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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINIONS ON THE CONSTITUTIONAL REGIME OF BOSNIA AND HERZEGOVINA

September 1994 – June 1998

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A. THE CONTRIBUTION OF THE VENICE COMMISSION TO THE INTERPRETATION OF THE CONSTITUTIONAL REGIME OF BOSNIA AND HERZEGOVINA[1]

By Christos Giakoumopoulos, Deputy Secretary of the European Commission for Democracy through Law

1. Introduction

The collapse of totalitarian regimes in Europe in 1989 opened new horizons to the process of European integration. The European Commission for Democracy through Law (Venice Commission) was established in 1990, as a partial agreement concluded within the Council of Europe with a view to assisting new democracies in central and eastern Europe in their constitutional reforms. In accordance with its Statute, the Venice Commission, as a consultative body composed of independent experts, gives priority in its work concerning the constitutional, legislative and administrative principles which serve the efficiency of democratic institutions, the principle of the rule of law, public rights and freedoms and the contribution of local and regional self-government to the development of democracy.

Contrasting with the ambitious hopes for a democratic new era in Europe, the war in Bosnia and Herzegovina started some months later. Thus, the building of democratic institutions in the new member States of the Council of Europe coincided with a war widely destroying all values on which European integration was and is still being carried out. Reacting to this absurd situation, the peace agreements which form the basis of the actual constitutional regime in Bosnia and Herzegovina constitute an effort to reach a viable solution based on what is regarded as part of the hard core of Europe's integration process: a collective guarantee for the protection of individual human rights. Achieving a long-lasting peace by securing human rights is the actual challenge of all peace agreements in the former Yugoslavia and, therefore, this challenge cannot but be in the centre of interest of the Council of Europe and the Venice Commission, a body acting in the field of "guarantees offered by law in the service of Democracy" (Article 1 para 1 of the Commission's Statute).

Since 1994, the Venice Commission has given no less than 8 opinions on general or specific topics concerning the constitutional regime in Bosnia and Herzegovina:

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[1] *Presented at the Round Table on constitutional Justice in Sarajevo, 4-5 April 1998.*

- Opinion on certain aspects of the constitutional situation in Bosnia and Herzegovina (Opinion on the proposed Constitution of the Federation of Bosnia and Herzegovina in the Washington Agreements).[2] This opinion was given in 1994, at the request of the Parliamentary Assembly of the Council of Europe.

- Opinion on the compatibility of the Constitutions of the Entities with the Constitution of Bosnia and Herzegovina.[3] This opinion was given in 1996, upon request by the High Representative.

- Opinion on the constitutional situation in Bosnia Herzegovina with particular regard to the human rights protection mechanisms.[4] This opinion was given in 1996, upon request by the Parliamentary Assembly of the Council of Europe.

- Opinion on the legislative powers during the transitional period between the entry into force of the Dayton Agreement and the general elections, given in 1996 upon request by the Office of the High Representative.

- Opinion on the setting up of the Court of Human Rights of the Federation of Bosnia and Herzegovina, given in 1997 following a request by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.[5]

- Opinion on the interpretation of certain provisions of the Constitution of the Republika Srpska, mainly the provisions concerning dissolution of the National Assembly. This opinion was given at the request of the High Representative.[6]

- Opinion on the competence of the Federation of Bosnia and Herzegovina in criminal matters, adopted in 1998, upon request by the Minister of Justice of the Federation.[7]

The Commission is also consulted on and involved in the drafting of the Law on municipalities in the Federation of Bosnia and Herzegovina, in the preparation of the proposal for the creation of an Ombudsman institution in the Republika Srpska, in the examination of an organic law for the Federation Ombudsmen and in the drafting of the electoral law.[8]

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[2] *Venice Commission Annual Report of activities for 1994, pp. 18 ff.*

[3] *Venice Commission, Annual Report of activities for 1996, pp. 60-73.*

[4] *Document CDL-INF (96) 9; Venice Commission Annual Report of activities for 1996, pp. 44-60.*

[5] *Venice Commission, Annual report of activities for 1997, pp. 31 ff; Parliamentary Assembly AS/jur (1997) 35.*

[6] *Venice Commission, Annual Report of activities for 1997, pp.35-36.*

[7] *Document CDL-INF (98) 5.*

[8] *Since the presentation of this paper, the Commission issued several other opinions and reports, which are not referred to in the paper but are included in this publication (Opinions and Reports*

The purpose of the present paper is not to present the content of the above opinions but to underline the salient points of some of them and try to identify the areas where problems arose and the basic elements of the Commission's approach. The following presentation refers to three opinions by the Commission, namely the opinion on the F.B.H. Constitution, the opinion on Human Rights protection mechanisms in Bosnia and Herzegovina and the opinion on the compatibility of the Entities Constitutions with the Constitution of Bosnia and Herzegovina. These opinions reveal the Commission's position on a number of constitutional issues, which still are a matter of concern. Reference to other opinions of the Commission is made where the Commission confirmed or departed from its stated position.

2. Opinion on the Constitution of the Federation of Bosnia and Herzegovina

The Commission's opinion on the Constitution of the Federation of Bosnia and Herzegovina was given in September 1994, i.e. before the conclusion of the Dayton Agreement. At that time, the proposed Federation Constitution was intended to be a state constitution and not the constitution of an entity. It is however noteworthy that some points raised by the Commission still remain problematic in their implementation. While considering that the proposed Constitution of the Federation of Bosnia-Herzegovina contained, in general, the principal elements of a federal Constitution based on the principles of democracy and the rule of law, the Commission found it necessary to make some observations.

As regards the division of competencies between the Federation and the cantons, the Commission noted already in 1994 the difficulties, which could arise from the fact that residual competence is vested in the cantons (Article III.4). A narrow interpretation of the list of competencies of the Federation (Article III.1-3) could lead to the conclusion that the Federation has no competence in the field of criminal law, and that it cannot legislate for example in respect of such matters as private law, labour law and social security or environmental law. The Commission noted that this situation was unsatisfactory. Moreover the Commission stated that it would have been wise to include a provision whereby, in the areas in which both the Federation and the cantons have competence, the cantons may not exercise their legislative powers if the Federation has enacted comprehensive legislation; it would also have been useful to make express provision for the Federation to adopt outline legislation, leaving it to the cantons to regulate matters of detail. In addition, the division of competencies in fiscal matters should be specified.

The Venice Commission's concern expressed in this opinion still seems justified. Some four years after the Commission's opinion on the proposed Constitution in the Washington Agreement and after the text of the proposed Constitution had been adopted, the Commission was requested by the Minister of Justice of the Federation to deal with this issue, having regard to the competence of the Federation to adopt

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VIII. & XI.).

criminal legislation. In its recent "Opinion on the competence of the Federation of Bosnia and Herzegovina in criminal matters", the Commission made a careful study of the relevant constitutional provisions with a view to reaching a reasonable solution on the basis of their systematic interpretation.

The Commission recalled that the Constitution lists the exclusive competencies of the Federation and those that are shared between the F.B.H. and its cantons (Article III-1 and III-2 of the Constitution). These constitutional provisions contain no specific references to the criminal law. This might have led to the conclusion that legislative competence in criminal law lies with the cantons. A careful analysis of the Constitution leads however to a different result:

The Commission observed that the F.B.H. Constitution grants the Federation competencies in the field of "*stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime*". It concluded from this provision that the F.B.H. has the right to draw up the relevant substantive criminal law provisions, clearly a broad competence since it covers all the types of criminal offence likely to have inter-cantonal implications, which, given the size of the cantons, will not be the exception. Moreover, the Commission found that the Federation's competence is not simply based on article III-1-f of its Constitution but extends, implicitly but unambiguously, to defining and punishing any act established by it as an offence within the exercise of its exclusive powers and responsibilities (for example with regard to the economy, land use or energy policy) or shared powers and responsibilities (for example with regard to guaranteeing and enforcing human rights, article III-2-a). It also has exclusive competence to enact criminal legislation to protect values – for example, symbols or territory - which, by their nature, it alone is capable of protecting.

For the Commission, there can be no doubt that the F.B.H. Constitution provides for substantive criminal legislation at the federal as well as the cantonal level.[9] The Commission concludes from the above that both the Federation and the cantons have shared responsibilities in the field of criminal law. In areas where competence is shared between the Federation and the cantons, it may be exercised separately. Consequently, the F.B.H. can enact its own criminal code but it must respect the cantonal prerogatives and the need for a certain flexibility in enforcing federal legislation.

As regards the chapter devoted to human rights, the Commission underlined two particularly positive features: the reference to rights and freedoms guaranteed by international instruments and the provisions concerning the Ombudsman. However, the reference to a variety of international instruments combined with a list of rights enshrined *expressis verbis* in the Constitution could give rise to difficulties of a technical

[9] *See for example, article IV-B-7(a), sub-paragraph vii, on the power of pardon of the Federation's President, makes a clear reference to "pardons for offences against Federal law"; similarly, article V-9-d, on cantonal responsibilities, refers explicitly to the "prosecution of crimes against cantonal law".*

kind in practice. Such problems could arise in particular in cases where there are discrepancies between the texts of international instruments safeguarding human rights and the catalogue of rights guaranteed by the Constitution.[10] The Commission proposed as a solution to this problem to adopt the principle whereby the provision most favourable to the rights of the individual would be applicable in the event of conflict. Failing the inclusion of such a provision in the Constitution, it is for the courts in the Federation to establish this principle through their jurisprudence. The list of rights appearing in Article II.2 might also, in the Commission's view, give the impression that the drafters of the constitution wanted to accord the rights expressly mentioned there a higher value than the rights guaranteed by international instruments. Despite the concern expressed by the Commission in this respect, the list of rights mentioned in the Federation Constitution and the multitude of international instruments referred to in it does not seem to have raised particular problems of interpretation. It is to be noted that subsequent constitutional drafts prepared in the context of the peace process by the contact group, including the Dayton Constitution, followed the same technique of reference to an extensive catalogue of international instruments combined with a list of rights enshrined in the corpus of the Constitution.[11]

The Commission also welcomed the creation of the Ombudsman, although it noted the absence of express provisions in the Constitution enabling the Ombudsman to make recommendations to the administration and defining the respective obligations of the latter. The text of the Constitution, the Commission observed, allows for a wide range of different practices by both the ombudsman and the administrative authorities. The difficulties often experienced by the Federation Ombudsmen in their relations with the authorities[12] might be due to the lack of clarification as to their powers and the obligations of the authorities. Moreover, a matter which seems to the Venice Commission to be of some concern is the Ombudsman's power to intervene in pending proceedings: For the Commission "intervention by the ombudsman in the course of a trial should be exceptional, or at least subject to extreme caution. Their role should in fact be to intervene before the institution of judicial proceedings. Intervention during a trial should have no other purpose than to bring about a friendly settlement. Any other kind of intervention would be contrary to the principle of the separation of powers, the independence of the judiciary and equality of arms".[13] Despite the wording of Article 6 in Chapter II of the Federation Constitution it seems clear from the Ombudsman's practice that the latter has made a careful and balanced use of this provision.

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[10] *Similar concern was later expressed with regard to the Constitution of the RS (see below, opinion on the compatibility of the Entities' Constitutions with the Constitution of B.H.).*

[11] *Paul SZAZ, "The protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia", AJIL vol. 90 (1996), pp. 301 ff. (307).*

[12] *See Annual Reports of the Ombudsman of the Federation of Bosnia and Herzegovina.*

[13] *Opinion on the Constitutional situation in Bosnia Herzegovina (proposed constitution in the Washington agreements (note 1, above).*

With regard to the judicial system provided for by the Federation Constitution, the Commission expressed some concern on two points. The first relates to the hierarchy to be established among the highest courts provided for in the Constitution, namely the Constitutional Court, the Supreme Court and the Human Rights Court and the delimitation of their respective competencies.[14] The Commission examined this point in some depth in its opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to the human rights protection mechanisms.[15] The second point made by the Commission relates to the powers of the Constitutional Court to intervene to put an end to political disagreements between the two Chambers or to decide as to the vital interests of one of the peoples of the Federation (Articles IV.A.18 and IV.B.6). In the Commission's opinion, these prerogatives are questionable since a Constitutional Court should as far as possible remain aloof from political disputes. Its involvement could discredit it and substantially impair its effectiveness as guarantor of the Constitution and the rule of law.

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

The Commission's opinion was given in November 1996 following a request by the Parliamentary Assembly of the Council of Europe. The Commission reviewed the competencies of various institutions and bodies acting in the field of human rights in Bosnia and Herzegovina and made the following general observations:

> "There exists in the legal system of B.H. and F.B.H. a multitude of bodies which may be competent to deal with human rights violations either in abstracto or in concreto, by means of individual petitions. This impressive machinery is not yet fully operational since several of these bodies have not yet been set up. However, when these bodies are established a risk of overlapping competencies will certainly arise, and it is therefore necessary to identify as a matter of urgency such procedural rules as will help avoid the risk of contradictory decisions or judgements. This is all the more important since contradictory decisions may affect the credibility of the institutions, with detrimental consequences for the peace and integration process.
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> The role of the bodies established under the Dayton Agreement Constitution will largely depend on the effectiveness of the protection granted by the bodies of the Entities. As long as an Entity's law provides for complete and effective protection, the Dayton bodies can only have a mere supervisory task; this task could in principle be carried out by a single instance judicial body. On the

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[14] *This point was raised in the individual opinion by J. Robert (CDL (94) 55: Commentaires sur la Constitution de la (Fédération) de Bosnie Herzégovine).*

[15] *See below.*

> contrary, where an Entity's system offers less opportunities for judicial protection of human rights, the role of the Dayton bodies should be much more active; this may require a more complex intervention, with two degrees of jurisdiction combined with procedures to facilitate a friendly settlement of the dispute. In this respect, one may observe that the judicial system of the RS contrasts with the complexity of the system of F.B.H. A complex and developed system of human rights protection at the level of B.H. will certainly contribute to improving the protection afforded in the RS, but it may render too elaborate and lengthy - and consequently less effective - the protection afforded as regards F.B.H.".

As regards the Republika Srpska, the Commission found that the judicial system for the protection of human rights has similarities with certain continental legal systems where it is for the courts and in particular for the Supreme Courts to deal with human rights cases and where no individual application can be brought before the Constitutional Court. However, having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established, giving the individual locus standi before the Constitutional Court in addition to or in substitution for the system of "individual initiatives". Moreover, the creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the F.B.H., will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in B.H. in its entirety. In order to ensure the necessary impartiality of the institution in a post-conflict situation, one should seriously consider that the RS Ombudsmen should be three in number, belonging to the three national groups being the constituent peoples of Bosnia and Herzegovina, and that the international community be involved in their nomination and operation.[16]

As regards the Federation of Bosnia and Herzegovina, the Commission considered the respective competencies of the Supreme Court, the Human Rights Court and the Constitutional Court underlining the fact that in practice, it will be difficult to distinguish human rights cases from normal domestic and from constitutional litigation. For example, a dispute as to the custody of children in divorce proceedings will probably be at the same time a litigation under civil law (family law) and under human rights law (right to respect for family life); similarly, litigation over property, -a key issue in Bosnia and Herzegovina- will be at the same time a question of common

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[16] On the basis of this opinion work has started on the creation of an Ombuds-institution for the Republika Srpska in 1997 involving the Venice Commission, the Presidency and the Constitutional Court of the Republika Srpska, the Council of Europe's Directorate of Human Rights, the OSCE and the Office of the High Representative. Despite the fact that co-operation was somewhat disrupted as a result of the constitutional crisis in the Republika Srpska, the Commission adopted a proposal (in the form of a preliminary draft law) with a view to submitting it for consideration by the competent authorities in the Republika Srpska (see Opinion VII. in this publication).

legislation and a human rights issue (right to peaceful enjoyment of possessions, Article 1 Prot. No 1 to the ECHR). The distinction between human rights questions and constitutional questions will again be difficult. For example, a question concerning the independence of the judiciary will be a question of constitutional law but it also refers to the individual right to fair proceedings before an independent and impartial tribunal.

In the opinion of the Venice Commission the delimitation of competencies of the Human Rights Court can only be a short-term exercise. For the Commission, "the distribution of competencies between three high courts is only justified by the particular will of the drafters of the Constitution in the Washington Agreement to create a body with the exclusive task of monitoring respect for human rights in F.B.H. After the Dayton Agreement and the establishment of the Human Rights Commission, setting up a specific human rights court with partial international composition at the level of an entity may no longer be advisable".

Indeed, the simultaneous functioning of two international Human Rights jurisdictional bodies raises particular problems. Unlike the three Constitutional Courts which are requested to make their decisions on the basis of different legal instruments, the Human Rights Court of F.B.H. and the Commission of Human Rights of B.H. will apply mainly the same basic human rights instruments and above all the European Convention of Human Rights and the case-law of its organs. In this way, the Commission of Human Rights of B.H. will actually have appellate jurisdiction over cases decided by the Human Rights Court of F.B.H.

As a consequence to the above, the process of exhaustion of the domestic remedies available to a citizen of F.B.H. becomes extremely lengthy. It involves the (possible) successive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of F.B.H.) and then of the Ombudsman of B.H. before reaching, finally, the Constitutional Court of B.H. or the Human Rights Chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from F.B.H. from applying to the European Commission of Human Rights in Strasbourg when B.H. becomes party to the European Convention on Human Rights. Admitting that the Dayton Agreement did not formally abolish the provisions of the F.B.H. Constitution concerning the Human Rights Court of the Federation,[17] the Commission

[17] *In its "Opinion on the setting up of the Court of Human Rights of the Federation of Bosnia and Herzegovina" (see note n° 4 above), the Commission stated: "The first question asked concerns the effects of the Dayton Agreements on the arrangements for the Washington Agreements. In other words, questions should be asked about whether the Dayton Agreements, coming after the Washington Agreement and the adoption of the Federation's Constitution resulted, through the setting up of the Human Rights Commission (Annex 6 to the Dayton Agreements), in the formal revocation of the provisions relating to the Human Rights Court of F.B.H. This does not seem to be the case from a legal point of view. The Dayton Agreements and the Washington Agreement do not involve the same parties. The Dayton framework agreement was signed by the Republic of Bosnia and*

clearly suggested that the Constitution of F.B.H. be amended in such a way as to do away with the Court of Human Rights. The lacuna, which might result from such an amendment in the judicial system of F.B.H., would be easily covered by the Supreme Court and the Constitutional Court of the Federation. In addition, this solution will simplify the judicial system of protection of human rights in F.B.H. and will consequently shorten the legal avenues of exhaustion of domestic remedies. It will also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, i.e. the Human Rights Commission. This solution is further supported by the consideration that in the long run one should examine anyhow whether the tasks entrusted to the Human Rights Court (if it had to be set up) could not be transferred to the Constitutional Court, whose competence could then be extended in order to include the examination of individual applications alleging human rights violations. This would bring the legal system of the F.B.H. into line with other European legal systems where, by means of individual applications (Individualbeschwerde), human rights issues are dealt with by the Constitutional Court. Moreover, such a development would be in line with the tendency in most European States to entrust Constitutional Courts with the task of human rights protection.[18]

But the most striking finding in the Commission's Opinion is the overlapping competence of various bodies created under the Dayton Agreement and, above all, the possible conflict of competence between the Constitutional Court of Bosnia and Herzegovina and the Human Rights Commission established under Annex VI to the said Agreement.

Among other competencies, the Constitutional Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)). It shall also have appellate jurisdiction over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). It follows from the latter provision that the Constitutional Court may receive appeals against decisions from

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Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and Annex 6 by the Republic of Bosnia and Herzegovina, F.B.H. and the Republika Srpska, whereas the Washington Agreements were signed by F.B.H. and the Republic of Croatia. Similarly, Annex 6 is intended to set up an institution to monitor the respect for human rights throughout the state of Bosnia and Herzegovina, whereas the Federation's constitution apparently only covers one entity of that state (even though the original aim of the Washington Agreements was to create a Federation covering the whole territory of Bosnia and Herzegovina). Since the two international Agreements neither have the same parties nor govern the same subject, it cannot be considered that the Dayton Agreements have affected the legal validity of the provisions relating to the Human Rights Court of F.B.H.".

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

any court whereby it is alleged that they violate the Constitution, including the provisions on Human Rights (cf. Article II). In accordance with Article VI para 4 of the Constitution of B.H., the decisions of the Constitutional Court "are final and binding". Similarly, the Commission on Human Rights - and in particular the Human Rights Chamber -has jurisdiction to receive applications concerning violations of human rights. The decisions of the Chamber are also "final and binding".

Whatever the intention of the drafters of the Constitution may have been,[19] there is an overlapping between the competencies of the Constitutional Court and those of the Commission of Human Rights. Both shall deal with human rights issues, mainly under the European Convention on Human Rights.

Of course, having regard to the difference in nature of the two institutions, one may assume that their decisions would have different effects. Thus, the decisions of the Human Rights Chamber will simply establish that a violation of human rights has occurred and will found an obligation for the authorities to grant just satisfaction to the victims of the violation,[20] while the judgements of the Constitutional Court may directly result in the abolition of legislative provisions and the annulment of court judgements or of administrative decisions. But in practice this difference does not resolve the problem of overlapping competence.

One suggestion for avoiding such overlapping would be to place one of these two judicial bodies in a hierarchically superior position to the other, allowing appeals from one jurisdiction to the other. One could envisage for instance to allow appeals from the Human Rights Chamber to the Constitutional Court. The argument in favour of this solution would be that the Human Rights Chamber is somehow integrated in the domestic legal order of Bosnia and Herzegovina and, consequently, allowing such an appeal would be in accordance with the constitutional provision empowering the Constitutional Court to deal with constitutional appeals against judgements "of any other court in Bosnia and Herzegovina".

The Venice Commission did not follow this view, since the opposite solution, namely to allow appeals from the Constitutional Court to the Chamber, finds more support in the history and the structure of the Agreements. Indeed, it could be assumed that the Commission on Human Rights should only be involved after the Constitutional Court. Appeal to the latter would then be regarded as a "domestic remedy" to be exhausted before applying to the Commission of Human Rights. An argument in favour of this solution would be the particular international character of the Human Rights

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[19] One could suggest that the intention was to attribute abstract norm control to the Constitutional Court and reserve in concreto control for the Human Rights Commission, but this interpretation does not fit with the "appellate jurisdiction" of the Constitutional Court.

[20] The Human Rights Chamber shall in its decisions "address what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures" (Article XI, para 1 (b) of Annex 6).

Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina). In this perspective the Human Rights Commission appears as a kind of international body integrated into the legal order of Bosnia and Herzegovina for a transitional period, namely until the effective integration of this State and until its accession to the Council of Europe, the ratification of the European Convention on Human Rights and the recognition of the human rights protection mechanism of the Strasbourg organs. This idea of a transitional international human rights protection mechanism is not new. It was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe. Article 5 of this Resolution provides that the arrangements as to a transitional human rights control mechanism integrated in the internal legal order of European States not yet members of the Council of Europe "shall cease once the requesting state has become a member of the Council of Europe except as otherwise agreed between the Council of Europe and the State concerned".[21] The provisions on jurisdiction of the Human Rights Commission do not exclude appeals from the Constitutional Court but rather underline this quasi-international character of the mechanism established under Annex 6: Article 2 of Annex 6 indicates that the Commission on Human Rights is established "to assist the parties (namely the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in honouring their obligations" to secure to all persons within their jurisdiction the highest level of internationally recognised human rights standards. Therefore, the State of Bosnia and Herzegovina is a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement also.

However, in the Venice Commission's view, even the latter solution is not entirely satisfactory since it adds a level of jurisdiction to the already long process of exhaustion of domestic remedies in Bosnia and Herzegovina. Having regard to the fact that the Human Rights Commission is a provisional institution designed to last 5 years, and taking into account the need to ensure legal certainty as to respect for human rights within a relatively short time[22] by avoiding undue prolongation of human rights litigation, a third solution was proposed: the jurisdiction of either court would not extend to matters already dealt with by the other. Potential applicants will thus have the choice between appealing to the Constitutional Court of B.H. and lodging a complaint with the Human Rights Commission. A case dealt with by any of these institutions should no longer be subject to review by any other court in Bosnia and Herzegovina. The risk of the two institutions producing diverging case-law could be reduced if human rights litigation were attributed, as a matter of principle, to the

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[21] This Resolution is expressly referred to in the Dayton Agreement, as the legal basis for the Human Rights Chamber (Article VII, para. 2 of Annex VI to the Dayton Agreement. See also Paul SZAZ, op.cit above footnote N° 8. The same Resolution may be regarded as being also at the origin of the Provisional Human Rights Court provided for in the Croatian Constitutional Law on the protection of human rights and rights of national minorities.

[22] This need is acknowledged in Annex 7. The Annex 7 Commission deals with real property claims in first and last instance; its decisions are final and binding.

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

Finally, the Commission concluded that none of the above solutions is entirely satisfactory and they can only be implemented as transitional arrangements. With the end of the transitional period, i.e. when the specialised institutions will cease their operation, the appeal to the Constitutional Court should be the only and final remedy in human rights litigation in B.H.

4. Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina

The Venice Commission gave this opinion at the request of the Office of the High Representative, in August 1996. After having considered the amendments to the Constitution of the Republika Srpska adopted in September 1996, it supplemented its findings with comments addressed to the Office of the High Representative. The Commission's opinion refers to the structure of the State of Bosnia and Herzegovina, to the implications resulting from the lack of sovereignty for the Entities, the distribution of powers between the State and the Entities, and protection of Human Rights.

Despite the position adopted by some representatives of the Entities, the Commission was of the opinion that the Constitution of B.H., without expressly saying so, establishes a federal State. It defines two Entities, F.B.H. and R.S., as constituent parts of B.H. and divides rights and powers between the institutions of B.H. and those of the Entities. It establishes a citizenship of B.H., while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present.

However, the Commission clearly recognised that Bosnia and Herzegovina is an unusually weak federation. All governmental functions and powers not expressly assigned in the Constitutions to B.H. shall be those of the Entities (Article III.3. (a)). A decisive weakness of B.H. is that it depends for its resources on contributions from the two Entities (Article VIII.3). This dependency may well threaten the efficient functioning of B.H. There are federal systems in which the federated entities depend

for their finances on the central authorities. But there seems to be no precedent for a federal State which solemnly proclaims the supremacy of its norms over the norms of the federated entities while at the same time acknowledging its financial dependency on these.

