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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT PRELIMINARY PROPOSAL FOR THE RESTRUCTURING OF HUMAN RIGHTS PROTECTION MECHANISMS IN BOSNIA AND HERZEGOVINA

prepared on the basis of contributions by
Messrs Peter Jambrek (Slovenia)
Giorgio Malinverni (Switzerland)
Franz Matscher (Austria)

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On 7 July 1998, the Office of the High Representative requested the Venice Commission to draw a report on a possible re-structuring of the human rights protection mechanisms in Bosnia and Herzegovina after the end of the five year transitional period provided for in the Dayton Peace Agreements. The Commission set up a working group composed of Messrs Helgesen, Jambrek, Malinverni and Matscher, who had already acted as Rapporteurs for its "Opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms" to consider this topic and report to it. It further asked Messrs Malinverni and Matscher to act as Rapporteurs. The Working Group met in Paris on 25-26 February and 11 June 1999 and considered the question on the basis of a working document prepared by the Secretariat upon instruction by the Rapporteurs. Ms Michèle Picard, President of the Human Rights Chamber of Bosnia and Herzegovina, Mr Ph. Bardiaux and Ms C. Nix, experts from the Office of the French Médiateur de la République and from O'Melveny and Myers, USA, Mr J. Van Lamoen, Deputy High Representative for Legal Affairs, I. Martin, Deputy High Representative for Human Rights, Ms L. Hastings, Mr M. Köngeter and Mr E. Strauss of the OSCE Mission in Bosnia and Herzegovina, Mr C. Harland and Mr A. Nicholas of the Office of the High Representative, Mr. N. Maziaux of the Constitutional Court of Bosnia and Herzegovina, Mr. C. Giakoumopoulos, Deputy Secretary of the Venice Commission, Ms S. Burton of the Secretariat of the Venice Commission and Ms H. Alefsen, of the Council of Europe, participated in the meetings. Following the meeting the Rapporteurs prepared the present report which is submitted to the Venice Commission.

* * *

Introduction

In its *Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms* (adopted on 15-16 November 1996, CDL-INF (96)9 and CDL-INF (98) 15 pp. 31), the Commission underlined that protection of human rights is not only a constitutional requirement but also a prerequisite and an instrument for long-standing peace in the country. Its effectiveness depends on the coherence of the protection machinery and on the credibility of the bodies which will monitor human rights implementation throughout the country. Conflicts of competence between bodies entrusted with protection of human rights should in principle be avoided, as well as situations whereby two highest judicial bodies may give contradictory answers to the same legal problem. Such situations, which are undesirable in general, could, in the circumstances of this country, affect the very essence of the constitutional order and thus the State as such.

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.

In order to cope with this unusual complexity, the Commission suggested that interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina, when deciding which case falls within their competence, should take into account not only laws and regulations but also the case-law of other institutions. Co-ordination of their practice by disseminating information on the cases which have been introduced, or are pending before, or which have been decided by either institution is of utmost importance and should have been ensured even in the first months of operation of the institutions concerned.

But interpretation has its limits. The Commission notes several elements likely to affect the coherence of the actual structure of human rights protection mechanisms:

The Constitutional regime in Bosnia and Herzegovina makes no clear choice between a system of concentrated control of constitutionality (by constitutional courts) and diffuse constitutional control (by all courts). It creates an important and unusual network of legal avenues for claiming violations of fundamental rights whose length and complexity may rather affect the effectiveness of the protection afforded.

The position of the non-judicial institutions for protection of human rights, namely the Ombudsman institutions at the level of the State and in the Federation, is also unusual, since these institutions have very large powers to perform quasi-judicial functions and to initiate or intervene in pending proceedings. In the face of these powers the independence of the judiciary can only be fully safeguarded through a very selective and careful practice by the Ombuds-institutions.

The Commission understands that the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina. Respect for human rights is the cornerstone of the Dayton and Washington peace agreements. However, duplication should be avoided since it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with constitutional amendments where the creation of specific human rights bodies may appear unnecessary or no longer necessary from a legal point of view.

Similarly, important disparities in the human rights protection systems of the two entities may also be detrimental to the effectiveness of protection. Ensuring a balanced and coherent judicial system for the protection of human rights in B.H. in its entirety may require a certain parallelism in the protection afforded under the legal orders of the two entities and possibly the establishment of equivalent bodies.

Finally, the Commission indicated that the integration of Bosnia and Herzegovina, the normalisation of its constitutional situation and the effective development and functioning of its constitutional institutions probably requires that, in the not too distant future, human rights protection be entirely entrusted to the Constitutional Court of the State.

In view of the above considerations and for other reasons indicated in the report, the Commission considers that action will be required also in the normative field.

