

Strasbourg, 23 July 1996  
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Restricted  
CDL (96) 47  
Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

D R A F T

**Opinion  
on the constitutional situation in Bosnia and Herzegovina  
with particular regard to  
human rights protection mechanisms**

prepared by  
the Commission's Working Group  
composed of  
Messrs JAMBREK, LA PERGOLA, MALINVERNI, MATSCHER  
and RUSSELL

## **1. INTRODUCTION**

*By letter of 16 February 1996 the President of the Parliamentary Assembly's Commission on Legal Affairs and Human Rights of the Council of Europe requested the Venice Commission to give an opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms.*

*The Commission held a meeting with representatives of Bosnia and Herzegovina and officials of the Office of the High Representative on 16 May in Venice. At its 27th Plenary meeting it entrusted a working Group composed of Messrs Jambrek, Malinverni, Matscher and Russell with the task of drawing up, in co-operation with representatives of all interested parties including the Office of the High Representative, a report on the Human Rights Protection mechanisms in Bosnia and Herzegovina. The Working Group held a meeting in Strasbourg on 21 May 1996 to make a preliminary examination of the topic. On 28-31 May 1996, the Secretariat of the Commission met officials from Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska, the Office of the High Representative and the Commission of Human Rights in Sarajevo and reported to the members of the Working Party. In reply to a request by the Working Group, the Republika Srpska and the Federal Ministry of Justice submitted in writing information on the human rights protection systems in the two Entities. The Office of the Human Rights Ombudsperson in Bosnia and Herzegovina submitted information on its activities and on the human rights protection system in Bosnia and Herzegovina.*

*The Working Group held a further meeting, presided by Mr. La Pergola, with representatives of Bosnia and Herzegovina, officials from the Office of the High Representative and representatives of bodies acting in the field of Human Rights in Bosnia and Herzegovina, in Paris on 21-22 June 1996. The list of participants is annexed to the present report.*

## **2. HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA - GENERAL APPROACH**

In accordance with the Dayton Agreement (Annex 4, Constitution of Bosnia and Herzegovina) the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina" (hereafter "BH") shall continue its legal existence under international law as a State, with its internal structure modified and with its presently recognised borders. It shall consist of the two entities, the Federation of Bosnia and Herzegovina (hereafter "FBH") and the Republika Srpska (hereafter "RS").

Human Rights - along with the right to free elections and freedom of movement of persons, goods, services and capital throughout the country (Article I, paras 2 and 4) - are at the centre of the Dayton Agreement. Article II of the Constitution of BH provides that "Bosnia and Herzegovina and the two entities shall provide the highest level of internationally recognised human rights and fundamental freedoms". In particular, "the Rights and freedoms set forth in the European Convention of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law". Particular

care has been taken in the Constitution in order to stress the principle of non discrimination and the rights of refugees and displaced persons to freely return to their homes and to have restored to them property of which they were deprived in the course of hostilities since 1991 (Article II, paras 4 and 5).

All institutions in Bosnia and Herzegovina and "all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and freedoms" referred to in the Constitution (Article II, para 6).

In these circumstances it is quite natural that each legal order in Bosnia and Herzegovina, i.e. the legal order of BH, the legal order of the FBH, possibly also the legal order of the cantons in the FBH, and the legal order of the RS, and the more or less provisional institutions created by the international community within the legal order of Bosnia and Herzegovina, all provide for human rights monitoring organs.

The Working Group finds 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, in particular the specialised bodies provided for in Annex 6 to the Dayton Agreement and in the Constitution of the FBH as well as the Supreme and Constitutional courts.

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 would give contradictory answers to the same legal problem. Such situations, which are in general undesirable, could in the present circumstances of this region, affect the very essence of the constitutional order and thus the State as such.

The Working Group has thus examined the competence of the most important human rights protection bodies in the legal orders of BH, FBH and RS (Chapter 3) in order to define the areas of possible conflicts of competence ; it has also made some proposals which may facilitate the resolution of these conflicts and the achievement of greater effectiveness in the human rights machinery (Chapter 4).

### **3. BODIES ACTING IN THE FIELD OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA**

#### **3.1. Bodies created under the Dayton Agreement**

##### **3.1.1. The Constitutional Court**

*Annex 4, Article VI*

The Constitutional Court of BH, which will be only established after the elections, is composed of nine members; four members are from the FBH, two from the RS and three are non-citizens of Bosnia and Herzegovina or of neighbouring States, selected by the President of the European Court of Human Rights.

The Constitutional Court has jurisdiction to decide any dispute that arises under the Constitution between the Entities and the central Government and between the Entities themselves or between institutions of Bosnia and Herzegovina including the question of compatibility of an Entity's Constitution with the Constitution of Bosnia and Herzegovina. (Article VI, para. 3 (a)).

The Court is to have jurisdiction over issues referred by any court in the country, 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 appellate jurisdiction over constitutionality issues arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI para 3 (b)). This may of course include human rights disputes (cf. Article II).

