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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT
of the
Working Group

on the Merger of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina

Sarajevo, Strasbourg
December 1999 – June 2000

Introduction

1. At its 39th Plenary meeting (Venice, 18, 19 June 1999), the European Commission for Democracy through Law (Venice Commission) adopted a Preliminary Proposal for the re-structuring of Human Rights protection Mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12, Appendix 3). This document, drawn up at the request of the Office of the High Representative, includes the proposal for a "merger" of the Human Rights Chamber (hereafter the "Chamber") and the Constitutional Court (hereafter "the Court"), at the level of the State of Bosnia and Herzegovina. Two main reasons are put forward for this proposal:

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

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

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

"transfer" should be structured without resulting in a diminution in the judicial protection of human rights in Bosnia and Herzegovina.

3. As suggested in the above mentioned proposal, the Venice Commission entrusted a Working group to examine the modalities of the merger and the possible problems it may raise and draw up a report

- The present report was drawn by Mr Christos Giakoumopoulos, Head of the Constitutional Justice Division of the Venice Commission, and Mr Peter Kempees, member of the Registry of the European Court of Human Rights and former Registrar of the Human Rights Chamber of Bosnia and Herzegovina (from December 1997 to August 1998). Mr Anders Månsson, present Registrar of the Human Rights Chamber, Mr Nicolas Maziau, Adviser to the President of the Constitutional Court, Ms Therese Nelson, Executive Officer of the Human Rights Chamber and Ms Biljana Potparić, Acting Secretary General of the Constitutional Court assisted the drafters and provided information on the Chamber and the Court and their working methods.
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4. It should be stressed that the Working Group's mandate was not to examine the legal and political aspects of the Venice Commission's proposal. Its mandate was to "investigate the procedural, administrative, financial and other practical issues of the merger and make recommendations".

5. The working group considered :

- Substantive legal issues, namely, whether the protection afforded to human rights by the Constitutional Court of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina and its Rules of Procedure can comprise the protection afforded by the Human Rights Chamber under Annex 6 to the Dayton Agreement (chapter I of this Report);

- The working methods of the two institutions and their human and financial resources (chapter II);

- A possible time schedule for the transfer of competence, the combination of working methods and the merger of the human and financial resources (chapter III).

I. Legal issues

6. As the competences of the Chamber and the Court are expressly set out in the Dayton Peace Agreement (Annex 6 and Annex 4, respectively), a transfer of competence from the Chamber to the Court without any amendment of the Constitution will only possible if the competence of the Court, as presently set out in the Constitution, comprises or can be construed in such a way as to comprise the competence of the Chamber.

7. The Human Rights Chamber is one of the two bodies of the Human Rights Commission of Bosnia and Herzegovina created under Annex 6 to the Dayton Peace Agreement, the other being the Human Rights Ombudsman **(**usually referred to as "Ombudsperson"**)**. The Chamber's competence extends to all allegations of 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 enumerated in 15 other human rights instruments listed in the Appendix to Annex 6. Cases may be brought before the Chamber by the Ombudsperson, on behalf of the applicants, or, most frequently, directly by the individuals complaining of a violation of their fundamental rights. The Chamber has to decide which applications to accept and in what priority to address them taking into account specific admissibility criteria which will be briefly discussed below. The decisions of the Chamber are final and binding. The Chamber may end a case by accepting a friendly settlement.[1]

[1] A detailed presentation of the Chamber's procedures can be found in Berg, Leif & Strauss, Ekkehard, *Human Rights Chamber for Bosnia and Herzegovina: A Handbook for Practitioners*, OSCE, Sarajevo, 2000.

8. 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) of the Constitution of Bosnia and Herzegovina). It also has appellate jurisdiction over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). This may of course include human rights disputes (cf. Article II, paras 2 to 4, of the Constitution). Furthermore, 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 (Article VI para 3 (c) of the Constitution).

Ratione materiae

11. A systematic reading of the above mentioned provisions leads to the conclusion that *ratione materiae* the competences of the Court and the Chamber in human rights matters are identical.

12. The Chamber (Annex 6, Article II para 2 (a)) and the Court (Articles II and VI para 3 (b) and (c) of the Constitution) are both competent to deal with alleged violations of human rights enshrined in the European Convention of Human Rights and its Protocols. The rights expressly referred in Article I (1 to 14) of Annex 6 and in Article II paras 3 and 4 of the Constitution are identical.

13. The Chamber's *ratione materiae* competence extends to alleged discrimination in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix to Annex 6. The Court's *ratione materiae* competence covers exactly the same field, since the same agreements are listed Appendix I to the Constitution and Article II para 4 of the Constitution prohibits discrimination in the enjoyment of these rights.

14. In several decisions the Court expressly declared that it is competent to deal with cases raising issues under substantive provisions of the European Convention on Human Rights, since, "under Article II.2 of the BiH Constitution, the Court has to apply the European Convention and its Protocols directly in Bosnia and Herzegovina" and that these have priority over all other law (see e.g. decision of 24 September 1999 in case U-6/98).

15. Consequently, the Chamber's competence *ratione materiae* is already comprised in the *ratione materiae* competence of the Court.

Ratione temporis

16. *Ratione temporis*, the competence of the Human Rights Chamber covers all acts or decisions occurring after 14 December 1995 (date of the signature and entry into force of the Dayton Agreement). A substantial number of complaints have been rejected on the ground that the matters complained of occurred before 14 December 1995. In this respect the Chamber has consistently held starting with the first case which came before it. that the Agreement cannot be applied retroactively (No CH/96/1, *Matanović v. RS*). However, although the Chamber has no jurisdiction to decide whether facts prior to the relevent date amount to a violation of human rights, it can consider evidence of events that occurred before that date in so far as it may cast light on an applicant situation since the entry into force of the Dayton Agreement.

17. The Constitution does not expressly provide for a limitation as to the Court's *ratione temporis* competence. However, as the rights are guaranteed in the Constitution as from its entry into force, it must be assumed that the *ratione temporis* competence of the Court is not more limited than that of the Chamber. In its decision of 5 June 1998 on case U 2/98, the Court clearly stated that it is "not competent to evaluate the constitutionality of any judgement that has been passed before the Constitution of Bosnia and Herzegovina came into force". The Constitutional Court might however be competent, by virtue of Article 3 of the transitional arrangements (Annex II) of the Constitution, to deal with cases brought before the Constitutional Court (of the Republic of Bosnia and Herzegovina) before the entry into force of the Dayton

Agreement and the Constitution. In its decision of 22 December 1997 on case U 40/95, which had been filed in November 1995, the Constitutional court expressly referred to the above mentioned provision. It did not reject the case as incompatible *ratione temporis* but for other reasons.