The present report aims at outlining a tentative proposal for re-structuring the human rights protection mechanisms in Bosnia and Herzegovina and the entities in accordance with the above considerations and findings of the Venice Commission. The Commission has taken into account the experience from the functioning of the institutions since their creation. It is also aware that some of the proposals may require new legislation, amendments to the Constitutions of Bosnia and Herzegovina and its entities, or memoranda of understanding, where appropriate. Pursuant to the Dayton Peace Agreement, by the end of 2000, responsibility for the continuing operation of several human rights institutions will be transferred to the Government of Bosnia and Herzegovina. This might be the appropriate time for the re-structuring operation. In this context one should also bear in mind that Bosnia and Herzegovina has applied for accession to the Council of Europe and may, following accession, become a Party to the European Convention on Human Rights.

1. <u>Institutions of the State of Bosnia and Herzegovina</u>

1.1. Merger of the Human Rights Chamber and the Constitutional Court

The Commission has found that the Human Rights Chamber, because of its origin and tasks pursuant to the Dayton Peace Agreement, is a provisional, *sui generis* institution which should cease to exist after the accession of Bosnia and Herzegovina to the Council of Europe and ratification of the European Convention of Human Rights**.**

In its above-mentioned opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection instruments, the Venice Commission found that the fields of respective competencies of the Constitutional Court and the Human Rights Chamber were partially overlapping. The Venice Commission noted:

> « Among other competencies, the Constitutional Court is to have <u>jurisdiction over issues referred by any court in the country</u>, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)). It shall also have <u>appellate jurisdiction</u> over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). It follows from the latter provision that the Constitutional Court may receive appeals against decisions from any court whereby it is alleged that they violate the Constitution, including the provisions on Human Rights (cf. Article II). In accordance with Article VI para 4 of the Constitution of BH, the decisions of the Constitutional Court "are final and binding". Similarly, the Commission of Human Rights - and in particular the Human Rights Chamber -has jurisdiction to receive <u>applications concerning violations of human rights</u>. The decisions of the Chamber are also "final and binding". Whatever the intention of the drafters of the Constitution may have been, there is an overlapping between the competencies of the Constitutional Court and those of the Commission of Human Rights. Both shall deal with human rights issues, mainly under the European Convention on Human Rights. »

This partial overlapping proved to be one of the most difficult problems in the judicial system of Bosnia and Herzegovina and will be one of the most important reasons of dysfunction if the situation remains unchanged. Indeed, the distribution of competencies between the two highest jurisdictions is very unclear and it seems almost impossible to establish any hierarchy between two highest courts both giving final and binding judgements. In a further opinion issued on the occasion of an appeal from the Chamber to the Constitutional Court (*Opinion on the admissibility of appeals against decisions of the Human Rights Chamber, 16-17 October 1998*, CDL-INF (98) 18), the Commission declared the following:

> "Article II of the Constitution of Bosnia and Herzegovina provides that *« the rights and freedoms as set forth in the European Convention on Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law »*. This provision would lose most of its meaning if the list of rights alone, and not the monitoring mechanism, were to apply in BH. However, the ECHR monitoring machinery is only open to States which are parties to this convention and BH is not one of them, since only member States of the Council of Europe can become parties to the ECHR. It is therefore necessary, pending the accession of BH to the Council of Europe and the ratification of the ECHR by it, to provide for a provisional monitoring mechanism reproducing in BH the Strasbourg bodies (the European Commission and Court of Human Rights).
>
> The idea of a transitional international human rights protection mechanism was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe, and Annex 6 to the Dayton Agreements, establishing the Human Rights Chamber, expressly refers to this Resolution.

> The international elements in the composition of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina) underline this specific role of the bodies established under Annex 6. The Human Rights Commission appears as a quasi-international *sui generis* body integrated into the legal order of Bosnia and Herzegovina for a transitional period, until the effective integration of this State has been achieved and it has acceded to the Council of Europe, ratified the European Convention on Human Rights and recognised the human rights protection mechanism of the Strasbourg organs. The transitional (provisional) character of the mechanism is also indicated in Annex 6 , which is scheduled to last for five years after the entry into force of the Dayton Agreement. After that period of time, the responsibility for the continued operation of the Commission of Human Rights is to be transferred to the institutions of Bosnia and Herzegovina, unless otherwise agreed. This provision has to be read in conjunction with Article 5 of Resolution (93) 6 which provides that the arrangements for a transitional human rights control mechanism integrated in the internal legal order of European States which are not yet members of the Council of Europe, shall cease once the requesting state has become a member of the Council of Europe, except as otherwise agreed.
>
> The provisions on jurisdiction of the Human Rights Commission further underline this quasi-international *(sui generis)* character of the mechanism established under Annex 6. Article 2 of Annex 6 states that the Commission on Human Rights is established to assist the parties (namely the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in honouring their obligations to secure to all persons within their jurisdiction the highest level of internationally recognised human rights standards. Therefore, the State of Bosnia and Herzegovina is also a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement."

