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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 (Bled, Slovenia 10-11-12 June 2001)

Following its conclusions on the Merger of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, adopted at its 42nd Plenary Meeting (Venice, 31 March – 1st April 2000, CDL-INF (2000) 8), the Report of the Working Group on the Merger (Sarajevo, Strasbourg, December 1999- June 2000, CDL (2000) 47 fin), and the conclusions of the meeting held in Paris in March 2001 (CDL 2001 (32)), the Venice Commission convened a meeting in Bled, Slovenia, to consider future concrete steps to be taken with a view to implementing the proposed merger.

The following persons took part in the meeting which took place in Bled, Slovenia, on 10-11-12 June 2001: Mr Peter JAMBREK (Chairman of the meeting), and, in alphabetical order, Mr Christopher HARLAND, Mr Dusan KALEMBER, Mr Peter KEMPEES, Javier LEON, Mr Nicolas MAZIAU, Ms Therese NELSON, Ms Michèle PICARD, Mrs Snezana SAVIC, and Mr Mato TADIC, as well as Mr. Eric ROSAND, observer, and Mr Christos GIAKOUMOPOULOS and Ms Caroline MARTIN, from the Secretariat of the Venice Commission.

The participants considered a discussion document prepared by the Secretariat of the Venice Commission. They agreed that the proposed merger could be regulated in a law, which could read as follows:

DRAFT LAW ON THE MERGER OF THE HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA WITH THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

"Having regard

- *to the constitutional obligation of Bosnia and Herzegovina under Article II.1 of the Constitution to ensure the highest level of internationally recognised human rights and fundamental freedoms, as well as to ensure that any amendment of the Constitution shall not eliminate or diminish these rights and freedoms;*
- *to Article II.1 of the Constitution of Bosnia and Herzegovina read together with Article XIV of the Annex 6 of the Dayton Peace Agreement and to the Agreement of the 10th of November 2000 between the Parties to Annex 6;*

Considering that the possibility offered to victims of human rights violations to seek directly judicial protection and obtain redress of those violations from a highest judicial authority is the cornerstone of international human rights protection;

Decides as follows:

Article 1

The Human Rights Chamber established as part of the Commission on Human Rights provided for in Annex 6 to the Dayton Peace Agreement is hereby merged with the Constitutional Court of Bosnia and Herzegovina in accordance with the following provisions:

Article 2

[Six months after / On] the date of entry into force of the European Convention on Human Rights and Fundamental Freedoms for Bosnia and Herzegovina, the Human Rights Chamber's competence to receive applications, as provided for in Article VIII of Annex 6 to the Dayton Peace Agreement, shall cease.

Article 3

The Constitutional Court shall be vested with the same powers and competences as the Human Rights Chamber for Bosnia and Herzegovina under Annex 6 of the Dayton Peace Agreement.

Article 4

The Human Rights Chamber shall continue to deal with all cases which are pending before it on the date mentioned in Article 2. All cases introduced to the Chamber after the said date shall be deemed to be introduced before the Constitutional Court of Bosnia and Herzegovina and will be dealt with by the latter in accordance with Article VI of the Constitution, the Constitutional Court's Rules of Procedure and other relevant legislation on the Constitutional Court.

Article 5

The Human Rights Chamber shall terminate its operation 18 months after the date of ratification of the European Convention on Human Rights, but in any case not before 31 December 2003. All cases pending before the Chamber at the time of the termination of its operation shall be transferred to the Constitutional Court and will be dealt with by the latter in accordance with Article VI of the Constitution, the Constitutional Court's Rules of Procedure and other relevant legislation on the Constitutional Court. [The Constitutional Court shall notify the parties thereof. It may decide to deal with these cases as a priority.]

Article 6

In the framework of proceedings before the Constitutional Court~~,~~ the Court may, on its own initiative or upon request of the parties or of the Ombudsman of Bosnia and Herzegovina, invite the latter to submit observations and conclusions concerning a case pending before it.