18. It follows from the above that there is no obstacle **to** transferring the Chamber's *ratione temporis* competence to the Court.

Ratione personae

19. Because of the Chamber's quasi international character, the defendants in the proceedings before the Chamber are the parties to Annex 6, namely Bosnia and Herzegovina (the State), the Federation of Bosnia and Herzegovina and the Republika Srpska. Therefore, although the Chamber may hear any person allegedly responsible for human rights violations, its decisions can only indicate that one or more of these three parties have acted in breach of their obligation to respect human rights. Nevertheless the Chamber has the possibility to identify clearly in the operative part of its decision the authority responsible for the redress of the violation and specify the measures it should take (cf. Article XI, para 1 (b) of Annex 6.

20. The range of parties potentially involved in the proceedings before the Constitutional Court is of course much wider, because of the particular nature of the constitutional proceedings, and may include, for example, individual municipalities or cantons (of the Federation). Article 11 of the Rules of Procedure of the Court indicates as possible participants in the proceedings before it in the frame of its appellate jurisdiction "the appellant and the court whose decision is the object of the lawsuit". It further states that "on a specific issue the Court shall determine other participants according to the principle of adversarial proceedings". This enables the Court to widen further the range of participants in the proceedings before it and above all to include the appellant's opponent in the previous proceedings. Besides, it allows the Constitutional Court to hear the authority involved and/or allegedly responsible for a human rights violation, to define this authority's responsibility in detail and determine the steps needed to redress the violation.

Access to the Chamber and to the Court

21. Access to the Chamber and the Court is regulated in different ways in Annex 6 and in the Constitution.

22. Annex 6 provides for inter-Party applications for human rights violations to be brought before the Chamber (Article VIII). Human rights disputes between Entities or between the State of Bosnia and Herzegovina and its Entities have not so far been brought before the Chamber. In any case, Article VI 3 (a) of the Constitution provides that the Constitutional Court shall have jurisdiction to decide "any dispute that arises under this Constitution" between the entities or between Bosnia and Herzegovina and an entity or entities. Clearly this may include inter-Party human rights disputes.

23. Annex 6 also provides that the Chamber shall receive applications "by referral from the Ombudsman on behalf of the applicant". In a total of 3,449 cases registered by 31 December 1999, only 155 were referred to the Chamber by the Ombudsman. However, although few in number the Chamber continues to receive applications by the Ombudsman. The new draft law on the State Ombudsman of Bosnia and Herzegovina provides that the Ombudsman shall have the power to bring cases before « the highest judicial authority of the State competent to deal with human rights issues » as provided for in the laws concerning appeals to this authority. Since the Ombudsman is not included in the list of authorities and persons who have the power, under Artcle VI of the Constitution, to bring cases before the Constitutional Court, a constitutional amendment will be necessary if the Ombudsman is to have the power to initiate proceedings before the Court after the proposed merger.

24. Annex 6 further provides in its Article VIII para 1 that the Chamber "shall receive … directly from any … person, non governmental organization, or group of individuals claiming to be the victim of a violation by any Party (to Annex 6) or acting on behalf of alleged victims who are deceased or missing for resolution or decision applications concerning alleged or apparent violations of human rights". The

Constitution does not contain any equivalent provision but expressly provides that "the Constitutional Court shall have appellate jurisdiction over issues under this Constitution arising out of a judgement of any other court in Bosnia and Herzegovina".

25. A comparison of the above provisions shows that an alleged victim of human rights violations may have direct access to the Chamber, whereas access to the Court requires the previous intervention of some other court in the country. In other words, on a strict reading, only the Chamber and not the Court may have original jurisdiction to deal with human rights abuses.

26. However, the above provisions must be read in conjunction with several other provisions contained in Annex 6 and in the Rules of procedure of the Court referring to exhaustion of other remedies before validly addressing the Chamber or the Court. Article VIII of Annex 6 provides in this respect, that the Chamber shall decide which applications to accept "taking into account" the criterion "whether effective remedies exist and the applicant has demonstrated that they have been exhausted". The Court's rules of procedure (Article 11) also provide that "the Court examines the appeal only if all other legal remedies against the appealed decision have been exhausted, according to the laws of the entities". In accordance with the above rules, before lodging a complaint either with the Chamber or with the Court, a victim of a human rights violation will have to use and exhaust the legal remedies available in the legal order of Bosnia and Herzegovina.

27. On the other hand, if no remedy exists before a court in Bosnia and Herzegovina, or if such a remedy exists in theory but is ineffective, the alleged victim will still be able to lodge an admissible application with the Chamber, whereas it is unclear whether his/her application will come within the Constitutional Court's appellate jurisdiction.

28. Two separate questions arise in this respect: Firstly, whether the constitutional provision on the Court's appellate jurisdiction (Article VI, 3 (b) of the Constitution) can be construed in such a way as to enable the Court to deal not only with human rights issues arising out of a judgement, but also with similar issues arising out of the

lack of **a** judgement, such as cases of denial of justice. The case-law of the Court does not so far contain any indication of a development in this sense. Although it cannot be excluded that case-law may develop in this direction, it is not possible to conclude already at this stage that the competence of the Chamber to deal with allegations of human rights violations under Article II para 2 of Annex 6 coincides with the "appellate jurisdiction" of the Court.

29. The second question concerns the requirement as to the exhaustion of other (domestic) remedies in the law and practice of the two institutions. It follows from Article VIII, para 2 (a) of Annex 6, that the Chamber is only required "to take (this criterion) into account". The terms used in Court's rules of procedure are stricter: "the Court examines the appeal only if all other legal remedies against the appealed decision have been exhausted". Moreover, the criterion in Annex 6 refers to "effective" remedies whereas the Court's rules refer to "all other legal remedies". The number of cases rejected under the domestic remedies rule by the Chamber has been relatively small, due at least in part to doubts as to the effectiveness of existing remedies before the ordinary courts or other authorities. Thus, in the case CH/96/17 *Blentić and others* v. RS, the Chamber held that remedies leading to judgements that could not be effectively enforced could not be regarded as "effective" and did not need to be exhausted. However, when a remedy is clearly available and there are no reasons to believe that it is ineffective, the Chamber applies the rule (see e.g the Chamber's decisions in the cases CH/97/54 *Mitrović* v. FBH and CH/98/663 *Mutapčić* v. BH and FBH. In contrast, the Court's interpretation of the term "remedies" in its Rules of Procedure would appear to include extraordinary remedies as well. By its decision of 5 June 1998 in case U-12/97 it rejected the appeal against a judgement of the High Court of Bijeljina because the appellant had failed to apply for "revision" prior to filing his appeal to the Constitutional Court.