### **3.1.2. The Commission on Human Rights**

*Article II, para 1 of the Dayton Constitution; Annex 6 to the Dayton Agreement, Chapter Two, Part A*

The Commission consists of two bodies: the Office of the Ombudsman and the Human Rights Chamber. They are jointly in charge of examining alleged or apparent violations of human rights as guaranteed in the European Convention for the Protection of Human rights and Fundamental Freedoms and its Protocols, but also discrimination as regards the enjoyment of fundamental rights guaranteed in other specified human rights instruments. The human rights protection mechanism is scheduled to last for five years after the entry into force of the Dayton Agreement, (14 December 1995). 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 the Parties agree otherwise, in which case the Commission will continue its operation.

The organisation of the Commission on Human Rights has some similarities to that of the Strasbourg mechanism, the Human Rights Ombudsman being equivalent to the European Commission of Human Rights and the Human Rights Chamber mirroring the European Court of Human Rights.

Although Article VIII para 1 seems to allow for the introduction of applications directly to the Human Rights Chamber, in principle all cases shall be brought before the Ombudsman (Article V, para 1). The Ombudsman may refer to the Human Rights Chamber cases where he/she finds a breach of human rights.

The competence of the Human Rights Commission extends to all acts or decisions occurring after 14 December 1995 (date of the signature of the Dayton Agreement).

**a. The Human Rights Ombudsman**  
*Annex 6, Part B (Articles IV to VI)*

Ambassador Gret Haller, Switzerland, has been appointed for a non renewable term of five years by the Organisation for Security and Cooperation in Europe (OSCE). The Office of the Ombudsman is an independent agency.

The Ombudsman has the power to investigate alleged or apparent violations of human rights. Upon receipt of a complaint he/she may communicate it to the respondent party and request its observations. After having received the applicant's observations in reply, he/she may invite the parties to reach a friendly settlement. If no settlement is achieved, the Ombudsman draws up a report on whether there has been a violation of human rights in the case and, where such a violation has occurred, he/she can make recommendations for just satisfaction. The respondent party has to reply on how it shall comply with the Ombudsman's conclusions. If the respondent party does not reply or refuses to comply with the conclusions, the Ombudsman shall publish the report and forward it to the High Representative and the Presidency. He/she may also refer the case to the Human Rights Chamber.

For his/her investigation, the Ombudsman must have access to all official documents, including confidential ones.

The Ombudsman may also investigate on his/her own initiative (Annex 6, Article V para 2). On 2 May 1995, the Ombudsman decided ex officio to investigate a case concerning the right to liberty of a person detained in the RS (Decision of 3 May 1996, Case 14/96).

The Ombudsman has some discretionary power as to the priority in which he/she should address the applications. Although not expressly required to do so, he/she takes into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

From 28 March to 7 June 1996, more than 110 complaints were lodged with the Office of the Ombudsman, 32 of which were registered as formal individual applications (12 against Bosnia and Herzegovina, 4 against the Federation, 8 against both Bosnia and Herzegovina and the Federation and 8 against the Republika Srpska). The applications introduced before the Office mostly concern property issues and the right to respect for the home. Some of them were "communicated" to the governments of the Entities for observations.

**b. The Human Rights Chamber**  
*Annex 6, Part C, Articles VII to XIII*

The Human Rights Chamber is composed of fourteen members; four are appointed by the Federation of Bosnia and Herzegovina, two by the Republika Srpska and the remaining eight by the Committee of Ministers of the Council of Europe. The members appointed by the Committee of Ministers must not be citizens of Bosnia and Herzegovina or any neighbouring State. Mr Germer has been nominated President of the Chamber.

The Chamber has jurisdiction to receive, by referral from the Ombudsman on behalf of the

applicant, applications concerning violations of human rights. It has to decide which applications to accept and in what priority to address them according to whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

The decisions of the Chamber are final and binding.

The Chamber may end a case by friendly settlement.

The Chamber sits in Panels of 7 members. When an application is decided by a Panel, the full Chamber may decide upon motion of a party to the proceedings or of the Ombudsman to review the decision.

The Chamber adopted in June 1996 its Rules of Procedure. One case (against the Republika Srpska) was introduced before the Chamber by the Ombudsperson.

### **3.1.3. The Commission for displaced persons and refugees (renamed "Commission for real property claims")**

*Article II para 5 of the Dayton Constitution; Annex 7 to the Dayton Agreement, Articles VII to XV*

This Commission has nine members, four of which are appointed by the Federation of Bosnia and Herzegovina, two for a term of three years and two for a term of four years ; two other members are appointed by the Republika Srpska, one for three years and the other for four years. The remaining members are to be appointed by the President of the European Court of Human Rights each for a term of five years. The Chairman is to be designated among the latter by the President of the said Court. Ms Saulle was appointed President. The members of the Commission may be reappointed.