Article 7

Any appeal under Article VI.3.b. of the Constitution must be lodged within six months from the date on which the decision complained of becomes final and enforceable or, where appropriate, within six months from the date on which the appellant/applicant is notified of the such a decision, or, in the absence of an available effective remedy against the act, decision or omission complained of, within six months from the date the alleged violation has occurred.

Article 8

In the framework of proceedings relating to alleged human rights violations under Article VI.3.b, the Constitutional Court may, when it finds that a violation has occurred, order any competent authority to refrain from an action or to take a specific action with a view to redressing the violation found.

The Court shall also be competent to take cognisance of any claims for compensation relating to costs, material and immaterial damage and interests. The decision may state the amount of the compensation to be paid to the victim of the violation and the authority responsible for the payment.

Article 9

In the framework of proceedings relating to alleged human rights violations under Article VI.3.b and in order to avert potential serious and irreversible damage to fundamental rights and freedoms, the Court may order provisional measures. These may consist of injunctions to any authority to refrain from an action or to perform an action. Orders for provisional measures may be issued without oral proceedings. Their validity shall cease, at the latest, when the Court's final decision on the case is issued.

Article 10

The Chamber and the Court shall retain their respective staff and separate financial resources until six months before the termination of the Chamber's operation. On that date the Chamber's staff and material resources and assets with the exception of the Executive Officer and other international staff and financial resources necessary for the functioning of the Chamber until the termination of its operation, are transferred to the Constitutional Court.

Article 11

The funding of the Constitutional Court of Bosnia and Herzegovina shall be provided for in the State budget and shall ensure an independent and comprehensive carrying out of constitutional judicial proceedings. The State budget shall annually allocate in a separate item funds needed to ensure activity of the Constitutional Court that shall be managed by the Constitutional court autonomously.

Article 12

Following the date referred to in Article 2, a co-ordinator shall be appointed by both the Presidents of the Constitutional Court and the Human Rights Chamber, after

consultation with the High Representative, with a view to advising the Presidents of both institutions on all legal and material issues relating to the merger operation.

The participants further considered that the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina should be amended where necessary in order to secure the following:

- Session of the Court

The Court shall be permanently in session. The duration of judicial vacations shall be determined by the Court with due regard to the needs of its business.

- Possibility for the Court to decide cases in panels

The Court may consider and decide cases brought before it under VI.3.b. in chambers composed of [five (?)] judges. A chamber may at any time decide to refer a case to the Plenary Court.

The Court may set up three-member panels that can decide unanimously and in summary proceedings that an appeal/application under VI.3.b is clearly inadmissible or manifestly ill founded.

The questions falling within the competence of the Court under Article VI.3.a and 3.c. shall be considered and decided by the Plenary Court.

- The pre-hearing investigation

The Court shall have the widest possible powers of inquiry and investigation.

It may, in particular:

1. correspond directly with any state authority and other public authority, in particular the Ombudsman of Bosnia and Herzegovina and the State Prosecutor;
2. hear parties and request them and any public authorities to communicate to it all documents and information having to do with the case;
3. take evidence from any person whose testimony it deems useful at that regard;
4. establish fact on site;
5. appoints experts;

The Court may, by means of an order, delegate to the Judge rapporteur specific powers of inquiry and investigation, which it shall determine.

- Amicus Curiae

An amicus curiae brief that brings to the attention of the Court relevant matter not yet brought to its attention by the parties may be accepted and filed by the Court.

The amicus curiae brief shall be submitted in writing [accompanied by the written consent of all parties] within the time allowed for filing a brief. The amicus curiae brief shall identify the party supported, if any. The amicus curiae may be invited to participate to the oral proceedings, in accordance with the Rules of Procedure of the Constitutional Court.

- Rule on dealing with some cases as a priority

The Court shall deal with appeals/applications in the order in which they become ready for examination. The Court may in view of particular circumstances, decide to hear a case as a matter of priority.

……..

Explanatory notes:

These explanatory notes resume the main issues, which arose when discussing the draft law of the merger.

It must be recalled that the purposes of this law were widely presented by the Venice Commission in its previous working papers documents in particular (CDL-INF (2000)8), where the transfer of all competences of the Chamber of Human Rights to the Constitutional Court were proposed in order to ensure, after the termination of the mandate of the Human Rights Chamber, the highest level of protection of Human Rights in Bosnia and Herzegovina, as stipulated in the Dayton Peace Agreement.