30. Having regard to the fact that the Constitutional Court's case-law as to the rule of exhaustion of remedies is not yet developed, it is not possible to assess already now whether the application of this rule by the Court will prove to be stricter in practice than the Chamber's. In any case, there is nothing to prevent the Court from adopting a more flexible interpretation of this rule or, if necessary, revise the wording of Article 11 of its rules of procedure.

31. The same applies to time limits for the introduction of cases before the two institutions. Pursuant to Article VIII para 2 of Annex 6, the Chamber shall decide which applications to accept taking into account the criterion whether the application has been filed within six months from the date on which the final decision complained of was taken. In accordance with Article 11 of the Court's rules of procedure the Court will only deal with the appeal if it is lodged within 60 days after the appellant has received the challenged decision. This difference can be explained at least in part by the differences in nature between human rights proceedings and constitutional appeals proceedings. It is to be underlined in addition that the 60 days time limit was recently introduced in the Court's rules of procedure in substitution for the previous 30 days time limit, which was found to be too short. The Working Group does not consider that the 6 months time limit necessarily offers more protection than the 60 days time limit. Long appeal time limits in domestic proceedings may sometimes hinder rather than accelerate the protection granted to individuals by unduly prolonging the proceedings. Be that as it may, having regard to the fact that the Court can at any time amend its Rules of procedure, the 60 day time limit cannot be regarded as an obstacle to the transfer of competences from the Chamber to the Court.

32. The working group has refrained from considering or comparing the accessibility of Chamber and Court procedures on the basis of the percentage of complaints declared inadmissible for non-compliance with procedural requirements of admissibility. Such a comparison would be pointless given that by the time when the Court became operational (no sooner than October 1997), the Chamber had already been functioning for some time, and had become known among the legal profession and the public. The following statistics are given for purposes of information only: As of 31 December 1999, the Chamber had given 170 decisions on admissibility (separate admissibility decisions or decisions determining both admissibility and merits) in which it found 103 applications to be inadmissible; the proportion of complaints declared admissible by the Chamber is far greater than that of the European

Commission of Human Rights[2]. Out of 44 decisions given by the Constitutional Court until November 1999, 34 reject the complaint for reasons of admissibility. Obviously, this high percentage is due to the fact that numerous cases relate to requests addressed to the Court by individuals for review of the constitutionality of laws. A procedure for constitutional review existed before the entry into force of the Annex 4 Constitution but is no longer provided for. In an attempt to make potential applicants more familiar with its new prerogatives, the Court has repeatedly stated in its decisions, that it would have been competent to consider the issues raised by the complainant in the context of its appellate jurisdiction, subject to the exhaustion of other legal remedies.

33. To sum up, the diverging ways in which access of individuals to the two institutions is provided need not in principle be an obstacle to the transfer of competence**.** Should be the Court's stricter admissibility requirements be considered an obstacle to the proposed transfer, the rules of procedure of the Court can be changed to reflect the more flexible and pragmatic admissibility practice of the Chamber.

34. In order to avoid reducing the protection of human rights afforded to individuals in Bosnia and Herzegovina under Annex 6, the Constitutional court's "appellate jurisdiction" should be construed in such a way as to enable the court to rule in the absence of an effective remedy at a lower level. If this cannot be achieved by means of interpretation of the Court's "appellate jurisdiction" (for instance by virtue of the direct application in the national legal order of Article 6 and 13 of the ECHR), then **A**rticle VI, para 3 of the Constitution should be amended.

Effects and execution of judgements

35. Under Annex 6, the Chamber shall consider applications concerning human rights violations. In its decision the Chamber may find that a decision, a fact or act imputable to the State or its entities is in breach of a provision guaranteeing human rights (Article XI, para 1 (a)). This finding is of a declaratory nature and has no other immediate effect. However, pursuant to Article XI, para 1 (b), if the Chamber finds a

[2] As of the entry into force, on 1November 1998, of Protocol No. 11 to the ECHR, the Commission's

violation, it shall address in its decision what steps shall be taken by the respondent Party to remedy the violation, including orders to cease and desist or monetary relief. The Chamber may thus order the respondent Party to take all necessary steps "by way of administrative or legislative action" to annul a decision or to amend a provision which was found to be in breach of human rights guaranteed in Annex 6. The Chamber's orders are often detailed. For instance, in its decision in case CH/97/67, *Zahirović v. BH and FBH*, the Chamber ordered the respondent Party to "undertake immediate steps to ensure that the applicant is no longer discriminated against in his work … and that he be offered the possibility of resuming his work on terms equal with those enjoyed by other employees". In case CH/96/26, *Islamic Community of Banja Luka v. RS*, it "ordered the respondent Party not only "to swiftly grant the applicant … the necessary permits for reconstruction of seven of the destroyed mosques at the location where they previously existed" but also "to allow the applicant to erect enclosures around the sites of the 15 destroyed mosques and to maintain these enclosures" and to "take all necessary action to refrain from destroying or removing any object remaining" there. In case CH/98/756, *DM v. FBH*, the Chamber ordered "that the respondent Party through its authorities take immediate steps to reinstate the applicant into her house". The Chamber's power to issue such orders is clearly wider than the power of the European Court of Human Rights, under Article 41 of the ECHR, to grant just satisfaction.

36. Furthermore, the Chamber has the power to award compensation for "pecuniary and non-pecuniary injuries" and has done so in almost all cases where it found violations of human rights.

37. Parties to Annex 6 are bound to "implement fully decisions of the Chamber" and in its decisions the Chamber habitually orders the Party found in breach of its obligations under Article 6 to report to it within a set time limit on the steps taken to give effect to its orders. In its annual reports of 1996-97 and 1998 the Chamber has expressed serious concerns about the lack of implementation of its decisions by the State and the entities. Despite an improvement in compliance in 1999 and early 2000, in particular as regards the FBH, the Chamber still does not consider the

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tasks have been transferred to the European Court of Human Rights

record of implementation to be satisfactory (see also: “Report on the Conformity of the Legal Order of Bosnia and Herzegovina with the Council of Europe Sandards” by Franz Matscher and Marc Vila Amigo AS/Bur/BIH (1999) 1 ; see also Human Rights Reports regularly issued by the OHR, http:// www.ohr.int).

38. Under the Constitution of Bosnia and Herzegovina, the Constitutional Court has appellate jurisdiction and jurisdiction to decide whether a provision or a law is compatible with the Constitution or the ECHR and its Protocols. The Constitutional Court of Bosnia and Herzegovina has so far given 47 decisions in cases brought before it under Article VI.3 of the Constitution of Bosnia and Herzegovina. The execution of decisions declaring an act incompatible according to Article VI.3 (a) or (c) of the Constitution differs from the of execution of decisions of the Court’s appelate jurisdicton under Article VI 3 (b) of the Constitution.

