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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**INFORMATION DOCUMENT
ON THE DRAFT LAW
ON THE STATE COURT OF BOSNIA AND HERZEGOVINA**

I. Reasons for the establishment of the State Court of Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina (Annexe 4 to the Dayton Peace Agreement) does not provide for any court at the level of the State of Bosnia and Herzegovina other than the Constitutional Court.

In its *Opinion on the need for a judicial institution at the level of the State of BH (CDL (98) 17)*, the Commission found however 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. (...) 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 noted, in its *Preliminary Proposal for the re-structuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12)* 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.

The Commission has also held that although offences to criminal law adopted by the State of BH can be tried by the entities' criminal courts according to the rules of jurisdiction laid down by BH law, it may be advisable that several offences provided for in State criminal Law be tried by a State rather than an entity court. This is particularly true for offences perpetrated by BH public officials, as these offences when committed by persons appointed to government or political office in the exercise of their functions cannot be tried by entity courts. The Commission suggested, in its above mentioned proposal (CDL-INF (99) 12) that competence in this field could be given to a State level court and this proposal was also supported by the conclusions of the Madrid Peace Implementation Council.

Finally, 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. The Commission expressed the view that competence in the field of electoral disputes all over the country should be entrusted to a special permanent electoral jurisdiction, whereas the Constitutional Court shall have appellate jurisdiction over constitutional issues arising out of the decisions of this electoral jurisdiction.

II. The Working Group of the Venice Commission and the Directorate of Legal Affairs

Following the above opinions and upon request by the Office of the High Representative, the Commission established, together with experts appointed by the Directorate of Legal Affairs of the Council of Europe, a Working Group to consider the legal and practical modalities of the creation of a State Court of Bosnia and Herzegovina. The Group, composed of Mr Jean Claude Scholsem (Venice Commission), Mr Wolfgang Schomburg and Ms Paloma Plaza Garcia (experts appointed by the Directorate of Legal Affairs) held meetings in Brussels, (10 May 1999) Venice (18-19 June 1999) and Strasbourg (10 September 1999) with representatives of the Office of the High Representative. It came to the conclusion that it was advisable, both for legal and practical reasons, to entrust criminal jurisdiction, judicial review of administrative acts and electoral appeals to a single jurisdictional body, **the Court of the State of Bosnia and Herzegovina** with several chambers.

The following is an outline of the proposal currently under consideration within the Working Group.

General Part

- The Court of Bosnia and Herzegovina shall be composed of at least 15 judges. It will also include a State Prosecutor and two Deputy Prosecutors.
- The Court shall be composed of three Chambers: the Criminal Chamber (which will include the State Prosecutor's Office) ; the Civil and Administrative Chamber, entrusted with judicial review of administrative acts and civil disputes in which the State of Bosnia and Herzegovina is a party (*contentieux administratif de pleine juridiction*) ; the Appeals Chamber which will hear appeals from the two other Chambers as well as electoral appeals and, possibly, appeals against decisions of the judiciary of the Brcko district.
- The Court shall have a Registry responsible for the administration and servicing of all Chambers.
- The Chambers shall sit in panels of three judges

The Criminal Chamber

- The Criminal Chamber shall have jurisdiction over the following :
 - a) Crimes against the State of Bosnia and Herzegovina ; crimes against institutions established under the Dayton Agreement shall be considered as crimes against the State of Bosnia and Herzegovina.
 - b) Crimes defined in the Laws of the State of Bosnia and Herzegovina, when provision is made in the said Laws that the Court has such jurisdiction.
 - c) Crimes committed or initiated by any official of the State of Bosnia & Herzegovina; this status shall not relieve such a person of criminal responsibility nor mitigate punishment.
 - d) Crimes related to torture and inhuman or degrading treatment or punishment in the territory of Bosnia and Herzegovina.
 - e) Crimes committed by persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the Statute of the International Tribunal in the Hague (United Nations Security Council S/Res/827 (1993) – Annex), taking into account the primacy of this Tribunal, as laid down in Art. 9 para 2, and Art. 29 of the said Statute.