The Commission's mandate is to receive and decide upon any claims for real property in Bosnia and Herzegovina, where, since 1 April 1992, the property has not voluntarily been sold or otherwise transferred. Claims may be for the return of property or for just compensation in lieu of return.

The Commission is empowered to "effect any transaction necessary to transfer or assign title, mortgage, lease or otherwise dispose of property with respect to which a particular claim is made, or which is determined to be abandoned". It may lawfully sell, mortgage or lease real property to any resident or citizen of Bosnia and Herzegovina, where the lawful owner has sought and received compensation in lieu of return, or where the property is determined to be abandoned according to local law.

The Commission's decisions are final, and any title, deed, mortgage, or other legal instrument created or awarded by the Commission must be recognised as lawful in the entire territory of Bosnia and Herzegovina.

### **3.1.4. The Election Appeals Sub-Commission**

*created by the Provisional Election Commission (Annex 3 to the Dayton Agreement)*

This body was created by the Provisional Election Commission. It will adjudicate upon

complaints regarding violations of provisions on elections in the Dayton Agreement and in the Rules adopted by the Provisional Election Commission, concerning additions or deletions in the provisional voters' list; standards of professional conduct of media and journalists; obligations of governments as regards media; conduct of political parties and candidates; registration of political parties and independent candidates; or polling and counting procedures.

The Sub-Commission may prohibit a political party or an independent candidate from running in the elections, remove candidates from the list and impose pecuniary penalties. The Sub-Commission's decisions shall be binding and may not be appealed.

### **3.1.5. Other bodies**

#### **a. The International Police Task Force**

*Annex 11 to the Dayton Agreement, Article VI*

The Agreement on the international Police Task Force stipulates that when IPTF personnel learn of credible information concerning violations of internationally recognised human rights and fundamental freedoms, they must provide the information to the Human Rights Commission, to the International Tribunal for the Former Yugoslavia or to other appropriate organisations. IPTF is not a judicial or quasi-judicial body

#### **b. The Office of the High Representative**

*Annex 10 to the Dayton Agreement*

The Office of the High Representative is entrusted with the task of establishing political and constitutional institutions in Bosnia and Herzegovina and the promotion and respect of human rights. The High Representative's (Mr Carl Bildt) mandate is to coordinate the activities of the civilian organisations in order to ensure the efficient implementation of the civilian aspects of the agreement. He is equally in charge of monitoring the activities of the Human Rights Task Force.

#### **c. The Human Rights Task Force (HRTF)**

*Article XIII of the Agreement on Human Rights contained in Annex 6 to the Peace Agreement for Bosnia and Herzegovina and paragraph 33 of the conclusions of the London Peace Implementation Conference of 8-9 December 1995*

Chaired by the Office of the High Representative, the HRTF operates in Sarajevo and throughout the territory of Bosnia and Herzegovina. The force operates in accordance with the provisions of Article XIII of the Agreement on Human Rights contained in Annex 6 to the Peace Agreement for Bosnia and Herzegovina and paragraph 33 of the conclusions of the London Peace Implementation Conference of 8-9 December 1995.

### **3.2. The Constitution of the Federation of Bosnia and Herzegovina (proposed in the Washington Agreement of February 1994)**

#### **3.2.1. The Constitutional Court**

*Chapter IV, Section C, Article 9-13*

The Constitutional Court has nine judges, six from FBH (2 Bosniacs, 2 Croats and two "others", in the present composition 2 Serbs) and three non-nationals of Bosnia and Herzegovina (Judge Ajibola (Nigeria), Judge El Khani (Syria) and judge Rigaux (Belgium)), designated by the President of the International Court of Justice<sup>1</sup>. The Court is presided over by judge Ibrahimagic. The Constitutional Court was created in 1995 but it only became operational in January 1996.

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, the Human Rights Court or a cantonal court have an obligation to submit any doubt as to whether an applicable law is in accord with the Constitution to the Constitutional Court. Its decisions are final and binding.

The Constitutional Court has not been seized with any case since its creation.

**3.2.2. The Supreme Court**

*Chapter IV, Section C, Article 14-17*

Composed of nine judges, the Supreme Court is the highest court of appeals of the FBH. It can receive appeals from cantonal courts in respect of matters involving questions concerning the Constitution, laws or regulations of the Federation and concerning other matters as provided for in Federation legislation, except those within the jurisdiction of the Constitutional Court or of the Human Rights Court (this is expressly provided by Article 15 para. 1 in fine). It shall also have such original jurisdiction as is provided for by Federation legislation. Judgments are final and binding.

**3.2.3. The Federation Ombudsmen**

*Chapter II, Article 1-9*

Three Ombudsmen are appointed for the same terms of service as those of the President and of the judges of the Supreme Court ; one Bosnian, one Croat and one "other", presently a Serb. Each of the Ombudsmen shall, with the approval of the President, appoint one or more Deputies. They shall in particular seek to appoint Deputies in Municipalities with populations that do not reflect the composition of the Canton as a whole.