39. In case of execution of a decision declaring an act incompatible, the authority which adopted the incompatible act may be granted a period, within which to adapt it accordingly**;** if the incompatibility was not eliminated within the set period, the Court shall declare, in a decision, that the incompatible provisions cease to be valid. Such provisions shall cease to be valid on a day on which the later decision of the Court is published in the "Official Gazette of Bosnia and Herzegovina" (Article 59 of the Rules of the Procedure of the Constitutional Court").

40. As regards the execution of decisions given in the framework of the Court’s appelate jurisdiction , Article 72 of the Court’s Rules of Procedure provides that every interested person or body may request the execution of the decision of the Court. Moreover, upon the request by a party, the Court shall confirm by a ruling that the decision of the Court has not been executed and shall undertake further measures for the purpose of execution. So far, the Court has not received any request to take action in respect of non execution of its decisions given in cases of individual appeals.

41. It has to be stressed that, by contrast to the Chamber, some of the Court’s decisions either have immediate effect or take effect on the date stipulated in the Court’s

judgement and may require no further implementation. Thus, in the context of its appellate jurisdiction, the Constitutional Court does not merely find that the challenged decision is in breach of the human rights provisions of the Constitution but also directly annuls the said decision and may confirm the validity of a lower instance decision. In the cases U-6/98 and U-2/99, the Court annulled judgements of the Supreme Court of the RS and confirmed previous decisions of the Municipal Court of Banja Luka. The Court further ordered, not the RS but the "defendants" (i.e. the applicants' opponents in the proceedings before the Municipal court and the Supreme Court of RS) "to hand over the apartment located in Banja Luka" to the applicant "free of persons and personal belongings, within 15 days of the entry into force of the judgement, otherwise the decision would be forcefully implemented". The Court's decisions were served to the appellant in the case U: 2/99 on 20 November 1999; the decision in the case U: 6/99, was received by the appellant on 25 November 1999. The Court has not yet received any information or complaint that its above mentioned decisions were not implemented. However, due to the relatively small number of cases of this sort decided by the Court, it is too early to make an assessment of the authorities' compliance with the Court's decisions,

42. Moreover, there is no obstacle to the Court's ordering the payment of compensation for pecuniary or non-pecuniary damages or the restoration of viously existing situation (*restitutio in integrum*). Article 69 of the Court's Rules of procedure expressly refers to this possibility.

43. Finally, in the context of its jurisdiction under (a) and (c) of Article VI 3 of the Constitution, the Court's decision again has immediate effect: The provisions found to be incompatible with the Constitution cease to be valid on the date specified in the Court's judgement (see Article 56 of the Court's Rules of procedure and the Court's judgement of 14 August 1999 in the case U 1/99 declaring several articles of the law on the Council of Ministers not in conformity with the Constitution). Of course, it remains to be seen how the authorities and, above all, the legislative authorities will comply with the Constitutional Court's judgements when their effective implementation will require positive legislative action on their behalf.

44. In any case, having regard to the above and despite the relatively small number of cases decided by the Constitutional Court on the merits of the complaint, it can be expected that the proposed transfer of competences will increase the immediate effect of several decisions given in the context of human rights litigation.

Provisional measures

45. Article X, para 1 of Annex 6 empowers the Chamber to order provisional measures. In practice the Chamber generally orders a provisional measure only where there is some *prima facie* indication that a protected right might have been infringed and it appears likely that the applicant will suffer serious or irreparable harm if an order for provisional measures is not made. Requests for provisional measures have been frequently made in cases concerning threatened evictions and numerous orders have been made to preserve the applicants' position in such cases. In the case CH/98/1330 *Hasanaj and others* v. BH and FBH, the Chamber ordered the respondent authorities to preserve the applicants' health by improving the conditions in a refugee camp and considering their transfer to other premises. In another case (CH/98/230-231) the Chamber ordered the respondent party (RS) to allow independent medical examination of the applicant in prison. In the above mentioned Islamic Community case the Chamber made a provisional order protecting the sites of the mosques from further interference

46. The Constitution does not provide for provisional measures to be ordered by the Constitutional Court. However, Article 70 of the Court's Rules of procedure reads as follows: "The Court may until the final decision has been made, fully or partially suspend the execution of decisions, laws (acts) or individual acts, if their execution may have detrimental consequences which cannot be overcome".

47. The provisional orders of the Chamber should, like recommendations of the Ombudsperson, effectively be implemented by authorities both at the State level and at the level of the Entities. Due to the very broad application of these measures by the Chamber it is possible to protect individuals against violations even though the applications might be considered inadmissible due to the non-exhaustion of domestic remedies later. Having regard to the importance, in practice, of provisional measures,

as appears from the Chamber's experience, it would be advisable to grant the Court the power, not only to suspend the execution of challenged decisions, laws, or individual acts, but also to order positive action as a provisional measure. It would further be advisable to enshrine this power of the Constitutional Court in an instrument binding all authorities in BH, i.e., in a law on the Constitutional Court of BH to be adopted by the Parliamentary Assembly of the State (see below). Finally, it must be avoided that the broad protection accorded by means of provisional measures be diminished by the application, by the Constitutional Court, of criteria which may turn out to be more restrictive and thus less functional.

Amicable Resolutions

48. According to Article IX of Annex 6, the Chamber may at any stage during the proceedings facilitate an amicable resolution of the matter. In a case concerning termination of employment of a **u**niversity teacher during the war, the Chamber facilitated an amicable solution enabling the applicant to be reinstated in her former position (CH/97/35, *Malić* v. FBH).

49. There is no equivalent provision in the rules concerning the Court. Naturally, if the case is settled during the proceedings, the Court shall strike the case off its list of cases. However, it is unlikely that the Court itself takes action to "facilitate" the settlement of the case.

50. The amicable resolution of human rights disputes will still be one of the main duties of the human rights Ombudsperson. Moreover, it is acceptable to leave the initiative for friendly settlements to the parties to a dispute. Therefore, the fact that the Court might not be in the position to "facilitate" an amicable resolution of the dispute should not be considered as an impediment to the suggested transfer of competence.