1. The participants felt that it was necessary to have a clear date on which the competence of the Human Rights Chamber to receive applications should cease. This should be the date of ratification of ECHR by Bosnia and Herzegovina although the possibility of having a later date (six months after the ratification of ECHR) is also retained, as an alternative. The proposal in the Venice Commission Secretariat document that the Chamber should cease to receive applications alleging that violations of Human Rights have taken place after the date of ratification (termination of the Chamber's ratione temporis competence) was abandoned. It was felt that the determination of the time when the alleged violation occurred may raise delicate issues of fact and law and would oblige the Chamber to deal with an considerable number of cases just to decide whether it is competent or not. For reasons of clarity, the proposal was retained that after a specific date (date of ratification of ECHR or six months after) the Chamber will no longer be competent to register any case and all cases addressed to the Chamber will be channelled to the Constitutional Court.

2. The Human Rights Chamber will continue to deal with its docket. It will continue to operate for 18 months after the ratification of ECHR, but in any case until 31 December 2003

(as required by the Agreement to extend Annex 6 to the Dayton Peace Agreement). After that, all cases will be transferred to the Constitutional Court.

3. The Human Rights Chamber will keep its separate staff and resources until six months before the termination of its operation. All staff and resources will then be automatically transferred to the Constitutional Court. This solution was regarded as easier to put into practice than the progressive merger suggested in the Working Group's Report.

4. However, the Chamber will keep its Executive Officer and other international staff and financial resources necessary for its functioning until the termination of its operation.

5. The fact that there is no longer any progressive pooling of the Court's and Chamber's respective secretariats makes the proposals for a common Registrar and a common Director General in the Working Group's Report superfluous. On the other hand, it was felt the co-operation between the two institutions should start at a very early stage and that this could be facilitated by a "co-ordinator" to be appointed by the Presidents of the two institutions after consultation with the High Representative. The co-ordinator will have advisory functions as far as legal and organisational issues of the merger are concerned. He/she will have in particular to contribute towards building within the Court the necessary capacities for dealing with an considerable number of individual human rights cases, transferring experience and working methods from the Chamber to the Court as appropriate and to assist in the effective managing of the transfer of cases, of staff, of financial resources and other assets from the Chamber to the Court. In the participants' opinion, the co-ordinator should be appointed as soon as possible after the ratification of ECHR and should remain in office for some time after the termination of the Chamber's operation, but no more than six months after that date. This means that he/she would be appointed for approximately 18 months. However, in the participants' view it is not necessary for the co-ordinator to be permanently in Sarajevo, although a permanent presence will be required during the critical merger period. The co-ordinator should be a lawyer with important working experience in highest judicial bodies, preferably constitutional courts or equivalent courts that deal with an considerable number of human rights cases.

6. The proposal to dismiss all staff of the two institutions and to re-appoint them as appropriate was not retained. Consequently, all staff of the Chamber shall be automatically transferred to the Court.

7. The question of harmonising the salaries and other remuneration or compensation of judges and staff of the two institutions should be addressed separately.

8. The Working Group's choice of drafting a law for the purposes of the merger:

Although the views was asserted that the Constitutional Court, is already constitutionally able to encompass the competences of the Chamber of Human Rights without any amendment of the Constitution or adoption of a law on the merger, the Working Group still opt for defining clearly in a specific norm the role of the Constitutional Court in the protection of Human Rights in Bosnia and Herzegovina after the ratification of the ECHR and the cessation of activities of the Human Rights Chamber. The necessity of amending the rules of procedure of the Court in order to allow the Court to perform fully these new tasks was also stressed.

The Working Group wouldn't have, of course, any objection to see this merger provided by a constitutional amendment, if favourable political climate and conditions are met. A constitutional amendment would have the advantage of clarifying in a most appropriate way the competences of the Constitutional Court in human rights matters. Such a constitutional amendment should contain the provisions currently set out in Articles 1 to 3 and Article 6 of the present draft.

