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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**OPINION**

**ON THE SETTING UP OF THE  
HUMAN RIGHTS COURT OF THE  
FEDERATION OF BOSNIA AND HERZEGOVINA**

**adopted at the 31st plenary meeting  
of the Commission (Venice, 20-21 June 1997)**

By letter of 16 June 1997 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the European Commission for Democracy through Law (Venice Commission) to give an opinion on the legal questions raised by the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina (hereafter "FBH"). This opinion, in response to the above-mentioned request, was adopted by the Venice Commission at its 31st plenary meeting (Venice, 20-21 June 1997).

The Commission feels that these legal questions should be analysed on two levels:

On one hand, an analysis of the current situation of constitutional law in Bosnia and Herzegovina (hereafter "BH") is called for (*de lege lata* analysis, point 1 below); on the other hand, given the Committee of Ministers' responsibilities for this, the system of human rights protection mechanisms should be examined with a view to giving an opinion on the advisability of setting up the Court in question (*de lege ferenda* analysis, point 2 below).

#### **1. The current state of constitutional law applicable in Bosnia and Herzegovina**

##### Membership and powers of the Human Rights Court of the Federation of Bosnia and Herzegovina under the Washington Agreements and the FBH Constitution

The Human Rights Court of FBH is an institution provided for by the Constitution of the Federation, itself proposed in the Washington Agreements of 18 March 1994 reached by FBH and the Republic of Croatia.

The proposed Constitution was adopted by Parliament on 30 May 1994.

The Human Rights Court is provided for in Chapter IV, Section C, Articles 18 to 23 of that Constitution. It has 7 members: 3 judges from Bosnia and Herzegovina (one Bosnian, one Croat and one "Other") and 4 members to be appointed by the Committee of Ministers of the Council of Europe in accordance with its Resolution (93)6. The participation of the foreign judges is a transitional arrangement (Chapter IX, Article 9 of the Constitution).

The Court's competence covers any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the instruments listed in the Annex to the Constitution of the Federation of Bosnia and Herzegovina. After having exhausted the remedies before the other courts of the Federation, one may appeal to the HR Court on the basis of any question within its competence. An appeal may also be taken to the court if proceedings are pending for an unduly long time in any other court of the Federation or any Canton. The Human Rights Court may also, on request, give binding opinions for the Constitutional Court, the Supreme Court or a cantonal court on matters falling within its competence. The decision of the Court shall be final and binding.

##### The effects of the Dayton Agreements

The first question asked concerns the effects of the Dayton Agreements on the arrangements for the Washington Agreements. In other words, questions should be asked about whether the Dayton Agreements, coming after the Washington Agreement and the adoption of the Federation's Constitution resulted, through the setting up of the Human Rights Commission

(Annex 6 to the Dayton Agreements), in the formal revocation of the provisions relating to the Human Rights Court of FBH.

This does not seem to be the case from a legal point of view.

The Dayton Agreements and the Washington Agreement do not involve the same parties. The Dayton framework agreement was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and Annex 6 by the Republic of Bosnia and Herzegovina, FBH and the Republika Srpska, whereas the Washington Agreements were signed by FBH and the Republic of Croatia.

Similarly, Annex 6 is intended to set up an institution to monitor the respect for human rights throughout the state of Bosnia and Herzegovina, whereas the Federation's constitution apparently only covers one entity of that state (even though the original aim of the Washington Agreements was to create a Federation covering the whole territory of Bosnia and Herzegovina).

Since the two international Agreements neither have the same parties nor govern the same subject, it cannot be considered that the Dayton Agreements have affected the legal validity of the provisions relating to the Human Rights Court of FBH.

The appointment of "foreign" judges by the Committee of Ministers of the Council of Europe

The Human Rights Court has not yet been set up. The three national members have been appointed but the "foreign" members, necessary for setting up the institution during the initial period, have not yet been appointed by the Committee of Ministers.

The legal base of the Committee of Ministers' action calls for clarification.

The Washington Agreements (between FBH and Croatia) and the FBH constitution are not binding on the Council of Europe and its bodies. These texts provide the legal base foreseeing, so as to meet the requirements of domestic law, action by an international institution for the setting up of the Court.

The Committee of Ministers' action on this is therefore not governed as such by the Agreements or the Constitution but is exclusively founded on its own Resolution (93)6 to which, furthermore, the Washington Agreements and the Federation Constitution refer. Resolution (93)6 states in Article 1 that:

*"At the request of a European non-member state, the Committee of Ministers may, after consultation with the European Court and Commission of Human Rights, appoint specially qualified persons to 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"*

By acting under this provision the Committee of Ministers must, when necessary, appoint foreign judges. It should be emphasised, in this respect, that the condition for carrying out this appointment is that a request has been made to it by a European non-member state, ie Bosnia and Herzegovina, and not an Entity. On the other hand, it is not at all necessary for the body responsible for the control of human rights to be at the top of the state's pyramid of legal bodies; it might well be the legal body of a federate entity.