Competence to deal with human rights issues upon referral by another court

51. Under Article VI, 3 (c) of the Constitution the Court is competent to decide on issues "referred by any other court of Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with (the) Constitution, with

the European Convention on Human Rights and its Protocols, or with the laws of Bosnia and Herzegovina". Annex 6 does not provide for any equivalent competence of the Chamber. In this respect, the suggested transfer of competence adds a new dimension to the mechanism for protection of human rights at the level of the State. The referral practice already tested in the application of the EC Treaty by the Court of Justice of the European Community is likely to contribute to the growth of human rights case-law of the Constitutional Court and its consistent applications by all lower courts. A matter that may have to be dealt with by the Strasbourg Court is whether for the purposes of Article 35, para 1 of the European Court of Human Rights, the domestic remedies have been exhausted when the Constitutional Court has given its authoritative interpretation.

Conclusion

52. It follows from the above considerations that the suggested transfer of competences of the Human Rights Chamber to the Constitutional Court of Bosnia and Herzegovina can in principle be achieved without any diminution of the protection granted by the Dayton Peace Agreement. This need not require amendments to the Constitution in force, although such amendments might clearly set out the Court's competence to deal with individual applications, clarify the State Ombudsman's (Ombudsperson's) relations with the Constitutional Court and improve the provisions concerning the composition of the Court (see also chapter II).

53. The transfer will however require normative action. Although it is true that the possibility of the Constitutional Court following a dynamic interpretation of its "appellate jurisdiction" cannot be excluded, it would be preferable to frame and guide this potential evolution by normative action taken at the State level of Bosnia and Herzegovina. This would require a constitutional law on the Constitutional Court and several amendments to the Court's Rules of Procedure. These substantial undertakings must be accomplished prior to the suggested merger.

Working methods and human and financial resources

Working methods

54. There are obvious differences between the working methods of the Chamber and the Court, mostly due to the different nature of the proceedings before them but also to the spectacular difference in workload. However, these are not likely to make the merger impossible. In this respect it should be underlined that although Annex 6 contains some rules as to working methods the Constitution does not contain any and, consequently, practical adaptations will be easily achievable where necessary by amendments in the Rules of procedure of the Court. The following is an outline of working methods of the two institutions:

55. The Chamber is composed of fourteen members (judges); 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 President is designated from among the international members. Pursuant to Annex 6, the Chamber normally 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. No review is possible of a decision of the Plenary Chamber.

56. The Chamber holds several panel and plenary sessions per year. From its creation until December 1999, the Chamber held 42 sessions. In 1998 it held 11 plenary sessions and 8 sessions of each of its panels. Panel sessions are in principle combined with plenary sessions. In practice, the Chamber sessions take place every month (except in August) and take about one week

57. The Chamber may reject a case as inadmissible *de plano* or communicate it to the respondent Government for written observations on the admissibility and merits. Although the Chamber may take a separate decision as to the admissibility of an

application its practice in communicated cases is to decide both aspects of the case (admissibility and merits) in a single decision.

58. The Chamber can hold public hearings. In practice, it is only exceptionally that the Chamber will do so, in cases raising particularly difficult issues of fact or law in order to secure adversarial submissions by the parties and submission of evidence by witnesses and experts or in cases raising new or unfamiliar issues. The Chamber's decisions on the merits are delivered at public hearings.

59. The Chamber can decide to give priority to a certain case. Under Annex 6, Article VIII (2) (e) its is supposed to do so if the case contains allegations of especially severe or systematic violations or allegations of discrimination on prohibited grounds.

60. The Chamber may also request the Ombudsperson to make use of her investigative powers or ask international field monitors (for instance, the IPTF) to assist with investigation.

61. The Chamber may also accept or invite written or oral submissions from amici curiae, for instance entity Ombudsmen or NGOs.

62. The Chamber considers the cases introduced before it on the basis of a report drawn up by its Registrar containing a proposal as to the procedural steps to be taken and eventually a draft decision on the admissibility and merits.

63. The Chamber's decisions are given in English and in the local language(s), these being also the working languages.

64. The use of an "application form" requesting the applicant to give information relevant to assessing the compliance with admissibility requirements and to present his/her complaints in a comprehensive and accurate way (a practice used by the European Court of Human Rights) facilitates the preparation of the case by the Registry.

65. The Constitutional Court is composed of 9 judges. Four of them are appointed by the Federation and two by the Republika Srpska. The remaining three are internationals appointed by the President of the European Court of Human Rights. It is submitted that this procedure for nomination, were it to continue after ratification of the ECHR**,** might raise delicate problems.

66. The question has arisen in the Constitutional Court whether it is necessary for it to function to have its full complement of judges as laid down in the Annex 4 Constitution. The Working party is of the opinion that should this question again arise in the future, the Constitutional Court should not be hindered in its normal operation if a judge is temporarily prevented from sitting or if a judge's seat become vacant. If it should appear that problems of this nature cannot be resolved under the rules in force, the proposed law on the Constitutional Court should provide for such eventualities.

67. The Court always sits in Plenary.

68. In 1999 the Court has held 7 plenary sessions despite the fact that the institution was not operational between February and June 1999 (because judges from RS suspended their participation). The Court's sessions are relatively short, as they usually do not last more than 2 days. The Court's Secretariat foresees an increase in the frequency and duration of sessions in 2000.

69. The Court may also hold public hearings. However, in principle, most of proceedings are in writing. The Court has held only one public hearing until now.

70. The Court has not yet made or asked for any factual investigations in any cases it has dealt with.

71. The Court's decisions deal with both admissibility and merits. Up to December 1999, the Court has given decisions in 44 cases of which 10 only deal with the merits of the complaint, the remainder having been found inadmissible.

72. The Court deals with cases on the basis of a report drawn up by a judge rapporteur. The President appoints judges as rapporteurs by alphabetical order. The judge rapporteur is assisted by one or two legal advisers. The rapporteur presents the factual and legal aspects of the case and a draft decision. Following the Court's vote, a drafting committee composed of 2 judges, two advisers and a proofreader draws up the final version of the Court's judgement.

73. The Court may also decide, in summary ("expedited") proceedings, not to include a case in its list of cases when it is clearly inadmissible (see Article 17 in fine of the Court's Rules of procedure)

74. The Court's judgements are given in the local language(s) and in English. The Court however also uses French in its proceedings, as an internal working language.

75. It is clear that the Chamber deals with a much greater number of cases. By 31 December 1999, the Chamber had issued 292 decisions concerning admissibility and merits (as well as decisions on claims for compensation, requests for review and strike outs) on more than 408 applications. Statistics also show an important development in the Chamber's capacity to deal with applications: The number of decisions issued through 1998 was 86 (involving 78 applications) whereas 206 decision were issued in 1999 alone **(**involving 330 applications).

76. Similarly, the number of registered applications also increased. At the end of 1998, 1.496 applications had been introduced before the Chamber; by 31 December 1999, this number had risen to 3.449. The majority of these cases concerned one of four issues: JNA apartments, abandoned property, pensions and frozen bank accounts.