For all the above reasons it seems both logical and desirable to opt for the transferring of competence on all final appeals in human rights cases to a single jurisdictional body at the state level, as is the case in most modern continental constitutional systems in Europe. However, the many procedural, administrative, financial, political and other differences between the Chamber and the Constitutional Court should be carefully reviewed to assess how such a "transfer" should be structured without resulting in a diminution in the judicial protection of human rights in Bosnia and Herzegovina.

It is well known that the Chamber is a relatively well-funded institution that benefits from the expertise on its bench of a majority of international judges, experts in human rights law. It has issued written opinions covering over 100 cases on a broad range of topics falling within the ambit of the ECHR. Over 2000 cases have been filed to date with the Chamber. In contrast, the Constitutional Court, which suffers from a tremendous lack of funding, has for a variety of reasons only rendered a final decision in a single case out of the less than ten that have been filed with the Court, and its appellate jurisdiction has yet to be tested. Furthermore, in addition to these institutional differences, the rules of procedure, including admissibility criteria for appellate cases and in particular the right of individuals to file a case, differ between the two bodies or are as yet untested in the Constitutional Court.

In the light of these and other differences, in practice, such a "transfer" will require a general restructuring of the Constitutional Court and it is highly advisable that this transfer takes the form of a merger of the Constitutional Court with the Human Rights Chamber. Indeed, entrusting the Constitutional Court with the task of dealing with individual human rights applications requires a simultaneous transfer of expertise, experience, resources, procedural and other capacities, which can best be achieving by the proposed merger. One way of realising the transfer may be to establish a separate human rights chamber within the Constitutional Court.

This merger will also ensure continuity in the Chamber's case-law and contribute to achieving the legal security and stability which the legal order of Bosnia and Herzegovina so much needs.

Naturally, this proposal is based on the premise that the many differences between these two bodies will be carefully addressed and reconciled, as appropriate, in order to ensure that the domestic protection of human rights afforded by the Human Rights Chamber is preserved and that the international obligations entered into by the parties under the peace agreements are taken into account. To that end, procedural issues such as the prerequisites for individual applications to the Constitutional Court, including exhaustion of other effective remedies, applications by the Ombudsman (see below), effects of judgements, power to grant compensation and other such matters must be regulated by a law (possibly constitutional law) to be adopted by the BH Parliament. The law should also contain transitional provisions concerning the transitional role of the international members of the Court and international administration, and indicating that once the merger has occurred, the Human Rights Chamber, in its present form, shall no longer be competent to deal with new cases or with cases pending at the Chamber on which the Chamber has not yet initiated proceedings.

The law shall further indicate the time at which the merger shall become effective. In this respect the transfer provision of Article XIV of Annex 6, as well as the possible/future accession of Bosnia and Herzegovina to the Council of Europe and ratification of the ECHR should be taken into consideration.

The Commission is ready to consider further the legal and practical modalities of this proposal, if the Office of the High Representative so requests. In particular, in the light of the above-mentioned complexities, as well as the need to ensure the preservation of human rights protection through the proposed merger of the Human Rights Chamber and the Constitutional Court, the Venice Commission believes that the modalities of such a merger must be carefully considered. The Rapporteurs suggest that a working group composed of international legal and administrative experts operating under the auspices of or reporting to the Venice Commission and/or the OHR should investigate the procedural, administrative, financial and other practical issues involved and make recommendations. The Venice Commission will consider these recommendations and detail further the steps necessary to achieve the suggested merger.

1.2. Creation of special courts at the level of the State of Bosnia and Herzegovina

Electoral jurisdiction

In its *Opinion on the competence of BH in electoral matters* (CDL (98) 16), the Commission held that, with regard to disputes concerning elections to BH institutions, it was necessary to assign appellate jurisdiction to a court at state level. Indeed, the democratic nature of BH (which is enshrined in the preamble to its Constitution) and, above all, the requirement that BH (and the entities) organise "free and fair elections" (Article I, paragraph 1 of Annex 3 to the Dayton Agreements) make it mandatory that any electoral dispute be dealt with by an independent judicial institution. BH is therefore bound both by the Peace Agreements and by its own Constitution to refer such disputes to a judicial institution.