Resolution (93)6 also states that the Committee of Ministers "may" appoint foreign judges to sit on a body responsible for the control of respect for human rights in a European non-member state. This allows the Committee of Ministers a certain amount of leeway in assessing the advisability of its actions. This leeway will be greater when, as in this case, it is requested to act to set up a second control body in the same state. It should, therefore, not be overlooked that the Committee of Ministers has already set up the Human Rights Chamber in BH, as provided for in Annex 6 to the Dayton Agreements, in accordance with Resolution (93)6. In these circumstances, the Committee of Ministers could decide against proceeding with the appointment requested if it believes that the aims of Resolution (93)6 are not served by setting up a second control body. The observations of the Venice Commission contained in its **opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms** (opinion adopted at the Commission's 29th meeting 15-16 November 1996, CDL-INF (96) 9) might be taken into consideration in this case.

**2. Problems linked to the functioning of the Human Rights Court of the Federation possibly affecting the efficiency of the human rights protection mechanism in Bosnia and Herzegovina**

At the Parliamentary Assembly's request the Venice Commission has examined the constitutional situation in Bosnia and Herzegovina with regard to the human rights protection mechanism. This examination has revealed a certain number of problems linked, in particular, to the proliferation of control bodies.

In its opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, the Commission found,

"that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

...

However, duplication should be avoided as it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with amendments of the entities' Constitutions where the creation of specific human rights bodies may be unnecessary from a legal point of view".

With reference in particular to the Human Rights Court of FBH, the Commission stated that the co-existence of two human rights jurisdictional bodies (the Human Rights Court of FBH and the Human Rights Commission provided for in the Dayton agreement) may create certain problems.

Firstly,

"the exhaustion of domestic remedies available to a citizen of FBH becomes extremely lengthy. It involves the (eventual) excessive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of FBH) and then of the Ombudsman of FBH before reaching, finally, the Constitutional Court of BH or the Human Rights chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from FBH from applying to the European Commission in Strasbourg when BH becomes party to the European Convention on Human Rights."

In addition,

"it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of FBH and of the Human Rights chamber of BH (both composed of a majority of international judges) might affect the authority of those courts".

Obviously these problems, linked to the establishment and the functioning of the Human Rights Court of FBH, jeopardise the efficiency of the human rights control mechanism both in that entity and in BH as a whole.

As a possible solution to these problems, the Venice Commission has recommended amending the FBH Constitution so as to do away with the Human Rights Court. The lacunae which might result from such an amendment in the judicial system of FBH would easily be covered by granting human rights responsibilities to the Constitutional Court and/or the Supreme Court of the Federation and by the possibility offered to any individual, including the Ombudsmen of FBH, to refer cases to the Human Rights Chamber.

In addition, this solution would simplify the judicial system of human rights protection in FBH and, consequently, shorten the legal avenues of exhaustion of domestic remedies.

It would also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, ie the Human Rights Commission.

The Commission finds that this solution is compatible with the international Agreements which are the basis of the judicial system of BH, in that the Washington agreement, which includes the Constitution of BH and foresees the creation of the Human Rights Court, has been politically "superseded" by the Dayton Agreements.

The Commission reiterates its position that, bearing in mind the mechanism set up by Annex 6 to the Dayton Agreements, the creation of the Federation's Human Rights Court now seems superfluous and runs the risk of slowing down proceedings.

However, given the possible expectations raised among the local people by the prospect of human rights protection mechanisms, political imperatives might well require the establishment of the Human Rights Court of FBH. The Commission has neither the information nor the competence to give an opinion on this political aspect of the question.

However, if this court were to be established, work would have to be undertaken immediately in

order to bring about, as quickly as possible, a simplification of the system, for example by means of merging this court with the Supreme Court or the Constitutional Court of the Federation. On this score, the Commission recalls that a similar simplification was carried out successfully in Croatia, where the provisional Human Rights Court (foreseen by the Croatian Constitutional Act of 1991 on human rights and minorities, also based on Resolution (93)6 of the Committee of Ministers) was replaced by a mechanism enabling the Croatian Constitutional Court to turn to international advisers taking part in its proceedings. This simplification, for which the Commission would be willing to lend any assistance to interested parties, would contribute to the efficiency of human rights protection mechanisms, a cornerstone of the peace agreements in Bosnia and Herzegovina.

### **3. Conclusions**

The Commission finds

- that the provisions of the FBH Constitution concerning the Human Rights Court of FBH have not been formally revoked by the Dayton Agreements;
- that the action requested of the Committee of Ministers of the Council of Europe is not governed by the Washington Agreements or by the FBH Constitution but exclusively by Resolution (93)6;
- that, in accordance with that Resolution, the request for setting up a control body, in the meaning of Article 1 of that Resolution, must come from a non-member state and not by an entity of that state;
- that the Committee of Ministers may decide as to the advisability of the appointment of international judges to the Human Rights Court of FBH, in accordance with the Resolution (93)6;
- that the Committee of Ministers must take into consideration the fact that it has already set up a control body, in the meaning of Article 1 of Resolution (93)6, in that same state, and assess to what extent the setting up of a second body, ie the Human Rights Court of FBH, serves the aims of that Resolution; in this respect, it will be for the Committee of Ministers of the Council of Europe to take into account the considerations set out above, together with any other political consideration which the state empowered to make that request, ie Bosnia and Herzegovina, might convey to it and on which the Commission, by its nature, has no competence to give an opinion;
- that, if the Human Rights Court of FBH were to be established, work would have to be undertaken immediately to bring about, as quickly as possible, a simplification of the system of legal human rights protection and, for example, the merger of that court with the Supreme Court or the Constitutional Court of the Federation might be envisaged.