The Commission further noted that Article III.3.(b) of the Constitution of B.H. provides that this Constitution supersedes inconsistent provisions of the constitutions and laws of the Entities. This implies that the Constitution of B.H. has direct abrogatory power with respect to the constitutions and other laws of the Entities, a conclusion supported by Article 2 of Annex II of the Constitution of B.H., which states that "all laws, regulations, and judicial rules of procedure in effect within the territory of B.H. when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution". On the other hand, Article XII.2 of the Constitution of B.H. provides for the obligation for the Entities to amend their respective constitutions to ensure their conformity with this Constitution. Both entities have indeed proceeded to revise their constitutions to this end. The Commission concluded that it was necessary, both for political and legal reasons, not to rely simply on the abrogatory power of the Constitution of B.H., but to try to bring the constitutions of the Entities into line with the central constitution. Otherwise this task would have fallen upon the Constitutional Court of B.H. and have threatened to overburden it and to lead to a long period of legal uncertainty.

The Commission also had regard to reference to constituent peoples in the Constitution of the State of Bosnia and Herzegovina and in the Constitutions in the entities. It found that the reference to Bosniacs and Croats as "constituent peoples, together with others" in the F.B.H. Constitution was not inconsistent with the Dayton Agreement. In the Commission's view these provisions should be seen historically in the light of the constitutions of 1974 and even of 1910. There is a clear political will to be deduced therefrom that Bosniacs, Croats and Serbs form the constituent peoples of B.H. Insofar as the R.S. defines itself as a national state of the Serb people, it could seem quite "natural" that the Federation defines itself to be the component entity for Bosniacs and Croats. A closer look into the governmental structure then reveals the application of the proportionality principle as far as representation and participation in the decision-making process in the legislative, executive and judicial branches is concerned. The Commission stressed, however, that there is - because of some sort of territorialisation and "nationalisation" of the institutional structures - a dangerous tendency arising from the proportionality principle, at least in practice, that citizens not belonging to the respective constituent peoples within the entities might be excluded from representation and the decision-making process. Their rights to stand as candidates for public offices on various levels should expressly be improved.

With regard to issues concerning sovereignty, the Commission observed that the new wording of the preamble of the F.B.H. Constitution clearly stated that the Federation "is a constitutive part of the sovereign state of B.H.". Sovereignty is thereby correctly attributed to the State of B.H. and not to the Federation itself.

As regards the Constitution of the Republika Srpska, the Commission observed that the Preamble expressed the RS aspiration to become a sovereign State and the wish to unite with other Serb countries. Recalling that the Entities are part of the internal structure of B.H. and cannot be sovereign States in their own right the Commission recommended that references to sovereignty and independence be deleted from the RS Constitution. In this respect the Commission rejected the argument that the Preamble had no normative character and that R.S. was therefore under no obligation to amend it. Since the Preamble is important for the interpretation of the whole Constitution, the Commission could not accept the maintenance of a text, which is in direct contradiction with the state structures of B.H. and the obligations of R.S. under the Dayton Agreement. The Commission recommended therefore that the previous text of the Preamble be replaced by a new text. Amendment LIV that was subsequently adopted replaced those provisions, which were in clear contradiction with the Constitution of Bosnia and Herzegovina (establishment of a sovereign and democratic state, decision to reunite with other Serb countries). However, in the Commission's view the new text of the Preamble is still problematic. Can one state that the Serb people independently decides on its political and national status when the Entity is part of B.H., and can one speak of the determination of the Serbian people of the RS to connect their state closely and in all aspects with other states of the Serbian people, when all such relations have to be consistent with the sovereignty and territorial integrity of B.H.? On the whole the Preamble still gives the impression of being a Preamble for an independent state. Although the Preamble has no direct operational consequences but is a text mainly serving to interpret the Constitution, it should reflect the character of the RS as an Entity of B.H. and therefore a further revision seems necessary. The Constitutional Court of B.H. might be called upon to decide on this matter.

The provision on the declaration of war in the Constitution of the RS raised very delicate and difficult issues. Can an Entity declare war and to what extent do Entities have under international law the right to self-defence? This problem will have to be settled by the Constitutional Court of B.H.

The Venice Commission requested also the deletion of Article 138 of the RS Constitution giving the authorities of RS the possibility of taking unilateral measures when they believe that their rights are violated by acts of B.H. or F.B.H. This Article has not been deleted but it has been very much qualified. Such measures are now possible only "temporarily until the decision of the Constitutional Court of B.H. in cases when ineliminable detrimental consequences may occur". In the Commission's view, the compatibility of this clause with the Dayton Constitution is still doubtful; however, the practical importance of this provision seems very much reduced.

Distribution of powers between State and Entities is regarded by the Commission as a key issue in the development of a coherent constitutional and legal system. The fundamental constitutional rule in this respect is of course that the two Entities enjoy

residual powers. The Constitution of B.H. assigns only certain specific areas of competence to the State, while the remainder lie with the federated Entities (article III-3-a of the Constitution of B.H.). It is therefore important that the competencies of the State be strictly observed.

With regard to the Amendments to the Federation Constitution, the Commission welcomed the fact that Article III.1 as amended by Amendment VIII no longer includes the competence of the Federation Government to conduct foreign affairs, this competence now being expressly attributed to the State.[23] The Commission further indicated that the various competencies in the economic field, in particular concerning economic policy (c), finance (e) and energy policy (h), have to be interpreted in accordance with the overriding principle of the Constitution of B.H. that there shall be free movement of goods, services, capital and persons throughout B.H. (Article I.4). These competencies may therefore not be exercised in a manner that may impede the free circulation of persons, goods, services and capital. For example, the fiscal system of the Entities may not constitute an impediment to free circulation. Similarly, the scope of financial competence under (e) has to be interpreted in the light of these provisions of the Constitution of B.H. which reserve monetary policy and the statute of the central bank to the institutions of B.H. (Articles III.1(d) and VII). The Entities' regulations may not encroach upon the exercise by the institutions of B.H. of competencies necessary to maintain the monetary unity of the country.

The Commission has also considered various interpretations of the provisions on distribution of competencies whereby the power to take normative action and define policies would lie with the State while implementation would be a competence of the Entities.

Considering a proposal to include a competence of the Federation in the matter of customs the Commission expressed the view that this would violate the exclusive competence of B.H. for customs policy under Article III.1(c) of the Constitution of Bosnia and Herzegovina. It is true that one could envisage giving the Federation bodies the task of implementing the customs policy adopted at B.H. level.[24] The Commission was reticent to accept this distinction between customs policy and implementation. It stated that although at B.H. level it may of course be decided in the

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[23] *The Commission indicated in the same opinion that Article IV.B.8 of the Federation Constitution is incompatible with the Constitution of B.H. because, according to Article V.3.B. of this Constitution, the Presidency of B.H. appoints Ambassadors. The appointment of Ambassadors by the President of the Federation therefore cannot be admitted. As to proposals made that the President of F.B.H. "initiates" or "proposes" nominations of Ambassadors from the territory of F.B.H. the Commission found that it is up to B.H. legislation to decide on whether to involve the Entities in the nomination procedure. There is no basis in the B.H. Constitution for requiring a consensus between Entity and B.H. on the nomination. The President of F.B.H. can therefore be at most one of the authorities making proposals.*

[24] *The justification for this interpretation being that Art.III.1.(c) of the B.H. Constitution speaks only of "customs policy" and not of customs as such.*

future to entrust implementation of the customs policy to the Entities, in the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. The Commission also underlined that it is essential that customs rules be uniformly applied throughout B.H. since merchandise can then freely circulate within B.H.

In its recent "Opinion on the competence of the Federation of Bosnia and Herzegovina in criminal matters" the Commission gave a concrete example of its understanding of the distribution of competencies between the State and the Entities:

The Entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competencies of the State of B.H. in this area, as provided for in the Constitution of B.H. Of the areas of competence assigned to B.H., only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives B.H. responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon B.H. in the area of criminal law and criminal procedure. However, the wording of article III-3-a of the Constitution of B.H. seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the Entities than competence for criminal law or criminal procedure in the full sense of the term.

Nevertheless, for the Commission, this finding does not strip the State of any competence in the field of legislation in criminal matters:

> "Article III-1-g is not the sole source of the competence of B.H. in criminal matters. B.H. may define certain acts as offences and provide for punishment insofar as it needs to use the machinery of criminal law to implement its powers and responsibilities. Although such competence is not explicitly provided for in any text, this is a logical consequence of the statehood of B.H. and the tasks entrusted to it. Customs policy, for example, is a prerogative of B.H. (article III-1-c of the Constitution of B.H.) and manifestly requires the existence and application of a range of criminal measures for which B.H. has competence and indeed sole competence. The same applies to criminal law relating to the currency and monetary policy, immigration and international transport and communication.
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> Similarly, it is clear that when the criminal law is intended to protect certain values that fall within the state's area of competence, B.H. must be responsible for enacting it. This will apply, for example, to the protection of the international frontiers of Bosnia and Herzegovina and its territorial integrity, the symbols of the state, such as its flags and emblems, and its constitutional system. The competencies of the two entities in criminal law do not therefore cover this field.

> The above-mentioned competence of B.H. is admittedly implicit, but this does not make it any less certain or exclusive. It is bound up with the nature of the state and cannot be exercised by, or even delegated to, the entities. If the two entities were to start legislating in place of the state, the same subject matter would be governed by different rules (leading, for example, to a conflict of rules for protecting the frontiers), which could result in absurd, or even dangerous, situations."

In its "Opinion on the Compatibility of the Entities Constitutions with the Constitution of B.H.", the Commission also examined the question whether it was possible for the entities to take action temporarily in case of inactivity by the State. Referring to Article III.2 of the Federation Constitution as amended by Amendment IX which attributes to the F.B.H. competence on "enforcement of laws and other regulations on ... foreigners staying and movement", the Commission noted that it seemed to be inconsistent with the responsibility of the B.H. government for foreign policy (Article III.1 (d)) and immigration, refugees and asylum policy (Article III.1 (f)). The Commission seemed satisfied however with the explanations given by the Federation authorities that these provisions have a partly transitory character and are necessary due to the lack of adequate structures at B.H. level.

The suggestion that the entities could legislate provisionally in an area to avoid any possibility of a legal vacuum created by the failure of the B.H. legislature to take action was again made in respect of criminal legislation for which B.H. is responsible. This time the Commission clearly indicated that it could not support this interpretation.

> "The Constitution of B.H. makes no provision for the entities to perform the functions of the state on a substitute basis and such an initiative on the part of the entities would appear to be in breach of the constitutional order of B.H. It would in any case have little justification since there appears to be no danger of such a legal vacuum. Thus, article 2 of Annex 2 of the Constitution of B.H. ("Transitional Arrangements") clearly states that "all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

As regards Human Rights and Freedoms the Commission observed that the Constitution of the RS contains a long list of guarantees (Articles 10-49). At the same time, the Constitution of B.H. provides for the application of a great number of international legal instruments in this field, with a particularly prominent place being reserved to the European Convention of Human Rights in Article II.2. The rights and freedoms set forth in the Convention are applied directly in B.H. and have priority over all other law. The Commission was of the opinion that there was a risk that a detailed catalogue of human rights and freedoms as set out in the Constitution of R.S.

may not always be fully in line with the relevant international instruments and the latest interpretation given to them by the competent bodies like the European Court of Human Rights. As a general solution to this problem, it is suggested that the Constitution should expressly state that, in the event of any discrepancy between the rights set out in the Constitution of the R.S. and the rights applicable by virtue of the Constitution of B.H., the provision most favourable to the rights of the individual will be applicable.

The Commission further observed that a large number of rights are guaranteed only to citizens of the Republic.[25] It indicated that the restriction to citizens of the R.S. of the principle of non-discrimination, of freedom of movement and of the right to peaceful assembly clearly contradicted Articles II.2, II.3 and II.4 of the Constitution of B.H., which provide that the rights guaranteed in these Articles apply "to all persons in B.H.". The restriction of the freedom of movement to citizens in Article 21 was also in direct contradiction with Article I.4 of the Constitution of B.H. Freedom to express one's national affiliation (Article 34) is guaranteed by the Framework Convention on National Minorities (Annex I to the Constitution of B.H.) and should therefore be granted to all citizens of B.H.

These recommendations of the Commission have been implemented. In particular, the rights previously reserved to RS citizens have now been granted to everyone and the clauses on the restriction of rights, which were formulated in a completely unacceptable way, have been deleted. Moreover, the problem that the international legal instruments being part of the Constitution of B.H. may in several respects be more favourable to citizens than the Human Rights catalogue contained in the Constitution of RS has been solved, as proposed by the Commission, by introducing a provision that, in case of any discrepancy, the provision more favourable to the individual will be applied.

5. Towards a coherent constitutional regime

The above presentation of the most important opinions of the Commission clearly shows the two areas in which constitutional interpretation will be instrumental in the near future.

The first is of course the establishment of a federal system based on a balanced and realistic distribution of competencies between the Entities and the State. A sensitive approach of the sometimes-conflicting constitutional provisions will be necessary. The Commission's opinion on the competence of the Federation in criminal matters is one

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[25] *In particular Article 10: non-discrimination; Article 21: freedom of movement and residence; Article 29: the right to vote; Article 30: the right to peaceful assembly; Article 32: the right to petition; Article 33: the right to participation in public affairs; Article 34: freedom to express national affiliation; Article 38: the right to establish private places of instruction; Article 43: the right to job training for partially disabled.*

example of systematic comparative analysis of the B.H. and the F.B.H. Constitutions acknowledging the existence of implied powers. While experience has shown a general European trend towards decentralisation in the form of federalism and regionalism,[26] central States cannot be stripped of the very essence of statehood. On the other hand, there are obvious limits in the interpretation of Constitutional texts and recourse to the notion of "implied powers" should remain exceptional.

Another area of concern, directly related to the federal system established by the Washington and the Dayton Agreements, is the combination of the principle of proportional representation of the constituent peoples combined with a certain territorialisation.[27] The Commission saw in this phenomenon a risk for citizens not belonging to the constituent peoples of the Entities to be deprived of fundamental political rights. The Constitutional Court will have to pay particular attention to this situation and interpret the Constitutional provisions taking into account the principle of non-discrimination as enshrined in the Constitution and the relevant international instruments.

Concluding its opinion on the compatibility, the Commission acknowledged with satisfaction that both the F.B.H. and the R.S. have made a serious effort to bring their Constitutions into line with the Dayton Agreements although full compatibility has not as yet been achieved. With respect to the F.B.H., the task is obviously complicated by the fact that the federated Entity is itself a federation and that competencies have to be distributed between multiple levels, making the whole legal system extraordinarily complicated. However, the obvious discrepancies with the Constitution of B.H. have been eliminated or, at least, their elimination is under discussion. In particular it must be acknowledged that Article 1 of the Constitution of the Federation as amended explicitly provides for the integration of the Federation into B.H. With respect to the R.S., an effort has also been made to remove incompatible provisions from the Constitution of R.S. There remain problems in particular with respect to the concept of the sovereignty of the R.S., which is maintained in a form that is inherently incompatible with its status as an entity of a Federal State, and concerning the rights of non-citizens of the R.S. within the R.S.

Therefore, work remains to be done for both Entities. Since the Constitution of B.H. provides that its provisions supersede any incompatible provisions of the legal order of the Entities and gives to the Constitutional Court the power to decide in the case of

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[26] *See, for instance, the case of Belgium changing in a quarter of a century from a unitary State to a regional and then a federal one; increasingly wide-ranging regionalism in Spain; the debate on federalism in Italy etc. See also European Commission for Democracy through Law, "Federal and regional States", Science & Technique of Democracy, No 19, Council of Europe Publishing 1997.*

[27] *See also in this respect, J. MARKO, "The Ethno-national Effects of Territorial Delimitation in Bosnia and Herzegovina", in Local Self-Government, Territorial Integrity and Protection of Minorities, Acts of the UniDem Seminar in Lausanne (25-27 April 1996), Science & Technique of Democracy No 16, Council of Europe Publishing 1997.*

conflict, it would seem that the Constitutional Court of B.H. will have to deal with the remaining problems of incompatibility.

The second area of concern is the human rights protection mechanism.[28]

The Commission found that protection of human rights is not only a constitutional requirement but also a prerequisite and an instrument for long-standing peace in the country. Its effectiveness depends on the coherence of the protection machinery and on the credibility of the bodies which will monitor human rights implementation throughout the country, in particular the specialised bodies provided for in Annex 6 to the Dayton Agreement and in the Constitution of the F.B.H. as well as the Supreme and Constitutional courts.

Conflicts of competence between bodies entrusted with protection of human rights should in principle be avoided, as well as situations whereby two highest judicial bodies may give contradictory answers to the same legal problem. Such situations, which are undesirable in general, could, in the present circumstances of this region, affect the very essence of the constitutional order and thus the State as such.

The human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

Interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina will have to take into account the complexity of the constitutional order and the need for speedy and effective judicial protection of individual human rights. When deciding which case falls within their competence, they should take into account not only laws and regulations but also the case-law of other institutions. Co-ordination of their practice by disseminating information on the cases which have been introduced, or are pending before, or which have been decided by either institution will be of utmost importance and should be ensured even in the first months of operation of the institutions concerned.[29]

But interpretation has its limits and action may be required also in the normative field.

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

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[28] *see also Jessica SIMOR, "Tackling Human Rights Abuses in Bosnia and Herzegovina: The Convention Is up to It, Are Its Institutions?", Eur. H.R. Law Reports (1997) p. 644 ff.*

[29] *See above-mentioned Opinion on Human Rights situation in Bosnia and Herzegovina.*

However, duplication should be avoided since it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with amendments of the entities' Constitutions where the creation of specific human rights bodies may appear unnecessary from a legal point of view. Similarly, important disparities in the human rights protection systems of the two entities may also be detrimental to the effectiveness of protection. Ensuring a balanced and coherent judicial system for the protection of human rights in B.H. in its entirety may require a certain parallelism in the protection afforded under the legal orders of the two entities and possibly the establishment of equivalent bodies.[30]

Also the creation of a coherent federal system cannot be seen to be a matter of simply removing inconsistencies from the Constitutions of the Entities. In order for this to come about, the difficulties of the implementation of the Constitution of B.H. as agreed at Dayton will have to be overcome. At present the State has a dual character with certain competencies lying with B.H. and others with the Entities. But co-operative mechanisms, which will be indispensable in many sectors to ensure the effective functioning of the institutions both of B.H. and of the Entities, are lacking. Article III.4 and III.5 of the Constitution of B.H. may provide a starting point for the development of such mechanisms. Both Entities however will have to reflect on how to integrate such co-operative mechanisms into their constitutional structure.[31]

[30] *Ibid.*

[31] *Opinion on the compatibility of the Constitutions of the Entities with the Constitution of Bosnia and Herzegovina.*

B. OPINIONS AND REPORTS

I. OPINION ON CERTAIN ASPECTS OF THE CONSTITUTIONAL SITUATION IN BOSNIA & HERZEGOVINA (OPINION ON THE CONSTITUTION OF THE FEDERATION OF BOSNIA-HERZEGOVINA)

The text of the Constitution of the Federation of Bosnia-Herzegovina contains, in general, the principal elements of a federal Constitution based on the principles of democracy and the rule of law. It includes instrumental provisions which define the various authorities and their powers, as well as their relations *inter se*. The Constitution does not confine itself to dealing with federal authorities, but also contains chapters on cantonal and municipal authorities. The Constitution then sets out provisions on the division of competencies between the Federation and the cantons, identifying those areas in respect of which the Federation has responsibility.

The Constitution also contains a chapter devoted to human rights. Two particularly positive features should be highlighted in this connection: the reference to rights and freedoms guaranteed by international instruments and the provisions concerning the Ombudsman.

The Commission nonetheless considers it necessary to offer a few observations on certain aspects of the Constitution.

1. The number and names of federate entities composing the Federation should appear in the Constitution. This is one of the characteristics of federal states (see e.g. the Swiss Federal Constitution, the Preamble to the Basic Law of the Federal Republic of Germany).

   Mention of the federate states in the actual text of the Constitution distinguishes them from mere provinces or regions of a unitary state and reflects their importance in the state structure.

2. The implementation of international **human rights** norms (as provided for in Article II.A.1) is without doubt a particularly felicitous provision, which demonstrates Bosnia-Herzegovina's commitment to effective protection of human rights. However, it could give rise to difficulties of a technical kind in practice.

Such problems could arise in cases where there are discrepancies between the texts of international instruments safeguarding human rights and the catalogue of rights guaranteed by the Constitution. One solution to this problem might be to state the principle whereby the provision most favourable to the rights of the individual would be applicable in the event of conflict. Failing the inclusion of such a provision in the Constitution, it will probably fall to the Constitutional Court or the Court of Human Rights to establish this principle through its case-law.

The list of rights appearing in Article II.2 may also raise some problems. Although it is a non-exhaustive list of rights guaranteed (as indicated by the words "in particular"), this list might nevertheless give the impression that the drafters of the constitution wanted to accord the rights expressly mentioned there a higher value than the rights guaranteed by international instruments. It will be for the supreme courts of the Federation to clarify this point.

3. The **protection of minorities** receives only a simple mention: having regard to the particularly delicate character of this question in Bosnia-Herzegovina, an economy of detailed provisions on this matter is unwarranted.

4. The Commission welcomes the existence of precise rules governing the **Ombudsman**, but an express provision in the Constitution to enable the Ombudsman to make recommendations to the administration would have been desirable. The present text allows for a wide range of different practices by both the ombudsman and the administrative authorities. Furthermore, intervention by the ombudsman in the course of a trial should be exceptional, or at least subject to extreme caution. His role should in fact be to intervene before the institution of judicial proceedings. Intervention during a trial should have no other purpose than to bring about a friendly settlement. Any other kind of intervention would be contrary to the principle of the separation of powers, the independence of the judiciary and equality of arms.

5. The Commission welcomes articles 3, 4 and 5. It considers in particular that the constitutional guarantee of the right of refugees to return to their homes is of paramount importance in the present political context in Bosnia-Herzegovina.

6. The matter of the **division of competencies between the Federation and the cantons** also gives rise to certain questions. Residual competence is vested in the cantons (Article III.4), which means (cf. Article III.1-3 *a contrario*) that the Federation has no competence in the field of criminal law, and that it cannot legislate for example in respect of such matters as private law, labour law and social security or environmental law. It may be questioned whether such a situation is satisfactory.

It would have been wise to include a provision whereby, in the areas in which both the Federation and the cantons have competence, the cantons may not exercise their legislative powers if the Federation has enacted comprehensive legislation; it would also have been useful to make express provision for the Federation to adopt outline legislation, leaving it to the cantons to regulate matters of detail. In addition, the division of competencies in fiscal matters should be specified.

Furthermore, the possibility for cantons to delegate certain competencies to the Federation (Article V.2, para.1) could give rise to problems. It would have been preferable to limit this possibility, in order to prevent the cantons being completely stripped of their powers.

7. As regards the various **organs of central government** and their respective powers, the points open to discussion include the following:

- the Constitution leaves open the question of whether the legislature will be elected by proportional representation for the whole country or whether the country will be divided into electoral constituencies and, if so, whether the constituencies will correspond to the cantons; these questions can of course be dealt with later by electoral legislation.

- the absence of a clear choice between perfect and imperfect bicameralism which could lead to a certain incoherence;

- there is no express provision for Parliamentary control over the administration, nor for the executive's right to initiate legislation;

- Article IV.B.16 which enables the President to dissolve both chambers of the legislature if he determines that they are unable to enact necessary legislation, gives rise to some misgivings; rash application of this provision could easily result in abuse and seriously infringe the principle of separation of powers.

- the powers of the Constitutional Court to intervene to put an end to political disagreements between the two Chambers or to decide as to the vital interests of one of the peoples of the Federation (Articles IV.A.18 and IV.B.6) are questionable. The Constitutional Court should as far as possible remain aloof from political disputes. Its involvement could discredit it and substantially impair its effectiveness as guarantor of the Constitution and the rule of law.

- the Commission considers that some of the conditions laid down for the appointment of military and diplomatic staff and all judges (appointments subject to approval by both Chambers) are often difficult to meet and hence the cause of malfunctions; another rule difficult to apply in all cases is the one

requiring an equal number of Bosniac and Croat judges in every court (see e.g. the Constitutional Court, which is made up of 9 judges).

8. The Commission finds it important that Cantons can create **cantonal councils** to co-ordinate their activities. In the Commission's opinion, such bodies will allow for the consideration of questions of more than a mere cantonal interest without requiring action by the Federation. It is on the other hand to be regretted that the Constitution prevents the creation of such cantonal councils between cantons having different ethnical majorities (Article V.3).

9. In addition, regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the **independence of the judiciary**.

   Finally, the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges (Articles V.11, para.3 and VI.7, para.4).

10. Lastly, the Commission notes that the new Constitution has not been adopted by a specially elected constituent assembly, but by a legislative assembly composed of Deputies whose mandate was still valid. It further observes that the referendum process has not been followed, either for the approval of the new constitution, or for the amendments to be made to it. However, this may be explained by the extreme political conditions prevailing in Bosnia-Herzegovina.

In conclusion, the Commission finds that the Constitution of the Federation of Bosnia-Herzegovina contains the essential norms of a federal constitution. Particular prudence will nevertheless be necessary in the practice of the federal and cantonal authorities in order for it to be implemented without difficulty.

II. OPINION ON THE CONSTITUTIONAL SITUATION IN BOSNIA AND HERZEGOVINA WITH PARTICULAR REGARD TO HUMAN RIGHTS PROTECTION MECHANISMS

Adopted by the Commission at its 29th Plenary Meeting (Venice 15-16 November 1996) on the basis of the report prepared by the Commission's Working Group composed of Messrs Jambrek (Slovenia), La Pergola (Italy), Malinverni (Switzerland), Matscher (Austria) and Russell (Ireland).

