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**MERGER
OF THE CHAMBER OF HUMAN RIGHTS
AND THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA**

**Conclusions
adopted at the 42nd Plenary Meeting
Venice, 31 March –1st April 2000**

At its 39th Plenary meeting (Venice, 18-19 June 1999), the European Commission for Democracy through Law (Venice Commission) adopted a **Preliminary Proposal for the restructuring of Human Rights protection Mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12)**. This document, drawn up at the request of the Office of the High Representative, includes the proposal for a “merger” of the Human Rights Chamber (hereafter the “Chamber”) and the Constitutional Court (hereafter “the Court”), at the level of the State of Bosnia and Herzegovina. Two main reasons are put forward for this proposal:

First, the partial overlapping between the competence of the Chamber and the Court as regards human rights issues is likely, in the Venice Commission’s view, to become an important factor leading to the dysfunctioning of human rights adjudication in the country.

Second, in the Commission’s view, the Chamber is a transitional *sui generis* (quasi-international) institution, whose establishment under Annex 6 to the Dayton Peace Agreement was necessary pending the accession of Bosnia and Herzegovina to the Council of Europe and ratification of the European Convention on Human Rights (ECHR). The Chamber should thus cease its operation after the ratification of the ECHR, when Bosnia and Herzegovina will be subject to the control mechanisms of this instrument, namely, the European Court of Human Rights.

The Venice Commission concluded that it is both logical and desirable to opt for the transfer of all competences of the Chamber to the Court in order to entrust all final appeals in human rights cases to a single jurisdictional body at the level of the State. This transfer should take the form of a “merger” of the Human Rights Chamber with the Constitutional Court, ensuring not only the transfer of competence but also an effective transfer of expertise, experience, procedural and other capacities and resources.

As suggested in the above-mentioned proposal, the Venice Commission entrusted a Working Group to examine the modalities of the merger and the possible problems it may raise and draw up a report. Mr Christos Giakoumopoulos, Head of the Constitutional Justice Division of the Venice Commission, and Mr Peter Kempees, member of the Registry of the European Court of Human rights and former Registrar of the Human Rights Chamber of Bosnia and Herzegovina, drew up a report considering the legal and practical issues involved in the proposed merger with the assistance of Mr Anders Månsson, Registrar of the Human Rights Chamber, Mr Nicolas Maziau, Adviser to the President of the Constitutional Court, Mrs Therese Nelson, Executive Officer of the Human Rights Chamber and Mrs Biljana Potparic, Acting Secretary General of the Constitutional Court.

The Working Group concluded that the suggested transfer of competences of the Human Rights Chamber to the Constitutional Court of Bosnia and Herzegovina can in principle be achieved without any diminishing of the protection granted by the Dayton Peace Agreement. Provided that the Constitutional Court follows an evolutive interpretation of its “appellate jurisdiction”, the transfer of competences need not require any amendment to the Constitution in force. However, the enactment of a law on the Constitutional Court and several amendments to the Court’s Rules of procedure would be advisable. The Working Group considered these to be substantial undertakings that must be accomplished prior to the suggested merger.

Moreover, the Working Group found that that the present human and financial resources of the Court are manifestly insufficient to ensure the effective handling of the case load of human rights cases which may be expected after the suggested transfer of competences. What is needed is therefore a merger of both human and financial resources of the institutions together with changes in working methods and training of local legal staff.

At a meeting held in Paris on 24 March 2000, the Venice Commission Rapporteurs, Messrs Jambrek, Malinverni and Matscher, considered the above conclusions of the Working Group's report in the presence of Mrs Michèle Picard, President of the Human Rights Chamber and Prof. Louis Favoreu, judge of the Constitutional Court of Bosnia and Herzegovina, and of representatives of the Chamber's and the Court's Registries, the Office of the High Representative and the OSCE Mission in Bosnia and Herzegovina. Mr William Spencer attended the meeting in his capacity as Observer to the Venice Commission for the United States. The European Commission (DG I) submitted a note commenting on the Working Group's report and conclusions.

The Rapporteurs have considered the conclusions and proposals of the Working Group in the light of the discussions at the meeting in Paris and the other information submitted.