77. In comparison, the Court's caseload is at present substantially lower. At the end of 1999, the Court had dealt with 44 cases and its docket amounted to about 40 cases. These numbers are likely to increase in 2000 because of the growing awareness of the legal profession of Bosnia and Herzegovina of the Court's appellate jurisdiction and of its power to consider constitutional issues upon referral by other courts. The Court is expected to be able to cope with this increase at least as long as both institutions remain operational and the main body of cases is channelled to the

Chamber. As from the proposed merger however, the Court will have to face the important flow of new applications brought before the Chamber and it will almost certainly have to adapt its working methods.

78. As **to** the proposed merger and in order to cope with the important increase of cases brought before it:
    - The Court will have to meet regularly and its sessions will have to be much longer. Moreover, in a not too distant future, the Court should expect to be in permanent session.
    - The Court should consider the possibility of dealing with some of the cases in panels rather than in plenary in order to speed up proceedings; the possibility of a panel referring the case to the plenary where important issues are raised should be provided for. The possibility of appealing a panel judgement to the Plenary should be excluded.
    - The Court should institute one or more committees, composed of 3 or 4 members empowered to dismiss (by unanimous decision) cases that are clearly inadmissible or do not have any prospect of success. The committees' decisions should not be subject to appeal.
    - The Court should be empowered to order other BH authorities to undertake investigations for the purpose of the proceedings before it, where necessary. Although the Ombudsperson is the institution entrusted with this task under Annex 6, it may be advisable, having regard to the re-orientation of the Ombudsperson's activities (see the above mentioned Venice Commission proposal), to entrust this task to the proposed Office of the Prosecutor of the Court of Bosnia and Herzegovina, were it to be created (see information document Appendix 8) or other executive authorities.
    - The possibility of *amicus curiae* submissions should be provided for.
    - The Court should consider setting rules for dealing with particular cases in priority.

Other administrative practices of the Chamber, such as the use of forms, might help the Court and its Registry to cope with the influx of appeals after the merger.

79. The Court's capacity to adapt its working methods to an important increase of work will however mostly depend on its human and financial resources. In its proposal, the Venice Commission, stated that "the Constitutional Court suffers from a tremendous lack of funding". The present report considers this problem in the following paragraphs.

Human resources

80. The capacity and experience of members of the Chamber in dealing with human rights cases is given. Therefore, when reference is made to human resources in the following paragraphs only the capacity and experience of staff members is considered.

81. The same applies to judges of the Constitutional Court.

82. The Working Group notes that the Chamber is expected to terminate its operation by the end of 2002 (see below, paras 107 ff)) ; the tenure of the Constitutional Court judges will come to an end in May 2002 and**,** as matters now stand**,** will not be renewable (Article VI, 1 c) of the Constitution). Consequently, there is a risk that experience and expertise in human rights litigation acquired since the establishment of the two institutions may be lost. Special care should be taken to avoid that. The possibility should therefore be considered of appointing to the Constitutional Court experienced members, especially national members, of the Human Rights Chamber after May 2002. Similarly, if a procedure for amending Article VI of the Constitution is envisaged, consideration might be given to revising the provision whereby the initially appointed judges of the Constitutional Court cannot be re-appointed. This would enable the competent authorities (national or other) to appoint to the new Constitutional Court experienced judges already serving in this court and further ensure continuity after the end of the 5 year period.

83. The Human Rights Chamber's Secretariat is at present comprised of 34 staff members of which 6 are internationals. The Secretariat includes the Registrar, the Deputy Registrar and 9 other lawyers; the Executive Officer and other administrative officials, including a Financial Officers, 9 interpreters and translators, 2 file

managers, assistants and other administrative staff. The Chamber's Registrar, 4 members of the legal staff and the executive officer are non-BiH nationals. Most of the staff are based in Sarajevo. 9 of the Chamber's staff members including 2 lawyers are based in the Chamber's office in Banja Luka. A list of members of the Chamber's staff, the Organisational Chart of the Chamber and the "Staff Rules" appear in Appendix 6.

84. The Registrar of the Chamber is a legal secretary of the European Court of Human Rights seconded to the Chamber. He/she is responsible for managing the case work of the Chamber, supervising the work of the lawyers, preparing the Chamber's sessions and performing any other legal work that may need doing. The Registrar's responsibilities include the drafting of legal memoranda and draft decisions. Because of his/her important legal tasks, the Registrar is (and has to be) a lawyer with significant experience in the field of judicial protection of Human Rights under the ECHR.

85. The Constitutional Court's Registry has 21 staff members. These include the acting Secretary General, 6 local legal advisers and 2 interpreters/translators. The Secretary General, who is a BiH national, is presently seconded by the Office of the High Representative. The 6 legal advisers, BiH nationals also, are officials of the former Constitutional Court of the Republic of Bosnia and Herzegovina (see Appendix 7).

86. The Court's Registry includes 3 international legal advisers of which one is put at the Court's disposal by the Phare assistance programme of the European Union, the two others being remunerated by means of the contributions made to the Court by the Austrian and the German Government. It is expected that the Phare programme will finance staffing by another 2 lawyers (1 national and 1 international) and 3 interpreters/translators in 2000.

87. It follows from the above that the Court's staff is not dramatically less numerous than the Chamber's. It is however obvious that the court's staff has not the required number of experienced human rights lawyers and administrative staff (including file management assistants and translators) to face the expected increase of cases after the suggested merger. In this respect it should be noted that most of the Court's legal

advisers (actually, all local lawyers of the Court) are not human rights lawyers but rather specialists of public and constitutional law of the former SFRY and SRBiH. A re-organisation of the court's staff combined with internal training in ECHR law and drafting will be necessary.

Financial resources

88. The Human Rights Chamber has faced serious difficulties in securing adequate funding in a timely manner. Although Annex 6 provides that the Chamber will be financed by Bosnia and Herzegovina, the international community has recognised that this goal is not achievable. The result is that the Chamber is primarily financed by voluntary contributions from foreign Governments and international organisations. It is to be noted that Bosnia and Herzegovina has contributed to the Chamber's funding already since 1997, but its contribution has so far not exceeded 8% of the funds received (see Appendix).

89. The uncertainty as to the future of the Chamber after December 2000 causes further funding difficulties, donor governments being reluctant to commit funds for an institution likely to disappear.