In its *Opinion on the need for a judicial institution at the level of the State of Bosnia and Herzegovina* (issued on 16-17 October 1998, CDL (98) 17), the Commission stated that

> "the choice of institution is left to the state legislature, which might envisage giving jurisdiction in such matters to a special division of the Constitutional Court or might establish a separate court Whatever solution is adopted by the legislature, it will necessarily entail an addendum to the BH

> Constitution, which makes no provision either for the constitutional court to have jurisdiction in electoral matters or for the establishment of a separate court. This does not mean that the Constitution will not be observed, since, as we have seen, the existence of such an institution is a requirement of the Constitution itself."

The Commission has taken into account the wide competencies this court will have (it will have to deal with all kinds of electoral disputes at State, entity and cantonal level), the specific nature of the issues involved and the urgency of most of the decisions in the matter. It further finds that electoral litigation would be a heavy burden for the Constitutional Court of BH, whose case-list of case will inevitably and dramatically increase after its merger with the Human Rights Chamber. The Commission is therefore of the opinion that competence in the field of electoral disputes all over the country should be entrusted to a special permanent electoral jurisdiction. Of course, the Constitutional Court will have appellate jurisdiction over constitutional issues arising out of the decisions of this electoral jurisdiction.

Administrative court

In its above-mentioned opinion on the need for a judicial institution at the level of the State of BH (CDL (98) 17), the Commission found that under the Constitution of BH, the State of BH is empowered to establish state-level courts, which should be specific, in the sense that they should have special and not general jurisdiction, and be created in response to an established constitutional need. Moreover, as regards administrative disputes, BH is empowered, and even obliged, to set up a state-level court (the Administrative Court of BH) for the following reasons:

> The general principle that administrative authorities must abide by the law as well as the principle of the rule of law, on which the BH Constitution is founded (Article I, paragraph 2), require that administrative decisions be subject to judicial review.
>
> This general requirement takes an even more definite form in cases where administrative decisions affect individual rights. In such cases the requirement that administrative decisions be subject to judicial review comes within the ambit of respect for fundamental rights.
>
> Article II of the BH Constitution provides that "the highest level of internationally recognised human rights and fundamental freedoms" shall be ensured in BH and that a Human Rights Commission shall be set up to that end, in accordance with Annex 6 to the peace agreements. The first article of Annex 6 itself makes reference to the European Convention on Human Rights, Article 6, paragraph 1 of which provides, inter alia, "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". (Also see Article II, paragraph 3 (e) of the BH Constitution). According to the established case-law of the European Court and the European Commission of Human Rights, the notions of "civil rights and obligations" and "criminal charges" are autonomous ones, specific to the ECHR, which are not to be interpreted by reference to the domestic law of the states bound by this convention. The European Court of Human Rights has consistently held that it is sufficient that the outcome of a dispute should be decisive for civil rights, that is to say that the rights in issue should be personal and economic rights of one of the parties to the proceedings. Disputes in fields traditionally governed by administrative law of member states have thus been regarded, in the context of the convention, as disputes over civil rights. Examples are disputes over the refusal of certain tax advantages (Editions Périscope v. France judgement of 26 March 1992, Series A No. 234-B); over entitlement to social security benefits (Deumeland v. Federal Republic of Germany judgement of 29 May 1986, Series A No. 100); over entitlement to a civil service pension (Lombardo v. Italy judgements of 26 November 1992, Series A Nos. 249-B and 249-C); and over the right to compensation for unlawful administrative acts (Tomasi v. France judgement of 27 August 1992, Series A No. 241-A). Similarly, certain administrative proceedings have been

> considered to involve a "criminal charge". Examples are cases concerning penalties imposed in economic matters (Deweer v. Belgium judgement of 27 February 1980, Series A No. 35); in tax matters (Commission report in the Sydow v. Sweden case); and for road traffic offences (Özturk v. Federal Republic of Germany judgement of 21 February 1984).
>
> There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.
>
> The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act).

The Commission further notes that such a court could have broader jurisdiction than that imposed by the requirements of Article 6 ECHR: other administrative disputes could also be brought before this body.

Special (high) criminal court

In the same opinion, the Commission held that although offences perpetrated by BH public officials can be tried by the entities' criminal courts according to the rules of jurisdiction laid down by BH law, several offences provided for in criminal legislation (e.g. high treason) committed by persons appointed to government or political office (members of the presidency, ministers, members of the Constitutional Court, etc.) in the exercise of their functions cannot be tried by entity courts. As in many other European states, special rules of procedure must be issued concerning such offences.

The Commission considered whether competence in this field could be given to the constitutional court. It tends to exclude this possibility since the Constitutional court's competencies are already quite extensive. Moreover, the idea of relating criminal liability of high officials with constitutional functions seems rather outdated. The Commission would suggest that competence in this field could be given to another new state level court (the high criminal court of BH). This position is also supported by the conclusions of the Madrid Peace Implementation Council.

