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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**DRAFT OPINION  
OF THE VENICE COMMISSION  
ON THE ADMISSIBILITY OF APPEALS  
AGAINST DECISIONS  
OF THE HUMAN RIGHTS CHAMBER  
OF BOSNIA AND HERZEGOVINA**

*At its 35<sup>th</sup> Plenary Meeting (Venice, 12-13 June 1998), the European Commission for Democracy through Law (Venice Commission), accepted the proposal made by Mr. Paul Gewirtz, Observer for the United States, to issue an opinion on possible appeals against decisions given by the Human Rights Chamber of Bosnia and Herzegovina. The present opinion was adopted by the Commission at its 36<sup>th</sup> Plenary Meeting (Venice, 16-17 October 1998) on the basis of a report by Mr. Malinverni, Rapporteur.*

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## **1. The establishment of the Human Rights Chamber of Bosnia and Herzegovina**

Annex 6 to the Dayton Peace Agreement provides for a Commission of Human Rights consisting of two bodies : the Office of the Human Rights Ombudsman and the Human Rights Chamber<sup>1</sup>. 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 (hereafter ECHR), 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 of Human Rights will continue its operation. 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).

The Human Rights Chamber is composed of fourteen members; four are appointed by the Federation of Bosnia and Herzegovina (FBH), two by the Republika Srpska (RS) 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.

The Chamber has jurisdiction to receive, either directly or 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.

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<sup>1</sup> *Annex 6 to the Dayton Agreement, Chapter Two, Part A and Part C Articles VII to XIII. See also, Article II, para 1 of the Dayton Constitution.*

## **2. Possible conflicts of jurisdiction between the Constitutional Court and the Human Rights Chamber**

Annex 4, Article VI, of the Dayton Peace Agreement (the Constitution of Bosnia and Herzegovina) also provides for a Constitutional Court. It is composed of nine members, four members from the FBH, two from the RS and three 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 has 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 judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b)). The Constitutional Court gives final and binding judgements.

In its opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection instruments<sup>2</sup>, the Venice Commission found that the fields of respective competences of the Constitutional Court and the Human Rights Chamber were partially overlapping. The Venice Commission noted :

« 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 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 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. »

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<sup>2</sup> Venice Commission, *Annual Report of Activities for 1996*, pp. 44-60; CDL-INF (98) 15.

The Venice Commission considered whether placing one of these two judicial bodies in a « hierarchically » superior position to the other, allowing appeals from one jurisdiction to the other could be a solution to the problem of overlapping competences.

It excluded this possibility mainly in the interest of the parties in a human rights litigation, for the following reasons : A solution allowing appeals from one institution to the other would « 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 remedies ».

Taking into account the need to ensure legal safety as to respect for human rights within a relatively short time and to avoid prolongation of human rights litigation, the Venice Commission suggested that the jurisdiction of either court should not extend to matters already dealt with by the other. Human rights litigation could be 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 appropriate legal information, consultation and assistance dispatched to potential applicants.

### **3. The Constitutional Court's decision on the appeal introduced against a decision by the Human Rights Chamber**

When the Venice Commission issued the above opinion, the Human Rights Chamber had not yet given any judgement and the Constitutional Court had not yet been set up. It was still possible to include in the Rules of Procedure of either bodies rules which would exclude overlapping and promote a clear distribution of cases, at least for the transitional period. This, however, did not occur.

On 31 December 1997, Mr Haris Siladjić, in his capacity as co-Chair of the Council of Ministers of Bosnia and Herzegovina, and Mr Plamenko Čustović, as Public Attorney of Bosnia and Herzegovina lodged appeals with the Constitutional Court against two decisions of the Human Rights Chamber (Decision of 3 November 1997 on cases N° 96/3,8 and 9 and Decision of 3 November 1997 on case N° 96/22). The applicants claimed to represent the State of BH. They alleged that the Human Rights Chamber had violated the Constitution of BH and that the Constitutional Court should review the challenged decisions pursuant to its « appellate jurisdiction » over constitutionality issues arising out of judgements « of any other court » in Bosnia and Herzegovina. On 5 June 1998 the Constitutional Court decided to reject the appeal. The relevant part of the Constitutional Court's decision reads as follows :

« Article VI, par. 3 (b) of the Constitution of Bosnia and Herzegovina provides that the Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgement of any other court in Bosnia and Herzegovina. The question therefore arises whether the Human Rights Chamber should be considered a court in Bosnia and Herzegovina according to this provision of the Constitution. It is significant to note in this context that,

according to Article XI (3) of the Agreement on Human Rights which is Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the decisions of the Human Rights Chamber are final and binding, subject only to review by the Chamber itself in some cases.