90. The Chamber's draft budget for 2000 amounts to 4,182,711 KM[3]. The costs concerning the (international and national) members of the Chamber (including salaries and travel expenses and other allowances) amount to 1,681,254. It is noted that international members' retainers are higher than national members' salaries. Expenses concerning the international staff (including salaries, subsistence allowances and accommodation costs) amount to 550,200 KM. Most of the international staff are not paid directly from the Chamber's budget but rather they are paid by individual Governments through secondments. The Chamber includes these items in its budget in the event that Governments discontinue funding secondments. Expenses concerning all national staff amount to 907,080 KM. In an external audit report of July 1999, it was noted that "the level of salaries granted by the Chamber is far above national standards of Bosnia and Herzegovina. Yet they correspond more

[3] One KM (*konvertibilni mark* or convertible mark) equals one German mark or 0,5113 euro

or less to the salaries granted by other international organisations located in Sarajevo". It should be noted that approximately 35% of the Chamber's budget for 2000 was paid by May 2000.

91. The Constitutional Court's financial situation is not at all secure and in any case cannot be regarded as sufficiently stable to allow the Court to deal effectively with an increasing number of cases. The Court is in principle financed by Bosnia and Herzegovina. The appropriation for the Constitutional Court in the State's budget in 1998 was of KM 700.000,- and in 1999 of KM1,000,000.-. It is however stressed that no more than 60% of these amounts were paid.

92. The Court's draft budget for 2000 totals for an amount of KM 1,300,000.-which is far lower than the Chamber's draft budget. Apparently, the BH budget for 2000 allocates KM 1,203.900 to the Constitutional Court.

93. Until now a substantial part of the Court's budget, like the Chamber's, depends on contributions by foreign Governments and international organisations; the Phare programme has made a voluntary contribution of approximately KM 1,000,000 (40% of which was used for the salaries and other allowances of internationals seconded to the Court). It is expected that the Phare programme could make another voluntary contribution of KM 1,200,000 in 2000. Contributions have also been made by the French, German and Swedish Governments. Other Governments have declared their intention to make contributions; but no payments had been effected by the end of 1999.

94. National and international judges of the Constitutional Court receive the same salaries (international judges are however exempted from taxation). Salaries of Constitutional Court judges are significantly lower than the corresponding salaries of national members of the Chamber. Also salaries of legal and linguistic staff of the Court are less than those of the corresponding Chamber staff.

95. The Court has in the past had difficulties in meeting the costs of its elementary functioning (including telephone and electricity bills). Although the situation has

improved, it is not yet satisfactory (in December 1999, staff salaries of October had not yet been paid). Financial independence of the Court is still far away.

Conclusion

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

III Proposal for a merger scheme

97. The merger can be carried out in two distinct phases, as follows: During the first phase, a formalised co-operation shall be instituted between the Constitutional Court and the Human Rights Chamber with a view to preparing the judges and the staff of both institutions for the merger. The second phase will be a transitional period, during which the Chamber shall cease to receive new cases but will continue to discharge its backlog. During this phase all new cases shall be forwarded to the Constitutional Court. The transitional period shall start after the ratification of the European Convention of human rights by Bosnia and Herzegovina and acceptance of the jurisdiction of the European Court of human rights in cases concerning Bosnia and Herzegovina and after the entry into force of the Constitutional Law on the Constitutional Court. The transfer will be concluded when the Chamber shall definitely end its operation.

Formalised co-operation

98. The formalised co-operation should start already now. During this phase the revision of the Constitutional Court's Rules of Procedure should be undertaken, as well as drafting of the relevant merger legislation.

99. The Constitutional Court's Rules of Procedure should provide for the possibility of dealing with some of the cases in panels rather than in plenary in order to speed up proceedings; the possibility of a panel referring the case to the plenary where important issues are raised should be provided for. The possibility of appealing a panel judgement to the Plenary should be excluded. Moreover the institution of one or more committees, composed of 3 or 4 members empowered to dismiss (by unanimous decision) cases that are clearly inadmissible or do not have any prospect of success should be provided for. The committees' decisions should not be subject to appeal. It would be desirable that the Court's Rules of Procedure include rules for dealing with particular cases in priority and rules on *amicus curiae* submissions.

100. In this phase, co-operation of legal and administrative staff of both institutions shall begin together with training of legal and administrative staff in the law, case-law and legal and administrative practices of both institutions.

101. There will be many procedures to work out during this phase including harmonising the legal and administrative work of the staff, which will entail an enormous effort in itself. In addition to working out proposals for harmonising the salaries of the staff of the two institutions it will be necessary to deal with many other issues such as compatibility of computer systems, case management systems etc. It will probably be necessary to obtain the services of information technology experts**.**

102. The judicial mechanism created by Annex 6 should remain unchanged in this phase. The possibility of "forum shopping", whereby persons claiming that their human rights are violated will be able to choose between lodging an application with the Chamber or appealing to the Constitutional Court, which results from the overlapping of competences of the two judicial institutions is unavoidable as long as the Chamber and the Court both receive new cases.

Transitional period

103. In the second phase, the Human Rights competence *ratione temporis* shall cease. The ratification of the ECHR by Bosnia and Herzegovina and the entry into force of the Constitutional Law on the Constitutional Court are both necessary conditions for the proposed merger and for the beginning of the transitional period. Ideally, the ratification of ECHR and the adoption of the Constitutional Law should coincide and the Working Group has proceeded on this assumption. In any case, the two events should be as close as possible to each other in time. Although the drafting and passing of the suggested Constitutional Law may be a lengthy procedure, the Working Group finds that the entry into force of the Constitutional Law should not exceed June 2002.

104. The Constitutional law on the Constitutional Court of Bosnia and Herzegovina envisaged here should be adopted by the Parliamentary Assembly of Bosnia and

Herzegovina. This law should regulate the termination of the Chamber's operation, the appointment of judges to the Constitutional Court (as required by Article VI para 1 (d) of the Constitution) and some aspects of admissibility of appeals to the Constitutional Court (exhaustion of other effective remedies and time-limits for appeals, the Court's power to undertake investigations for the purposes of the proceedings before it) as well as several aspects of the Court's relations with other State and entity institutions, such as

- the Constitutional Court's power to order provisional measures including positive action and the obligation to abide by the Constitutional Court's orders on provisional measures;
- individual (disciplinary or criminal) liability for non compliance with the Court's orders and judgements;
- co-operation with other national authorities, including the Prosecutor of the State Court of Bosnia and Herzegovina and the Ombudsman of Bosnia and Herzegovina;
- the responsibility of Bosnia and Herzegovina to ensure adequate funding independence.

The Constitutional Law shall give an authoritative interpretation of the Court's appellate jurisdiction under Article VI, 3 (b) of the Constitution to comprise appeals against the lack of judgements.