The exact scope of the *ratione personae* and *ratione materiae* competence and the composition of this court should be determined in a law to be adopted by the State legislator. In this respect, the requirements of Article 2 of Protocol No 7 to the ECHR should be taken into consideration. This provision reads:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal (…). This right may be subject to exceptions … in cases in which the person concerned was tried in the first instance by the highest tribunal"

The Commission is currently considering, together with the Directorate of Legal Affairs of the Council of Europe, the legal and practical modalities of the above-mentioned proposals for the creation of specific courts at the level of BH, at the request of the Office of the High Representative.

1.3. A new concept for the Human Rights Ombudsman (Ombudsperson) of Bosnia an Herzegovina

It is envisaged to re-define the operation of the Ombudsperson of BH as regards in particular its functions as a classical Ombuds-institution; its relations with the highest judicial authorities of the State (i.e. the Constitutional Court); and the definition of its field of activities.

The Commission stated in its *Interim Report on the distribution of competencies and structural and operational relations in the Ombudsman institutions in BH* (adopted on 12-13 June 1998) that the Ombudsperson of Bosnia and Herzegovina is a hybrid institution. Set up very shortly after the peace agreement, the Office of the Ombudsperson was for a long time the only institution responsible for introducing the European Human Rights Convention into the legal system in Bosnia and Herzegovina. This task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. The Ombudsperson thus ruled on the admissibility of the complaints it received, sought a friendly solution, investigated and communicated its findings to the party allegedly at fault and, if it were not satisfied with that party's response, referred the matter to the Human Rights Chamber. At the same time, at the hub of the human rights machinery provided for in Annex 6, the Ombudsperson has a non-judicial activity when it decides, *ex officio*, to conduct investigations and draw up special reports.

In the not-too-distant future, however, a structural reorganisation of its *modus operandi* must be undertaken. The quasi-judicial sorting role performed by the Office of the Ombudsperson should in fact be taken over by the judicial body responsible for protecting human rights. The Ombudsperson could then concentrate more on its more conventional mediation functions, without so many procedural constraints (application deadlines, exhaustion of other remedies), that are uncharacteristic of the ombudsman's work.

This should not prevent the Ombudsperson from referring cases to the highest judicial authority competent to deal in human rights matters, i.e. the Constitutional Court of Bosnia and Herzegovina, if the proposal under 1.1 is accepted.

The competence of the Ombudsperson should also be confined to matters concerning the State of Bosnia and Herzegovina, cases which simultaneously concern the two entities ("inter-entity" cases) and entity cases whose outcome is of importance for the whole of Bosnia and Herzegovina. Clearly as the state institutions are gradually set in motion and begin effectively to exercise their powers under the Constitution of Bosnia and Herzegovina, the citizens will be increasingly concerned by the decisions of those institutions. Similarly, the co-operation required in numerous areas under the Dayton Agreement -between the entities themselves or between the entities and the state - seems to point to a likely increase in the number of cases involving both entities. It is in this field that the Ombudsperson will have to develop its activities, while in the medium term questions concerning issues of concern to only one entity should generally fall within the ambit of the Ombudsmen of the entities[1].

[1] *See in this respect the Report of the Working Group of the Venice Commission and the Directorate of Human Rights of the Council of Europe on the Ombudsman Institutions in Bosnia and Herzegovina (CDL(99)27) and the draft law on the State Ombudsman of Bosnia and Herzegovina prepared by the same Working Group (CDL(99)28).*

It goes of course without saying that as long as the RS Ombudsman is not created, the Ombudsperson shall be competent to deal with all cases concerning RS.

The reform outlined above requires the amendment of the fundamental texts of the institutional apparatus in Annex 6. As responsibility for the continuing operation of the Office of the Ombudsperson will lie, after December 2000, with the institutions of Bosnia and Herzegovina, it seems that the most appropriate means of carrying out the reform would be an organic Law to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina. The Working Group on the Ombudsman institutions in BH, set up by the Venice Commission and the Human Rights Directorate of the Council of Europe drafted such an organic law, at the request of the Ombudsperson.

Moreover, the Ombudsperson's power to refer cases to the Constitutional Court should be reflected in the Constitution of BH. This will be part of the reform concerning the competencies of the Constitutional Court of BH.

1.4. The relations between the Constitutional Court and Annex 7 Commission

The Commission has noted in its above-mentioned *Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms*, that a certain conflict of competencies could arise in the relations of the Human Rights Chamber and the Annex 7 Commission, when they are both dealing with property protection cases. After the proposed merger of the Chamber and the Constitutional Court, the same conflict will appear in regard to the Constitutional Court. It is to be noted in this respect that both bodies are expected to give "final and binding" decisions.