The Criminal Chamber shall further be competent to

- f) decide on appeals lodged against decisions of the judiciary of the district of Brcko;
- g) give preliminary rulings on the interpretation of State Laws on request by any court of the entities entrusted to implement State Law <or to review the interpretation of State law given by entity courts>; the State Court has discretionary power to decide whether to take up such questions;
- h) decide on the admissibility of judicial assistance in criminal matters, including extradition, surrender and transfer of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign States or International Courts or Tribunals
- i) decide any issue relating to International and inter-Entity criminal law enforcement, including relations with Interpol and Europol.

- In cases of concurrent jurisdiction between the State Court of Bosnia and Herzegovina and any other court in Bosnia and Herzegovina of the Entities and the Brcko District, primacy is given to the Criminal Chamber of the State Court of Bosnia and Herzegovina. The Criminal Chamber may transfer the proceedings to and remove proceedings from any other court in the territory of Bosnia Herzegovina.

The State Prosecutor's Office

- The prosecution of criminal perpetrators is the duty of the Prosecutor. The State-Prosecutor and Deputy Prosecutors, shall act independently as a separate organ of the Court. The prosecutor has the following powers and duties: to take the necessary steps to uncover crimes and to identify the perpetrators and to guide preliminary criminal proceedings and supervise the activities of any law enforcement agencies acting on behalf of the Prosecutor pertaining to the identification of crimes and their perpetrators; to order that an examination be conducted; to draft and defend an indictment before the chamber; to file - where necessary - appeals against court decisions which have not become final.

The Administrative Chamber

- The Administrative Chamber shall be competent to decide applications against administrative acts and decisions of the State Administration or the Public Agencies acting on its behalf, which are final and no longer subject to any administrative remedy. This competence concerns :
 - The legality of the administrative acts based on administrative law, performed in the exercise of public functions;
 - the legality and interpretation of public-administrative procurements and the administrative decisions concerning them ;
 - the legality of Administrative regulations having general application;
 - assess the omission to act, if the State of Bosnia and Herzegovina has failed to take a decision or to perform an act in respect of which it has a legal or contractual obligation, within a three month period of having been requested to do so;
 - assess the liability of the State of Bosnia and Herzegovina for damage caused by the Administration or its Agencies whilst exercising public functions.

The Appeals Chamber

- Appeals from both the Criminal and the Administrative Chambers can be brought before the Appeals' Chamber.

III. The electoral appeals

As indicated above, the Working Group found that competence in electoral appeals should be given to the State Court of Bosnia and Herzegovina as suggested by the Venice Commission in its Opinion on the competence of Bosnia and Herzegovina in electoral matters. The State Court of Bosnia and Herzegovina would indeed seem to be the most appropriate body to perform judicial review in electoral matters, notwithstanding the competence of the Constitutional Court of Bosnia and Herzegovina to consider appeals on points under the Constitution.

The **Draft Election Law of Bosnia and Herzegovina**, currently under consideration by the competent authorities in Bosnia and Herzegovina, provided in its early version (28 July 1999) for appeals to be brought before an Election Complaints and Appeals Council (hereafter ECAC), a body set up by the Electoral Commission of Bosnia and Herzegovina. This was criticised by Venice Commission experts, Prof. Owen and Prof Rose (CDL (99) 40 and 41), who were concerned by the fact that the draft law did not make any reference to a control of decisions of the Election Commission by an independent judicial body. Prof Owen stressed in this respect that the ECAC could not be regarded as a judicial body.

A fresh version of the Draft Election Law (October 1999) provides for several means for the protection of the electoral right. These include appeals to the ECAC but also appeals to an Appeal Council. The latter is a body established under the Election Law. It consists of five members, of whom four are elected by the Parliaments of each entity and the other by the President of the European Court of Human Rights; members of the Appeals Council are appointed for five years. The Appeals Council is competent to hear appeals against decisions of the Election Commission or the ECAC which restrict a person's right to vote and to be elected or impose fines or other sanctions provided for in the draft election law. The Appeal Council may remove a candidate from a list, impose a fine, "de-certificate" a political party, annul an election and order the election to be repeated.

The Commission understands that this new body must be regarded as a provisional institution, filling the gap of the lack of any judicial review body in electoral matters, until the State Court of Bosnia and Herzegovina is established, and that it shall cease to operate when the Court will become operational. If the two bodies were to operate in parallel, an anomaly would be created in an otherwise cohesive arrangement of judicial review at the State level.