1. Introduction

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

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

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

The Commission held an exchange of views on the topic at its 28th Plenary meeting (Venice, 13-14 September 1996) in which the Ombudsperson of Bosnia and Herzegovina, Mrs Gret

Haller, took part. At its 29th meeting (Venice, 15-16 November 1996) the Commission adopted the present report.

2. Human Rights in Bosnia and Herzegovina: general approach

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

Human Rights - along with the right to free elections and freedom of movement of persons, goods, services and capital throughout the country (Article I, paras 2 and 4) - are at the centre of the Dayton Agreement. Article II of the Constitution of B.H. provides that "Bosnia and Herzegovina and the two entities shall provide the highest level of internationally recognised human rights and fundamental freedoms". In particular, "the Rights and freedoms set forth in the European Convention of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law". Particular care has been taken in the Constitution in order to stress the principle of non discrimination and the rights of refugees and displaced persons to freely return to their homes and to have restored to them property of which they were deprived in the course of hostilities since 1991 (Article II, paras 4 and 5).

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

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

The Commission finds that protection of human rights is not only a constitutional requirement but also a prerequisite and an instrument for long-standing peace in the country. Its effectiveness depends on the coherence of the protection machinery and on the credibility of the bodies which will monitor human rights implementation throughout the country, in particular the specialised bodies provided for in Annex 6 to the Dayton Agreement and in the Constitution of the F.B.H. as well as the Supreme and Constitutional courts.

Conflicts of competence between bodies entrusted with protection of human rights should in principle be avoided, as well as situations whereby two highest judicial bodies would give contradictory answers to the same legal problem. Such situations, which are in general undesirable, could in the present circumstances of this region, affect the very essence of the constitutional order and thus the State as such.

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

3. Bodies acting in the field of human rights in Bosnia and Herzegovina

3.1. Bodies created under the Dayton Agreement

3.1.1. The Constitutional Court

Annex 4, Article VI

Following the general elections of 15 September 1996, the Constitutional Court of B.H. has to be established. It will be composed of nine members, four members from the F.B.H., two from the RS and three non-citizens of Bosnia and Herzegovina or of neighbouring States, selected by the President of the European Court of Human Rights.

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

The Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)).

It shall also have appellate jurisdiction over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). This may of course include human rights disputes (cf. Article II).

3.1.2. The Commission on Human Rights

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

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

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

Although Article VIII para 1 seems to allow for the introduction of applications directly to the Human Rights Chamber, in principle all cases shall be brought before the Ombudsman (Article V, para 1). The Ombudsman may refer to the Human Rights Chamber cases where he/she finds a breach of human rights. Moreover, when dealing with an application the Ombudsman takes into account whether the applicant has exhausted the effective domestic remedies.

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

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

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

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

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

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

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

In accordance with Rule 37 of the Rules of Procedure of the Office of the Human Rights Ombudsman, the latter may at any time during the investigation decide to refer a case to the Chamber. In accordance with Rule 37 b), adopted in September 1996, he/she may also refer to the Chamber "cases, which are communicated for this purpose by the Ombudsmen of the Federation of Bosnia and Herzegovina or any equivalent institution in the Republika Srpska".

Between 28 March and 31 October 1996, more than 980 complaints were lodged with the Office of the Ombudsman, 256 of which were registered as formal individual applications (41 against Bosnia and Herzegovina, 92 against the Federation, 22 against both Bosnia and Herzegovina and the Federation, 94 against the Republika Srpska, 7 Other). The applications introduced before the Office mostly concern property issues and the right to respect for the home (see Case Summary annexed to this report). The Ombudsperson, Mrs Gret Haller, has declared 20 cases inadmissible and has referred another 19 to the Human Rights Chamber.

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

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

The Chamber has jurisdiction to receive, by referral from the Ombudsman on behalf of the applicant, applications concerning violations of human rights. It has to decide which applications to accept and in what priority to address them according to whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

The decisions of the Chamber are final and binding.

The Chamber may end a case by friendly settlement.

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

The Chamber adopted in November 1996 its Rules of Procedure. Until the end of October 1996, 19 cases were introduced to the Chamber by the Ombudsperson. The Chamber declared admissible one case against the Republika Srpska (case CH/96/1, *J., B. and T. Matanovic v. Republika Srpska*, decision of 13.09.1996).

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

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

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

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

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

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

3.1.4. The Election Appeals Sub-Commission

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

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

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

3.1.5. Other bodies

a. The International Police Task Force
Annex 11 to the Dayton Agreement, Article VI

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

b. The Office of the High Representative
Annex 10 to the Dayton Agreement

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

c. The Human Rights Task Force (HRTF)
Article XIII of the Agreement on Human Rights contained in Annex 6 to the Peace Agreement for Bosnia and Herzegovina and paragraph 33 of the conclusions of the London Peace Implementation Conference of 8-9 December 1995

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

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

3.2.1. The Constitutional Court
Chapter IV, Section C, Article 9-13

The Constitutional Court has nine judges; six from F.B.H. (2 Bosniacs, 2 Croats and two "others", in the present composition 2 Serbs) and three non-nationals of Bosnia and Herzegovina (Judge Ajibola (Nigeria), Judge El Khani (Syria) and Judge Rigaux (Belgium)) designated by the President of the International Court of Justice.[32] The

[32] *This is a transitional arrangement. After five years all members of the Constitutional Court should*

Court is presided over by Judge Ibrahimagic. The Constitutional Court was created in 1995 but it only became operational in January 1996.

The primary functions of the Constitutional Court are to resolve disputes between Cantons; between any Canton and the Federation Government; between any Municipality and its Canton or the Federation Government; and between or within any of the institutions of the Federation Government.

The Court also determines, on request, whether a law or a regulation is in accordance with the Constitution of the Federation. The Supreme Court, the Human Rights Court or a cantonal court have an obligation to submit any doubt as to whether an applicable law is in accord with the Constitution to the Constitutional Court. Its decisions are final and binding.

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

3.2.2. The Supreme Court

Chapter IV, Section C, Article 14-17

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

3.2.3. The Federation Ombudsmen

Chapter II, Article 1-9

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

The Office of the Ombudsmen is an independent agency. The Ombudsmen have the power to examine the activities of any institution of the Federation, Canton, or Municipality as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects. In so doing, the Ombudsman must have access to all official documents,

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be nationals of F.B.H.

including confidential ones. An Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings, including any in the Human Rights Court. Each Ombudsman shall present an annual report to the Prime Minister and the Deputy Prime Minister of the Federation, to each cantonal President and to the OSCE. In addition, he/she may at any time present special reports and oblige domestic institutions to reply. The Ombudsman may initiate proceedings before the Human Rights Court.

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

The Ombudsmen addressed the authorities in F.B.H. on several occasions requesting that measures be adopted. The U.S. State Department Report on Human Rights indicates in this respect that "the Ombudsmen have done impressive work monitoring the human rights situation and bringing cases of abuse to the Bosniac and Croat Governments. However, the Ombudsmen have no enforcement power and authorities treat them with varying degrees of indifference and hostility. The Ombudsmen say that were it not for the international backing, Federation authorities would disband them immediately."

In a report concerning the Work of the Federation Ombudsmen in the period 1 January - 30 June 1996, the Ombudsmen state that "the six-month period after the signing of the Dayton Peace Accords did not mark an improvement in its civilian implementation, while the human rights situation worsened. (...) The authorities resisted (the Ombudsmen's) efforts to monitor human rights compliance despite repeated assurances to the contrary".

3.2.4. The Human Rights Court

Chapter IV, Section C, Article 18-23

This Court has 7 members: 3 Judges from B.H. (one Bosnian, one Croat and one Other) and 4 members to be appointed by the Committee of Ministers of the Council of Europe in accordance with Resolution (93) 6.[33]

The Court's competence covers any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the instruments listed in the annex to the Constitution of the Federation of Bosnia and Herzegovina. After having exhausted the remedies before the other courts of the

[33] *This is a transitional arrangement (see Chapter IX, Article 9 of the Constitution).*

Federation, one may appeal to the HR Court on the basis of any question within its competence. An appeal may also be taken to the Court if proceedings are pending for an unduly long time in any other court of the Federation or any Canton.

The Human Rights Court may also, on request, give binding opinions for the Constitutional Court, the Supreme Court or a cantonal court on matters falling within its competence.

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

The decision of the Court shall be final and binding.

So far the Human Rights Court has not been established.

3.2.5. The Federation Implementation Council

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

3.3. The Constitution of the Republika Srpska

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

3.3.1. The Constitutional Court

Article 120 - Article 125

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

The Constitutional Court shall decide on:

- conformity of laws, other regulations and general enactments with the Constitution;

- conformity of regulations and general enactments with the law;

- conflict of jurisdiction between agencies of legislative, executive and judicial authorities;

- conflict of jurisdiction between agencies of the Republic, region, city and municipality;

- conformity of programmes, statutes and other general enactments of political organisations with the Constitution and the law.

In accordance with amendment XLII (Article 115 in fine), the Constitutional Court monitors constitutionality and legality by providing the constitutional bodies with opinions and proposals for enacting laws to ensure "protection of freedoms and rights of citizens".

Proceedings before the Constitutional Court can be instituted by the President of the Republic, by the National Assembly and by the government. The Constitution enables the legislator to authorise other bodies or organs of the State to bring a case before the Court.

The Constitutional Court may itself initiate proceedings on constitutionality and legality.

There is no individual application before the Constitutional Court but anyone "can give an initiative" for constitutional proceedings. In practice, the majority of cases brought before the Constitutional court have their origin in individual initiatives.

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

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

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

The Constitution of the Republika Srpska contains no provision as to the place of international human rights instruments in the hierarchy of norms. Normally, the

international human rights instruments listed in the Dayton Agreement, including the ECHR, should also apply in the Republika Srpska (Article II paras 1 and 6 of the Constitution of B.H.: Bosnia and Herzegovina and both Entities, all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights referred to in the Constitution). However, the Constitution of RS does not allow the Constitutional Court to control the compatibility of laws with these international instruments.

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

3.3.2. The Supreme Court and the other courts of law

Article 126 - Article 132

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

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

4. Areas of conflicts of competence and proposals for their solution

4.1. Preliminary remarks

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

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

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

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

4.2. As regards the Entities (F.B.H. and RS)

4.2.1. In the Republika Srpska

The system provided for in the law of RS is a classical system where judicial protection of human rights is afforded by ordinary courts. The Supreme Court of RS will be the main instrument for human rights protection since all types of litigation (civil, criminal and administrative) will be brought before it, whereby the Court shall "protect human rights and freedoms" in accordance with Article 121 of the Constitution. The Constitutional Court cannot be seized with individual applications; it will examine the compatibility of a law or a regulation with the human rights guaranteed in the Constitution in abstracto, at the request of other State organs or at its own initiative.

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

However, having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established, giving the individual locus standi before the Constitutional Court in addition to or in substitution for the system of "individual initiatives". At the same time, some remnants of the constitutional order of the former Yugoslavia, such as the capacity to initiate proceedings ex officio and the competence to make "proposals", could be abandoned. This would strengthen the judicial character of the Court and bring the system closer to the recent evolution in several new democracies in Europe.

Moreover, the creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the F.B.H., will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in B.H. in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of B.H., as provided by Rule 37 b) of the Office's Rules of Procedure (this Rule already mentions that the Ombudsman of B.H. will refer to the Chamber cases communicated for this purpose by the Ombudsmen of the F.B.H. or "any equivalent institution in the Republika Srpska"). Of course, in order to ensure the necessary impartiality of the institution in a post conflict situation, one should seriously consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation (e.g. the OSCE may nominate the three Ombudsmen and support substantially the functioning of their office).

4.2.2. In the Federation of Bosnia and Herzegovina

a) General remarks on the simultaneous operation of the Supreme Court, the Constitutional Court and the Human Rights Court

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

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

It is, at the same time, a short term exercise, because, in the Commission's view, this distribution of competencies between three high courts is only justified by the particular will of the drafters of the Constitution in the Washington Agreement to create a body with the exclusive task of monitoring respect for human rights in F.B.H.. After the Dayton Agreement and the establishment of the Human Rights Commission, setting up a specific human rights court with partial international composition at the level of an entity may no longer be advisable (see below the Commission's remarks under 4.3.2).

Be that as it may, one should examine whether the tasks entrusted to the Human Rights Court (if it had to be set up) could not be transferred in the long run to the Constitutional Court, whose competence could then be extended in order to comprise the examination of individual applications alleging human rights violations. This would bring the legal system of the F.B.H. into line with other European legal systems where, by means of individual applications (Individualbeschwerde), human rights issues are dealt with by the Constitutional Court. Moreover, such a development would be in line with the tendency in most European States to entrust Constitutional Courts with the task of human rights protection.[34]

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

Since the Constitutional Court has no appellate jurisdiction but can only be seized by other courts or State institutions, appeals from the cantonal courts can be made in theory either to the Supreme Court or to the Human Rights Court: allegations as to non-observance of domestic law will be introduced in an appeal to the Supreme Court, while violations of human rights provisions will be introduced to the Human Rights

[34] *See e.g. the Proceedings of the Seminar "The protection of fundamental rights by the Constitutional Court", Brioni, Croatia, 23-25 September 1995, Council of Europe, Science and Technique of Democracy No 15.*

Court. However, in practice, it will be difficult to distinguish human rights cases from normal domestic litigation. For example, a dispute as to the custody of children in divorce proceedings will probably be at the same time a litigation under civil law (family law) and under human rights law (right to respect for family life). It is therefore necessary to determine which court will have the final say in the dispute.

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

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

This leads to the following conclusions:

- appeals from cantonal courts in civil, criminal or administrative cases will be introduced, as a general rule, before the Supreme Court;

- the Supreme Court shall ask the Human Rights Court for a binding answer on human rights questions raised in the appeal;

- appeals from the Supreme Court can be lodged with the Human Rights Court on human rights points only.

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

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

One of the elements that the courts could take into consideration when deciding these matters, either in their Rules of Procedure or in case, is the fact that the drafters of the

Constitution of F.B.H. clearly intended to give the Human Rights Court general and final jurisdiction over all cases which present a human rights aspect in the legal order of F.B.H.. For this reason, Article 22 must be interpreted in such a way as to give a presumption of competence to the Human Rights Court.

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

d) The Federation Ombudsmen

The Venice Commission had already described in 1994 the institution of the Federation Ombudsmen as a particularly positive feature.[35] The activities of the Ombudsmen in 1995 confirm this opinion.

The Commission had expressed the view that the Ombudsmen's power to make recommendations to the administration should be expressly provided and that some clarification of the administration's obligations in respect of the Ombudsmen recommendation would have been desirable. The Commission had indicated that the text of the Constitution "allows for a wide range of different practices by both the Ombudsmen and the administration". One year later, the lacunae indicated by the Commission seem to have weakened the effectiveness of the Ombudsmen's work.[36]

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

In accordance with Chapter II B, Article 6 of the Constitution of F.B.H., the Ombudsmen are entitled to initiate and to intervene in proceedings before all courts, including the Human Rights Court. In its above mentioned opinion, the Commission had called for prudence in the use of this provision, considering the Ombudsmen's unlimited power to intervene in pending proceedings as a threat to the principle of separation of powers and equality of arms.

The possibilities offered in Article 37 of the Rules of procedure of the Office of the Ombudsperson (referral to the Human Rights Chamber of cases presented for this

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[35] *See the opinion of the Venice Commission on certain aspects of the constitutional situation in Bosnia-Herzegovina, Annual Report of Activities for 1994, pp. 17-20.*

[36] *See the Ombudsmen Annual Report for 1995.*

purpose to the Ombudsperson by the Federation Ombudsmen) should be regarded as more compatible with international standards of fair trial. In addition, it has the advantage of simplifying and shortening the complex and lengthy remedies for human rights violations in the F.B.H..

4.3. As regards relations between the institutions of the Entities and the institutions of B.H.

4.3.1. The simultaneous existence of three Constitutional Courts

In general, the simultaneous existence of three Constitutional courts should not raise particular problems, since each one of them functions within the framework of a specific Constitution. Thus, the Constitutional Court of F.B.H. is competent for the examination of constitutional issues under the Constitution of F.B.H., while the Constitutional Court of RS shall deal with constitutional questions under the Constitution of RS. The Constitutional Court of B.H. is competent inter alia to decide the question of compatibility of an Entity's Constitution with the Constitution of B.H. (Article VI, para 3 (a)), which takes precedence over the Constitutions of the Entities.

The provisions in the Constitutions of the Entities providing that judgements of their highest courts are "binding and final" should be either revised or interpreted in such a way as to mean "binding and final in the legal order of the Entity, as long as it is not declared inconsistent with the Constitution of B.H.".

4.3.2. The simultaneous functioning of two Human Rights jurisdictional bodies

The simultaneous functioning of two international Human Rights jurisdictional bodies raises particular problems.

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

Admittedly, ratione materiae and ratione temporis, the competencies of the Human Rights Chamber of F.B.H. and that of the Commission of Human Rights of B.H. are not exactly the same. The Human Rights Commission may only deal with allegations of violations of the European Convention of Human Rights; it can also deal with alleged discrimination as regards the enjoyment of the rights guaranteed by the other international instruments listed in the Appendix to Annex 6. The Human Rights Court, on the contrary, shall deal in addition to the above with alleged violations of any right (not only discrimination) guaranteed in the international instruments listed in the Annex to the Constitution of F.B.H.. Moreover, the competence ratione temporis of the Commission of Human Rights of B.H. starts on 14 December 1995. The ratione temporis competence of the Court of Human Rights of F.B.H. starts - in theory - on 1 January 1991 (Chapter IV C, Article 19 of the Constitution of F.B.H.).

However, the actual ratione materiae competence of the Commission of Human Rights will depend on its jurisprudence on "discrimination"; a wide interpretation of the concept of interpretation will bring within the scope of control exercised by the Commission of Human Rights most of the cases whereby a violation of rights guaranteed by the international instruments listed in the Appendix to Annex 6 is alleged. The same applies as regards the ratione temporis competence of the Commission of Human Rights which will much depend upon its jurisprudence on "continuing violations" (i.e. cases originating before 14 December 1995 but whose effects are continuing after that date). From a practical point of view, the difference of competence between the two institutions may not be significant.

On the other hand the co-existence of the two human rights jurisdictional bodies may create several problems:

The exhaustion of the domestic remedies available to a citizen of F.B.H. becomes extremely lengthy. It involves the (eventual) successive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of F.B.H.) and then of the Ombudsman of B.H. before reaching, finally, the Constitutional Court of B.H. or the Human Rights Chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from F.B.H. from applying to the European Commission of Human Rights in Strasbourg when B.H. becomes party to the European Convention on Human Rights.

In addition, it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of F.B.H. and of the Human Rights Chamber of B.H. (both composed of a majority of international judges) might affect the authority of those Courts.

One possible solution to these problems would be to amend the Constitution of F.B.H. in such a way as to do away with the Court of Human Rights. The lacuna which might result from such an amendment in the judicial system of F.B.H. would be easily covered by the Supreme Court and the Constitutional Court of the Federation and by the possibility offered to the Federation Ombudsmen to refer cases to the Ombudsperson of B.H. and to the Human Rights Chamber. In addition, this solution will simplify the judicial system of protection of human rights in F.B.H. and will consequently shorten the legal avenues of exhaustion of domestic remedies. It will also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, i.e. the Human Rights Commission. The Commission finds that this solution would not be contrary to the international agreements, which are at the basis of the judicial system of B.H.. Actually, one could argue that the Washington Agreement, which includes the Constitution of F.B.H. and which foresees the creation of the Human Rights Court, has been politically (if not legally) superseded by the Dayton Agreement.

In any event, the merger of the Human Rights Court, if it had to be created, with the Constitutional Court of F.B.H. should be envisaged at a later stage, as suggested above (4.2.2.).

4.4. As regards the Dayton Institutions

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

a) Human Rights Commission and the Commission for real property claims

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

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

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

b) Human Rights Commission and the Election Appeals Sub-Commission

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

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

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

4.4.2. Human Rights Commission and Constitutional Court

Among other competencies, the Constitutional Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision

depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)). It shall also have appellate jurisdiction over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). It follows from the latter provision that the Constitutional Court may receive appeals against decisions from any court whereby it is alleged that they violate the Constitution, including the provisions on Human Rights (cf. Article II). In accordance with Article VI para 4 of the Constitution of B.H., the decisions of the Constitutional Court "are final and binding".

Similarly, the Commission on Human Rights - and in particular the Human Rights Chamber -has jurisdiction to receive applications concerning violations of human rights. The decisions of the Chamber are also "final and binding".

Whatever the intention of the drafters of the Constitution may have been, there is an overlapping between the competencies of the Constitutional Court and those of the Commission of Human Rights. Both shall deal with human rights issues, mainly under the European Convention on Human Rights.

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

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

Indeed, it could be assumed that the Commission on Human Rights should only be involved after the Constitutional Court. Appeal to the latter would then be regarded as a "domestic remedy" to be exhausted before applying to the Commission of Human Rights. An argument in favour of this solution would be the particular international character of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina). In this perspective the Human Rights Commission would appear as a kind of international body integrated into the legal order of Bosnia and Herzegovina for a transitional period, namely until the effective integration of this State and until its accession to the Council of Europe, the ratification of the European Convention on Human Rights and

the recognition of the human rights protection mechanism of the Strasbourg organs.[37] The provisions on jurisdiction of the Human Rights Commission do not exclude appeals from the Constitutional Court but rather underline this quasi-international character of the mechanism established under Annex 6: Article 2 of Annex 6 indicates that the Commission on Human Rights is established "to assist the parties (namely the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in honouring their obligations" to secure to all persons within their jurisdiction the highest level of internationally recognised human rights standards. Therefore, the State of Bosnia and Herzegovina is a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement also.

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

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

Having regard to the fact that the Human Rights Commission is a provisional institution designed to last 5 years, and taking into account the need to ensure legal safety as to respect for human rights within a relatively short time[38] by avoiding prolongation of human rights litigation, a third solution could be envisaged: the jurisdiction of either court would not extend to matters already dealt with by the

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[37] The idea of a transitional international human rights protection mechanism is not new. It was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe. Article 5 of this Resolution provides that the arrangements as to a transitional human rights control mechanism integrated in the internal legal order of European States not yet members of the Council of Europe "shall cease once the requesting state has become a member of the Council of Europe except as otherwise agreed between the Council of Europe and the State concerned". This Resolution is expressly referred to in the Dayton Agreement, as the legal basis for the Human Rights Chamber. It may be regarded as being also at the origin of the Provisional Human Rights Court provided for in the Croatian Constitutional Law on the protection of human rights and rights of national minorities.

[38] This need is acknowledged in Annex 7. The Annex 7 Commission deals with real property claims in first and last instance; its decisions are final and binding.

other. Potential applicants will thus have the choice between appealing to the Constitutional Court of B.H. and lodging a complaint with the Human Rights Commission. A case dealt with by any of these institutions should no longer be subject to review by any other court in Bosnia and Herzegovina. The risk of the two institutions producing diverging case-law could be reduced if human rights litigation were attributed, as a matter of principle, to the Human Rights Commission as long as it is in operation, through the adoption of a system of appropriate legal information, consultation and assistance dispatched to potential applicants. This solution also respects the spirit of the Dayton Agreement which apparently aimed at creating during the transitional period a number of specialised institutions giving final and binding judgements on matters within their competence (Human Rights Commission, Commission on Real Property Claims, Electoral Appeals Sub-Commission). During this transitional period one could reasonably expect the Constitutional Court to be released of the burden of cases already dealt with by these bodies.

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

5. Concluding remarks

The Commission observes that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

Interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina will have to take into account the complexity of the constitutional order and the need for speedy and effective judicial protection of individual human rights. When deciding which case falls within their competence, they should take into account not only laws and regulations but also the case-law of other institutions. Co-ordination of their practice by disseminating information on the cases which are introduced, are pending or those decided by either institution will be of outmost importance and should be ensured already in the first months of operation of the institutions concerned.

The Commission understands that the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina. Respect for human rights is the cornerstone of the Dayton and Washington peace agreements. However, duplication should be avoided since it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed

with amendments of the entities' Constitutions where the creation of specific human rights bodies may appear unnecessary from a legal point of view.

Similarly, important disparities in the human rights protection systems of the two entities may also be detrimental to the effectiveness of protection. Ensuring a balanced and coherent judicial system for the protection of human rights in B.H. in its entirety may require a certain parallelism in the protection afforded under the legal orders of the two entities and possibly the establishment of equivalent bodies.

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

III. OPINION ON THE COMPATIBILITY OF THE CONSTITUTIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA AND THE REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Approved by the working party on the basis of contributions by Mr Joseph Marko (Austria) Mr Jean-Claude Scholsem (Belgium), Mr Jacques Robert (France), Mr Sergio Bartole (Italy), Mr Jan Helgesen (Norway), Mr Andreas Auer (Switzerland), Mr Ergun Özbudun (Turkey) following discussions at the meeting on 27 June 1996 with representatives of the Office of the High Representative, Bosnia and Herzegovina, and the Federation of Bosnia and Herzegovina and revised following discussions with experts from the Federation of Bosnia and Herzegovina and the Republika Srpska on 27 and 28 August 1996 in Sarajevo.

Introduction

The Venice Commission has been requested by the Office of the High Representative to give an opinion on the compatibility of the Constitutions of the two Entities of Bosnia and Herzegovina (hereafter referred to as B.H.), i.e. the Federation of Bosnia and Herzegovina (hereafter referred to as F.B.H.) and the Republika Srpska (hereafter referred to as R.S.), with the Constitution of B.H. as established as part of the Dayton Agreements. The present text was prepared on the basis of written contributions by the rapporteurs, given preliminary approval by the Working Party following discussions at a meeting in Paris on 27 June 1996 between the rapporteurs and representatives of the Office of the High Representative, of B.H., and F.B.H. and revised following further discussions between a delegation of the Commission, consisting of Prof. Marko, Prof. Scholsem and Prof. Malinverni, and experts from B.H., F.B.H. and R.S. in Sarajevo on 27-28 August 1996.