The Office of the Ombudsmen is an independent agency. The Ombudsmen have the power to examine the activities of any institution of the Federation, Canton, or Municipality as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including

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<sup>1</sup> *This is a transitional arrangement. After five years all members of the Constitutional Court should be nationals of FBH.*

by accomplishing ethnic cleansing or preserving its effects. In so doing, the Ombudsman must have access to all official documents, including confidential ones. An Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings, including any in the Human Rights Court. Each Ombudsman shall present an annual report to the Prime Minister and the Deputy Prime Minister of the Federation, to each cantonal President and to the OSCE. In addition, he/she may at any time present special reports and oblige domestic institutions to reply. The Ombudsman may initiate proceedings before the Human Rights Court.

The first Ombudsmen of FBH (Mrs Jovanovic, Mr Muhibic and Mr Raguz) were appointed by the OSCE in 1994. They started working in January 1995. Their report of activities for 1995 was issued in February 1996 (see CDL (96) 38). It is clear from the report that most of the cases examined by the Ombudsmen relate to the protection of the right to property (numerous cases of the so-called "abandoned apartments") as well as to freedom of movement, missing persons and the right to life.

The Ombudsmen addressed the authorities in FBH on several occasions requesting that measures be adopted. The U.S. State Department Report on Human Rights indicates in this respect that "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."

### **3.2.4. The Human Rights Court**

*Chapter IV, Section C, Article 18-23*

This Court has 7 members: 3 Judges from BH (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 Resolution (93) 6<sup>2</sup>.

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 Human Rights Court has jurisdiction over cases commenced after 1 January 1991.

The decision of the Court shall be final and binding.

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<sup>2</sup> *This is a transitional arrangement (see Chapter IX, Article 9 of the Constitution).*

The Federation has appointed 3 judges of the Human Rights Court and has requested the Committee of Ministers of the Council of Europe to appoint the remaining judges.

### **3.2.5. The Federation Implementation Council**

In May 1996 the FBH established this body, which is composed of the President and Vice-President of the FBH, the Principal Deputy of the High Representative and two other representatives of the international community. Its task is to overcome problems created by officials at the municipal, cantonal or federal level in the implementation of the Dayton Agreement. The Prime-Minister of FBH, the Ombudsman of BH, any of the three Ombudsmen in the FBH and any member of the Council may refer to this body cases whereby it is alleged that any person holding public office has violated obligations under the Constitution or the law, has engaged in substantial violations of international human rights law or has obstructed co-operation with the International Criminal Tribunal for the former Yugoslavia. The Council has the power to remove the person concerned from his/her functions.

### **3.3. The Constitution of the Republika Srpska**

The human rights protection system established under the Constitution of the Republika Srpska is based on the ordinary judiciary and the Constitutional Court.

#### **3.3.1. The Constitutional Court**

Article 120 - Article 125

The Constitutional Court has 7 members with a tenure of 8 years, after which they cannot be re-elected. The President of the Constitutional Court is elected by the National Assembly for a three-year term, after which he cannot be re-elected. Prof. G. Miljanovic is the current President.

The Constitutional Court shall 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. In practice, the majority of cases brought before the Constitutional court have their origin in individual initiatives.

Proceedings against legislative or other provisions can be brought within a period of one year from the entry into force of the challenged provisions.

If the Constitutional Court finds that a law or a regulation is not in accordance with the Constitution, this law or regulation shall become void at the date of the Court's judgment.

Article 124 of the Constitution states that the decisions of the Constitutional Court are universally binding and final, but there is no specification as to the scope of the binding character of the decisions of the Court. Under the Dayton Constitution, it can reasonably be argued that the decisions of this Court (as of any other court) are liable to be challenged as to their constitutionality before the Constitutional Court of BH, which has appellate jurisdiction in respect of decisions of the Constitutional Court.

The Constitution of the Republika Srpska contains no provision as to the place of international human rights instruments in the hierarchy of norms. Normally, the international human rights instruments listed in the Dayton Agreement, including the ECHR, should also apply in the Republika Srpska (Article II paras 1 and 6 of the Constitution of BH : 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). However, the Constitution of RS does not allow the Constitutional Court to control the compatibility of laws with these international instruments.

The Constitutional Court has not developed any particular human rights case-law. In its judgments it takes into account the jurisprudence of the Constitutional Courts of Yugoslavia and of the former federated Republics.

### **3.3.2. The Supreme Court and the other courts of law**

Article 126 - Article 132

The Supreme Court of the Republic has functioned since 1992 with an interruption of some months. Being the highest court of law, it provides for the unique and universal enforcement of the law. The court protects the established rights and interests of all persons and ensures legality. It protects human rights and freedoms *in concreto*, within the framework of civil or criminal cases brought before it. A special chamber of the Supreme Court deals with administrative actions.

The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law.