The Constitutional Law will effect the "transfer of responsibility for the continuing operation of the Human Rights Commission to the authorities of Bosnia and Herzegovina", as laid down in Article XIV of Annex 6.

105. Applications concerning facts, acts or decisions post-dating the date of ratification and of entry into force of the Constitutional law shall be automatically forwarded to the Constitutional Court.

106. The Chamber should finish dealing with all the cases pending before it within a fixed time limit after the expiration of which it shall definitely cease its operations.

Although it is difficult to predict when this could occur, the following indication is given:

107. More than 4.500 cases were pending before the Chamber by the end of May 2000 and it is expected that the number of pending cases will be higher by the end of this year. Many of the currently pending cases (up to 2.000) belong to series of similar (or identical) cases: these concern JNA apartments, abandoned property, frozen bank accounts or pension rights. Even the most optimistic assessment of the Chamber's situation (based on its present resources and workload) leads to the conclusion that, if the ratification of ECHR and the adoption of the Constitutional Law were to take place at the beginning of 2001, the Chamber would not be able to discharge all these cases it has before June 2002 at the earliest.

108. In any case, there should be a set period for the Chamber to discharge its backlog. The Working Group would suggest setting end of 2002 as final date of the Chamber's operation. Cases still pending before the Chamber as of the end of that period should be transferred to the Court.

109. In order to avoid loss of experience and to secure a measure of continuity after the end of the initial 5 year period of the Constitutional Court (May 2002) competent authorities might consider appointing members of the Chamber to the Constitutional Court. Similarly, it would be worth considering amending Article VI of the Constitution to allow for the re-appointment of some of the serving judges of the Constitutional Court.

110. As of the date on which the ECHR has been ratified and the Law on the Constitutional Court is in force, a pooling of the Chamber's and Court's Secretariat and resources should start.

111. All Chamber and Court staff should be placed under the authority of a Common Registrar and a Common Director General.

112. During the transitional period, the Registrar should be an international seconded by the European Court of Human Rights. He/she will be responsible for

case management and the work of the lawyers of both institutions. It will be the responsibility of the Registrar to ensure that both institutions have the legal resources necessary to conduct their respective work. He/she will report to the Presidents of the Chamber and the Court. The Registrar's task will be to organise the progressive redirection of legal staff from Chamber work to Constitutional Court work as the Chamber's workload decreases. It will be for the Registrar to decide the various stages of this operation.

113. We would consider it necessary that the Registrar continue to be seconded by the European Court of Human Rights. The Registrar's expertise is essential for the transfer of experience to and training of local lawyers. As long as the two institutions function with a merged Registry, his/her authority will be instrumental in the smooth running of the Registry. The international Registrar's functions will come to end when the Chamber ceases to be.

114. Similarly, during the same transitional period, one Director General would be responsible overall for the administration of both institutions. The Director General will report to the Presidents of the Chamber and the Court. His/her task will be to organise a progressive reallocation of all human and material resources from the Chamber to the Constitutional Court. It will be for the Director General to decide the various stages of this operation. The Working Group would recommend that the Director General be an international appointed by the Registrar of the European Court of Human Rights. He/she should be assisted by one or two national administrators.

115. During the transitional period the Chamber and the Constitutional Court shall retain their respective staff and separate financial resources.

116. In order to maintain continuity the staff, especially national staff, should be encouraged to stay on. This applies to experienced non-legal staff (secretariat, translation, interpretation, administrative support and other support) as well as to legal staff. The legal position of the staff should also be settled in an appropriate way. The possibility of the Chamber's national staff to retain a special salary position perhaps for a certain additional period should be seriously considered.

Last phase: Termination of the Chamber operation

117. The transitional period shall come to an end not later than end of 2002. At this time the Chamber shall definitely cease its operation and all remaining cases will be transferred to the Court.

118. All remaining financial resources and assets of the Chamber shall be transferred to the Court.

119. The international Registrar and Director General shall be automatically dismissed. In addition, the staff of both institutions shall be automatically dismissed and re-appointed in accordance with the procedures and criteria provided for in the Law on the Constitutional Court.

120. Bosnia and Herzegovina shall bear the sole responsibility for the operation of the Constitutional Court after the end of the transitional period.

Recapitulation

1. **The working group finds that the transfer of functions of the Human Rights Chamber to the Constitutional Court of Bosnia and Herzegovina can essentially be achieved within the constitutional provisions governing the Constitutional Court as already in force, without diminishing the protection of human rights granted under Dayton Peace Agreement.**

2. **The transfer of functions should only take place after ratification of ECHR by Bosnia and Herzegovina and after a Constitutional Law on the Constitutional Court regulating the merger procedure, the termination of the Chamber's operations and some aspects of the Constitutional Court's functioning and competence is passed by the Parliamentary Assembly of Bosnia and Herzegovina.**

3. **Minor amendments to Article VI of the Constitution may clarify or improve some aspects of the Constitutional Court's functioning and competence, in particular as regards its composition after the expiry of the mandate of its initial members, its relations with the Ombudsman (Ombudsperson) of Bosnia and Herzegovina and its appellate jurisdiction and. However, these amendments need not be regarded as a *conditio sine qua non* for the proposed merger.**

4. **The transfer could be carried out in two distinct phases as described in Chapter 3 of this report. The final transfer should coincide with a merger of the two institutions' human and financial resources.**

5. **Bosnia and Herzegovina should bear sole responsibility for the operation of the Constitutional court after the merger procedure.**

Time schedule

First phase : Formalised co-operation
From the present until **r**atification of ECHR and entry into force of the Constitutional Law on the Constitutional Court BiH

Formalised co-operation between the Constitutional Court and the Human Rights Chamber with a view to transferring the competences of the Chamber to the Court. Revision of the Court's Rules of Procedure. Drafting of the Constitutional Law on the Constitutional Court of BiH. Harmonisation of working methods in the registries. Training courses for the staff of the two institutions.

Second phase : Transitional period
From ratification of the ECHR and entry into force of the Law on the Constitutional Court to December 2002

End of the Chamber's competence *ratione temporis*. All cases outsidethe Chamber's ratione temporis competence are forwarded to the Constitutional Court. Chamber to clear up its backlog. Chamber staff to be progressively redirected to work on Constitutional Court cases as Chamber's backlog gradually disappears. Operation of the common Registrar and Director General.

Third phase: Termination of the Human Rights Chamber operation
From December 2002 onwards

Extinction of the Human Rights Chamber; transfer of all cases still pending before it to the Constitutional Court. Transfer of all the Chamber's remaining financial resources and assets to the Court. Automatic dismissal and re-appointment of the staff of the two institutions. Operation of the new Constitutional Court under the sole responsibility of the State of Bosnia and Herzegovina.