The following documents in particular have been used as a basis for the opinion:

- the Dayton Agreements, in particular Annex IV containing the Constitution of B.H.;

- the Constitution of F.B.H., being part of the Washington Agreements (Document CDL(94)28);

- the amendments to the Constitution of F.B.H. adopted on 5 June 1996 (CDL(96)50), as well as some amendments appended to document CDL(96)50 on which no agreement has yet been reached;

- the Constitution of the R.S. as amended (document CDL(96)48).

The Working Party noted that in the documents put at its disposal there was a number of discrepancies. The translation did not always seem reliable and it was not always clear which text is in fact in force. With respect to F.B.H., most of the problems could be settled at the meeting of 27 June 1996 with representatives of F.B.H and B.H. The exchange of views with representatives of RS on 28 August 1996 permitted a clarification of most of the issues concerning the text of the constitution of RS.

General Comments

The Constitution of B.H. as part of the Dayton Agreements is, like the Constitution of F.B.H. as part of the Washington Agreements, in its origin more a public international law than a constitutional law text. Its character seems more contractual than normative. In order to become fully operational as the legal basis of B.H., the institutions established by the Agreements still need to acquire that degree of democratic legitimacy which can be conveyed only by free elections as foreseen in Annex 3 of the Dayton Agreements.

The Constitution of B.H., without expressly saying so, establishes a federal State. It defines two Entities, F.B.H. and R.S., as constituent parts of B.H. and divides rights and owners between the institutions of B.H. and those of the Entities. It establishes a citizenship of B.H., while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present.[39]

B.H. however is an unusually weak federation. All governmental functions and powers not expressly assigned in the Constitutions to B.H. shall be those of the Entities (Article III.3.(a)). There is no clause conferring general implicit competence on B.H., though Article III.5.(a) may in certain respects come close to such a clause.

A decisive weakness of B.H. is that it depends for its resources on contributions from the two Entities (Article VIII.3). This dependency may well threaten the efficient functioning of B.H. There are federal systems in which the federated entities depend for their finances on the central authorities. But there seems to be no precedent for a federal State which solemnly proclaims the supremacy of its norms over the norms of the federated entities while at the same time acknowledging its financial dependency on these.

[39] *The experts from RS did not accept the character of B.H. as a federation but consider it a "union".*

On the positive side, Article I.4 of the Constitution of B.H., which proclaims the free movement of goods, services, capital, and persons throughout B.H., seems destined to become an important factor for unifying the country.

With more specific reference to the question of compatibility, it should first be noted that Article III.3.(b) of the Constitution of B.H. provides that this Constitution supersedes inconsistent provisions of the constitutions and laws of the Entities. This implies that the Constitution of B.H. has direct abrogatory power with respect to the constitutions and other laws of the Entities, a conclusion supported by Article 2 of Annex II of the Constitution of B.H., which states "all laws, regulations, and judicial rules of procedure in effect within the territory of B.H. when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution".

On the other hand, Article XII.2 of the Constitution of B.H. provides for the obligation for the Entities to amend their respective constitutions to ensure their conformity with this Constitution. Both entities have indeed proceeded to revise their constitutions to this end. It seems in fact necessary, both for political and legal reasons, not to rely simply on the abrogatory power of the Constitution of B.H., but to try to bring the constitutions of the Entities into line with the central constitution. Otherwise this task would have fallen upon the Constitutional Court of B.H. and have threatened to overburden it and to lead to a long period of legal uncertainty.

1. Compatibility of the constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

The preamble as amended by Amendment II:

In the new wording of the preamble it is clearly stated that the Federation "is a constitutive part of the sovereign state of B.H.". Sovereignty is thereby correctly attributed to the State of B.H. and not to the Federation itself.

Article I.1 as amended by Amendment III:

The reference to Bosniacs and Croats as "constitutive peoples, together with the others" seems realistic under the present circumstances and is not inconsistent with the Dayton Agreement. It should also be seen historically in the light of the constitutions of 1974 and even of 1910. There is a clear political will to be deduced that Muslims/Bosniacs, Croats and Serbs form the constitutive peoples of B.H. Insofar as the R.S. defines itself as a national state of the Serb people, it seems to be quite "natural" that the Federation defines itself to be the component entity for Bosniacs and Croats. A closer look into the governmental structure then reveals the application of the proportionality principle as far as representation and participation in the decision-making process in the legislative, executive and judicial branches is concerned.

After various discussions in Sarajevo it must be stressed, however, that there is - because of some sort of territorialisation and "nationalisation" of the institutional structures - a dangerous tendency coming from the proportionality principle, at least in practice, that citizens not belonging to the respective constitutive peoples within the entities might be excluded from representation and the decision-making process. Their rights to stand as candidates for public offices on various levels should expressly be improved.

The new wording of paragraph (2) of Article I.1 attributes to the Federation all power, competence and responsibilities which are not, as determined by the Constitution of B.H., within "the responsibility of the B.H. institutions".[40] This correctly reflects the Dayton Agreements.

Article II.A.2:

Paragraph (2) of this article confines the enjoyment of political rights, i.e. the right to form and belong to political parties, to participate in public affairs, to have equal access to public service and to vote and stand for election, to citizens of the Federation. This is problematic and in any case does not apply to the first elections.

The first elections to the House of Representatives of the Federation have to take place in accordance with the Agreement on Elections (Annex III of the Dayton Agreements). Article II paragraph (2) of this Agreement mentions explicitly the elections to the House of Representatives of the F.B.H. Article IV.1 of the Agreement prescribes that any citizen of B.H. has, if he meets the necessary technical conditions, the right to vote. Article I.7(c) defines as citizens of B.H. all persons that were citizens of the Republic of B.H. immediately prior to the entry into force of this Constitution. And finally, in order to avoid the consequences of ethnic cleansing, Article IV.1 of the Agreement on Elections provides that the citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote in person or by absentee ballot in that municipality. Hence, the right to vote for the House of Representatives of the Federation obviously derives from citizenship of B.H. together with the place of residence and cannot be restricted to citizens of the Entity.

That this should apply not only to the first elections but also to all future elections can be concluded from the character of B.H. as a federal State. For example, Article 43 paragraph 4 of the Swiss Constitution provides that the "established Swiss citizen" shall enjoy at his domicile all the rights of the citizens of that canton, and paragraph 5 expressly states that "in cantonal and communal matters, he shall acquire the right to vote after having settled for three months". It seems also scarcely conceivable that such a large part of the electorate should be disenfranchised between the first and second elections.

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[40] *In document CDL(96)50 the wording "exclusive competence" is used. This seems to be an erroneous translation.*

Therefore, the words "of Bosnia and Herzegovina" should be added to the text of paragraph 2 after the words "all citizens". For the right to vote it is of course appropriate to introduce a minimum period of residence.

The Working Party noted that in the interpretation of Mr. Hasi_, Vice Minister of Justice of F.B.H., this provision is already applicable to all B.H. citizens. Since the usual rules of legal interpretation would however indicate that in a F.B.H text the word "citizens" without qualification refers to F.B.H citizens, it maintains its recommendation.

With respect to the right to form and belong to political parties, it should also be noted that it is often difficult to distinguish from the freedom of association also enjoyed by non-citizens.

Article II.A.5 as amended by Amendment VII:

In accordance with Article I.7(c) of the Constitution of B.H., this article rightly provides that the citizens of the Federation are citizens of B.H. However, the question how citizens of B.H. obtain citizenship of the Federation is not addressed. It is however clear that each citizen of B.H. must have the possibility to be a citizen of at least one of either of the two Entities, and that the two Entities do not have unlimited discretion in this respect.

Article III.1 as amended by Amendment VIII:

Article III.1 contains the competencies of the Federation Government, and Amendment VIII is of particular importance for bringing the Constitution of the Federation into line with the Constitution of B.H.

As required by the Dayton Agreements, the amendment deletes the former competence of the Federation Government to conduct foreign affairs.

A new paragraph (a) on defence provides *inter alia* for co-operation with the standing committee on military matters established by Article V.5(b) of the Constitution of B.H. No details are given on this co-operation, but the word "co-operate" could lead to the assumption of an equal relation between the Federation bodies and the standing committee. Article V.5(b) however entrusts the standing committee with the function of co-ordinating the activities of the armed forces in B.H., which could imply a dependence of the Federation bodies upon the authorities of the Republic. It would seem advisable to include provisions on a necessary decision-making process in this area in the Constitution of the Federation, not least because the provisions of Article V.5 of the Constitution of B.H. are fairly ambiguous.

The various competencies in the economic field, in particular concerning economic policy (c), finance (e) and energy policy (h), have to be interpreted in accordance with the overriding principle of the Constitution of B.H. that there shall be free movement of goods, services, capital and persons throughout B.H. (Article I.4). These competencies may therefore not be exercised in a manner such as to impede the free circulation of persons, goods, services and capital. For example, the fiscal system of the Entities may not constitute an impediment to free circulation. Similarly, the scope of financial competence under (e) has to be interpreted in the light of these provisions of the Constitution of B.H. which reserve monetary policy and the statute of the central bank to the institutions of B.H. (Articles III.1(d) and VII). The Entities' regulations may not encroach upon the exercise by the institutions of B.H. of competencies necessary to maintain the monetary unity of the country.

It is welcome that in (g), it is expressly recalled that the allocation of frequencies has to be done in accordance with the Constitution of B.H.

With respect to (d), no agreement has yet been reached and there are still two proposals. Insofar as one of them does include a competence of the Federation in the matter of customs within the Federation, this proposal should not be retained. By restricting this competence to customs within the Federation, it avoids violating the exclusive competence of B.H. for customs policy under Article III.1(c). However, it is still in contradiction with the principle of the free circulation of goods contained in Article I.4 of the Constitution. This makes it not only illegal to introduce customs duties between the Entities, but, as the wording "throughout B.H." shows, it rules out the introduction of customs duties within one Entity, for example between the cantons.

At the meeting on 27 June 1996, it has been explained that the proposal does not purport to legitimise customs within the Federation, but only to give the Federation bodies the task of implementing the customs policy adopted at B.H. level. The justification for this proposal is that Art.III.1.(c) speaks only of "customs policy" and not of customs as such.

The Working Party was reticent to accept this distinction between customs policy and implementation. At B.H. level it may of course be decided in the future to entrust implementation of the customs policy to the Entities. In the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. It is essential that customs rules are uniformly applied throughout B.H. since merchandise can then freely circulate within B.H. The lack of other resources of B.H. (see above) is also an argument in favour of B.H. collecting the customs duties on its own behalf.

In Article III.1(f) (fight against crime) it is necessary to avoid any interference with the functions entrusted to B.H. under Article III.1 (g) of the Constitution of B.H. It would be advisable to provide for mixed bodies entrusted with ensuring co-operation between B.H. and the Federation in the field of international and inter-Entity criminal law enforcement.

The provision on energy policy as adopted in (h) no longer contains a reference to the public corporations foreseen by Annex IX of the Dayton Agreements. It seems advisable to explicitly provide in the Constitution for the implementation of Annex IX in the fields of communication and transportation.

Article III.2 as amended by Amendment IX:

The wording of sub-paragraphs (f) and (g) following the adoption of Amendment IX seems somewhat unclear. The new sub-paragraph (g) seems partly to cover the same ground as sub-paragraph (f), and the provision on "foreigners staying and movement" seems to be inconsistent with the responsibility of the B.H. government for foreign policy (Article III.1 (d) and immigration refugees and asylum policy (Article III.1 (f)).

It was explained at the meeting on 27 June 1996 that these provisions have a partly transitory character and are necessary due to the present lack of adequate structures at B.H. level.

Chapter III in general:

The Constitution as amended contains no provision for the implementation of Article III.4 (co-ordination) and III.5 (additional responsibilities) of the Constitution of B.H. or Annex 7 (Agreement on refugees and displaced persons) and Annex 8 (Agreement on commission to preserve national monuments) of the Dayton Agreements.

It is suggested to introduce into the Constitution a clause like "F.B.H. shall co-operate with bodies that may be established by the competent authorities of B.H. to implement the responsibilities of B.H. under the Constitution and other Annexes to the Dayton Agreements."

Article IV.B.7 as amended by Amendment XIII:

With respect to Article IV.B.7(a) (i) and (ii), the text of the amendments to be adopted has not yet been agreed. The various versions agree however on deleting the competence of the President of the Federation to appoint heads of diplomatic missions and to serve as Commander in Chief of the military of the Federation.

Article IV.B.7 III (a) (vii) still says that the President of the Federation shall be responsible for receiving and accrediting Ambassadors. The Working Party was however informed at the meeting on 27 June 1996 that there is consensus not to apply this provision.

Article IV.B.8 in conjunction with the proposed amendment XIV:

Article IV.B.8 in its present form is incompatible with the Constitution of B.H. because, according to Article V.3.B. of this Constitution, the Presidency of B.H. appoints Ambassadors. The appointment of Ambassadors by the President of the Federation therefore cannot be admitted. There are now proposals that the President of F.B.H. "initiates" or "proposes" nominations of Ambassadors from the territory of F.B.H. It is up to B.H. legislation to decide on whether to involve the Entities in the nomination procedure. There is no basis in the B.H. Constitution for requiring a consensus between Entity and B.H. on the nomination. The President of F.B.H. can therefore be at most one of the authorities making proposals.

Articles IV.C.12, 16 and 20:

According to these articles the judgements of the Constitutional Court and of the Supreme Court of the Federation and of the Human Rights Court shall be final. Article VI.3 of the Constitution of B.H., says that the Constitutional Court of B.H. shall have appellate jurisdiction over issues arising under the B.H. Constitution out of the judgement of any other Court in B.H. The Human Rights Commission established by Annex 6 to the Dayton Agreements may also deal with cases already decided by the highest courts of F.B.H.

The Working Party noted that the word "final" is understood as "final at the level of F.B.H." It nevertheless suggested qualifying this word, e.g. "final for matters not within the jurisdiction of the B.H. courts".

Article VII.4 as amended by Amendment XX:

According to the new wording of this Article, agreements between the Federation and States or international organisations enter into force following approval by the Parliamentary Assembly of B.H. unless the Parliamentary Assembly has provided by law that such types of agreement do not require its consent. This corresponds to the requirement of approval by the Parliamentary Assembly of B.H. as provided for in Article III.2.(d) of the Constitution of B.H.

The Working Party was informed that this approval is in fact required before signature and/or ratification, and not, as the wording leads to assume, before entry into force.

2. Compatibility of the Constitution of Republika Srpska with the Constitution of Bosnia and Herzegovina

At the meeting on 27th June 1996 in Paris, both the Working Party and the representatives of B.H. and F.B.H. regretted that there was no opportunity to discuss this question with a representative of R.S. since, despite repeated invitations, no R.S. representative participated in the meeting. Such a discussion, however, took place on 28 August 1996 in Sarajevo.

The Preamble

The preamble of the constitution of R.S. is missing in document CDL (96) 48 but its text is contained in Amendment XXVI adopted by the Parliament of RS on 11 November 1994. At this time R.S. aspired to be an independent State, sovereign under international law: with the wish to unite with other Serb countries, and the text reflects this situation.

According to Articles I.1 and I.3 of the Constitution of B.H., however, both the R.S. and the F.B.H. are Entities of B.H. which "shall continue its legal existence under international law as a State, with its internal structure modified as provided herein...". Thus, the Entities are part of the internal structure of B.H. and cannot be sovereign States in their own right. It is recalled in this connection that all references to sovereignty and independence have been deleted from the Constitution of the Federation; this should also be the case for the R.S.

In addition, while Article III.2.(a) of the Constitution of B.H. allows the entities to establish special parallel relationships with neighbouring States, these relationships have to be "consistent with the sovereignty and territorial integrity of B.H.". This does not allow one of the Entities to unite with a foreign State. The phrase concerning the decision to unite with other Serb countries would therefore also have to be deleted.

During the exchange of views on 28th August 1996, the experts of R.S. maintained that the Preamble had no normative character and that R.S. was therefore under no

obligation to amend it. Since, however, the Preamble is important for the interpretation of the whole Constitution, the members of the Working Party could not accept the maintenance of a text which is in direct contradiction with the state structures of B.H. and the obligations of R.S. under the Dayton Agreement.

Article 1:

It should be noted that the word "sovereign" appearing in the text of this article in document CDL (96) 48 was in fact deleted by Amendment XLIV, passed by the Parliament of R.S. on 2 April 1996. This is positive.

A provision should, however, be added that R.S. is a constitutive part of B.H. (cf. the new preamble of the F.B.H. Constitution). During the exchange of views on 28 August 1996, the experts of R.S. accepted that R.S. is part of B.H. under international law but considered it as a superfluous repetition of the provisions of the Dayton Agreement to say so in the text of the Constitution of R.S. Due to the overriding importance of this principle, the Working Party nevertheless considers it necessary to make an express statement in the Constitution, all the more so since the text of the Preamble still contradicts it.

Article 2:

The present wording of para. 2 is unfortunate since it gives the impression that borders could be changed unilaterally by plebiscite without the agreement of the other Entity concerned and should therefore be amended. The experts from R.S. said that this was not the intention and that R.S. was bound by Annex 2 to the Dayton Agreement. According to the R.S. experts, a change in wording might be considered.

Article 3:

It has already been recommended that the word "sovereign" be deleted throughout the whole Constitution. The experts of R.S. accepted that the word "sovereign" could not mean sovereign according to international law but that it was to be understood in the sense of "competent". Since this use is in accordance with Yugoslav tradition, they were reluctant to abandon the wording, though this is considered imperative by the Working Party. The words "in the joint interest" are also inappropriate because the competencies of B.H. result from the Constitution of B.H. and it is not up to the R.S. to unilaterally decide on whether there is a joint interest justifying the competencies of B.H.

The reference in paragraph 2 of this Article whereby "the Republic can establish special parallel relations with the Federal Republic of Yugoslavia and its constitutional units" is partly a quotation from Article III.2 (a) of the Constitution of B.H., whereby "the entities shall have the right to establish special parallel relationships with neighbouring States consistent with the sovereignty and territorial integrity of B.H.". The important qualification "consistent with ..." is however missing and should be introduced.

Article 4:

This article is already considered abrogated following the introduction of the new version of Art. 3.

Article 5:

The first dash refers to the guarantee and protection of human freedoms in accordance with international standards. While it does not contain as many specific details as the provisions on the implementation of international human rights agreements in Article II of the Constitution of B.H., this cannot be considered as an inconsistency. It would however be advantageous if such provisions were explicitly included in the text.

Article 6:

While the main inconsistencies with the Constitution of B.H. have been removed, an explicit reference to the citizenship provisions of the Constitution of B.H. is still missing. The above remarks on Article II.5 of the Constitution of F.B.H. apply *mutatis mutandis* to this Article.

Chapter II - Human Rights and Freedoms:

a) The Constitution contains an extensive Chapter on Human Rights and Freedoms (Articles 10-49). At the same time, the Constitution of B.H. provides for the application of a great number of international legal instruments in this field, with a particularly prominent place being reserved to the European Convention of Human Rights in Article II.2. The rights and freedoms set forth in the Convention are applied directly in B.H. and have priority over all other law. There is obviously a big risk that a detailed catalogue of human rights and freedoms as set out in the Constitution of R.S. may not always be fully in line with the relevant international instruments and the latest interpretation given to them by the competent bodies like the European Court of Human Rights. It is impossible in the present opinion to analyse the text of the Constitution article by article and to assess for each article whether some formulation might be incompatible with one or the other international legal instrument. Only some particularly important questions will be addressed.

As a general solution to this problem, it is suggested that the Constitution should expressly state that, in the event of any discrepancy between the rights set out in the Constitution of the R.S. and the rights applicable by virtue of the Constitution of B.H., the provision most favourable to the rights of the individual will be applicable.

b) A striking feature of this chapter is that a large number of rights are guaranteed only to citizens of the Republic, in particular:

- Article 10: non-discrimination;

- Article 21: freedom of movement and residence;

- Article 29: the right to vote;

- Article 30: the right to peaceful assembly;

- Article 32: the right to petition;

- Article 33: the right to participation in public affairs;

- Article 34: freedom to express national affiliation;

- Article 38: the right to establish private places of instruction;

- Article 43: the right to job training for partially disabled.

With respect to the right to vote (Article 29), the comments on Article II.A.2 of the Constitution of F.B.H. apply *mutatis mutandis* to the Constitution of the R.S.

The restriction of the principle of non-discrimination, of freedom of movement and of the right to peaceful assembly to citizens of the R.S. clearly contradicts Article II.2, II.3 and II.4 of the Constitution of B.H., which provide that the rights guaranteed in these Articles apply "to all persons in B.H.". The restriction of the freedom of movement to citizens in Article 21 is also in direct contradiction with Article I.4 of the Constitution of B.H.

The freedom to express one's national affiliation (Article 34) is guaranteed by the Framework Convention on National Minorities (Annex I to the Constitution of B.H.). One could also argue that freedom of expression, in conjunction with the non-discrimination principle, implies the freedom to express one's national affiliation. Hence this particular right at least must be granted to all citizens of B.H., but should better be understood as a fundamental human right.

Article 22:

The reference to the security of Yugoslavia at the end of this Article should be deleted.

The experts from R.S. accepted that this reference is obsolete.

Article 34:

The last paragraph of Article 34 that citizens of the Republic may also declare that they are Yugoslavs is a remainder of a previous Yugoslav practice. The freedom to express one's national affiliation is already guaranteed by the first paragraph, and the paragraph therefore seems superfluous. In no case it may be understood as referring to Yugoslav citizenship.

Articles 47 and 48:

These Articles should be thoroughly reviewed and are in their present form clearly incompatible with the European Convention on Human Rights.[41] Article 48 paragraph 2, which states that "abuse of freedoms and rights is unconstitutional and punishable", is by far too imprecise (cf. Arts. 8 - 11 ECHR). Clear criteria would have to be included on what constitutes such abuse.

At the meeting on 28 August 1996, the R.S. experts seemed willing to consider a revision of the human rights provisions (which are mainly based on the old Yugoslav constitution) on the basis of the international legal instruments.

Article 57:

The provision in paragraph 2 that property and other rights of a foreign investor acquired on the basis of capital invested cannot be restricted even by a law goes too far (cf. the first additional protocol to the European Convention on Human Rights).

Article 68:

Amendment XLIX has introduced a new paragraph into Article 68, stating that the "functions of the Republika Srpska ... are carried out in accordance with its Constitution, and within the framework and to the extent they have been determined as being the competence of the institutions of Bosnia and Herzegovina as well, shall also be carried out in accordance with the Constitution of B.H." There is a serious problem of language (or perhaps of translation) here, but the Amendment, if it means anything, seems to have recognised the supremacy of the Constitution of B.H., in which case all competencies attributed to the R.S. by Article 68 as amended by Amendment XXXII should be read within the limits posed by the Constitution of B.H. Nevertheless, Amendment XLIX requires clarification. It should clearly state the supremacy of the Constitution of B.H., as well as stating that the S.R. is competent in all matters which are not within the competence of B.H. by virtue of its Constitution.

The provision also does not justify leaving in the catalogue of competencies matters which are within the exclusive jurisdiction of B.H. since this would threaten to completely overburden the Constitutional Court of B.H. and be incompatible with legal certainty.

As regards the various provisions in the catalogue, the following comments have to be made:

No. 1:

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[41] *The translation of Art. 47 is not quite correct and this Article should read "are restricted" and not "shall be restricted".*

It has already been stated above that the word "sovereignty" cannot be used for the R.S. This equally applies to the word "independence", which is in contradiction with Article I.3 of the Constitution of B.H. This was accepted by the R.S. experts at the meeting on 28 August 1996.

Nos. 2 and 3:

As is the case of the Federation of B.H., it would be desirable to introduce a provision on co-operation with the Standing Committee on military matters set up by Article V.5 of the Constitution of B.H.

At the meeting on 28 August 1996, the R.S. experts vigorously contested any B.H. competence in the field of defence. According to them the civilian command authority of members of the B.H. Presidency means that the Serb members of the B.H. Presidency commands the R.S. troops. Since defence is not mentioned in Art. III.1 of the B.H. Constitution, it is within the exclusive competence of R.S. While the Working Party agreed that the main competence lies with the Entities, it nevertheless continues to consider that the co-ordinating function of the Standing Committee limits the discretion of the Entities and should therefore be mentioned.

No. 6:

According to Article III.1 of the Constitution of B.H., economic relations with foreign countries are the responsibility of the institutions of B.H. These words should therefore be deleted in No. 6.

No. 7:

According to Articles III.1 (d) and VII of the Constitution of B.H., the Central Bank of B.H. shall be the sole authority for issuing currency and for directing monetary policy. The references to the monetary and foreign exchange systems in No. 7 therefore have to be deleted. At the meeting on 28 August 1996 this seemed to be accepted by the R.S. experts.

As explained with respect to Article III.1 of the Constitution of the F.B.H., the word "customs" must also be deleted.

In particular for the remaining competencies under Nos. 6 and 7, and also for others, the overriding principle of the freedom of movement of goods, services, capital and persons throughout B.H. will have to be respected.

No. 15:

The R.S. has only a very limited capacity to enter into agreements with States and international organisations under Article III.2.(d) of the Constitution of B.H. The

wording of No. 15, which indicates a general competence in the field of international co-operation, therefore has to be amended.

Article 70:

In No. 12 the references to confederation or similar forms of uniting with other countries have to be deleted (cf. the remarks on Article 4). This was accepted by the R.S. experts.

No. 13 has to be brought into line with the limited foreign policy competence of R.S. (see above, Article 68 No. 15). The R.S. experts indicated that this paragraph might be reworded.

The second paragraph, according to which the National Parliament decides on war and peace and declares a state of war in case of an armed attack on the Republic, is problematic, also with respect to international law. The R.S. experts indicated that this paragraph might be reworded.

Article 80:

According to No. 8, the President of the R.S. should perform, in accordance with the Constitution and the law, tasks related to the defence, security and the Republic's relations with other countries and international organisations. These tasks are not defined and, since the competencies of the R.S. are limited by the respective provisions of the Constitution of B.H., a specific reference to the Constitution of B.H. should be introduced into this provision.