#### **4. AREAS OF CONFLICTS OF COMPETENCE AND PROPOSALS FOR THEIR SOLUTION**

##### **4.1. Preliminary remarks**

The above description of the human rights protection machinery calls for two preliminary remarks:

First, there exists in the legal system of BH and FBH a multitude of bodies which may be competent to deal with human rights violations either in abstracto or in concreto, by means of individual petitions. This impressive machinery is not yet fully operational since several of these bodies have not yet been set up. However, when these bodies are established a risk of overlapping competences will certainly arise, and it is therefore necessary to identify as a matter of urgency such procedural rules as will help avoid the risk of contradictory decisions or judgments. This is all the more important since contradictory decisions may affect the credibility of the institutions, with detrimental consequences for the peace and integration process.

Secondly, the role of the bodies established under the Dayton Agreement Constitution will largely depend on the effectiveness of the protection granted by the bodies of the Entities. As long as an Entity's law provides for complete and effective protection, the Dayton bodies can only have a mere supervisory task ; this task could in principle be carried out by a single instance judicial body. On the contrary, where an Entity's system offers less opportunities for judicial protection of human rights, the role of the Dayton bodies should be much more active ; this may require a more complex intervention, with two degrees of jurisdiction combined with procedures to facilitate a friendly settlement of the dispute. In this respect, one may observe that the judicial system of the RS contrasts with the complexity of the system of FBH. A complex and developed system of human rights protection at the level of BH will certainly contribute to improving the protection afforded in the RS, but it may render too elaborate and lengthy - and consequently less effective - the protection afforded as regards FBH.

These remarks have been borne in mind throughout the deliberations of the Working Group which has identified the following areas of possible conflict of competence.

## **4.2. As regards the Entities (FBH and RS)**

### **4.2.1. In the Republika Srpska**

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 will be 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 cannot be seized with individual applications ; it 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.

The system created thus has similarities with certain continental legal systems where it is for the courts and in particular for the Supreme Courts to deal with human rights cases and where no individual application can be brought before the Constitutional Court (Bulgaria, France, Greece, Romania).

However, having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established, 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.

### **4.2.2. In the Federation of Bosnia and Herzegovina**

#### *a. General remarks on the simultaneous operation of the Supreme Court, the Constitutional Court and the Human Rights Court*

One of the particularities of the judicial system of the Federation is that it has three supreme judicial bodies, namely the Supreme Court, the Constitutional Court and the Court of Human Rights. A number of provisions in the Constitution seek to define the respective competences of these Courts in order to avoid overlapping.

The Working Group's observations aim at making the distinction between these courts' respective competences clearer. Admittedly, this is a difficult exercise and one of the difficulties raised is that the main human rights protection body, the Court of Human Rights, has not been established.

It is, at the same time, a short term exercise, because, in the Rapporteurs' view, this distribution of competences between three high courts is only justified by the particular will of the drafters of the Constitution to create a body with the exclusive task of monitoring respect for human rights in FBH.

In the long run, one should examine whether the tasks actually entrusted to the Human Rights Court could not be transferred to the Constitutional Court, whose competence could then be extended in order to comprise the examination of individual applications alleging human rights violations. This would bring the legal system of the FBH into line with other European legal systems where, by means of individual applications (Individualbeschwerde), human rights issues are dealt with by the Constitutional Court. Moreover, such a development would be in line with the tendency in most European States to entrust Constitutional Courts with the task of human rights protection.<sup>3</sup>

*b) Relations between the Human Rights Court and the Supreme Court*

Since the Constitutional Court has no appellate jurisdiction but can only be seized by other courts or State institutions, appeals from the cantonal courts can be made in theory either to the Supreme Court or to the Human Rights Court : allegations as to non-observance of domestic law will be introduced in an appeal to the Supreme Court, while violations of human rights provisions will be introduced to the Human Rights Court. However, in practice, it will be difficult to distinguish human rights cases from normal domestic litigation. For example, a dispute as to the custody of children in divorce proceedings will probably be at the same time a litigation under civil law (family law) and under human rights law (right to respect for family life). It is therefore necessary to determine which court will have the final say in the dispute.

In this respect, Chapter IV C, Article 22, has a particular importance. This provides that the Supreme Court may at the request of any party to an appeal or on its own motion address to the Human Rights Court a question arising out of the appeal which is within the competence of the Human Rights Court. In this case the response of the Human Rights Court will be binding for the Supreme Court.

Moreover, an application can be lodged with the Human Rights Court only after other remedies have been exhausted (Chapter IV C, Article 20).

This leads to the following conclusions:

- appeals from cantonal courts in civil, criminal or administrative cases will be introduced, as a general rule, before the Supreme Court ;
- the Supreme Court shall ask the Human Rights Court for a binding answer on human rights questions raised in the appeal ;
- appeals from the Supreme Court can be lodged with the Human Rights Court on human rights points only.