In the Commission's view, Annex 7 Commission is a specific *sui generis* body, provided for by the Peace Agreements. The rationale for its existence lies in the struggle to achieve a certain security as to the property regime in BH, within a short time period, and thus allow economic development and consolidate peace. Its operation appears as an exception to the legal order of BH, which, through Article 6 of the ECHR, requires that disputes over civil rights and obligations be decided by tribunals established by law, after fair and public hearings. It should be regarded as a provisional institution. If its functioning is to continue after 2000 this shall be effected by virtue of an agreement of the parties to the Annex 7 to the Peace Agreement (as provided in Annex 7, Article XVI). It will not be possible to integrate this Commission in the legal order of BH without subjecting its decisions to judicial or, at least, constitutional control.

The Venice Commission would be ready to pursue the consideration of issues related to the functioning of Annex 7 after the end of the transitional period, in co-operation with the Annex 7 Commission, if the Office of the High Representative so requests.

2. Institutions of the Federation of Bosnia and Herzegovina

2.1. The Human Rights Court of the Federation

The Commission has on several occasions stated that the setting up of the Human Rights Court of the federation was unnecessary and should therefore be avoided. The reasons for this position of the Commission were explained in the Commission's *Opinion on the establishment of a human rights Court in FBH* (issued on 20-21 June 1997, CDL-INF (98) 15, p. 77 ff):

> The co-existence of two human rights jurisdictional bodies (the Human Rights Court of F.B.H. and the Human Rights Commission provided for in the Dayton Agreements) may create certain problems.
>
> First, the exhaustion of domestic remedies available to a citizen of F.B.H. 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 F.B.H.) and then of the Ombudsman of B.H. before reaching, finally, the Constitutional Court of B.H. 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 F.B.H. from applying to the European Commission in Strasbourg when B.H. 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 F.B.H. and of the Human Rights chamber of B.H. (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 F.B.H., jeopardise the efficiency of the human rights control mechanism both in that entity and in B.H. 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 of the Federation.

The Commission has now examined whether there are reasons for setting up of the Human Rights Court of the Federation having regard to the judicial system of the Federation and to the envisaged changes in the institutional set-up at the level of the State.

It recalls in this respect:

- that the Supreme Court of FBH, as all other courts in the FBH, directly apply the human rights provisions of the Constitution of FBH and of BH, the ECHR and the other international human rights instruments listed in the annexes to the Washington and Dayton Agreements;
- the Constitutional Court of BH has appellate jurisdiction over decisions of any court in BH on constitutional issues, including human rights ; if the reform envisaged under point 1.1 above is accepted, this competence will be further developed ;
- the Supreme Court of FBH (or a cantonal court) have an obligation to submit any doubt as to whether an applicable law is compatible with the FBH Constitution to the FBH Constitutional Court.

Under these circumstances it does not seem that the setting up of the Human Rights Court of the Federation corresponds to any pressing need. On the contrary, establishing the Human Rights Court would unnecessarily complicate the judicial system of both the Federation and the State. Further, it is suggested that the provisions on the Human Rights Court of the Federation in the Constitution of this entity have become inoperative or obsolete by the provisions on the Human Rights Commission of the Dayton Peace Agreement.

The Commission is ready to further elaborate this proposal, considering also the possibility of creating a human rights section within the Supreme Court of FBH, which would not, however, take over the jurisdiction of the unformed Human Rights Court. The creation of such a section may be justified in view of the Supreme Court's competence to deal *in concreto* with human rights issues. It may be also justified by the Supreme Court's power to refer to the Constitutional Court of BH

questions as to whether a law is compatible with the human rights provisions of the BH Constitution or the ECHR (see below).

2.2. The Constitutional Court of the Federation

The primary functions of the Constitutional Court are to resolve disputes between Cantons; between any Canton and the Federation Government; between any Municipality and its Canton or the Federation Government; and between or within any of the institutions of the Federation Government. The Court also determines, on request, whether a law or a regulation is in accordance with the Constitution of the Federation. The Supreme Court and cantonal courts have an obligation to submit doubts as to whether an applicable law is constitutional to the Constitutional Court.

If the Human Rights Court of the Federation is not set up, as suggested in paragraph 2.1. above, the question might be raised whether the competence of the Constitutional Court of FBH should comprise human rights issues. Having regard to the need to have a coherent human rights policy and practice all over Bosnia and Herzegovina, it is preferable that human rights issues be directly referred to the Constitutional Court of BH. This appears as an interesting shortcut accelerating the procedure. Of course, this would mean that mandatory referral to the Constitutional Court of FBH would not comprise human rights issues, and may require amending the Constitution of FBH to remove the current mandatory referral of constitutional questions to the Constitutional Court of FBH.