As set out above with respect to the Constitution of the F.B.H., Article V.3.(b) of the Constitution of B.H. vests the power to appoint ambassadors in the Presidency of B.H. There is no room for the President of the R.S. to nominate ambassadors of B.H.; at the most he may make non-binding proposals. At the meeting on 28 August 1996, it was explained that the word "nominate" in No. 9 was a wrong translation and should instead read "propose candidates". As regards the nomination of ambassadors of the R.S., the word ambassador implies a sovereign State and can therefore not be used. The existence of representation offices abroad and of other international representatives may comply with the Constitution of B.H. provided that these offices and representatives do not function as regular embassies or consular offices.

Article 90:

With respect to No. 10 the remarks on Article 80, No. 9 apply. No diplomatic or consular offices of the R.S. may be established.

Article 98:

The R.S. experts explained that the "National Bank" was not supposed to issue money but only had functions like the banks of the Republics in former Yugoslavia.

Article 101:

The words sovereignty and independence in No.1 have to be deleted.

Article 106:

The Articles on defence, in particular Article 106, do not take into account the fact that under Article V.5 of the Constitution of B.H. the members of the Presidency of B.H. have command authority over the armed forces, and that there is a Standing Committee on military matters to co-ordinate activities of armed forces in B.H.

Article 119:

The various competencies of the Constitutional Court of R.S. as enumerated in Art. 115, are, with the exception of Art. 115 No. 5, unlikely to frequently lead to the possibility of an appeal to the Constitutional Court of B.H. Nevertheless, this possibility exists at least for No. 5 and therefore the word final for the decisions has to be qualified as "final for matters not falling within the jurisdiction of the B.H. courts".

Article 138:

Adopted on 1 and 2 April 1996 by the National Assembly of the R.S., Amendment LI to the Constitution provides for a new text of Article 138, including a sort of ius nullificandi for the R.S. with respect to acts of B.H. considered as violating the rights and legal interests of the R.S. This provision is in clear contradiction with the Constitution of B.H., which requires such conflicts to be settled by the Constitutional Court and which provides for many procedural guarantees for the Entities and for the national groups to protect their interests. This Amendment is completely unacceptable and has to be deleted.

During the discussions on 28 August 1996, the R.S. experts interpreted this provision restrictively as referring only to exceptional situations, e.g. before the Constitutional Court of B.H. has reached a decision. They promised to consider amending the provision so that it would permit only temporary measures to prevent irreparable damage. This would make the text somewhat less objectionable but not acceptable.

Proposals for amendments for the Constitution la R.S.

The Commission had made a certain number of propositions for amendment some of which had been taken up by the R.S.

Below is a memorandum prepared by the Secretariat on the question of the compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia and Herzegovina following the adoption of amendments LIV-LXV by the National Assembly of the Republika Srpska.

Introduction

At its 28th meeting in Venice on 13 and 14 September 1996 the Venice Commission adopted an opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina (F.B.H.) and the Republika Srpska (RS) with the Constitution of Bosnia and Herzegovina (B.H.). The text of this opinion appears in Document CDL(96)56 final. Appendix 2 to the opinion contains a number of concrete proposals for amendments to the Constitution of RS.

On 13 September 1996, the National Assembly of RS adopted amendments LIV to LXV to the Constitution of RS. These amendments were adopted following discussions between the working group of the Commission and experts from RS on 28 August 1996. To a considerable extent, these amendments take up recommendations made by the Venice Commission.

The Preamble

The opinion of the Commission recommends replacing the previous text of the Preamble by a new text. Amendment LIV only replaces the third and fourth paragraphs, which were in clear contradiction with the Constitution of Bosnia and Herzegovina (establishment of a sovereign and democratic state, decision to reunite with other Serb countries). The new text of the Preamble is still problematic. Can one state that the Serb people independently decides on its political and national status when the Entity is part of B.H., and can one speak of the decisiveness of the Serbian people of the RS to connect their state closely and in all aspects with other states of the Serbian people, when all such relations have to be consistent with the sovereignty and territorial integrity of B.H.? It is also problematic to call the RS a state, though there are precedents for this in other federal states (United States, Free States of Bavaria and Saxony in Germany). On the whole the Preamble still gives the impression of being a Preamble for an independent state. Although the Preamble has no direct operational consequences but is a text mainly serving to interpret the Constitution, it should reflect the character of the RS as an Entity of B.H. and therefore a further revision seems necessary. The Constitutional Court of B.H. might be called upon to decide on this matter.

Chapter I - Basic Provisions

The previous inconsistencies with the text of the Constitution of B.H. have been removed, as recommended in the Commission's opinion. This concerns in particular Articles 2 and 3. The Commission's proposal to state explicitly that RS is a constitutive part of B.H. has not been taken up. This can however not be regarded as directly required by the text of the Dayton Constitution and it may be argued that the new Article 3, as well as other Articles, implicitly acknowledges that RS is a part of B.H..

Chapter II - Human Rights and Freedoms

With respect to this Chapter, the recommendations of the Commission have been implemented. In particular, the rights previously reserved to RS citizens have now been granted to everyone and the clauses on the restriction of rights, which were formulated in a completely unacceptable way, have been deleted.

The problem that the international legal instruments being part of the Constitution of B.H. may in several respects be more favourable to citizens than the Human Rights catalogue contained in the Constitution of RS has been solved, as proposed by the

Commission, by introducing a provision that, in case of any discrepancy, the provision more favourable to the individual will be applied. It is therefore not essential that the wording of every single article is fully in line with the most recent interpretation of the legal international instruments.

Chapter III - Economic and Social Order

No amendments were requested by the Commission to bring this Chapter in conformity with the Constitution of B.H..

Chapter IV - The Rights and Duties of the Republic

The Commission recommendations to amend Article 68 have mostly been followed, in particular:

- in No. 1 the words "sovereignty" and "independence" were deleted and replaced by "integrity" and "constitutional order";

- in No. 6 the words "economic relations with foreign countries" were not deleted but qualified "which have not been transferred to the institutions of B.H."; direct incompatibility is thus avoided;

- in No. 7 the words "monetary", "foreign exchange" and "customs" were deleted;

- in No. 15 international co-operation is qualified now by "except one which has been transferred to the institution of B.H.";

- the unfortunately worded second paragraph introduced by amendment XLIX is deleted.

The proposal to introduce into Nos. 2 and 3 a reference to the civilian command authority of the members of the Presidency of B.H. and to the co-ordinating function of the Standing Committee on Military Matters was not followed. It should however be noted that this reference is also missing in the Constitution of the Federation.

Chapter V - Organisation of the Republic

The catalogue of competencies of the National Assembly in Article 70 has been amended, as requested by the Commission, by deleting the reference to the uniting with other countries and introducing the reference to the B.H. competencies concerning international agreements.

The provision on the declaration of war was reworded but not deleted. This provision raises very delicate and difficult issues. Can an Entity declare war and to what extent do Entities have under international law the right to self-defence? This problem will have to be settled by the Constitutional Court of B.H..

With respect to the competencies of the President enumerated in Article 80, first of all the proposed reference to the B.H. Constitution in No. 8 concerning tasks related to defence was not introduced. This would have been advisable but can not be regarded

here as a direct inconsistency and is also missing in the Constitution of the Federation. In Article 80, No. 9, an inconsistency remains insofar as the word ambassador may also refer to the RS representative (while the Amendment to Article 90 makes it clear that there is no more a possibility for diplomatic offices of the RS). This inconsistency seems not very important.

In Article 90, the possibility of the establishment of diplomatic and consular offices by RS was deleted as recommended.

Chapter XII - Concluding Provisions

The Venice Commission requested the deletion of Article 138 since this Article gave the authorities of RS the possibility to take unilateral measures when they believe that their rights are violated by acts of B.H. or F.B.H.. This Article has not been deleted but it has been very much qualified. Such measures are now possible only "temporarily until the decision of the Constitutional Court of B.H. in cases when ineliminable detrimental consequences may occur". This is still not acceptable under the Constitution of B.H. but the practical importance of this provision seems very much reduced.

Conclusion

In conclusion it may be stated that the amendments adopted by the National Assembly of RS take to a very large extent account of the recommendations of the Venice Commission and that nearly all direct incompatibilities have been removed, the most obvious exception being the command authority of the President over the military forces. The RS has not followed the recommendations to introduce positive references clearly stating that it is a constitutive part of B.H., but these recommendations could not be regarded as directly required by the Constitution of B.H..

Since the Constitution of B.H. foresees that its provisions supersede any incompatible provisions of the legal order of the Entities and gives to the Constitutional Court the power to decide in the case of conflict, it would seem that the Constitutional Court of B.H. should be able to deal with the remaining problems of incompatibility. The area of defence certainly merits the further attention of the international community with respect to both Entities. On the whole, however, it has to be acknowledged that the RS, like before the Federation, has taken a major step to fulfil its commitments under the Dayton Peace Agreement.

3. General conclusions

The Commission acknowledges with satisfaction that both the F.B.H. and the R.S. have made a serious effort to bring their Constitutions into line with the Dayton

Agreements. As the above detailed analysis of their provisions has shown, however, such compatibility has not as yet been achieved.

With respect to the F.B.H., the task is obviously complicated by the fact that the federated Entity is itself a federation and that competencies have to be distributed between multiple levels, making the whole legal system extraordinarily complicated. However, the obvious discrepancies with the Constitution of B.H. have been eliminated or, at least, their elimination is under discussion. In particular it has to be acknowledged that Article 1 of the Constitution of the Federation as amended explicitly provides for the integration of the Federation into B.H.

With respect to the R.S., an effort has also been made to remove incompatible provisions from the Constitution of R.S. There remain problems in particular with respect to the concept of the sovereignty of the R.S., which is maintained in a form that is inherently incompatible with its status as an entity of a Federal State, and concerning the rights of non-citizens of the R.S. within the R.S. In addition, Article 68 paragraph 2, which acknowledges the competencies of B.H., is worded in a somewhat unfortunate way.

Therefore, work remains to be done for both Entities. It should however be stressed that this work cannot be seen to consist simply in removing inconsistencies from the Constitutions of the Entities. B.H. will have to become a viable State. In order for this to come about, the difficulties of the implementation of the Constitution of B.H. as agreed at Dayton will have to be overcome. At present the Federation has a dual character with certain competencies lying with B.H. and others with the Entities. But co-operative mechanisms, which will be indispensable in many sectors to ensure the effective functioning of the institutions both of B.H. and of the Entities, are lacking. Article III.4 and III.5 of the Constitution of B.H. may provide a starting point for the development of such mechanisms. Both Entities however will have to reflect on how to integrate such co-operative mechanisms into their constitutional structure.

IV. OPINION ON LEGISLATIVE POWERS IN BOSNIA AND HERZEGOVINA IN THE PERIOD BETWEEN THE ENTRY INTO FORCE OF THE CONSTITUTION SET OUT IN ANNEX IV TO THE DAYTON AGREEMENT (14 DECEMBER 1995) AND THE ELECTIONS OF 14 SEPTEMBER 1996

By Mr Sergio BARTOLE (Italy), Mr Giorgio MALINVERNI (Switzerland), Mr Jean-Claude SCHOLSEM (Belgium)

A. Introduction

1. By letter dated 18 November 1996 the Office of the High Representative asked the European Commission for Democracy through Law to give an opinion on the validity of the legislative acts adopted by the Constituent Assembly of the Federation of Bosnia and Herzegovina and by the Assembly of the Republic of Bosnia and Herzegovina in the period between the date of the entry into force of the Constitution of Bosnia and Herzegovina set out in Appendix IV to the Dayton Agreement (14 December 1995) and the elections of 14 September 1996.

2. This opinion has been drafted on behalf of the Commission by Professor Jean-Claude Scholsem, Belgium, Professor Sergio Bartole, Italy, and Professor Giorgio Malinverni, Switzerland.

B. The legal background

3. An answer to the question put to the Commission can only be given by first looking at the situation existing in Bosnia and Herzegovina before the entry into force of the Dayton Peace Agreement. During this period legislative competencies were legally exercised by the Constituent Assembly of the Federation of Bosnia and Herzegovina on the basis of the Constitution of the Federation of Bosnia and Herzegovina as contained in the Washington Agreements. Article IX.3 of this Constitution provides that "until the House of Representatives is first convened, its functions under this constitution shall be carried out by the Constituent Assembly referred to in Article (IX)1.1". According to Article IX.1.1, the Constituent Assembly comprises "those representatives elected at the 1990 elections to the Assembly of the Republic of Bosnia and Herzegovina whose mandate is still valid".

4. The Constitution contained in the Washington Agreements was legally implemented at the level of the Republic of Bosnia and Herzegovina by the Constitutional Law on the Amendment of the Constitution of the Republic of Bosnia

and Herzegovina adopted by the Assembly of the Republic of Bosnia and Herzegovina on 30 June 1994. This same constitutional law provides in its Article 4: "the Assembly of the Republic of Bosnia and Herzegovina, elected in 1990, will continue its work based on
the authority and powers vested into it by the Constitution of Bosnia and Herzegovina for as long as it takes to reach and implement a peace agreement for Bosnia and Herzegovina".

5. From these provisions it results that two parliamentary bodies were in legal existence which had the same composition.

6. The Constitution set out in Appendix IV to the Dayton Agreement, according to its Article XII.1, enters into force as follows: "this Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". As from the date of signature, both parliamentary bodies therefore had to exercise their competencies while respecting the provisions of this Constitution.

C. The legislative powers of the constituent assembly of the Federation

7. The new Constitution of Bosnia and Herzegovina is based on the existence of two Entities, among them the Federation of Bosnia and Herzegovina, and contains no obstacle to the continued existence of parliamentary bodies of the Federation.

8. However, Article III of the Constitution contains a distribution of responsibilities between Bosnia and Herzegovina and the Entities. According to the above-mentioned Article XII.1 of the Constitution, this new distribution of responsibilities entered into force upon signature. If Article XII.2 requires from the Entities to amend their constitutions within three months to bring them into conformity with this text, this is a requirement in the interest of legal certainty and it in no way puts into question the immediate entry into force of the new provisions and the immediate abrogation of contrary provisions in the Constitutions of both Entities. This is confirmed by section 2 of the Transitional Arrangements (Annex II of the Constitution): "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina."

9. It therefore results:

- that the Constituent Assembly could continue to exercise legislative activities until its replacement by the House of Representatives and the House of Peoples foreseen in the Constitution of the Federation of Bosnia and Herzegovina;

– that, in exercising this legislative activity, the Constituent Assembly had to respect the new distribution of responsibilities between Bosnia and Herzegovina and the Entities and that any legislative act falling within the area of responsibility of the central institutions of Bosnia and Herzegovina would be *ultra vires* and void.

D. The legislative powers of the Assembly of the Republic of Bosnia and Herzegovina

10. Article IV of the new Constitution of Bosnia and Herzegovina contains provisions on a Parliamentary Assembly. This Parliamentary Assembly is different from the Assembly of the Republic of Bosnia and Herzegovina existing under the previous Constitution.

11. Following the rule on immediate entry into force of the new Constitution, contained in its Article XII.1, at first sight the Assembly of the Republic would lose its legal basis upon signature of the Dayton Agreement and therefore cease to be able to validly enact legislation or other decisions. A different conclusion may however result in particular from the Transitional Arrangements contained in Annex 2 to the Constitution.

12. Section 2 of the Transitional Arrangements on the continuation of laws is worded as follows: "all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

This provision does not cover legislation adopted after the entry into force of the new Constitution, but only previously enacted legislation. The very absence of a provision on legislation adopted during the transitional period might however be regarded as an indication that such legislation was not envisaged.

13. On the other hand, section 4 of the Transitional Arrangements provides under the heading "offices" as follows: "until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law".

Within the terminology of the Dayton Constitution, a parliamentary body may be covered by the expression "governmental offices, institutions, and other bodies". This results from Article III.1 where the word institution is applied to all State organs, including the Parliamentary Assembly. Moreover, section 2 of Annex 2 cited above calls "governmental" the competent body, which determines the continued validity of previous legislation.

By contrast, the application of the words "until superseded by applicable agreement or law" to a parliamentary body seems problematic since parliament has its main legal basis in the Constitution and the new Constitution has already superseded the previous Constitution.

14. The wording of the Transitional Arrangements therefore seems ambiguous and an answer has to be found by applying general principles to the interpretation of the Constitution contained in the Dayton Peace Agreement.

15. According to Article I.1 of the Constitution, Bosnia and Herzegovina is not a new State but it continues its legal existence under international law as a State. This also results clearly from Article XII.1 according to which the new Constitution enters into force "amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". It is therefore clear that the State of Bosnia and Herzegovina continued to exist throughout the whole period. As a State it had to exercise the attributes of State power proper to any State under international law. The organs of the State therefore had to be able to effectively exercise their powers. Since the new parliamentary organs did not come into existence before the elections on 14 September 1996, a denial of the continued existence of the Assembly of the Republic of Bosnia and Herzegovina would mean that for a period of 10 months no parliamentary or legislative body would have existed at the level of the State of Bosnia and Herzegovina. This is difficult to conceive, and in the absence of any clear provision in the text itself, the principle of continuity requires the continued existence of a parliamentary organ of the State of Bosnia and Herzegovina.

16. However, this continued existence would seem to be very limited.

17. First of all, it is obvious that the Assembly of the Republic, acting as an organ of Bosnia and Herzegovina, could only act within the sphere of responsibilities given to the parliamentary organs of Bosnia and Herzegovina (as distinct from the Entities) by the new Constitution.

18. In addition, the powers of the Assembly were only justified on the basis of the principle of necessity. The Assembly was not a competent organ by virtue of the new Constitution, with the full powers given by the new Constitution to the new institutions. It only continued to exist to avoid the absence of the existence of any competent body and its actions were only justified to the extent that such a lack of a competent body had to be avoided. The Assembly of the Republic could therefore only deal with current matters and not take any measures going beyond what is necessary to ensure the continuity of the State. This limitation may be difficult to determine, as is for example the case for the current matters a government still can expedite during a governmental crisis. The limits can however be, if necessary, assessed by the Constitutional Court and, provisionally, by the High Representative under the conditions of Article 2.1.d of Annex 10 to the Dayton Agreement.

V. OPINION ON THE ESTABLISHMENT OF A HUMAN RIGHTS COURT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

By letter of 16 June 1997 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the European Commission for Democracy through Law to give an opinion on the legal questions raised by the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina (hereafter "F.B.H."). This opinion, in response to the above-mentioned request, was adopted by the Venice Commission at its 31st plenary meeting (Venice, 20-21 June 1997).

The Commission feels that these legal questions should be analysed on two levels:

On the one hand, an analysis of the current situation of constitutional law in Bosnia and Herzegovina (hereafter "B.H.") is called for (*de lege lata* analysis, point 1 below); on the other hand, given the Committee of Ministers' responsibilities for this, the system of human rights protection mechanisms should be examined with a view to giving an opinion on the advisability of setting up the Court in question (*de lege ferenda* analysis, point 2 below).

1. The current state of constitutional law applicable in Bosnia and Herzegovina

Membership and powers of the Human Rights Court of the Federation of Bosnia and Herzegovina under the Washington Agreements and the F.B.H. Constitution

The Human Rights Court of F.B.H. is an institution provided for by the Constitution of the Federation, itself proposed in the Washington Agreements of 18 March 1994 reached by F.B.H. and the Republic of Croatia.

The proposed Constitution was adopted by Parliament on 30 May 1994.

The Human Rights Court is provided for in Chapter IV, Section C, Articles 18 to 23 of that Constitution. It has 7 members: 3 judges from Bosnia and Herzegovina (one Bosnian, one Croat and one "Other") and 4 members to be appointed by the Committee of Ministers of the Council of Europe in accordance with its Resolution (93)6. The participation of the foreign judges is a transitional arrangement (Chapter IX, Article 9 of the Constitution).

The Court's competence covers any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the

instruments listed in the Annex to the Constitution of the Federation of Bosnia and Herzegovina. After having exhausted the remedies before the other courts of the Federation, one may appeal to the HR Court on the basis of any question within its competence. An appeal may also be taken to the court if proceedings are pending for an unduly long time in any other court of the Federation or any Canton. The Human Rights Court may also, on request, give binding opinions for the Constitutional Court, the Supreme Court or a cantonal court on matters falling within its competence. The decision of the Court shall be final and binding.

The effects of the Dayton Agreements

The first question asked concerns the effects of the Dayton Agreements on the arrangements for the Washington Agreements. In other words, questions should be asked about whether the Dayton Agreements, coming after the Washington Agreements and the adoption of the Federation's Constitution resulted, through the setting up of the Human Rights Commission (Annex 6 to the Dayton Agreements), in the formal revocation of the provisions relating to the Human Rights Court of F.B.H..

This does not seem to be the case from a legal point of view.

The Dayton Agreements and the Washington Agreements do not involve the same parties. The Dayton framework agreement was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and Annex 6 by the Republic of Bosnia and Herzegovina, F.B.H. and the Republika Srpska, whereas the Washington Agreements were signed by F.B.H. and the Republic of Croatia.

Similarly, Annex 6 is intended to set up an institution to monitor the respect for human rights throughout the state of Bosnia and Herzegovina, whereas the Federation's constitution apparently only covers one entity of that state (even though the original aim of the Washington Agreements was to create a Federation covering the whole territory of Bosnia and Herzegovina).

Since the two international Agreements neither have the same parties nor govern the same subject, it cannot be considered that the Dayton Agreements have affected the legal validity of the provisions relating to the Human Rights Court of F.B.H..

The appointment of "foreign" judges by the Committee of Ministers of the Council of Europe

The Human Rights Court has not yet been set up. The three national members have been appointed but the "foreign" members, necessary for setting up the institution during the initial period, have not yet been appointed by the Committee of Ministers.

The legal base of the Committee of Ministers' action calls for clarification.

The Washington Agreements (between F.B.H. and Croatia) and the F.B.H. constitution are not binding on the Council of Europe and its bodies. These texts provide the legal base foreseeing, so as to meet the requirements of domestic law, action by an international institution for the setting up of the Court.

The Committee of Ministers' action on this is therefore not governed as such by the Agreements or the Constitution but is exclusively founded on its own Resolution (93)6 to which, furthermore, the Washington Agreements and the Federation Constitution refer. Resolution (93)6 states in Article 1 that:

> "*At the request of a European non-member state, the Committee of Ministers may, after consultation with the European Court and Commission of Human Rights, appoint specially qualified persons to sit on a court or other body responsible for the control of respect for human rights set up by this state within its internal legal system*".

By acting under this provision the Committee of Ministers must, when necessary, appoint foreign judges. It should be emphasised, in this respect, that the condition for carrying out this appointment is that a request has been made to it by a European non-member state, i.e. Bosnia and Herzegovina, and not an Entity. On the other hand, it is not at all necessary for the body responsible for the control of human rights to be at the top of the state's pyramid of legal bodies; it might well be the legal body of a federate entity.

Resolution (93)6 also states that the Committee of Ministers "may" appoint foreign judges to sit on a body responsible for the control of respect for human rights in a European non-member state. This allows the Committee of Ministers a certain amount of leeway in assessing the advisability of its actions. This leeway will be greater when, as in this case, it is requested to act to set up a second control body in the same state. It should, therefore, not be overlooked that the Committee of Ministers has already set up the Human Rights Chamber in B.H., as provided for in Annex 6 to the Dayton Agreements, in accordance with Resolution (93)6. In these circumstances, the Committee of Ministers could decide against proceeding with the appointment requested if it believes that the aims of Resolution (93)6 are not served by setting up a second control body. The observations of the Venice Commission contained in its **opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms** (opinion adopted at the Commission's 29th meeting 15-16 November 1996, CDL-INF (96) 9) might be taken into consideration in this case.

2. Problems linked to the functioning of the Human Rights Court of the Federation possibly affecting the efficiency of the human rights protection mechanism in Bosnia and Herzegovina

At the Parliamentary Assembly's request the Venice Commission has examined the constitutional situation in Bosnia and Herzegovina with regard to the human rights protection mechanism. This examination has revealed a certain number of problems linked, in particular, to the proliferation of control bodies.

In its opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, the Commission found,

> "that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.
> ...
>
> However, duplication should be avoided as it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with amendments of the entities' Constitutions where the creation of specific human rights bodies may be unnecessary from a legal point of view".

With reference in particular to the Human Rights Court of F.B.H., the Commission stated that the co-existence of two human rights jurisdictional bodies (the Human Rights Court of F.B.H. and the Human Rights Commission provided for in the Dayton Agreements) may create certain problems.

First,

> "the exhaustion of domestic remedies available to a citizen of F.B.H. becomes extremely lengthy. It involves the (eventual) excessive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of F.B.H.) and then of the Ombudsman of F.B.H. before reaching, finally, the Constitutional Court of B.H. or the Human Rights chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from F.B.H. from applying to the European Commission in Strasbourg when B.H. becomes party to the European Convention on Human Rights."

In addition,

> "it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of F.B.H. and of the Human Rights chamber of B.H. (both composed of a majority of international judges) might affect the authority of those courts".

Obviously these problems, linked to the establishment and the functioning of the Human Rights Court of F.B.H., jeopardise the efficiency of the human rights control mechanism both in that entity and in B.H. as a whole.

As a possible solution to these problems, the Venice Commission has recommended amending the F.B.H. Constitution so as to do away with the Human Rights Court. The lacunae which might result from such an amendment in the judicial system of F.B.H. would easily be covered by granting human rights responsibilities to the Constitutional Court and/or the Supreme Court of the Federation and by the possibility offered to any individual, including the Ombudsmen of F.B.H., to refer cases to the Human Rights Chamber.

In addition, this solution would simplify the judicial system of human rights protection in F.B.H. and, consequently, shorten the legal avenues of exhaustion of domestic remedies.

It would also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, i.e. the Human Rights Commission.

The Commission finds that this solution is compatible with the international Agreements which are the basis of the judicial system of B.H., in that the Washington Agreements, which includes the Constitution of B.H. and foresees the creation of the Human Rights Court, has been politically "superseded" by the Dayton Agreements.

The Commission reiterates its position that, bearing in mind the mechanism set up by Annex 6 to the Dayton Agreements, the creation of the Federation's Human Rights Court now seems superfluous and runs the risk of slowing down proceedings.