*c) Relations between the Human Rights Court and the Constitutional Court*

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<sup>3</sup> See e.g. the Proceedings of the Seminar "The protection of fundamental rights by the Constitutional Court", Brioni, Croatia, 23-25 September 1995, Council of Europe, Science and Technique of Democracy No 15.

The delimitation of the respective competences of the Constitutional Court and the Human Rights Court may also create difficulties. The Constitutional Court has competence for constitutional matters : whenever a question of constitutionality is raised in proceedings before the Supreme Court or the Human Rights Court, these courts will have to stay the proceedings and submit the question to the Constitutional Court. The latter's judgment will be binding for the Supreme Court and the Human Rights Court (Chapter IV C, Articles 10 (3), 11 and 12). However, the competence of the Constitutional Court does not extend to human rights issues. For those, the Constitutional Court may refer to the Human Rights Court, whose judgment is binding on the Constitutional Court (Chapter IV C, Article 22). Of course, in practice, the distinction between human rights questions and constitutional questions will be again difficult. For example, a question concerning the independence of the judiciary will be a question of constitutional law but it also refers to the individual right to fair proceedings before an independent and impartial tribunal.

One of the elements that the courts could take into consideration when deciding these matters, either in their Rules of Procedure or in casu, is the fact that the drafters of the Constitution of FBH clearly intended to give the Human Rights Court general and final jurisdiction over all cases which present a human rights aspect in the legal order of FBH. For this reason, Article 22 must be interpreted in such a way as to give a presumption of competence to the Human Rights Court.

In other words, when a question presents both constitutional and human rights aspects, the Constitutional Court should, in accordance with Chapter IV C, Article 22 of the Constitution, refer the question to the Human Rights Court whose response will be binding on it.

d) *The Federation Ombudsmen*

The Venice Commission had already described in 1994 the institution of the Federation Ombudsmen as a particularly positive feature<sup>4</sup>. The activities of the Ombudsmen in 1995 confirm this opinion.

The Commission had expressed the view that the Ombudsmen's power to make recommendations to the administration should be expressly provided and that some clarification of the administration's obligations in respect of the Ombudsmen recommendation would have been desirable. The Commission had indicated that the text of the Constitution "allows for a wide range of different practices by both the Ombudsmen and the administration". One year later, the lacunae indicated by the Commission seem to have weakened the effectiveness of the Ombudsmen's work<sup>5</sup>.

An institution which is likely to strengthen the Ombudsmen's position is the establishment of

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<sup>4</sup> See the opinion of the Venice Commission on certain aspects of the constitutional situation in Bosnia-Herzegovina, *Annual Report of Activities for 1994*, pp. 17-20.

<sup>5</sup> See the *Ombudsmen Annual Report for 1995*.

the Federation Implementation Council, whose creation was recently decided. However, this body (whose functioning should be very carefully (re)examined in order to make sure that it meets the requirements of Article 6 of the ECHR) should be regarded as very provisional and even exceptional. Therefore, other solutions should also be explored.

In accordance with Chapter II B, Article 6 of the Constitution of FBH, the Ombudsmen are entitled to initiate and to intervene in proceedings before all courts, including the Human Rights Court. In its opinion, the Commission had called for prudence in the use of this provision, considering the Ombudsmen's unlimited power to intervene in pending proceedings as a threat to the principle of separation of powers and equality of arms. Having regard to the solutions adopted in the Dayton Constitution (i.e. the integration of the Office of the Ombudsman with that of the Human Rights Chamber under the umbrella of the "Commission of Human Rights"), one should examine whether analogous solutions could apply in the FBH. In fact, the possibility for the Ombudsmen to refer a case to the Human Rights Court (especially when the administration refuses to take any steps to abide by the Ombudsmen's recommendations) will undoubtedly strengthen the Ombudsmen's position. However, special care should be taken in order to clearly define the links between the Ombudsmen and the Human Rights Court and to safeguard the principle of separation of powers and equality of arms.

*e) Final Remarks as regards the Human Rights Court in the legal order of FBH*

It is clear from the above that the Constitution of FBH reserves a particularly important role as regards the protection of human rights to the Human Rights Court, a body which has not yet been established.

Action should be taken in order to ensure that this Court be operational as soon as possible.

However, for the reasons already stated above (see 4.2.2.a) but also because the competence of this Court could overlap with that of the Human Rights Commission established under the Dayton Agreement (see below 4.3.2), it should be envisaged at a later stage that this Court be merged with the Constitutional Court of the Federation.

### **4.3. As regards relations between the institutions of the Entities and the institutions of BH**

#### **4.3.1. The simultaneous existence of three Constitutional Courts**

In general, 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 FBH is competent for the examination of constitutional issues under the Constitution of FBH, while the Constitutional Court of RS shall deal with constitutional questions under the Constitution of RS. The Constitutional Court of BH is competent inter alia to decide the question of compatibility of an Entity's Constitution with the Constitution of BH (Article VI, para 3 (a)), which takes precedence over the Constitutions of the Entities.

