individual Entities, which hold all the prerogatives not expressly attributed to the State. The Entities also have some foreign policy prerogatives in that they are entitled to establish relations with neighbouring countries and enter into agreements with other States or international organisations with the consent of the Parliamentary Assembly.

The central institutions provided for are:

- a two-chamber legislative body, the Parliamentary Assembly;
- a tripartite Presidency (Bosnian, Croat, Serb);
- a Council of Ministers;
- a Constitutional Court, to rule on disputes between the Entities and between the Entities and the central State authorities;
- a Central Bank.

None of these institutions will be set up before the elections.

Furthermore, with the exception of the Constitutional Court, the central State has no courts. Justice and the judicial system fall within the remit of the two Entities. The powers of the (central) Ministry of Justice and Administration are essentially limited to international co-operation and questions of citizenship (including mutual judicial assistance and issuing passports).

## 3. The constitutional situation in the Federation of Bosnia and Herzegovina

On the basis of the Constitution proposed in the Washington Agreements, a federal State, comprising 10 cantons, was set up.

Under the Constitution (before amendment), the Federation has exclusive powers in the areas of foreign policy, defence, citizenship, economic policy, trade and customs policy, monetary and fiscal policy, measures against terrorism and organised crime, the allocation of broadcasting frequencies and energy policy.

The Federation and the cantons share prerogatives in the area of guarantees for respect for human rights, health, environment policy, communications and transport infrastructures, social security, the exercise of citizenship, immigration, asylum, tourism and the use of natural resources.

The cantons hold all the prerogatives not reserved for the Federation. They are supposed to have their own constitutions instituting canton bodies and protecting fundamental rights (Section V, Article 6 of the Constitution).

At Federation level, the legislature comprises two chambers: the House of Representatives (140 members elected by universal suffrage in the Federation); and the House of the Peoples (60 members elected by the canton assemblies).

The executive comprises the Presidency of the Federation (one President and one Vice-President are proposed by the Bosnian and Croat groups within the legislature and elected by the two chambers for a term of 4 years, during which they alternate duties of President and Vice-President for one year at a time) and the Cabinet of Ministers.

Judicial power is exercised by 3 courts at Federation level:

- the Supreme Court (the relevant legislation has just been adopted), which is competent to rule on appeals against decisions of canton courts;
- the Constitutional Court (recently set up and including 3 "international" judges) rules on disputes between cantons, between cantons and the Federation, between municipalities and cantons and between Federation institutions. It also rules on questions of constitutionality referred to it by other federal or canton courts;
- the Court of Human Rights (which is not (yet) fully constituted and 4 members of which are to be appointed by the Committee of Ministers of the Council of Europe) will rule on individual applications alleging human rights violations.<sup>[2]</sup>

At canton level, the assemblies (30 to 50 members elected for two years) exercise legislative power.

Executive power lies with the Canton President (elected for two years by the canton assembly), who appoints the canton government. Canton courts will be competent to rule on appeals against municipal court decisions.

There are special provisions for mixed Croat and Bosnian cantons (Middle Bosnia and Neretva).

At municipality level, "municipal governments" ensure that laws are implemented; they have regulatory power.

Municipal courts are competent to rule on civil and criminal law matters.

The activities of all bodies (municipal, cantonal and federal) are monitored by the three Federation Ombudsmen, who ensure that the rights and freedoms guaranteed in the federal Constitution and canton constitutions are respected. The Ombudsmen may take legal action or intervene in judicial proceedings, including before the Court of Human Rights. The Ombudsmen began exercising their duties in 1995. They drew up an annual report for 1995, setting out their practices and recommendations<sup>[3]</sup>.

The Federation Constitution has been implemented only to a very limited degree, a circumstance which has led to a great deal of confusion. In November 1995, it was acknowledged that, twenty months after the adoption of the Constitution, the process of consolidating the Federation and building trust between the peoples making it up had not yet yielded satisfactory results (Agreement establishing the Federation, Dayton, 10.11.95).

A new organ, the Federation Implementation Council, was set up in May 1996 with the task of identifying individuals allegedly hampering the effective implementation of the Federation. The Ombudsmen were authorised to apply to the Federation Implementation Council, which is empowered to propose sanctions (of a disciplinary nature) and notably to dismiss from office any individuals found to be hampering implementation of the Federation.

#### **4. The constitutional situation in the Republika Srpska**

The Constitution of the Republika Srpska, adopted in 1992, has been amended several times. Having previously advocated union with Yugoslavia (Serbia and Montenegro), the Constitution in its current version proclaims the sovereignty of the Republika Srpska for all matters, except where prerogatives are attributed to the institutions of the State of Bosnia and Herzegovina (Amendment XLVI).

The Constitution enshrines the existence of the Republic as a unitary State.

Legislative power lies with the National Assembly and executive power with the Government and the President, elected by universal suffrage<sup>[4]</sup>.

Judicial power is wielded by the courts. The highest court, the Supreme Court, hands down final instance judgments on civil and criminal matters. Appeals in administrative law may be referred to a special section of the Supreme Court.

The Constitutional Court rules on the constitutionality of laws and regulations and also on conflicts of competence between State organs and between courts. Matters may be referred to the Court by the Parliament, President or Government. Any individual may request that a question of constitutionality be submitted to the Court. The Court may also institute *ex officio* proceedings.

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[1] *It should be noted in this connection that, in the absence of provisions allowing the Republika Srpska to participate in government before the elections, the institutions in place in Bosnia-Herzegovina, as the successor State of the Republic of Bosnia-Herzegovina, are made up of politicians and senior officials of the Federation. For its part, the Republika Srpska seems to dispute the fact that the State of "Bosnia and Herzegovina" provided for in the Dayton Constitution already exists.*

[2] *The Venice Commission has been requested to give its opinion on the necessity of instituting such a court.*

[3] *The Report of the State Department of the United States on human rights practices says: "The Ombudsmen have done impressive work monitoring the human rights situation and bringing cases of abuse to the Bosniac and Croat Governments. However, the Ombudsmen have no enforcement power and authorities treat them with varying degrees of indifference and hostility. The Ombudsmen say that were it not for the international backing, Federation authorities would disband them immediately."*

[4] *The above-mentioned US State Department report says: "although a Parliament exists, the Pale Government is run by a small group of military and civilian authorities".*