However, given the possible expectations raised among the local people by the prospect of human rights protection mechanisms, political imperatives might well require the establishment of the Human Rights Court of F.B.H.. The Commission has neither the information nor the competence to give an opinion on this political aspect of the question.

However, if this court were to be established, work would have to be undertaken immediately in order to bring about, as quickly as possible, a simplification of the system, for example by means of merging this court with the Supreme Court or the Constitutional Court of the Federation. On this score, the Commission recalls that a similar simplification was carried out successfully in Croatia, where the provisional Human Rights Court (foreseen by the Croatian Constitutional Act of 1991 on human rights and minorities, also based on Resolution (93)6 of the Committee of Ministers) was replaced by a mechanism enabling the Croatian Constitutional Court to turn to international advisers taking part in its proceedings. This simplification, for which the Commission would be willing to lend any assistance to interested parties, would

contribute to the efficiency of human rights protection mechanisms, a cornerstone of the peace agreements in Bosnia and Herzegovina.

3. Conclusions

The Commission finds that:

- the provisions of the F.B.H. Constitution concerning the Human Rights Court of F.B.H. have not been formally revoked by the Dayton Agreements;

- the action requested of the Committee of Ministers of the Council of Europe is not governed by the Washington Agreements or by the F.B.H. Constitution but exclusively by Resolution (93)6;

- in accordance with that Resolution, the request for setting up a control body, in the meaning of Article 1 of that Resolution, must come from a non-member state and not by an entity of that state;

- the Committee of Ministers may decide as to the advisability of the appointment of international judges to the Human Rights Court of F.B.H., in accordance with Resolution (93)6;

- the Committee of Ministers must take into consideration the fact that it has already set up a control body, in the meaning of Article 1 of Resolution (93)6, in that same state, and assess to what extent the setting up of a second body, i.e. the Human Rights Court of F.B.H., serves the aims of that Resolution; in this respect, it will be for the Committee of Ministers of the Council of Europe to take into account the considerations set out above, together with any other political consideration which the state empowered to make that request, i.e. Bosnia and Herzegovina, might convey to it and on which the Commission, by its nature, has no competence to give an opinion;

- if the Human Rights Court of F.B.H. were to be established, work would have to be undertaken immediately to bring about, as quickly as possible, a simplification of the system of legal human rights protection and, for example, the merger of that court with the Supreme Court or the Constitutional Court of the Federation might be envisaged.

VI. OPINION ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THE CONSTITUTION OF THE REPUBLIKA SRPSKA

On 8 July 1997, the Office of the High Representative in Bosnia and Herzegovina sent a letter to the European Commission for Democracy through Law asking the following questions:

1. Does the President of the Republika Srpska have the power to dissolve the National Assembly without first having obtained the opinion of the Prime Minister and the President of the Assembly?

2. Does the President of the Republika Srpska have the authority to appoint a government following dissolution of the National Assembly on the basis of Article 94 of the Constitution?

3. Can the Government, pursuant to Article 114 of the Constitution, suspend the decision taken by the President of the Republika Srpska to dissolve the National Assembly?

The rapporteurs appointed, Mr G. Malinverni (Switzerland) and Mr C. Economides (Greece), assisted by Mr C. Giakoumopoulos (Deputy Secretary of the Venice Commission), held a meeting in Geneva on 10 July 1997.

On the basis of the information available to them and within the very short space of time at their disposal, the rapporteurs gave the following opinion, which was approved by the Commission at its 32nd plenary meeting.

Question 1

Under the terms of Amendment LX to Article 72 of the Constitution, the President of the Republic may dissolve the National Assembly after consulting the Prime Minister and the President of the National Assembly.

The wording of this provision states that the President is required to seek the opinion of the Prime Minister and the President of the Parliament, but that such an opinion is purely advisory. The decision to dissolve Parliament falls to the President of the Republic alone. Accordingly, the position taken by the Prime Minister and the President of the Assembly is in no way binding on the President of the Republic.

In the circumstances in question, the President of the Republic, in accordance with the aforementioned provision, requested the opinion of the Prime Minister and the President of the Assembly. The latter, however, did not reply within the requested time. Nevertheless, such a situation need not prevent the President from lawfully taking her decision, given that the opinion of the Prime Minister and the President of the Assembly is not binding. To make the President's decision subject to receiving the opinion of the Prime Minister and the President of the Assembly would serve to halt the dissolution process and render the provision ineffective.

The deadline given for their opinion may appear tight. However, the Constitution does not specify any deadline and decisions of this importance must often be taken urgently. In any case, a deadline of some 20 hours seems sufficient to enable the two persons consulted to express their opinion or at least ask for more time, which they did not do.

Question 2

In accordance with Amendment XXXIX as amended by Amendment LX, the Government's mandate ends upon the dissolution of Parliament.

However, pursuant to Article 94 para. 9, a government whose mandate has been revoked following the dissolution of the National Parliament shall remain in office until the appointment of a new government.

Article 94 para. 10, which the President claims, allows her to form a new government, at this point cannot be regarded as a constitutional basis for this purpose. This provision clearly stipulates that the President must propose a candidate for the position of Prime Minister. The very fact that the President may only "propose a candidate" implies that this nomination must be approved by another organ of the state. It is clear from this provision that the candidate must secure the confidence of Parliament.

Consequently, this provision cannot be applied if there is no parliament, which is the case at present, since the previous parliament has been dissolved and the new parliament has not yet been elected.

Clearly, Article 94 para. 10 is not intended to apply until after the elections of 1 September 1997. Until then, the present government must remain in office to deal with routine business, as specified moreover in Article 94 para. 9.

Question 3

Pursuant to Article 114 of the Constitution, the Government does not have the authority to suspend the decision taken by the President of the Republic to dissolve Parliament. In fact, Article 114 refers exclusively to the "*enforcement of a regulation, general or specific enactment*", i.e. legislative or administrative acts. Clearly, the decision to dissolve Parliament, which is of an obvious political nature, does not fit into the category of acts referred to in Article 114.

Furthermore, the dissolution of Parliament requires no intervention whatsoever by the Government. As an executive organ, the Government should not intervene with regard to a presidential act concerning the Parliament in any way other than that provided for in Amendment LX of the Constitution (opinion of the Prime Minister at the request of the President).

Accordingly, the Government cannot rely on Article 114 of the Constitution to suspend the President's decision to dissolve Parliament.

VII. OPINION ON THE COMPETENCE OF THE FEDERATION OF BOSNIA AND HERZEGOVINA IN CRIMINAL LAW MATTERS

Adopted by the Venice Commission at its 34th Plenary meeting (Venice, 6-7 March 1998) on the basis of the opinion by Mr Jean-Claude SCHOLSEM (Belgium)

1. In a letter of 25 September 1997, Mr Mato Tadic, Minister of Justice of the Federation of Bosnia and Herzegovina, requested the opinion of the European Commission for Democracy through Law (the Venice Commission) as regards the competence of the Federation in criminal law matters. The request should be seen in the context of the criminal code being drawn up by the Federal Ministry of Justice, with the Council of Europe's assistance.

2. The Commission considered this matter at its 32nd plenary meeting (Venice, 12-13 December 1997), on the basis of the preliminary opinion of Mr Scholsem, Rapporteur, and in the presence of Mr van Lamoen, Deputy to the High Representative of the international community in Bosnia and Herzegovina. The Commission decided to resume its examination at its next plenary meeting and invited Mr Scholsem to present a draft report on the subject.

3. This opinion takes account of the views expressed at the 32nd plenary meeting, together with the explanations and clarifications supplied to the Rapporteur by the Office of the High Representative and the Council of Europe's Secretary General on the subject of the draft criminal code prepared by the Federation authorities and Council of Europe experts. It was adopted by the Commission at its 34th Plenary meeting (Venice, 6-7 March 1998).

A. Purpose of this opinion

4. The question is being interpreted in a broad sense to include the Federation's competence to legislate in the fields of substantive criminal law and criminal procedure, areas that are, to an extent, interlinked. The reply necessarily entails a examination of the division of competence between the State of Bosnia and Herzegovina (B.H. hereafter) and the two *entities*: the Federation of Bosnia and Herzegovina (F.B.H. hereafter) and the Republika Srpska (RS hereafter). It also requires an examination of the division of powers in this area between the Federation and its cantons.

B. The competence of the F.B.H. regarding criminal law vis-à-vis the State of B.H.

5. The fundamental rule for interpreting the constitutions of B.H. (Appendix IV of the Dayton Agreements), the F.B.H. and the RS is that the two entities enjoy residual powers. The Constitution of B.H. assigns only certain specific areas of competence to the State, while the remainder lie with the federated entities (article III-3-a of the Constitution of B.H.). The entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competencies of the State of B.H. in this area, as provided for in the Constitution of B.H..

6. Of the areas of competence assigned to B.H., only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives B.H. responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon B.H. in the area of criminal law and criminal procedure. Our task is to establish the scope of that competence as accurately as possible.

7. To assist in interpreting this provision, a comparison may be made between article III-3-a of the Constitution of B.H. and the equivalent provision of the Constitution of F.B.H. (article III-1, as modified by amendment VIII: "*It is an exclusive competence of the Federation ... stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime*". The first version of the F.B.H. Constitution granted the Federation powers in the field of international criminal law, which patently clashed with the Constitution of B.H.. Although the new version has rectified this situation, it has still left a certain ambiguity. The Venice Commission had stressed the need to avoid any overlap with the powers granted to the State of B.H. and proposed the setting up of joint institutions to guarantee co-operation between B.H. and the Federation in the enforcement of criminal law in international cases and cases involving more than one entity (Commission opinion on the compatibility of the Constitutions of the Federation of B.H. and the RS with the Dayton Constitution, CDL (96) 56 revised 2, 4 September 1996, p. 7; Venice Commission, Annual Report 1996). The Commission does not appear to have identified in the wording of the two constitutions a risk of conflict with regard to the exercise of legislative power, but rather in the implementation of crime policy. The wording of article III-3-a of the Constitution of B.H. seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of B.H., which expressly refers to relations with Interpol, is indicative in this respect.

8. Article III-1-g of the Constitution of B.H. does not therefore appear to undermine the competence in principle of the F.B.H. in the field of substantive criminal law, that is the power to determine offences and penalties.

9. However, that does not mean that article III-1-g is the sole source of the competence of B.H. in criminal matters. B.H. may define certain acts as offences and provide for punishment insofar as it needs to use the machinery of criminal law to implement its powers and responsibilities. Although such competence is not explicitly provided for in any text, this is a logical consequence of the statehood of B.H. and the tasks entrusted to it. Customs policy, for example, is a prerogative of B.H. (article III-1-c of the Constitution of B.H.) and manifestly requires the existence and application of a range of criminal measures for which B.H. has competence and indeed sole competence. The same applies to criminal law relating to the currency and monetary policy, immigration and international transport and communication.

10. Similarly, it is clear that when the criminal law is intended to protect certain values that fall within the state's area of competence, B.H. must be responsible for enacting it. This will apply, for example, to the protection of the international frontiers of Bosnia and Herzegovina and its territorial integrity, the symbols of the state, such as its flags and emblems, and its constitutional system. The competencies of the two entities in criminal law do not therefore cover this field.

11. The above-mentioned competence of B.H. is admittedly implicit, but this does not make it any less certain or exclusive. It is bound up with the nature of the state and cannot be exercised by, or even delegated to, the entities. If the two entities were to start legislating in place of the state, the same subject matter would be governed by different rules (leading, for example, to a conflict of rules for protecting the frontiers), which could result in absurd, or even dangerous, situations.

12. One suggestion is that the entities could legislate provisionally in this area to avoid any possibility of a legal vacuum created by the failure of the B.H. legislature to take action. For the reasons set out above, the Commission cannot support this interpretation. The Constitution of B.H. makes no provision for the entities to perform the functions of the state on a substitute basis and such an initiative on the part of the entities would appear to be in breach of the constitutional order of B.H.. It would in any case have little justification since there appears to be no danger of such a legal vacuum. Thus, article 2 of Annex 2 of the Constitution of B.H. ("Transitional Arrangements") clearly states that "all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

13. It should be noted, finally, that in another area the Constitution of B.H. itself establishes a rule of criminal law by providing for parliamentary immunity (article IV-3-j).

14. Subject to these reservations, it can be concluded that the entities' competence in substantive criminal law is clearly established in the constitutional system of Bosnia and Herzegovina.

15. Regarding criminal procedure, the conclusion that B.H. is not competent is strengthened by the fact that B.H. has no powers to establish courts, other than the Constitutional Court. It difficult to envisage B.H. establishing a system of criminal procedure before courts that do not come within its jurisdiction. Moreover, the Constitution of the F.B.H. contains numerous provisions concerning criminal procedure, which have never attracted any criticism (articles II-2-1 (b) and (e) relating to *habeas corpus* and fair criminal proceedings; article IV-C-3 empowers the Federation to prescribe such rules of procedure as may be necessary to ensure uniformity with regard to due process[42]). Article IV-C-8 establishes a criminal police service responsible directly to the federal courts. Article V-11 institutes cantonal courts and article VI-7-1 establishes municipal courts with general jurisdiction in all civil and criminal matters.

16. It is clear from these provisions that criminal procedure lies within the competence of the entities.

17. It has been asked whether, in the areas of criminal law for which B.H. has exclusive competence, it should not also have the power to establish rules of procedure concerning their implementation, including the establishment of special courts. The Commission believes this would not be compatible with the Constitution of B.H., which, as already noted, only provides for one court at state level: the Constitutional Court. Besides, there is nothing to prevent the entities' courts from enforcing the laws enacted by the B.H. legislature. Admittedly, in the absence of a court of ordinary instance at the state level, these laws might not always be uniformly interpreted. However, any divergences in the interpretation of state laws that might occur need not create significant or insurmountable problems. In any event, if variations in the interpretation of state laws by the entities' judicial institutions does raise serious problems, these could be seen as a threat to the constitutional order of B.H. and could thus be set aside by the Constitutional Court of B.H..

18. Briefly, the F.B.H. is competent in the criminal field in all the areas where B.H. has no specific competence. B.H. has competence regarding criminal law and criminal procedure;

a. under article III-1-g of its Constitution, for the implementation of a co-ordinated crime policy, both internationally and between the entities;

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[42] *The Constitution of the RS also refers to the basic rules of criminal procedure (inter alia in Articles 11, 12, 14, 15, 18, 19 and 20) and institutes courts with general jurisdiction as well as the state counsel (Art. 133).*

b. whenever the use of the criminal law is necessary for the exercise of one of its constitutional powers or to protect the values of the state.

In the absence of any other explicit granting of competencies in this area, B.H. has no authority to lay down the general principles or basic rules of criminal law or procedure. The drawing up of a criminal code containing the above principles and rules is certainly outside its competence. It is thus an entity responsibility.

C. The competence of the F.B.H. vis-à-vis the cantons

19. While the F.B.H. is undoubtedly competent to draw up a criminal code and a code of criminal procedure, it still has to be decided whether this is the responsibility of the Federation itself or the cantons. According to the Constitution of the F.B.H., the cantons have residual powers (article III-4: "*The cantons shall have all responsibility not expressly granted to the Federation Government. They shall have, in particular, responsibility for: ...*"). *Prima facie*, therefore, the cantons have competence in criminal matters. However, a close examination of the F.B.H. Constitution reveals that the F.B.H. has broad competence in this area and that the constitutional logic points to a shared competence between the cantons and the Federation.

- *The Federation's competence regarding specific areas of criminal law*

20. Article III-1 of the Constitution lists the exclusive competencies of the Federation and article III-2, those that are shared between the F.B.H. and its cantons. These provisions, as modified by amendments VIII and IX of 5 June 1996, contain no specific references to the criminal law, apart from the aforementioned article III-1-f: ("*stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime*"). This article appears to give the F.B.H. a certain measure of competence in the criminal field. Like the similar provision of the Constitution of B.H., it gives the F.B.H. special competence regarding situations exceeding the jurisdiction of cantons (inter-cantonal crime) or certain particularly serious offences (terrorism, organised crime and drug dealing). However, the competencies of the F.B.H., unlike those of B.H., are not confined to the problems of co-ordinating crime policy – the term *criminal law enforcement* does not appear in the F.B.H. Constitution. The F.B.H. has the right to draw up the relevant substantive criminal law provisions (see article IV-20-d of the F.B.H. Constitution). This is clearly a broad competence since it covers all the types of criminal offence likely to have inter-cantonal implications, which given the size of the cantons will not be the exception.

21. Moreover, just as is the case with B.H., the Federation's competence is not simply based on article III-1-f of its Constitution but extends, implicitly but unambiguously, to defining and punishing any act established by it as an offence within the exercise of its exclusive powers and responsibilities (for example with regard to the economy, land use or energy policy) or shared powers and

responsibilities (for example with regard to guaranteeing and enforcing human rights, article III-2-a).

22. It also has exclusive competence to enact criminal legislation to protect values – for example, symbols or territory - which, by their nature, it alone is capable of protecting (see also para 27 below).

- ***The Federation's competence regarding criminal procedure and the criminal justice system***

23. It should also be borne in mind that the Federation has a constitutional responsibility for ensuring respect for human rights (article III-2-a) and for certain fundamental rules of criminal procedure. It can easily be inferred from several constitutional provisions that the F.B.H. has numerous competencies in the fields of criminal procedure and the criminal justice system. For example, there are several provisions of the F.B.H. Constitution relating to criminal procedure (articles II-2-1 (b) and (e) are concerned with safeguarding *habeas corpus* and the right to a fair trial). It establishes courts with general – and thus criminal – jurisdiction, at both the federal and cantonal levels; it contains rules that are applicable to all federal and cantonal courts (articles IV-C 1 to 4) and makes fairly detailed provision for the election of judges (articles V-11 and VI-7). Finally, and above all, article IV-C-3 grants the Federation the – particularly wide - power to determine "such rules of procedure as may be necessary to ensure uniformity with regard to due process and the basic principles of justice in the proceedings of all courts". On the other hand, the F.B.H. Constitution makes cantonal legislatures responsible for laying down *supplementary* rules governing cantonal and municipal courts (ibid.) and determining the jurisdiction of cantonal and municipal courts (article V-6-d, see also para 30 below).

24. It is clear from the foregoing that, as a matter of principle, competence to determine rules of criminal procedure in the F.B.H. lies with the Federation itself, with the cantons' responsibility being confined to laying down supplementary rules.

- ***The Federation's competence regarding general criminal law***

25. It has been shown that the F.B.H. has a fairly considerable competence in the fields of special criminal law and criminal procedure. It remains to be considered whether the Federation or the cantons are competent to determine the general principles of criminal law (imputability, complicity, aggravating or mitigating circumstances, reoffending). This issue seems to be not covered at all in the F.B.H. Constitution. A literal reading of the Constitution would suggest that this competence must lie with the cantons, since it is not referred to in either the exclusive competencies of the Federation or those it shares with the cantons. However, this interpretation should be approached with caution, in that it would lead to a fragmentation of legislation, which appears completely at odds with traditional practice (the matter was previously dealt with at the federal level in the former Yugoslavia). A reading of the

Constitutions of the F.B.H. and the RS gives the impression that competence for the basic principles of criminal law has been in some ways "forgotten". In this context, it may be considered that, by granting the Federation the right to establish courts with general jurisdiction and competence for criminal procedure, the Constitution of the F.B.H. also makes the Federation competent for establishing the basic principles of criminal law. It is nevertheless true that this area of competence is not expressly listed in Articles III-1 and III-2. Were this situation to be regarded as a source of ambiguity or controversy, it will be desirable to revise the Constitution of F.B.H. as regards this point.

26. It is clear from the foregoing (paras. 20-25) that competence in criminal law is in fact shared between the Federation and its cantons, despite the fact that it is not included in the list of shared competencies in article III-2. This incompatibility with the exhaustive list in article III-2-a is more apparent than real. In practice, this provision grants the F.B.H. and the cantons shared responsibilities regarding human rights and it can be validly maintained that a large part of criminal law and criminal procedure comes within the scope of "guaranteeing and enforcing human rights", in the broad sense of the term.[43]

27. There can be no doubt that the F.B.H. Constitution provides for substantive criminal legislation at the federal as well as the cantonal level. For example, article IV-B-7(a), sub-paragraph vii, on the power of pardon of the Federation's President, makes a clear reference to "pardons for offences against *Federal* law"; similarly, article V-9-d, on cantonal responsibilities, refers explicitly to the "prosecution of crimes against *cantonal* law".

28. Turning to the laws governing criminal procedure and the criminal justice system, the F.B.H. Constitution grants the Federation responsibility for determining the rules of procedure (IV-C-3) while cantons are given the task of adopting supplementary rules and determining the extent of the jurisdiction of cantonal and municipal courts.

29. Finally, competence in this field is already shared between the Federation and the cantons for a completely factual reason, since it appears that many cantons have delegated their criminal law powers to the Federation, in accordance with article V-2 of the Constitution.

30. Article III-3 of the F.B.H. Constitution establishes the rule that, in areas where competence is shared between the Federation and the cantons, it may be exercised

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[43] *Article III-2-a differs from the provision in the Constitution of Bosnia and Herzegovina (article II-3), where human rights are guaranteed as general principles. Article III-2-a of the F.B.H. Constitution, as opposed to the above provision of the Constitution of B.H. and article II-2 of the F.B.H. Constitution, attributes specific competence for implementation ("guaranteeing and enforcing") of human rights.*

separately. Under the powers granted to it by the Constitution, the F.B.H. can enact its own criminal code and code of criminal procedure or legislation governing the criminal justice system. However, article III-3 of the F.B.H. Constitution also requires it to respect cantonal prerogatives and the need for a certain flexibility in enforcing federal legislation. For their part, the cantons can also legislate in this field, but only to supplement federal legislation. With particular regard to the criminal justice system, the cantons must establish the rules governing the jurisdiction of cantonal and municipal courts (article V-6-(d)). In view of the Federation's responsibility for ensuring uniformity with regard to procedural safeguards – including access to the courts (article IV-C-3) – cantonal legislation must take into account the federally established rules governing the competence *ratione materiae* of the various cantonal courts; on the other hand, cantonal legislatures are free to determine the number and territorial jurisdiction of the courts operating within their canton.

31. Finally, it must be emphasised that, while recognising the shared competence that the F.B.H. and the cantons have in this field, federal legislation is based directly on the Constitution itself and not on a delegation of powers from the cantons. Federal law is thus applicable in all the cantons, including those that have not delegated their competencies to the Federation or that have revoked that delegation.

VIII. OPINION ON THE NUMBER OF MUNICIPAL COURTS TO BE ESTABLISHED IN MOSTAR

By Mr Jean-Claude SCHOLSEM (Belgium)

A. Introduction

1. By letter dated 26 February 1998 the Office of the High Representative asked the Venice Commission to provide an opinion on the question of whether, within the City of Mostar, a separate court has to be established for each municipality unless the municipalities concerned agree to establish a common court. The City of Mostar is composed of six municipalities and one central zone.

2. Under the Constitution of Bosnia and Herzegovina, the two Entities are competent for the establishment of courts. The City of Mostar is within the territory of the Federation of Bosnia and Herzegovina (Herzegovačko Neretvanska Canton). The question is therefore to be decided on the basis of the Constitution of the Federation.

B. The applicable constitutional provisions of the Federation of Bosnia and Herzegovina

3. Article VI.7 of the Constitution of the Federation of Bosnia and Herzegovina is worded as follows:

> "*(1) Each municipality shall have courts, which may be established in co-operation with other Municipalities, and which shall have original jurisdiction over all civil and criminal matters, except to the extent original jurisdiction is assigned to another court by this or the Cantonal Constitution or by any law of the Federation or the Canton.*
>
> *(2) Municipal courts shall be established and funded by the Cantonal government.*
>
> *(3) Judges of the cantonal courts shall be appointed by the President of the highest Cantonal Court after consultation with the Municipal Executive.*"
> ...

4. The first and the second sections of art. 7 might seem contradictory at first sight. Section 2 attributes the power to establish a court to the cantonal government, section 1 gives the impression that the municipalities are competent to establish courts. Both

sections may however be reconciled by distinguishing between the power to decide on whether to establish a municipal court, which belongs to the municipality, and the establishment itself. Under section 1 a court common to several municipalities may be established only "in co-operation with other Municipalities". Co-operation is a voluntary process and the establishment of a court common to several municipalities therefore requires their consent. The importance of the role of the municipalities is confirmed by the fact that the municipal courts appear in the chapter of the Constitution on municipality governments.

5. One may wonder whether it is wise to give such an important role to the municipalities if the financial consequences are then borne by the cantons. But this corresponds obviously to the will of the constituent.

6. It may also seem surprising to foresee such a large number of courts. The provision that each municipality shall, in principle, have its own court is understandable only if one knows that municipalities in Bosnia and Herzegovina are fairly large. Nevertheless, it seems questionable whether this rule facilitates the establishment of an efficient court system. At least if, in accordance with certain intentions, a municipal reform is carried out in the Federation which would substantially increase the number of municipalities, this constitutional provision will have to be reviewed. These considerations however do not justify a departure from the clear wording of the existing Constitution.

C. Provisions specific to the canton and to the city of Mostar

7. With respect to the establishment of courts, the Constitution of the Herzegovačko Neretvanska Canton is less specific than the Constitution of the Federation.

"*Article 79*

The municipal courts are established by the Law of the Canton.

The municipal courts are financed by the cantonal budget.

Article 80

The municipal court is established for the territory of the municipality. One municipal court can be established for two or more municipalities."

8. The second sentence of art. 80 does not explicitly provide that the establishment of a municipal court competent for more than one municipality requires the consent of the municipalities concerned. This article has however to be interpreted in accordance with the Constitution of the Federation (see art. V.4 of the Constitution of the Federation) and the consent requirement therefore also applies within this canton.

9. It remains to be considered whether the above-mentioned principle is also applicable within cities. It should be noted that initially the Constitution of the Federation did not provide for cities and that city authorities were created only by Amendment XVI to the Constitution. Amendment XVI does however not mention judicial matters among the powers of cities. The establishment of a city instead of a municipal court could therefore only be based on the provision that cities are responsible for "other competence the city is being entrusted with by the canton or municipalities". The canton may not entrust the city with a power not belonging to it, therefore only the municipalities concerned could jointly decide the establishment of a city court.