The provisions in the Constitutions of the Entities providing that judgments 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 BH".

#### **4.3.2. The simultaneous functioning of two Human Rights Courts**

The simultaneous functioning of two Human Rights Courts raises particular problems.

Unlike to the three Constitutional Courts which are requested to make their decisions on the basis of different legal instruments, the Human Rights Court of FBH and the Commission of Human Rights of BH shall apply mainly the same basic human rights instruments and above all the European Convention of Human Rights and the case-law of its organs. In this way, the Commission of Human Rights of BH will actually have appellate jurisdiction over cases decide by the Human Rights Court of FBH.

This creates the following problem:

The exhaustion of the domestic remedies available to a citizen of BH becomes extremely lengthy. It involves the successive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court) and then of the Ombudsman of BH 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 of Human Rights 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 partly composed of international judges) might affect the authority of those Courts.

One could envisage a possible solution to these problems whereby the Constitution of FBH is amended in such a way as to do away with the Court of Human Rights and to allow the Federation Ombudsmen to refer cases directly to the Human Rights Commission of BH. One could even argue that the Washington Agreement, which includes the Constitution of FBH and which foresees the creation of the Human Rights Court, has been politically (if not legally) superseded by the Dayton Agreement.

However, this solution disregards the extremely important role entrusted to the Human Rights Court in the legal order of FBH at the present time.

It also disregards the fact that *ratione materiae* and *ratione temporis*, the competences of the Human Rights Chamber of FBH and that of the Commission of Human Rights of BH are not exactly the same. The Human Rights Commission may only deal with allegations of violations of the European Convention of Human Rights ; it can also deal with alleged discrimination as regards the enjoyment of the rights guaranteed by the other international instruments listed in the Appendix to Annex 6. The Human Rights Court, on the contrary, shall deal in addition to the above with alleged violations of any right (not only discrimination) guaranteed in the

international instruments listed in the Annex to the Constitution of FBH. Moreover, the competence *ratione temporis* of the Commission of Human Rights of BH starts on 14 December 1995 ; the *ratione temporis* competence of the Court of Human Rights of FBH starts on 1 January 1991 (Chapter IV C, Article 19 of the Constitution of FBH).

In view of the above, the Working Group finds that despite the obvious risk of prolonging the process of exhaustion of domestic remedies, the establishment of the Human Rights Court of FBH is an important element in the consolidation of the legal order of the FBH.

Of course, as suggested above (4.2.2.e), the merger of the Human Rights Court with the Constitutional Court of FBH should be envisaged at a later stage.

#### **4.4. As regards the Dayton Institutions**

##### **4.4.1. Human Rights Commission and other institutions created under the Annexes to the Dayton Agreement**

###### **a. Human Rights Commission and the Commission for real property claims**

The Commission for real property claims receives and decides upon any claims for real property in Bosnia and Herzegovina, where, since 1 April 1992, the property has not voluntarily been sold or otherwise transferred. Claims may be for the return of property or for just compensation in lieu of return. Its decisions are final and any title, deed, mortgage, or other legal instrument created or awarded by the Commission must be recognised as lawful in the entire territory of Bosnia and Herzegovina.

There may be a conflict of competence between the Human Rights Commission and the Commission for real property claims when the same case is presented to both bodies as a real property case and simultaneously as a human rights case (right to property, right of access to property, right to respect for one's home, right to free movement within one's State). In fact, several applications concerning property issues have been lodged with the Office of the Ombudsperson.

In order to avoid conflict, it is suggested that all applications relating to real property be dealt with exclusively by the Commission on real property claims. Remaining property rights issues should be dealt with by the Commission on Human Rights.

###### **b. Human Rights Commission and the Election Appeals Sub-Commission**

A similar conflict of competence may occur between the Commission on Human Rights and the Election Appeals Sub-Commission. For instance, a case concerning access to media during the electoral campaign may be simultaneously brought before both organs as an electoral law case and as a case concerning the right to free and fair elections for the legislature (Article 3 of Protocol 1 ECHR) or a case of non-discrimination as regards freedom of speech (Articles 10 and 14 ECHR).

A similar solution can be suggested : in order to avoid conflict, all applications relating to elections should be dealt with exclusively by the Election Appeals Sub-Commission.

The solutions proposed above are compatible with the Dayton Agreement which, by establishing specialised institutions to deal with real property and elections issues, provided that these institutions' decisions will be final and binding.

#### **4.4.2. Human Rights Commission and Constitutional Court**

Among other competences, the Constitutional Court is to have jurisdiction over issues referred by any court in the country, 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 appellate jurisdiction over constitutionality issues arising out of a judgment 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 on Human Rights - and in particular the Human Rights Chamber - has jurisdiction to receive applications concerning violations of human rights. 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 competences 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.