2.3. The Federation Ombudsman

The Office of the Federation Ombudsman is an independent agency. The Ombudsman have the power to examine the activities of any institution of the Federation, a canton, or a municipality as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects. In so doing, the Ombudsman must have access to all official documents, including confidential ones. Pursuant to the FBH Constitution the Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings. The Commission has considered these powers of the Ombudsman with some scepticism. In its opinion on certain constitutional aspects of the situation in Bosnia and Herzegovina (opinion on the Washington Agreements), issued in September 1994, it stated :

> « Intervention by the ombudsman in the course of a trial should be exceptional, or at least subject to extreme caution. His role should in fact be to intervene before the institution of judicial proceedings. Intervention during a trial should have no other purpose than to bring about a friendly settlement. Any other kind of intervention would be contrary to the principle of the separation of powers, the independence of the judiciary and equality of arms. »

The draft organic law for the Federation Ombudsman, prepared by the Working Group on the Ombudsman institutions in Bosnia and Herzegovina, deals with this problem. Without limiting the constitutional powers of the FBH Ombudsman, the draft law provides that the Ombudsman intervene before courts only when they consider this to be strictly necessary for the effective performance of their duties under the Constitution.

3. Institutions of the Republika Srpska

3.1. The judiciary : Constitutional Court, Supreme Court and other courts of law

The Constitutional Court of the RS has competence to decide on conformity of laws, other regulations and general enactments with the Constitution; conformity of regulations and general

enactments with the law; conflict of jurisdiction between agencies of legislative, executive and judicial authorities; conflict of jurisdiction between agencies of the Republic, region, city and municipality; conformity of programmes, statutes and other general enactments of political organisations with the Constitution and the law. In accordance with amendment XLII (Article 115 *in fine*), the Constitutional Court monitors constitutionality and legality by providing the constitutional bodies with opinions and proposals for enacting laws to ensure "protection of freedoms and rights of citizens".

Proceedings before the Constitutional Court can be instituted by the President of the Republic, by the National Assembly and by the government. The Constitution enables the legislator to authorise other bodies or organs of the State to bring a case before the Court. The Constitutional Court may itself initiate proceedings on constitutionality and legality.

There is no individual application before the Constitutional Court but anyone "can give an initiative" for constitutional proceedings. Apparently, in practice, many cases brought before the Constitutional court have their origin in individual initiatives.

The Constitution of the Republika Srpska contains no provision as to the place of international human rights instruments in the hierarchy of norms. However, the international human rights instruments listed in the Dayton Agreement, including the ECHR, should apply directly in the Republika Srpska (Article II paras 1 and 6 of the Constitution of B.H.: *Bosnia and Herzegovina and both Entities, all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights referred to in the Constitution*).

The system provided for in the law of RS is a classical system where judicial protection of human rights is afforded by ordinary courts. The Supreme Court of RS is the main instrument for human rights protection since all types of litigation (civil, criminal and administrative) will be brought before it, whereby the Court shall "protect human rights and freedoms" in accordance with Article 121 of the Constitution. The Constitutional Court will examine the compatibility of a law or a regulation with the human rights guaranteed in the Constitution *in abstracto*, at the request of other State organs or at its own initiative.

In its *Opinion on the constitutional situation in BH with particular regard to human rights protection mechanisms*, the Commission has expressed the view that

> « having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established (in the Republika Srpska), giving the individual *locus standi* before the Constitutional Court in addition to or in substitution for the system of "individual initiatives". At the same time, some remnants of the constitutional order of the former Yugoslavia, such as the capacity to initiate proceedings ex officio and the competence to make "proposals", could be abandoned. This would strengthen the judicial character of the Court and bring the system closer to the recent evolution in several new democracies in Europe. »

Taking into account the envisaged merger of the Human Rights Chamber with the Constitutional Court of BH and the need to preserve a parallelism in the two entities, the Commission considers that the institution of individual application to the Constitutional Court of the RS is not necessary. Furthermore, the Constitutional Court's capacity to initiate proceedings *ex officio* does not affect the human rights protection system and is not therefore discussed in the present report.

However, the possibility of a referral to the Constitutional Court of BH of questions as to the compatibility of laws and regulations with human rights provisions should be envisaged (see below).

3.2. Creation of an Ombudsman institution in the RS

In the above-mentioned opinion, the Commission stated :

> "The creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the F.B.H., will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in B.H. in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of B.H. In order to ensure the necessary impartiality of the institution in a post conflict situation, one should consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation."