10. As regards the central zone of the City of Mostar, it does not have the status of a municipality. Article VI.7 is therefore not applicable and there is no obligation to establish a municipal court in this zone. The cantonal legislature is free to adopt a solution compatible with the general court structure of the Federation. If the central zone seems too small to justify a specific court, other solutions may be found. Possibilities include dividing the territory between neighbouring courts, detaching one judge from each of the other municipal courts of the City of Mostar on a part time basis (e.g. for one day a week) with a rotating chair or a rotating competence of the neighbouring courts for the central zone. Attributing competence directly to the cantonal court would seem less appropriate since parties would lose one instance.

D. Conclusion

11. In conclusion, the text of the Constitution of the Federation clearly requires the consent of the municipalities concerned for the establishment of a court competent for the territory of more than one municipality. The municipalities concerned would certainly be well advised to give this consent: otherwise Mostar may well be the only town of this size in Europe, if not the world, to have six courts of general jurisdiction.

IX. PRELIMINARY DRAFT LAW ON THE OMBUDSMAN OF THE REPUBLIKA SRPSKA (BOSNIA AND HERZEGOVINA) AND INTRODUCTORY NOTE

PRELIMINARY DRAFT

CHAPTER I

1. Nature

Article 1

The Ombudsman of the Republika Srpska shall be an independent institution set up in order to protect the legitimate rights and interests of natural and legal persons, as enshrined in particular in the Constitutions of Bosnia and Herzegovina and the Republika Srpska and the international treaties appended thereto, monitoring to this end government activity, in accordance with the provisions of the present law.

2. Powers

Article 2

The Ombudsman shall have the power to admit, follow up or investigate any complaint whatsoever made to it about the poor ordinary functioning of, or the violations of human rights committed by, any government department, authority or official or any other agency performing public services.

The Ombudsman's competence shall comprise the power to investigate all complaints made about the dysfunctioning of the judicial system.

It also comprises the competence to ensure that the military administration functions properly and respects human rights.

The Ombudsman has the power to refer complaints to the Human Rights Chamber, provided for in Appendix VI to the Dayton Agreement, but must do this through the Human Rights Ombudsperson for whom provision is made in the same Appendix.

The Ombudsman also has the power to refer complaints to the Constitutional Court of the Republika Srpska in cases of alleged violations of human rights.

3. Appointment and resignation

Article 3

1. Three persons shall compose the institution of the Ombudsman, belonging to the constituent peoples of Bosnia and Herzegovina as defined in the Preamble of the Constitution of Bosnia and Herzegovina,. They will be elected by Parliament by a three-quarters majority, following a joint proposal by the President of the Republic, the President of the Parliament and the Prime Minister.

2. The election shall be held no more than three months after the candidature is deposited with Parliament, and, in any case, no more than three months after the date on which the vacancy occurs or on which one or all three of the members of the Ombudsman institution cease their functions for a reason provided for by this law.

3. Until the new election has been held, the Ombudsmen who are to be replaced, for any reason provided for by law, shall continue to perform their duties on an interim basis.

Article 4

The Ombudsmen shall be elected for a period of five years and may be re-elected only once.

Any Ombudsman elected following the resignation, or in replacement, of another shall only serve for that part of the five-year term of office remaining.

Article 5

Any citizen of the Republika Srpska of recognised prestige and high moral stature who is of age and enjoys full civil and political rights may be elected as an Ombudsman.

Article 6

1. An Ombudsman's duties shall terminate for any of the reasons below:

a. His/Her resignation;
b. Expiry of his/her term of office, except as provided in Article 3.3;
c. His/Her decease or incapacity following an accident;
d. Action by him/her with conspicuous negligence in discharging his/her obligations and duties;
e. His/her conviction, and final sentencing, for of an intentional offence.

2. An Ombudsman's post shall be declared vacant by the President of the Parliament in the event of decease, resignation, expiry of the term of office, or final conviction. In other circumstances, the decision that a post is vacant shall be taken by a two-thirds majority of Parliament, after a debate and following a hearing of the person concerned.

3. Once a post is vacant, the procedure for appointing a new Ombudsman shall be started within one month.

4. When one of the three Ombudsmen's posts becomes vacant for a reason for which there is statutory provision, the remaining Ombudsmen, in the order of seniority, shall provisionally perform his/her duties.

4. Prerogatives and incompatibilities

Article 7

1. The Ombudsman shall be under no specific orders. Within the framework of his/her constitutional and legal competencies, the Ombudsman shall not be given instructions by any authority. The Ombudsman shall perform his/her duties independently, on the basis of his/her own criteria.

2. The Ombudsman shall not be prosecuted, subjected to investigation, arrested, detained or tried for the opinions expressed or for the decisions taken while exercising the powers associated with his/her duties.

3. In all other circumstances, and insofar as he/she performs his/her duties, the Ombudsman may not be arrested or detained, safe in case of *flagrante delicto* relating to an offence punished with imprisonment of more than five years. Decisions to prosecute, to detain or to refer the Ombudsman to a court charged with a criminal offence shall be taken after the National Assembly has lifted the above immunity. He/she shall be tried solely by the Criminal Chamber of the Supreme Court.

Article 8

1. The position of Ombudsman is incompatible with the holding of any representative office; with any political activity or office or propaganda; with continued activity in government service; with membership of a political party or with the exercise of leadership of a political party, trade union, association, foundation, or religious organisation or with employment by any of these; with performance of the duties of a judge; and with any activity in an occupation or profession, in commerce or in employment.

2. The Ombudsman who is a civil servant enjoys the guarantee of reintegration in his service at the end of his/her term of office.

3. The Ombudsman shall, within ten days of his/her appointment, and before taking up his/her office, forgo any position of potential incompatibility, failing which he/she shall be regarded as having declined the appointment.

4. Where incompatibility arises after they have taken up their duties, it is understood that they shall give up their duties on the date on which it arises.

5. Investigation procedure

Article 9

1. The Ombudsman shall take action either on receipt of a complaint or *ex officio*.

2. Any natural or legal person claiming a legitimate interest may apply to the Ombudsman without any restriction. Nationality, citizenship, residence, gender, minority, legal incapacity, imprisonment of any kind, and, in general terms, a special relationship with, or dependence on, a government department or authority may not restrict the right to lodge a complaint with the Ombudsman.

3. No administrative body or authority or legal person of public law may complain to the Ombudsman about matters within its remit.

Article 10

The activity of the Ombudsman shall not be interrupted while Parliament is not in session, either because it has been dissolved or because its term has expired.

Emergency situations shall not interrupt the Ombudsman's term of office.

Article 11

1. Any complaint must be signed and submitted by the person concerned, who shall indicate his/her surnames, first names and address, in a document stating his/her grounds, written on plain paper, within a maximum of six months from the time when he/she became aware of the facts complained of.

2. All the work of the Ombudsman is free of charge to the person concerned and does not require the assistance of counsel or a solicitor.

Article 12

1. Correspondence addressed to the Ombudsman from places where individuals are held in detention, in imprisonment or in custody may not be the subject of any kind of censorship.

2. Conversations between Ombudsman or people delegated by the Ombudsman and any of the persons listed in the previous paragraph may not be monitored or interfered with.

Article 13

1. The Ombudsman shall register and acknowledge receipt of the complaints submitted, whether they are declared admissible or rejected. When The Ombudsman rejects a complaint, he/she shall do so in writing, explaining the grounds and informing the person concerned of the most appropriate means of taking action, if any exist, leaving it to the person concerned to use those which he/she considers most suitable.

2. The Ombudsman shall reject anonymous complaints and may reject complaints, which he/she considers to have been made in bad faith, which are ill founded, which include no claim or which entail damage to the legitimate right of a third party. No appeal lies against the decisions of the Ombudsman.

Article 14

Without prejudice to the provisions of Articles 2 and 24 par. 3 of this Law, the Ombudsman cannot interfere with pending court proceedings nor can he/she challenge the legality of a decision by a court or tribunal, but has the power to make recommendations to the governmental body party to these proceedings.

Article 15

1. Once a complaint has been received, the Ombudsman shall conduct a summary and informal investigation to elucidate the details of the case. In all cases, he/she shall advise the body or administrative service concerned of the material part of the application, so that the person in charge can submit a written report within a time-period indicated by the Ombudsman. This time-limit may be extended when circumstances so require.

2. A refusal or negligence by the official or his/her superiors responsible for submitting the requested initial report may constitute a hostile attitude impeding the Ombudsman's duties. In this case the Ombudsman shall publicise this immediately and underline this attitude in the annual or, if applicable, a special report to Parliament, without prejudice to the criminal action which he/she could bring.

3. Where the competent authority fails to take action, the Ombudsman may, in substitution for this authority, institute disciplinary proceedings against the official responsible or, where appropriate, bring the case before a criminal court.

6. Obligation to co-operate with the Ombudsman

Article 16

1. Governmental, judicial and all public authorities are obliged to provide the Ombudsman with preferential and urgent assistance in his/her investigations and inspections.

2. During the investigation of a complaint, or where a matter is investigated by the Ombudsman *ex officio*, the Ombudsman or the person to whom he/she has delegated the task may present himself/herself at any office of a government department, attached to it or assigned to a public service in order to check all the requisite information, conduct personal interviews or study the necessary files and documents.

3. The Ombudsman may not be denied access to any file or administrative document or to any document relating to the activity or service under investigation, without prejudice to the provisions of Article 19 of this law.

Article 17

1. When the complaint under investigation concerns the conduct of persons employed in government service and is connected with the duties they perform, the Ombudsman shall advise the person concerned and either his/her superior or the body to which he/she is attached.

2. The official concerned shall reply in writing and submit all the documents and evidence which he/she considers relevant, within the time-limit indicated to him/her. Upon request, the time-limit may be extended.

3. The Ombudsman may check the veracity of the elements submitted and propose a hearing of the official involved in order to obtain further information. Officials who refuse this hearing may be required by the Ombudsman to give a written explanation of the reasons for their refusal.

4. The information provided by an official during an investigation through personal evidence is confidential, without prejudice to the provisions of the criminal legislation on the denunciation of acts, which may be of the criminal nature.

Article 18

Superior officials or bodies which prohibit officials subordinate to them or in their service from responding to a request from the Ombudsman or from having a hearing with the Ombudsman shall declare that they have done so in a written document, stating their grounds, sent to the official and to the Ombudsman. The Ombudsman shall then approach the said superior in respect of all the operations necessary to the investigation.

7. Confidential and secret documents and duty of discretion

Article 19

1. The Ombudsman may require the public authorities to hand over documents he/she considers necessary to perform his/her duties, including those classified as confidential or secret in accordance with the law. In such cases, the Ombudsman shall apply the requisite discretion to these and shall not make them available to the public.

2. Investigations conducted by the Ombudsman and the Ombudsman's staff, and procedural measures, shall be conducted with the greatest discretion, where both individuals and public services and bodies are concerned, without prejudice to the considerations which the Ombudsman finds it appropriate to include in the reports to Parliament. Special protective measures shall be taken in respect of documents classified as confidential or secret.

3. Where the Ombudsman believes that a document classified as confidential or secret and not handed over by the government could be crucial to the proper conduct of the investigation, he/she shall advise Parliament of this fact.

8. The responsibility of authorities and officials

Article 20

When the investigation reveals that an abuse, an arbitrary procedure, a discrimination, an error, a negligence or an omission complained of was perpetrated by an official, the Ombudsman may communicate his/her finding in this respect to the official concerned. On the same date, he/she shall transmit the same document to the official's superior and set down the suggestions he/she considers pertinent.

Article 21

1. If a hostile attitude or an attitude impeding the investigation of the Ombudsman is maintained by a body, officials, holders of positions of responsibility or members of a public service, this may be the subject of a special report, and it shall also be drawn to attention in the corresponding part of the annual report.

2. Where an official impedes an investigation by the Ombudsman by refusing to send documents required by him/her, or through negligence in the sending of such documents or by refusing him/her access to administrative files or documents necessary to the investigation, the Ombudsman shall send the relevant file to the State Prosecutor's Office for the appropriate action to be taken, in accordance with the law.

Article 22

When the Ombudsman in the exercise of his/her duties becomes aware of conduct or acts which seem to be offences, he/she shall immediately advise the competent judicial authority.

9. Resolutions

Article 23

1. The Ombudsman has no power to amend or annul government measures or orders, but may suggest the amendment of the criteria used in their drafting.

2. When, following the examination of a case, the Ombudsman finds that the implementation of a Law leads to iniquity, he/she may address to the competent governmental body any recommendation capable to set a fair solution to the situation of the complainant, suggest to the competent authority the measures likely to remedy to the complainant's situation, including payment of damages, and propose those amendments to Laws and regulations that he/she finds appropriate.

3. If the activities complained of have been carried out on the occasion of services provided by private persons under a contract of concession of public service, the Ombudsman may ask the competent administrative authorities to exercise their powers of inspection and punishment.

Article 24

1. The Ombudsman may, when conducting investigations, make recommendations and suggestions to government authorities and officials with a view to the adoption of new measures. In every case the authorities and officials are obliged to reply in writing and inform the Ombudsman of the effect given to the recommendations within a period indicated by the Ombudsman.

2. If, once recommendations have been made, the administrative authority concerned does not take appropriate measures within a reasonable time, or if it does not inform the Ombudsman of the reasons for not doing so, the Ombudsman may draw the attention of the Minister responsible for the department concerned or of the highest authority of the government department concerned to the course of the case and to the recommendations made. Should the Ombudsman, following this, obtain no satisfaction in a case where he considers that it would have been possible to find a positive solution, he/she shall include the matter in the annual or in a special report, mentioning the names of the authorities or officials taking this attitude.

3. In case of non-execution of a court judgement, the Ombudsman may order the department concerned to give effect to the judgement within a time-limit indicated by the Ombudsman. If the order is not followed, the non-execution of the court judgement shall be included in the annual or a special report to the National Assembly.

10. Notification and communication

Article 25

1. The Ombudsman shall inform the person concerned of the result of his/her investigations and activities and of the reply given to it by the government department or the official concerned, unless the reply, by its nature, is to be considered as confidential or secret.

2. The Ombudsman shall communicate the positive or negative findings of the investigations to the authority, official or administrative department concerned.

3. The Ombudsman may decide to publish his/her general recommendations in the Official Gazette.

4. All other recommendations of the Ombudsman shall be accessible to the public, except in cases where they relate to matters which are confidential or secret, or where the complainant expressly requested that his/her name and the circumstances of the complaint should not be revealed.

11. Reports to the national assembly

Article 26

1. The Ombudsman shall communicate to the National Assembly each year the result of the institution's administration in a report submitted to Parliament during an ordinary session.

2. Where the public prominence or urgency of the facts so require, the Ombudsman may submit a special report.

3. Annual reports and any special reports shall be published.

Article 27

1. In the annual report, the Ombudsman shall state the number and nature of the complaints received, indicate which were rejected, and the reasons thereof, and which were the subject of an investigation, and the findings of this; the Ombudsman shall also specify those suggestions or recommendations accepted by the government.

2. The report shall contain no personal data enabling the persons involved in the investigation procedure to be publicly identified, without prejudice to the provisions of Article 21.1.

3. The report shall also contain an appendix intended for Parliament, which shall show the liquidation of the institution’s budget during the period covered.

4. The Ombudsman shall give an oral presentation of the report to the National Assembly and the parliamentary groups shall be able to state their position.

12. Rules of procedure

Article 28

The rules governing the operation of the Ombudsman institution shall be laid down in compliance with the provisions of this law by the Ombudsmen themselves, in Rules of Procedure of which Parliament shall be informed and which shall be published in the Official Gazette.

13. Staffing and equipment

Article 29

The Ombudsman may freely appoint the advisers needed, in accordance with the Rules of procedure and within the budgetary limits.

Section 30

1. The advisers shall be automatically dismissed when a new Ombudsman appointed by Parliament takes up his/her duties; they may be re-appointed.

2. The advisers who are civil servants enjoy the guarantee of reintegration in their service at the time of their dismissal.

Article 31

Upon proposal by the Ombudsman, the financial appropriation necessary to the functioning of the institution shall be included in the budget of Parliament.

CHAPTER II

TRANSITIONAL PROVISIONS

Article 32

On the entry into force of the present Law, the Human Rights Ombudsperson for Bosnia and Herzegovina shall appoint, after consultation with the President of the Republic, the President of Parliament and the Prime Minister, three persons to exercise provisional, for a period of twelve months, the powers of the Ombudsman. The persons thus appointed shall remain in office in accordance with Article 3.3.

Article 33

Five years after the present law comes into force, the Ombudsman institution may propose to Parliament, in a report containing reasons, the amendments which it considers should be made to it.

CHAPTER III

FINAL PROVISION

The present Law does not apply to facts prior to 15 December 1995.

INTRODUCTORY NOTE PREPARED BY THE SECRETARIAT OF THE VENICE COMMISSION

1. Introduction

In its Report on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, the European Commission for Democracy through Law (Venice Commission) recommended, inter alia, the creation of an Ombudsman institution in the Republika Srpska.[44] A working Group was set up to this end comprising the Commission's Rapporteurs and experts appointed by the Directorate of Human Rights of the Council of Europe.

The Venice Commission Rapporteurs, Mr G. Batliner, Mr. J.-C. Scholsem and Ms M. Serra-Lopes, met on 24 April 1997, in Strasbourg with Mr A. Gil Robles, former Defensor del Pueblo in Spain and Mr P. Bardiaux, from the office of the French Médiateur, experts of the Directorate of Human Rights of the Council of Europe. The Group made the following observations:

- there was a general consensus within the international community on creating this position quickly;

- for this purpose, consideration had to be given to the judicial systems for the protection of human rights in Bosnia and Herzegovina, characterised by the complexity in the Federation of Bosnia and Herzegovina and the simplicity, if not non-existence, in the Republika Srpska; the need to give some immediate thought to the nature of the long-term relationship between the Ombudsman structure in the Republika Srpska and the existing Ombudsman structures in Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, as well as the relationship between these structures and the judicial apparatus.

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[44] *See Annual Report of activities for 1996, pp. 44-60 (p.52): "Moreover, the creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the F.B.H., will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in B.H. in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of B.H., as provided by Rule 37 b) of the Office's Rules of Procedure (this Rule already mentions that the Ombudsman of B.H. will refer to the Chamber cases communicated for this purpose by the Ombudsmen of the F.B.H. or "any equivalent institution in the Republika Srpska"). Of course, in order to ensure the necessary impartiality of the institution in a post conflict situation, one should seriously consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation (e.g. the OSCE may nominate the three Ombudsmen and support substantially the functioning of their office).*"

Following this meeting, the Secretariat of the Commission had contacted the authorities in Republika Srpska, and on 3 June 1997, Mr Gil Robles, together with Mr Giakoumopoulos, Deputy Secretary of the Venice Commission, and Mr Titiun, of the Directorate of Human Rights, met in Banja Luka, on 3 June 1997, with Ms Plavsic, President of Republika Srpska, and Mr Mijanovic, President of the Constitutional Court, in Banja Luka. This meeting confirmed that Republika Srpska was interested in instituting the office of Ombudsman and that representatives from the Republika would take part in the Group's work.

Indeed, representatives from Republika Srpska were present at the 31st Plenary Meeting of the Venice Commission (Venice 20-21 June 1997) and presented the outlines of their plans for creating the office of Ombudsman:

The Ombudsman would be nominated by the National Assembly by qualified majority. The Ombudsman would examine those cases presented by individuals according to a non-judicial procedure. He will control both the functioning of the administration and complaints of violation of human rights. The Ombudsman should be able to initiate certain procedures (e.g. before the Constitutional Court), in particular cases of violation of human rights. However, he should not appear to be a substitute for the judicial apparatus. His competencies should be limited in the case of *res judicata*. In addition to his role of defender of individual rights, the Ombudsman could also be competent in matters of public moral and corruption. Recommendations made to the authorities by the Ombudsman should be available to the public. The person nominated as Ombudsman should have high moral qualities. His mandate should be of reasonable length. The status of Ombudsman should be incompatible with carrying out other functions. The Ombudsman of the Republika Srpska will take due account of the activities of the Human Rights Ombudsperson of Bosnia and Herzegovina and the Ombudsmen of the Federation of Bosnia and Herzegovina.

A second meeting of the working group and representatives from Republika Srpska was initially planned for 24 June 1997. However, due to the constitutional crisis in Republika Srpska, this meeting could not take place.

The Working Group further met in Venice, on 16 October 1997. It decided to pursue its work on the basis of the outline of the project for the creation of Ombudsman institution of the Serb authorities as this was communicated to the Commission by Mr. G. Mijanovic, President of the Constitutional Court of the Republika Srpska.[45] The Group considered in particular the Ombudsman's powers, the nature of Ombudsman institution and the procedures before it, as well as to the questions of appointment and the structure of the Ombudsman's Office.

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[45] *CDL (97) 25 "The introduction of the Office of Ombudsman in the Republika Srpska".*

The Working Group further met in Venice, on 11 December 1997. A part of this meeting was devoted to the hearing of the Ombudsmen of the Federation who explained their working methods. On 4 February 1998, the Group met in Paris. It considered and finalised the preliminary draft law instituting the Ombudsman of the Republika Srpska (CDL(98)12) on the basis of a working document drafted by Mr Gil Robles (CDL (97) 56) and the comments of the members of the Working Group and Mr R. Lavin (CDL (97) 64).

The Preliminary Draft Law on the Ombudsman on the Republika Srpska was submitted to the Venice Commission, at its 34th Plenary Meeting (Venice, 6-7 March 1998). The Commission approved the draft.

2. General observations

- The powers of the Ombudsman of Republika Srpska

As regards the powers of the Ombudsman of Republika Srpska, the working group considered that, as well as examining complaints about human rights violations, he should also supervise the proper functioning of the administration. This wide range of powers was considered necessary in view of the fact that it was not possible for individuals to lodge petitions with the Constitutional Court.

On the other hand, the working group considered that the Ombudsman should not deal with "public morality and corruption", in addition to his role as defender of individual rights. The working group believed that the notion of public morality was too vague and was likely to weaken the Ombudsman's role by making it too political. The working group further considered that it was normally the role of the courts to examine accusations and cases of corruption.

- Nature of the institution and procedures

With regard to the nature of the institution and procedures before it, the working group was of the opinion that the Ombudsman should examine cases submitted to him by natural and legal persons through a non-judicial process.

He should also be able to act on his own initiative (ex officio).

Relations with the judiciary

The Ombudsman should not interfere with pending court proceedings and should not challenge the legality of court judgements. His role should not be to supervise the judiciary and to impose his own interpretation of the law (see Article 14 of the Preliminary Draft Law). However, in litigation between State institutions and private persons, the Ombudsman should be able to make recommendations to the State body

party to the proceedings (and not to the court) with a view to a friendly settlement of the case (Article 14 in fine of the Preliminary Draft Law).

Moreover, the Ombudsman should be able to initiate legal proceedings before the Constitutional Court (see Article 2 of the Preliminary Draft Law), particularly in cases of human rights violations. However, referring cases to the Constitutional Court should not be his main task and his role should not appear to be an alternative to the courts.

The Ombudsman of Republika Srpska should also be able to refer cases to the Human Rights Chamber provided for in Annex VI to the Dayton Agreement through the Ombudsperson described in the same Annex. This is already provided for in the Rules of Procedure for the Ombudsperson, and similar provision should be made in the law on the Ombudsman of Republika Srpska. The importance of this possibility was emphasised by the working group. Submissions to the Chamber of Human Rights by the Ombudsman of Republika Srpska will not only contribute to easing the existing imbalance between the two entities as regards human rights protection mechanisms,[46] but would also amount to going beyond the legal system of Republika Srpska to the courts of the State of Bosnia and Herzegovina, as the office of Ombudsman would be acting beyond the limits of the entity's jurisdiction. Of course, before addressing the Human Rights Chamber, the Ombudsman of Republika Srpska would have to ensure that domestic remedies had been exhausted.

Finally, the Ombudsman should be able to intervene in the execution of court decisions (see Article 24 para. 3) and to supervise the functioning of the judicial administration (e.g. undue prolongation of the proceedings, unreasonable delays, loss of files etc).

Relations to the legislator

The Ombudsman has not legislative power nor power of legislative initiative. Nevertheless, it should be possible for the Ombudsman to propose in his report to the National Assembly amendments to a law, when the implementation of the law leads to iniquity (Article 23, para.2).

Recommendations and Report of the Ombudsman

In principle, the Ombudsman's recommendations to the authorities should be accessible to the public. However, the public need not be informed about all his activities. It should be possible to maintain confidentiality about actions and decisions taken by the Ombudsman in the course of his enquiries, as well as about those concerning secret information, for example, relating to national security. In the same

[46] *See the Report by the Venice Commission on the constitutional situation in Bosnia and Herzegovina, with particular regard to human rights protection mechanisms, supra note 1.*

way, it ought to be possible for the Ombudsman not to disclose the identity of those who contact him, if they so request.

The working group did not consider it necessary for the Ombudsman of Republika Srpska to prepare a report for an international institution, as is the case for the Federation Ombudsmen. The Ombudsman of Republika Srpska should present his annual report to the Government and the Parliament. If he wished, he could of course also send a copy to the High Representative of Bosnia and Herzegovina.

- **Nomination and mandate**

On the subject of the Ombudsman's appointment, the working group noted firstly that the Serb plan made no provision for protecting the Ombudsman from dismissal. It was generally accepted that the Ombudsman could only be dismissed in cases of mental disorder. The draft law should also rule on issues such as the Ombudsman's immunity, and the possible waiver of this immunity, as these are important factors in preserving the institution's independence. The working group indicated its support for the proposal, included in the plan, that the person selected for the role of Ombudsman should be seen to have high moral qualities.

The Ombudsman's mandate should be fairly long. The working group considered that a mandate of five years, renewable once, was sufficient to guarantee the institution's independence.