The Rapporteurs find that the Constitution of Bosnia and Herzegovina entrusts the Constitutional Court with tasks which go beyond those usually assigned to such courts. The Constitutional Court is competent to review the constitutionality of laws, has appellate jurisdiction on issues of constitutionality arising out of court judgments, decides upon referral by other courts on the compatibility of norms with the Constitution, with the ECHR or with the laws of Bosnia and Herzegovina. The Constitution thus gives the Constitutional Court the means for being an decisive actor in the shaping of the legal system of Bosnia and Herzegovina as a whole. In the Rapporteurs' view, the Constitutional Court has the power and even the duty to assume alone in due course the responsibility for the judicial protection of human rights and that this implies the termination of the Chamber's operation. The Rapporteurs find it of utmost importance that the termination of the Chamber's operation be very carefully prepared in order to avoid any *lacunae* or diminishing in the judicial protection of individual rights in Bosnia and Herzegovina. This will require a legal framework for the merger operations aiming *inter alia* at securing legal certainty as to the judicial avenues available to potential victims of human rights violations and the prerequisites for their use. It also implies an intensive co-operation between the Court and the Chamber with a view to transferring the Chamber's competences and docket to the Court. Finally, it will require the active participation of the Constitutional Court and the Chamber in the preparation of the necessary legislative measures to be taken by the Parliamentary Assembly of Bosnia and Herzegovina.

The Rapporteurs concluded the following:

1. The Commission's position that it is highly desirable to entrust **all final appeals in human rights cases to a single jurisdictional body** at the level of the State and that this can be achieved by a "merger" of the Human Rights Chamber with the Constitutional Court should be confirmed.

2. The proposed “merger” shall consist of the **termination of the Chamber’s operation** and transfer of its competences (and possibly of its docket), together with its human and financial resources, to the Constitutional Court.
3. The proposed merger should not take place before the **ratification by Bosnia and Herzegovina of the ECHR**, after which Bosnia and Herzegovina will be subject to the control mechanisms of this instrument, namely the European Court of Human Rights.
4. In order to achieve **access to the Constitutional court** under the same conditions as to the Chamber in cases of a lack of effective remedies, the Court’s appellate jurisdiction (Article VI, 3 (b) of the Constitution) could be construed in such a way as to enable the Court to deal not only with human rights issues arising out of a judgment but also with similar issues arising out of the lack of judgment, such as denial of justice. However, as the case-law of the Court does not so far contain any indication of a development in this sense, it is difficult to conclude, at this stage, that the competence of the Chamber to deal with allegations of human rights violations under Article II para 2 of Annex 6 coincides with the “appellate jurisdiction” of the Court. Consequently, if the Court’s jurisprudence does not evolve in the above-mentioned direction in the near future, the Rapporteurs would consider it necessary that Article VI, 3 (b) of the Constitution be amended or preferably authoritatively interpreted by an **interpretative constitutional law** indicating that the Constitutional Court’s “appellate jurisdiction” comprises appeals against judgements as well as appeals challenging the lack of judgements. Such an interpretative law should be adopted before the termination of the Chamber’s jurisdiction and preferably not later than 18 months after the end of the transitional period provided for by the Dayton Agreement, i.e. not later than June 2002.
5. A **constitutional law (on the Constitutional Court) to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina** should regulate the termination of the Chamber’s operation, the appointment of foreign judges (as required by Article VI para 1 (d) of the Constitution) and possibly some aspects of admissibility of appeals to the Constitutional Court (exhaustion of other effective remedies and time-limits for appeals) as well as aspects of the Court’s relations with other State and entity institutions, such as
 - the obligation to abide by the Constitutional Court’s orders on provisional measures;
 - individual (criminal or disciplinary) liability for non compliance with the Court’s orders and judgements;
 - co-operation with other national authorities, including the Prosecutor of the Court of Bosnia and Herzegovina and the Ombudsman of Bosnia and Herzegovina;
 - the responsibility of Bosnia and Herzegovina to ensure the Court’s adequate funding independence.
6. The **Constitutional Court’s Rules of Procedure** should provide for the possibility of dealing with some of the cases in panels rather than in plenary in order to speed up proceedings; the possibility of a panel referring the case to the plenary where important issues are raised should be provided for. The possibility of appealing a panel judgement to the Plenary should be excluded. Moreover the institution of one or more committees, composed of 3 or 4 members empowered to dismiss (by unanimous decision) cases that are clearly inadmissible or do not have any prospect of success should be provided for. The committees’ decisions should not be subject to appeal. It would be desirable that the Court’s Rules of Procedure include rules for dealing with some cases in priority and rules on *amicus curiae* submissions.

7. The law on the termination of the Chamber's operation shall also provide for the **transfer of human, financial and other resources from the Chamber to the Court**. The idea (in the Working Group's report) that some members of the Chamber should be appointed as members of the Constitutional Court shall be maintained as this will ensure continuity in working methods and case-law.
8. Until ratification of ECHR and adoption of necessary law and rules as indicated above the two jurisdictions should continue their **parallel operation** despite the "forum shopping" problem.