Nonetheless, the Working Group considered that there exists already a constitutional basis for the merger that allows for this operation without necessarily going through a constitutional amendment. Actually, Article II.1 of the Constitution enshrines the obligation of Bosnia and Herzegovina states to ensure the highest level of human rights and refers in this respect to the Human Rights Commission established under Annex 6. Article XIV of Annex 6, dealing with the fate of the Human Rights Commission after the end of a five year period, refers in turn to a transfer of responsibility for the operation of the Commission to the institutions of Bosnia and Herzegovina. Therefore, Article II.1 of the Constitution, combined with Article XIV of Annex 6 permit - and even require – that the role, competence and powers of the Human Rights Commission be taken up by institutions of Bosnia and Herzegovina. However, this constitutional permission does not suffice for the merger operation but requires further legislative action to determine the institution(s) in Bosnia nad Hzerzegovina that are to take up the role, tasks and powers of the Human Rights Commission, the time of the transfer of competencies, the means by which the transfer of responsibilities will be realised. The law on the merger aims at responding to the need for such a legislative action.

9. The Venice Commission's choice of talking about a merger rather than a transfer of competences:

Although, one could consider that this draft law deals principally with the issue of the transfer of the Human Rights Chamber competences, the term "merger" has been chosen in order to illustrate the whole mechanism of this transfer, which includes not only the transfer of competences but also an effective transfer of expertise, and experience, procedural and other capacities and resources. Therefore the Working Group upholds the use of the term "merger" rather than transfer considering that this transfer is achieved by a merger rather then by a transfer in a stricto sensu sense.

10. The inclusion of procedural issues in the draft law of the merger:

The Working Group is fully aware that the present draft law deals in Articles 7, 8, 9 with procedurals issues that could be considered as already stipulated or to be stipulated in the Rules of procedure of the Constitutional Court. Nevertheless, the Working Group considered as important if not essential in order to guarantee the highest level of protection to include these provisions in the Law on the merger, considering that these provisions, dealing essentially with the fundamental right of access to the Constitutional Court should preferably be foreseen on the level of the law of the merger rather than on the level of Rules of Procedure.

In this respect, the participants recalled that all European Constitutional Courts or bodies of equivalent jurisdiction dealing with human rights issues see their activities and procedures mainly regulated in a specific law; which is often only completed by internal rules of procedure adopted within the Court. The main reason for dealing with procedural aspects in a

law is the need to guarantee the legal certainty of the use of legal avenues in the field of judicial protection of human rights.

11. The Working Group considered also the possibility of including an Article that would allow the Constitutional Court to impose fines and penalties:

The Working Group would be in favour of regulating this issue at the level of a law, but it understands that the Law on the merger might not be the most appropriate one. The possibility of imposing fines and penalties should be included in a lefgal norm, that could read as follow:

"The Constitutional Court has the power to impose penalties or fines when:

1. *Officials and other persons refuse to abide by or unduly delay or otherwise hinder or prevent the execution of provisional measures and decisions of the Court;*
2. *Officials and other persons without valid reasons, fail to comply with requests and orders of the Court, in particular with any order to present documents or other material, to approve documents or texts of acts, or to carry out investigations;*
3. *Without valid reasons, a witness or expert fails to attend, refuses to attend, or does not inform of his/her incapacity to appear before the Court;*
4. *An expert, without valid reasons, refuses or delays to provide the findings;*
5. *An applicant/appellant deliberately lodges a frivolous application/appeal*

Orders and judgements of the Constitutional Court imposing financial penalties or fines shall be enforceable.

The above provisions do not exclude criminal liability of possible offenders pursuant to the criminal legislation applicable."

12. Finally, the Working Group considers that the success of the merger will also depend on the human and financial resources dedicated to the Constitutional Court in order to deal with the case load it might follow from the merger, and therefore would recommend to allocate to the Constitutional Court sufficient financial and human resources for the fulfilment of its tasks. The possibility of having former staff/judges of the former Human Rights Chamber appointed to the Constitutional Court for a transitional period should therefore be envisaged.