The exercise of other functions, whether public or private, should be incompatible with that of Ombudsman. In particular, the Ombudsman should have no political position, and should not be a member of a political party.

The Working Group also considered that the Ombudsman Office should have two major characteristics:

First, the Ombudsman should appear as an institution of confidence in the service of the people. Having regard to the recent trauma caused by the ethnic war in Bosnia and Herzegovina, the Ombudsman should not only function in an impartial manner and place himself subjectively above all ethnic, political, religious or other considerations, but should also objectively appear as an institution sufficiently independent and representative at the same time. Citizens must see in the Ombudsman an ally in their applications to the administration.

Moreover, if the Ombudsman is an institution trusted by all citizens, it must also at the same time be a outstanding partner of the authorities. Its democratic legitimacy must be significantly high in particular in the case of the Republika Srpska, which has only recently overcome a serious constitutional crisis.

The Group thus considered whether it was appropriate to provide for a system comparable to that of the Federation's Ombudsmen (there are three Ombudsmen, one from each of the Bosnian, Croatian and Serb national groups). After observing that several Ombudsmen work in parallel in certain European states (for example, there are three Ombudsmen in Austria and two in Belgium), the Group held that the most appropriate system might be that of three Ombudsmen, one from each national group.

As regards the appointment procedure for the Ombudsmen, the working group came to the following conclusion:

The three Ombudsmen of the Republika Srpska would be elected by Parliament. The President of the Republic, the Prime Minister and the President of the Parliament would jointly propose three candidates to Parliament, which could adopt the nomination by a three-quarters majority (a level which would require negotiation and would also offer the Ombudsman broad democratic legitimacy). Parliament must elect the three candidates within a period of three months, as provided for and established by the Ombudsman law. The international community's involvement in the appointment should be considered but only on a transitional basis and for a very limited period of time.

3. Observations on some provisions of the preliminary draft

Articles 1 and 2:

The term "public administration" in Article 1 must be understood *lato sensu* and should not be limited to the executive. Article 2 makes it clear that the competence of the Ombudsman extends also over two often sensitive areas: the judicial administration (i.e. all activities of the judiciary which do not entail a judgement, including the activity of court registries, notaries, bailiffs, as well as delays, administrative handling of files etc) and the military. With regard to the latter, the preliminary draft underlines that members of the military staff are citizens who can seek protection in their relations with the military hierarchy and the administration.

The possibility offered to the Ombudsman to introduce a case before the Human Rights Chamber of Bosnia and Herzegovina through the Ombudsperson of Bosnia and Herzegovina shall be valid, as long as these institutions exist. Were the competence currently belonging to the Human Rights Chamber to be transferred to the Constitutional Court of Bosnia and Herzegovina, one should envisage whether the Ombudsman should be empowered to bring cases before the latter.

Article 3:

The preliminary draft does not regulate the distribution of competencies among the three persons exercising the functions of Ombudsman. This question should be addressed in the Rules of Procedure (Article 28).

Article 5:

The word "citizen" in Article 5 must be understood as comprising persons who have the citizenship of Bosnia and Herzegovina, in accordance with the Law of 16 December 1997 (published in the Official Gazette 4/98), and who are citizens of the Republika Srpska.

Article 7:

The wording according to which the Ombudsman shall be under no specific orders (Article 7 para 1) indicates that he is not subject to any obligation to abide by orders of court.

Moreover, as regards the Ombudsman's immunity under Article 7 para 2, it must be understood that the acts accomplished by the Ombudsman's staff within the exercise of their functions and in the name of the Ombudsman are also covered by immunity.

Article 11:

The six months time-limit in Article 11 aims at harmonising the procedural requirements for lodging an application with the RS Ombudsman and with the Commission on Human Rights of Bosnia and Herzegovina (Annex VI of the Dayton Agreement). This time-limit shall not apply to cases taken up ex officio by the Ombudsman and should not prevent him from examining cases, which are brought to his attention even after the above time-limit has expired, where necessary.

Articles 15, 16 and 24:

The Rules of Procedure can provide for the time-limits that the Ombudsman shall set in principle to the authorities for the submission of the information and reports he may request. However, the Rules of Procedure shall be flexible so as to permit the Ombudsman to adapt the time-limits, where circumstances so require.

Articles 25, 26, 27:

It is obvious that the Ombudsman's Reports to the National Assembly will be signed by all three Ombudsmen. It would be advisable that the Rules of Procedure provide that the Recommendations of the Ombudsman are also signed by the three Ombudsmen.

Article 31:

This provision implies that the Government is not involved in the presentation of the draft Ombudsman budget to the Parliament. It does not preclude that expenses of the Ombudsman institution require a visa by the financial controller.

Final Provision

The date of 15 December 1995 (date of the signature of the Dayton Agreements) aims at preventing the institution from examining facts, which occurred during the war. It should not prevent the institution from examining cases, which concern situations, which started before that date but continue after it (continuing situations).

X. INTERIM REPORT ON THE DISTRIBUTION OF COMPETENCIES AND STRUCTURAL AND OPERATIONAL RELATIONS IN THE OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Prepared by the Working Group on Ombudsman institutions in Bosnia and Herzegovina composed of Mr J.-C. SCHOLSEM (Belgium), Mr Ph. BARDIAUX (France), Mrs M. SERRA LOPES (Portugal), Mr A. GIL ROBLES GIL DELGADO (Spain) and approved by the Commission at its 35th Plenary Meeting (Venice, 12-13 June 1998)

1. Introduction

In the course of its work on the setting up of an Ombudsman institution in the Republika Srpska (Bosnia and Herzegovina) and the drafting of a law instituting the Ombudsman of the Federation of Bosnia and Herzegovina, the European Commission for Democracy through Law (Venice Commission) was requested by Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, to give an opinion on the distribution of competencies between the Ombudsman institutions in Bosnia and Herzegovina. The Working Group set up by the Venice Commission and the Directorate of Human Rights to study the Ombudsman institutions in this country was entrusted with this task. The Working Group, composed of Mr J.C. Scholsem, Vice-President of the Venice Commission, Mrs Serra-Lopes, member of the Commission, Mr Gil Robles Gil Delgado, former *Defensor del Pueblo* in Spain, and Mr Bardiaux, who is in charge of international relations in the Office of the French *Médiateur de la République*, has held two meetings, one in Strasbourg, on 19 and 20 May 1998 and one in Paris, on 27 May 1997. At these meetings it heard Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, Mrs V. Jovanovic, Mrs B. Raguz and Mr E. Muhibic, Ombudsmen of the Federation of Bosnia and Herzegovina, and Mrs M. Picard, President of the Human Rights Chamber of Bosnia and Herzegovina.

The Working Group would like to underline from the outset that the Ombudsman institutions in Bosnia and Herzegovina are still in a state of flux. The Human Rights Ombudsperson is now halfway through its first five-year term, and it has not yet been decided in what manner it will continue its work; the Ombudsman institution of the Republika Srpska is still at the project stage; finally, an Act defining the *modus operandi* of the Ombudsmen of the Federation of Bosnia and Herzegovina is currently in preparation. It is not possible at this time, therefore, to present a final report on the distribution of competencies and structural and operational relations of these changing institutions. The conclusions contained in this interim report are therefore the

provisional findings of the Working Group. They may be reviewed in the light of future developments.

2. The institutions and their functions

- The Human Rights Ombudsperson

The Ombudsperson of Bosnia and Herzegovina (instituted in conformity with Annex 6, Part B of the Dayton Agreement) is an independent institution constituting one of the two branches of the Human Rights Commission (provided for in Article II, para 1 of the B.H. Constitution and in Annex 6 of the Dayton Agreement, Chapter II, Part A), the other branch being the Human Rights Chamber. The two institutions are jointly responsible for investigating manifest or alleged violations of human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, and discrimination in the exercise of fundamental rights enshrined in other relevant instruments.

The Office of the Ombudsperson is empowered to investigate alleged or manifest violations of human rights. Upon receipt of a complaint, it may inform the accused party and ask it to comment. The applicant then has an opportunity to respond to these comments, following which the Ombudsperson invites the parties to reach a friendly agreement. If no such agreement is forthcoming, the Ombudsperson then drafts a report stating whether or not there has been any violation of human rights, and if so, it may make recommendations with a view to securing fair satisfaction. The party at fault must then state how it intends to comply with the findings of the Ombudsperson. Should that party fail to reply or refuse to comply, the Ombudsperson publishes its report and submits it to the High Representative and the Presidency. It may also refer the matter to the Human Rights Chamber. For the purposes of its investigation, the Ombudsperson must have access to all official documents, even those which are confidential. It may open an investigation at its own initiative (Annex 6, Article V, para 2). Under Article V, para 5 of Annex 6, the Ombudsperson may decide, at any stage in its examination of an allegation, to refer a case to the Chamber. According to Article 37 b), adopted in September 1996, it may also refer to the Chamber "any case referred to it for this purpose by the Ombudsmen of the Federation of Bosnia and Herzegovina or by an equivalent institution of the Republika Srpska".

The Human Rights Chamber (instituted by Annex 6, Part C, Articles VII to XIII) is a court composed of fourteen members. Complaints of human rights violations are referred to it by the Ombudsperson, on behalf of the complainant, or directly by the complainant. It examines the admissibility and the level of priority of the complaints it receives and decides whether the complainant has exhausted the available domestic remedies. The rulings of the Chamber are final and binding.

The organisation of the Commission is similar in some respects to that of the European Human Rights Convention, the Ombudsperson being comparable to the European Commission of Human Rights and the Human Rights Chamber to the European Court of Human Rights. While Article VIII, para 1 authorises cases to be referred directly to

the Human Rights Chamber, in principle all the complaints referred to the Human Rights Commission are first presented to the Ombudsperson (Article V, para 1), which may refer them to the Chamber when it considers that there has been violation of human rights.

- The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen – a Bosnian, a Croatian and one "other", currently a Serb – are appointed for a term of office similar to that of the President and judges of the Supreme Court. Each appoints one or more assistants, with the approval of the President. In particular, they must appoint assistants at municipal level where the composition of the local population does not reflect that of the whole canton. The Ombudsmen form an independent institution. They are empowered to examine the activities of any federal, canton or municipal institutions, as well as complaints from people whose dignity, rights or freedoms have allegedly been violated, particularly by or in the wake of ethnic cleansing. In order to accomplish their task, Ombudsmen must have access to all official documents, even confidential ones. They may bring proceedings before the competent courts and take steps to settle pending cases. The Ombudsmen present their annual report to the Prime Minister and Deputy Prime Minister of the Federation, to the President of each canton and to the OSCE; at any time they may present special reports and enjoin the local institutions to reply.

- The Ombudsman of the Republika Srpska

The Ombudsman of the Republika Srpska has not yet been instituted. A preliminary draft law drawn up by the Venice Commission and the Directorate of Human Rights of the Council of Europe, with the help of the OSCE and the Office of the High Representative, has been submitted to the authorities of the Republika Srpska for consideration (CDL (98) 12 def). The comments in the present report are based on this draft law. It provides for the institution to be composed of three Ombudsmen, belonging to the constituent peoples of Bosnia and Herzegovina. The Ombudsman of the Republika Srpska has competencies both in the human rights field and in administrative affairs. Without being structurally related to the Ombudsperson of Bosnia and Herzegovina, it should (according to the draft law) be able to refer matters to the Human Rights Chamber via the Ombudsperson.

The Venice Commission proposed setting up this institution in its Opinion on the constitutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery (CDL-INF (96) 9). According to the Commission, setting up such an institution, equivalent to the Ombudsmen of the Federation of Bosnia and Herzegovina, will help to establish a balanced, coherent system of human rights protection throughout Bosnia and Herzegovina.

3. The parallel functioning of the ombudsman institutions in Bosnia and Herzegovina

In terms of their functions, there are as many similarities as there are differences between the three institutions mentioned above. All three may receive complaints from individuals or initiate investigations *ex officio*.

The Ombudsmen of the Federation and the Ombudsperson of Bosnia and Herzegovina are more human-rights-oriented, whereas the Ombudsman of the Republika Srpska also has the more conventional role of monitoring the proper functioning of the administration.

The Ombudsmen of the entities have dealings with all the administrative authorities in their respective entities, while the Ombudsperson of the Bosnia and Herzegovina has dealings only with the entities and the state, as such.

The Ombudsmen of the entities are competent only in matters concerning the administrative authorities of the entities concerned, while the Ombudsperson also deals with affairs concerning the state authorities of Bosnia and Herzegovina.

Whereas the powers of the Ombudsmen of the Federation seem to be unlimited in time, those of the Ombudsperson (and according to the Venice Commission's draft law, those of the Republika Srpska Ombudsman) apply only to events, which occurred subsequently to the Dayton Agreement.

The main difference between the Ombudsmen of the entities and the Ombudsperson of Bosnia and Herzegovina, however, is the latter's special relationship with the Human Rights Chamber, within the framework of the Human Rights Commission.

Indeed, the main activity of the Ombudsmen of the entities consists in seeking solutions acceptable to the parties in certain cases of human rights violation or maladministration. Although the F.B.H. Ombudsmen are empowered to take matters before the ordinary courts and the RS Ombudsman may refer a case to the Constitutional Court, and both may refer cases to the Human Rights Chamber, their main activity is to seek settlements acceptable to the parties, in a spirit of respect for human rights. They tend to resort to the justice system only in exceptional cases, generally expressing their disagreement with the authorities' reactions to their work by publishing reports, particularly special reports. So their action is mainly of a non-judicial nature.

The Ombudsperson of Bosnia and Herzegovina, on the other hand, is a hybrid institution. Set up very shortly after the peace agreement, the Office of the Ombudsperson was for a long time the only institution responsible for introducing the European Human Rights Convention into the legal system in Bosnia and Herzegovina. Whatever those who drafted Annex 6, had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. The Ombudsperson thus rules on the admissibility of the complaints it receives, seeks

a friendly solution, investigates and communicates its findings to the party allegedly at fault and, if it is not satisfied with that party's response, refers the matter to the Chamber. At the same time, at the hub of the human rights machinery provided for in Annex 6, the Ombudsperson has a non-judicial activity when it decides, of its own accord, to conduct investigations and draw up special reports.

This difference between the institutions accentuates the confusion as regards their competencies *ratione personae, materiae, temporis* and *loci* and the various means of action they tend to privilege (reports; referral to the competent courts; negotiations with political authorities, etc.). It also renders the structure of the whole ombudsman apparatus in Bosnia and Herzegovina particularly complex. The Venice Commission has already established that the human rights protection machinery in the legal system of Bosnia and Herzegovina is, on the whole, unusually complex. The co-existence, side by side, of judicial bodies responsible for specific human rights tasks, courts expected to rule on cases of alleged human rights violations which are brought before them, and non-judicial institutions for the protection of individual rights, evidently results in some overlapping of competencies which, along with the large disparities in the human rights protection systems in the two entities, may undermine the efficacy of the protection provided. To guarantee a balanced and coherent system for protecting human rights throughout Bosnia and Herzegovina requires a certain equilibrium between the legal systems of the two entities, and a clear definition of the respective competencies of the institutions operating within the legal systems of the entities and the state.

4. Proposals concerning the distribution of competencies and relations between the ombudsman institutions

4.1 The brief but conclusive experience of how the ombudsman institutions function in Bosnia and Herzegovina clearly shows how useful these institutions can be in a society still haunted by the trauma of war. By their flexibility and the flexibility of their procedures, and their multi-ethnic or international composition, the ombudsman institutions are able to react promptly and effectively to the urgent situations created by human rights violations.

4.2 The ombudsman structures of the constituent entities need to be more similar in terms of their composition, powers and means of action. As the laws governing these institutions are currently being drafted, care must be taken to avoid disparities in the manner in which they operate.

4.3 In the not-too-distant future, however, and if possible before the end of the Ombudsperson's first term of office, a structural reorganisation of its *modus operandi*, and consequently that of the Human Rights Chamber, must be undertaken. The quasi-judicial sorting role now performed by the Office of the Ombudsperson should in fact be taken over by the judicial body responsible for protecting human rights. This would be in keeping with the trend in the organs of the European Convention on Human

Rights, where the original Court and Commission have been merged into a single organ, the European Court of Human Rights provided for in Protocol No 11 to the Convention. The Ombudsperson could then concentrate more on its more conventional mediation functions, without so many procedural constraints (application deadlines, exhaustion of other remedies), which are uncharacteristic of the ombudsman's work. This should not prevent the Ombudsperson from referring cases to the proper courts (the Human Rights Chamber or even the Constitutional Court of Bosnia and Herzegovina).

Reorganising the work of the Ombudsperson in this way does raise certain practical difficulties.

The Chamber will have to be given the powers of investigation and examination currently enjoyed by the Ombudsperson, particularly the power to investigate and prepare cases brought before it. This means extending the powers of the Chamber (investigation, hearing of cases referred by the Ombudsmen of the entities, *locus standi* of same) and also its wherewithal (large secretariat with a good knowledge of the ECHR, judges to report on investigations). Indeed, such a move seems not only recommendable for the coherency of the ombudsman system but actually necessary for the functioning of the Chamber itself; many of the cases brought before the Chamber even now are brought not through the Ombudsperson but directly by the applicants.

4.4 The competence of the Ombudsperson should also be confined to matters concerning the State of Bosnia and Herzegovina and "inter-entity" questions. Clearly as the state institutions are gradually set in motion and begin effectively to exercise their powers under the Constitution of Bosnia and Herzegovina, the citizens will be increasingly concerned by the decisions of those institutions. Similarly, the co-operation required in numerous areas under the Dayton Agreement -between the entities themselves or between the entities and the state - seems to point to a likely increase in the number of cases involving both entities. It is in this field that the Ombudsperson will have to develop its activities, while in the medium term questions concerning only one entity should fall within the exclusive ambit of the Ombudsmen of the entities.

In the interim, however, the Ombudsperson will have to have parallel competencies to those of the Ombudsmen of the entities.

4.5 Clearly, therefore, there will be no hierarchical relationship between the three institutions; they will each function independently. In particular, there must be no possibility of appealing decisions of the Ombudsmen of the entities before the Ombudsperson.

4.6 However, the Ombudsperson must be empowered to organise co-operation and consultation between the institutions. It is important that there should be

arrangements for communication, mutual information and consultation, or even co-operation in certain cases, particularly when a case is brought before the wrong institution, or where it emerges in the course of proceedings that an institution lacks jurisdiction. Regular meetings of the Ombudsmen of the entities and the Ombudsperson should be held in order to determine what form co-operation should take and, where necessary, decide on joint action to be taken. The initiative to convene these meetings and the form they should take, as well as the procedure for taking decisions and their scope, could be agreed jointly. The flexibility and the informal nature of the ombudsman institutions should favour this development.

IV.7 The reform broadly outlined above will, of course, require the amendment of certain fundamental texts of the institutional apparatus in Annex 6. One should note, in this respect, that provision is actually made, in Article XIV of Annex 6, for revision of the *modus operandi* of the institutions concerned, starting five years after the entry into force of the Dayton Agreement. As responsibility for the continuation of the institutions provided for in Annex 6 lies, in principle, with the institutions of Bosnia and Herzegovina, it seems that the most appropriate means of carrying out the reform would be an organic Law to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina.

XI. INTER-ENTITY JUDICIAL CO-OPERATION IN BOSNIA AND HERZEGOVINA

Opinion on the basis of contributions by Mr Jean-Claude Scholsem (Belgium), Mr Jan Helgesen (Norway) and Mr Helmut Steinberger (Germany), adopted by the Commission at its 35th Plenary meeting (Venice, 12-13 June 1998)

A. Introduction

1. When speaking before the Venice Commission at the 34th Plenary meeting in Venice on 6 March 1998, the High Representative to Bosnia and Herzegovina, Mr Carlos Westendorp, asked the Commission to provide an expertise on the issue of inter-entity judicial co-operation against the background of the complex federal structure of Bosnia and Herzegovina (B.H.).

2. By letter of 7 May 1998, the Office of the High Representative provided some background material of interest to this question, in particular the text of a draft agreement on the regulation of legal assistance between institutions of the Federation of Bosnia and Herzegovina (F.B.H.) and the Republika Srpska (RS) and an opinion of the Ministry of Civil Affairs and Communication of B.H. of 16 February on the constitutionality of this draft agreement. The Office of the High Representative asked the Commission to provide an opinion, in particular on the following two questions:

a) is inter-entity judicial co-operation within the competence of B.H.?

b) are the Entities entitled to conclude an agreement on inter-entity judicial co-operation?

3. It is recalled that the Commission has already given an opinion on the competence of the F.B.H. in criminal law matters (document CDL-INF (98) 5).

B. The competence of B.H. in the field of inter-entity judicial co-operation

4. The question of the competence of the State of B.H. in the field of criminal law and criminal procedure has already been addressed in the above-mentioned opinion on the competence of the F.B.H. in criminal law matters, although mainly from the point of view of substantive criminal law. The Commission came to the following conclusions:

> 5. "*The fundamental rule for interpreting the constitutions of B.H. (Appendix IV of the Dayton Agreements), the F.B.H. and the RS is that the two Entities enjoy*

residual powers. The Constitution of B.H. assigns only certain specific areas of competence to the State, while the remainder lie with the federated Entities (article III-3-a of the Constitution of B.H.). The Entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competencies of the State of B.H. in this area, as provided for in the Constitution of B.H..

6. Of the areas of competence assigned to B.H., only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives B.H. responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon B.H. in the area of criminal law and criminal procedure. Our task is to establish the scope of that competence as accurately as possible.

7. The wording of article III-1-g of the Constitution of B.H. seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the Entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of B.H., which expressly refers to relations with Interpol, is indicative in this respect".

These considerations remain valid. They have however to be further refined with respect to the specific topic of this opinion, judicial co-operation, which was a topic not really envisaged in the previous opinion.

8. The reference in Article III-1-g to "enforcement" makes it clear that, as stated in the previous opinion, Article III-1-g in no way intends to give B.H. wide-ranging powers in the field of the adoption of substantive criminal law rules. With respect to criminal procedure, this is less obvious since criminal procedure is aimed at enforcement of the criminal law rules.

9. The term "law enforcement" in the English language is usually associated with the police and might therefore be understood in this context as referring mainly to police co-operation. A further indication in this respect is the reference to Interpol. Nevertheless, it does not seem possible to draw a very clear line between co-operation at the police and at the court and prosecution level. Law enforcement may also refer to the tasks of the Public Prosecutor's office and of the criminal courts and in many countries the police acts in the field of criminal law under the instructions of the prosecutor or an investigating judge. A very clear-cut distinction therefore cannot be made and it seems not possible to exclude any competence of B.H. at the level of co-operation between prosecutors and courts.

10. On the other hand, it seems also not possible to provide for an exclusive competence of B.H. for all matters concerning judicial co-operation in the criminal law field. The simple fact that all criminal law courts are courts of the Entities requires an

active rule of the Entities in this field. The State of B.H., which does not itself have the instruments to enforce criminal law, cannot claim to have a monopoly on regulating such matters. It would moreover be surprising if judicial co-operation in the criminal law field were an exclusive prerogative of B.H., while judicial co-operation in the field of civil law undoubtedly is within the powers of the Entities.

11. Having regard to the situation that practical implementation is a task of the two Entities, the only possible interpretation seems to be that Article III-1-g intends to give to B.H. in the field of criminal procedure powers to co-ordinate, to harmonise and to initiate co-operation with respect to all cases involving the two Entities or other countries. The precise extent of these powers will have to be assessed on a case basis.

C. Power of the Entities to enter into an agreement on inter-entity judicial co-operation

12. The above-mentioned opinion of the Ministry of Civil Affairs and Communications of 16 February 1998 considers that the two Entities do not have the right to conclude agreements among themselves on inter-entity judicial co-operation. This position, and in particular some of the arguments used, is in contradiction with the modern theory of federalism which more and more emphasises the need for co-operative federalism.

13. The simple fact that the Constitution of B.H. does not explicitly provide for such agreements seems not relevant, provided that these agreements respect the basic principles on the division of powers.

14. It is also not true to say that such agreements would be similar to international agreements and would give to the Entities the attributes of sovereign States. In a large number of federal States (Belgium, Canada, Germany, United States) agreements and conventions between federated Entities (or between some or all the federated Entities and the federal State) are quite usual and nobody pretends that such agreements would give to the federated Entities the attributes of a sovereign State. In Belgium, certain co-operation agreements between Entities or between Entities and the Federal State are even explicitly required by the laws on institutional reform.

15. The specific situation of B.H. and its Entities where the Central State only has very few powers makes this "co-operative" approach to federalism particularly necessary, especially in the judicial field. In effect, even if one arrived at a different conclusion from the one set out above concerning the possible powers of B.H. in the criminal law field, judicial co-operation in the civil law field is entirely within the powers of the federated Entities and may therefore only be implemented by way of voluntary agreements.

16. The B.H. constitution is therefore no obstacle to such agreements. On the contrary, several of its provisions seem to invite (or even impose) the conclusion of agreements between the Entities. The following provisions may be cited:

a) Article III-2-c requires that the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, inter alia, "by taking such other measures as appropriate". The conclusion of mutual agreements is one of the possible "other measures".

b) Article III-2-d enables the Entities to enter, under certain conditions, into agreements with foreign States. This power is fairly rare in comparative law (it exists, for example, in Belgium). It would seem paradoxical that the Entities may conclude international agreements and may not conclude mutual agreements although this last possibility is very frequent in most federal States.

c) By virtue of Article III-4, the B.H. Presidency may decide to facilitate inter-entity co-ordination on matters not within its responsibility (and which therefore are within the responsibility of the Entities). One way of achieving such co-ordination may be to conclude agreements between federated Entities on the exercise of their respective powers.

d) Article III-5-a of the B.H. constitution provides that the State of B.H. may assume responsibility for such other measures as are agreed by the Entities. This provision therefore envisages the possibility of transfers in the exercise of powers resulting from an agreement between federated Entities. It would seem difficult to conceive that the constitution provides for this kind of agreement and does not permit the federated Entities to agree on the way of exercising their proper powers as is the case in the agreement to be concluded on judicial co-operation.

17. There seems therefore no doubt that the Entities may enter into an agreement on judicial co-operation.