The Working Group on the Ombuds-institutions in Bosnia and Herzegovina has prepared a preliminary draft law on the Ombudsman of the RS in accordance with the above suggestion and has forwarded it to the competent RS authorities. The RS Ombudsman, as envisaged in the draft law, has similar compositions, powers and functions with the FBH Ombudsman. However, the RS Ombudsman does not have the power to intervene before ordinary courts in the Republika Srpska.

The recent Madrid Peace Implementation Conference supported the draft law.

4. Relations between the institutions of the entities and the institutions of the State

4.1. Referral of cases to the highest judicial authority of the State competent to deal with human rights cases by the entities' Ombudsmen

The working group on the Ombuds-institutions in BH suggested in its interim report and in the draft laws prepared for the entities' Ombudsman that the latter should be given the possibility to bring cases to the highest judicial authority of the State competent to deal with human rights cases (i.e., in accordance with the suggestion in point 1.1 of this report, the Constitutional Court).

The working Group suggests in its report to allow the Ombudsmen of the entities access to the Constitutional Court through the Ombudsman of Bosnia and Herzegovina. The latter shall make sure that the position of the entities' Ombudsman is adequately presented to the Constitutional Court[2]

4.2. Scope of the jurisdiction of the Constitutional Court

The Constitutional system of Bosnia and Herzegovina allows for two different legal orders (those of the two entities) to co-exist. The only common area of these two different entities' legal orders and of the legal order of the State of Bosnia and Herzegovina is human rights. It is to be expected that human rights will be the topic, that will allow for the State judiciary, i.e. the Constitutional Court, to exercise a control over the judiciary of the entities and to ensure a minimum of common interpretation.

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[2] *See the Report of the Working Group on the Ombudsman institution in Bosnia and Herzegovina (CDL(99)27).*

Appeals against decisions of Supreme and ordinary courts

The Constitution (Article VI, para 3 b) already allows for appeals from any other court in Bosnia and Herzegovina over issues arising under the Constitution. Most human rights cases will be brought before the Constitutional Court under this provision (which should be construed in such a way as to comprise all human rights cases previously dealt with by the Human Rights Chamber). Exhaustion of effective remedies in the entities' legal order should be set out as a procedural requirement for appeals to the Constitutional Court.

Appeals against decisions of the entities' constitutional Courts

The Commission has indicated in its above-mentioned opinion :

> "The simultaneous existence of three Constitutional courts should not raise particular problems, since each one of them functions within the framework of a specific Constitution. Thus, the Constitutional Court of F.B.H. is competent for the examination of constitutional issues under the Constitution of F.B.H., while the Constitutional Court of RS shall deal with constitutional questions under the Constitution of RS. The Constitutional Court of B.H. is competent inter alia to decide the question of compatibility of an Entity's Constitution with the Constitution of B.H. (Article VI, para 3 a), which takes precedence over the Constitutions of the Entities. The provisions in the Constitutions of the Entities providing that judgements of their highest courts are "binding and final" should be either revised or interpreted in such a way as to mean "binding and final in the legal order of the Entity, as long as it is not declared inconsistent with the Constitution of B.H."

It is clear that issues under the Constitutions of the entities will not fall within the jurisdiction of the BH Constitutional Court.

In contrast, whenever the entities constitutional courts' decisions directly or indirectly concern the constitutional order as set out in the BH Constitution, including its human rights provisions and guarantees, it must be accepted that appeals to this Court are allowed, under Article VI para 3 b or, of course, under Article VI para 3 a.

Referral from other courts in Bosnia and Herzegovina

Article VI para 3 c. allows referral to the Constitutional Courts of issues concerning the compatibility of any laws with the Constitution of BH, the ECHR and the laws of BH.

The Commission is of the opinion that the referral mechanism provided for in the BH Constitution is an important element for the cohesion of the constitutional order of this State. However, referral should be regulated in order to avoid procedural abuses likely to complicate rather than facilitate the smooth progress of proceedings. Since individuals, parties to court proceedings, or the Ombudsman have the power to introduce cases before the Constitutional Court, after exhaustion of other remedies, referral at an earlier stage should not occur whenever parties so request but only when a court finds it necessary.

It is suggested that courts in Bosnia and Herzegovina, including Constitutional Courts of the entities, refer constitutionality questions to the Constitutional Court of BH, whenever they find that a law (on whose validity their decision depends) is incompatible with the BH Constitution and the ECHR.

It is highly advisable that the Constitutional Court be empowered to refuse referral whenever it finds that the issue referred has been already dealt with or is manifestly unfounded. The Court should also be empowered to refer cases or questions to other courts if these would be better forums for resolving the issues raised.

The Commission is ready to further elaborate this proposal in the context of the general re-organisation of constitutional control in Bosnia and Herzegovina, if the Office of the High Representative so requests.