The Constitutional Court, however, does not consider it necessary in this case to resolve the question whether a decision of the Human Rights Chamber can be appealed to the Constitutional Court, because, even if the Constitutional Court were considered to have jurisdiction with respect to such an appeal, the appeals filed in the present case would have to be rejected for the following reasons.

In both cases one of the defendants before the Human Rights Chamber was the State of Bosnia and Herzegovina. The Decisions of the Chamber indicate that the Chamber invited the State, both before and after it decided on the admissibility of the cases, to participate in the proceedings by submitting comments in writing. The State did not respond to the requests of the Chamber in any way. The State did not submit any comments, nor was it represented at the oral hearings in the two cases.

The Constitutional Court considers that, even if it should be possible to appeal against a decision of the Human Rights Chamber, it would not be permissible for the parties to present their comments and arguments for the first time in the appellate proceedings ».

It follows from the above decision that the issue as to the admissibility of appeals to the Constitutional Court from the Human Rights Chamber is still open.

#### **4. Opinion of the Commission**

There are elements in the Constitution of BH which would support the position to allow appeals from the Human Rights Chamber to the Constitutional Court. Since the Human Rights Chamber is somehow integrated in the domestic legal order of Bosnia and Herzegovina it could be regarded as « any other court in Bosnia and Herzegovina », whose decisions can be appealed against. It would also be consistent with the role normally attributed to constitutional courts in some European constitutional systems, namely the role of ultimate appeal court. The Venice Commission already referred to these arguments in its above mentioned opinion.

However, a careful consideration of the role of the Human Rights Chamber in the context of the Dayton Peace Agreements clearly supports the opposite view.

Protection of Human Rights appears as the cornerstone of the Peace Agreement. In Article VII of the General Framework Agreement the parties to the Agreement expressly recognise that « the observance of human rights and the protection of refugees and displaced persons are of vital importance for achieving a lasting peace ». In this context, the experience of the European Convention on Human Rights seems determinative. The ECHR, an international instrument conceived as an effective legal reply to the atrocities of the Second World War, appears as a tool for achieving « greater unity » between European States by « the maintenance and further realisation of Human Rights and

Fundamental freedoms »<sup>3</sup>. The key element in this instrument is not the list of rights set out in it but rather the implementation machinery which it establishes namely the monitoring bodies (the European Commission and the European Court of Human Rights) and the right of individuals to address these international bodies when they claim that their rights have been violated. This machinery is the realisation of the « collective enforcement »<sup>4</sup> of the rights set out in the ECHR and is indeed so closely related to these rights that the latter would not have the same scope if the implementation mechanism did not exist.

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 character of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina) underlines this specific role of the bodies established under Annex 6. The Human Rights Commission appears as a kind of international 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 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.

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<sup>3</sup> *Preamble to the ECHR.*

<sup>4</sup> *ibid.*

The provisions on jurisdiction of the Human Rights Commission further underline this international 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.

The Venice Commission further recalls that the decisions of the Human Rights Chamber, as well as those of the Constitutional Court, are final and binding (see Article XI, para 3 of Annex 6 and Article VI, para 4 of the Constitution). This clearly shows that, in principle, there should be no room for appeals from one body to the other and that there should be a distribution of competencies among these two bodies, as long as they are both in operation in the field of human rights. This distribution of competencies can rely on the difference in nature of these bodies: The Human Rights Chamber deals with applications (including individual applications) whereby it is alleged that the fundamental rights of persons in the jurisdiction of BH have been violated (concrete control). Its decisions indicate whether a breach of the human rights provisions has occurred, imputable to a party to the Agreement and, if so, what steps shall be taken in order to remedy such breach (e.g. appropriate compensation, monetary relief, orders to cease and desist, provisional measures; see article VIII of Annex 6). The Constitutional Court deals with human rights issues referred to it by other courts in Bosnia and Herzegovina concerning whether a legal norm is compatible with the Constitution or the ECHR (abstract control; see Article VI, para 3 (c) of the Constitution).

The above distribution of competencies and the exclusion of appeals from one court to the other further contributes to the effectiveness of human rights protection in the country, since it avoids adding another degree of jurisdiction to the already long process of exhaustion of legal remedies.

## **5. Conclusion**

It follows from the above that the Human Rights Chamber, on account of its international and provisional character, cannot be regarded as a domestic court of Bosnia and Herzegovina, at least as long as these characteristics (international and transitional) remain<sup>5</sup>.

Consequently, the Venice Commission is of the opinion that the Constitutional Court has no appellate jurisdiction in respect of decisions of the Human Rights Chamber.

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<sup>5</sup> *The situation may of course change if the Human Rights Commission becomes a permanent constitutional institution of Bosnia and Herzegovina, i.e. when the responsibility for the operation of the Commission will be transferred to the State of BH (see Annex 6, Article XIV).*