Of course, having regard to the difference in nature of the two institutions, one may assume that their decisions would have different effects. Thus, the decisions of the Human Rights Chamber will simply establish that a violation of human rights has occurred, while the judgments of the Constitutional Court may directly result in the abolition of legislative provisions and the annulment of court judgments or of administrative decisions. But in practice this difference does not resolve the problem of overlapping competence. This is all the more so since the Human Rights Chamber shall in its decisions "address what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non pecuniary injuries) and provisional measures" (Article XI, para 1 (b) of Annex 6).

One suggestion for avoiding such overlapping would be to place one of these two judicial bodies in a hierarchically superior position to the other, allowing appeals from one jurisdiction to the other.

Indeed, it could be assumed that the Commission on Human Rights should only be involved after the Constitutional Court. Appeal to the latter would then be regarded as a "domestic remedy" to be exhausted before applying to the Commission of Human Rights. An argument in favour of this solution would be the particular international character of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina). In this perspective the Human Rights Commission would

appear as a kind of international body integrated into the legal order of Bosnia and Herzegovina for a transitional period, namely until the effective integration of this State and until its accession to the Council of Europe, the ratification of the European Convention on Human Rights and the recognition of the human rights protection mechanism of the Strasbourg organs<sup>6</sup>. The provisions on jurisdiction of the Human Rights Commission do not exclude appeals from the Constitutional Court but rather underline this quasi-international character of the mechanism established under Annex 6: Article 2 of Annex 6 indicates 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 a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement also.

The opposite solution, namely to allow appeals from the Human Rights Chamber to the Constitutional Court, could also be envisaged. Since the Human Rights Chamber is somehow integrated in the domestic legal order of Bosnia and Herzegovina, allowing such an appeal would be in accordance with the constitutional provision empowering the Constitutional Court to deal with constitutional appeals against judgments "of any other court in Bosnia and Herzegovina". It would also be consistent with the role normally attributed to Constitutional Courts in modern European constitutional systems.

However, both solutions presented above disregard the fact that the decisions of both the Constitutional Court and the Human Rights Chamber have to be regarded as "final and binding" under the Dayton Agreement. In these circumstances, a decision of the Human Rights Chamber finding a violation of the European Convention on Human Rights cannot be reviewed by the Constitutional Court and vice-versa. Moreover, the above solutions are not entirely satisfactory since they add a level of jurisdiction to the already long process of exhaustion of domestic remedies.

Having regard to the fact that the Human Rights Commission is a provisional institution designed to last 5 years, and taking into account the need to ensure legal safety as to respect for human rights within a relatively short time<sup>7</sup> by avoiding prolongation of human rights litigation, a third solution could be envisaged: the jurisdiction of either court would not extend to matters already dealt with by the other. Potential applicants will thus have the choice between appealing to the Constitutional Court of BH and lodging a complaint with the Human Rights Commission. A case dealt with by any of these institutions should no longer be subject to review by any other court in Bosnia and Herzegovina. The risk of the two institutions producing diverging case-law could be reduced if human rights litigation were attributed, as a matter of principle, to the Human Rights Commission as long as it is in operation, through the adoption of a system of

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<sup>6</sup> *The idea of a transitional international human rights protection mechanism is not new. It was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe and may be regarded as being at the origin of the Provisional Human Rights Court provided for in the Croatian Constitutional Law on the protection of human rights and rights of national minorities.*

<sup>7</sup> *This need is acknowledged in Annex 7. The Annex 7 Commission deals with real property claims in first and last instance; its decisions are final and binding.*

appropriate legal information, consultation and assistance dispatched to potential applicants. This solution also respects the spirit of the Dayton Agreement which apparently aimed at creating during the transitional period a number of specialised institutions giving final and binding judgments on matters within their competence (Human Rights Commission, Commission on Real Property Claims, Electoral Appeals Sub-Commission). During this transitional period one could reasonably expect the Constitutional Court to be released of the burden of cases already dealt with by these bodies.

Of course, all the above solutions are not entirely satisfactory and can only be implemented as transitional arrangements. With the end of the transitional period, i.e. when the specialised institutions will cease their operation, the appeal to the Constitutional Court will be the only and final remedy in human rights litigation in BH.

#### **4.4.3. Concluding remarks**

The Working Group observes 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.

Interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina will have to take into account the complexity of the constitutional order and the need for speedy and effective judicial protection of individual human rights. When deciding which case falls within their competence, they 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 are introduced, are pending or those decided by either institution will be of outmost importance and should be ensured already in the first months of operation of the institutions concerned.

The Working Group understands that the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina since respect for human rights is the cornerstone of the Dayton and Washington peace agreements.

Nevertheless, the merger of human rights bodies and the constitutional courts appears to be the step which should be envisaged at the next stage. The integration of Bosnia and Herzegovina, the normalisation of its constitutional situation and the effective development and functioning of its constitutional institutions will probably require that human rights protection be entirely entrusted to the Constitutional Courts of the State and of its Entities.