COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 3 March 2005

Opinion no. 326 / 2004

Restricted
CDL(2005)016
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON A POSSIBLE SOLUTION TO THE ISSUE OF DECERTIFICATION OF POLICE OFFICERS IN BOSNIA AND HERZEGOVINA

on the basis of comments by

Mr Pieter van DIJK (Member, the Netherlands)
Mr Jan HELGESEN (Member, Norway)
Mr Giorgio MALINVERNI (Member, Switzerland)

I. Introduction

1. By a letter of 8 December 2004, Mr Adnan Terzic, Prime Minister of Bosnia and Herzegovina, requested the assistance of the Commission in finding an adequate solution to the issue of a possible review of some of the decisions taken by UNMBiH until 2002 on decertification of police officers in Bosnia and Herzegovina.

2. A working group, composed of Messrs Pieter van Dijk, Jan Helgesen and Giorgio Malinverni, members, and of Mr Ralph Wilde, UK expert, was subsequently set up.

3. The present opinion, which was prepared on the basis of the contributions of the members of the working group, was discussed within the sub-commission on international law on ... and subsequently adopted by the Commission at its .. Plenary Session (Venice ...)

II. Background

4. In the period 1996-2002, the United Nations International Police Task Force (IPTF) of Bosnia and Herzegovina, established under Annex 11 to the Dayton Peace Accords (General Framework Agreement for Peace in Bosnia and Herzegovina – GFAP), proceeded with the reorganisation of the police forces in both the Federation of Bosnia and Herzegovina (pursuant to the Bonn-Petersberg agreement of 1996[1]) and in the Republic Srpska[2] (see in particular the UN Security Council Resolution No. 1088/1996 and the decisions of the Peace Implementation Conference held in London on 4-5 December 1996).

5. The vetting process of police officers in Bosnia and Herzegovina was notably conducted pursuant to IPTF Policies Nos. P10-2002 and P11-2002.

6. The certification criteria set out in Policy P11 were the following:

Positive criteria (all to be complied with):

- Demonstrated ability to perform police powers;
- Proof of citizenship of Bosnia and Herzegovina (original or certified copy of the certificate would be accepted);
- Valid educational credentials;
- Completed Human Dignity and Transitional Course;
- Proof that no criminal case is pending (Certificate from the court: original or certified copy would be accepted); and
- Compliance with the property legislation.

---

1 "We agree to the creation of the permanent Police Standards and Training Commission under the advice and guidance of the Commissioner UN IPTF. Based on recommendations by the Commissioner UN IPTF, which will be predicated on his review of the conduct of those persons provisionally certified, the Police Standards and Training Commission shall issue permanent credentials to police officers and be responsible for future accessions to the police forces and for the continued training function." Bonn-Petersberg Agreement, "Concrete Steps, Section 8."

2 A reform and restructuring agreement in Republika Srpska was signed only in December 1998.

Negative criteria (any of which would prevent certification):

- Failure to have demonstrated ability to uphold human rights and/or abide by the law (e.g: pattern of abuses, of violations of law and/or of duty);
- Officer made a deceptive statement in the context of the registration process and/or certification process;
- Criminal proceedings against the officer have been commenced by a domestic court, in case of war crimes (in accordance with the Rules of the Road); and
- Non-compliance with the property legislation, when an officer has been identified as:
  1) an illegal occupant, or
  2) a multiple occupant, or
  3) having an expired deadline specified in a court or administrative decision (i.e. 15 and 90 day), or
  4) occupying claimed property where there is a) housing authority and/or b) CRPC decision, and s/he has failed to vacate within 30 days from receipt of the notification sent by the IPTF Commissioner.

7. The provisionally authorised officers[3] who did not meet the requirements as listed under Certification Criteria were not certified by UNMIBH/IPTF to exercise police powers.

8. The certified officers, who by their acts or omissions, would fall within the scope of application of Policy IPTF-P10/2002 para. 2(a) to 2(h), i.e. in the following cases:

- Conviction of a serious breach of law, and the law enforcement agency in which the officer is employed has failed to take appropriate actions/sanctions in conformity with domestic law;
- Conviction by a disciplinary panel of a serious breach of duty, and the penalty assigned does not correspond to the severity of the misconduct of the officer;
- In the context of investigations conducted under Security Council resolution 1088, UNMIBH/IPTF has obtained independent evidence that an officer has committed a serious breach of duty that would obligate a law enforcement agency and the judiciary to take action under domestic law;
- An officer has committed a pattern of minor offences that demonstrate disregard for upholding the law;
- In the context of investigations conducted under Security Council resolution 1088, UNMIBH/IPTF has obtained independent evidence that an officer committed a serious breach of duty that would obligate a law enforcement agency to take action under domestic law and rulebooks on disciplinary procedure;
- An officer has been issued two substantive non-compliance reports as outlined in UNMIBH/IPTF "Performance Assessment Policy" (IPTF-P05/2001);
- An officer has made a material misrepresentation to UNMIBH that fundamentally affects consideration of suitability to exercise police powers; or
- An officer, whose acts and/or omissions, and/or functions from the period of April 1992 to December 1995, demonstrate the inability or unwillingness to uphold internationally recognised human rights standards.

were decertified. Non-certification and de-certification precluded the local police officer from holding any position within a law enforcement agency in BiH.

---

[3] See UNMIBH/IPTF Policy on Registration, Provisional Authorisation and Certification (IPTF-P02/2000).

9. In May 2002 a review mechanism was introduced: the possibility of applying, within eight days of the Commissioner's decision on decertification, to a panel composed of UNMBiH staff members. The application was to be made on the basis of the reasons for the refusal, but without access to the file and the evidence. Neither the applicant nor a representative were allowed to appear before the panel. The panel would make its recommendation to the Commissioner who would then make the final and binding decision.

10. According to the information provided by the UNMBiH, 16,762 officers were certified, and 598 decertified, of which 150 have challenged the decisions decertifying them before national courts.

11. UNMBiH terminated its mission on 31 December 2002.[4] The continuation was ensured by the European Union with the European Union Police Mission[5] as of 1 January 2003.

III. Analysis

12. A decision whereby a police officer is decertified, that is to say is prevented from exercising the same profession *for life*, is certainly one which substantially affects that individual's rights under Articles 8 of the European Convention on Human Rights (ECHR) and 1 of Protocol No. 1 to the ECHR. It must therefore be possible for the police officer to challenge this decision before an independent and impartial court in conformity with Article 6 ECHR, or at least before a body competent to effectively review the merits of the decision in accordance with Article 13 ECHR.

13. The decertification decisions should fall under domestic law. However, in the circumstances under consideration, they were taken *by an international organisation* rather than by the competent national bodies of Bosnia and Herzegovina. This is due to the particular constitutional arrangement of Bosnia and Herzegovina. As a result of this, and given that the national authorities (the FBiH) did not have any margin of appreciation in respect of decertification recommendations and were bound to implement them in order to comply with their international obligations[6], the Bosnian courts, even if competent to review the decertification decisions, have no competence to annul such decisions and order to be taken new ones, as they have no power to ignore or reverse the IPTF recommendations on decertification.[7]

14 The Venice Commission considers that this situation, which amounts to a lack of effective domestic remedies, should be analysed in a similar manner as if the policemen had been *employed by the United Nations* and consequently not subjected to the jurisdiction of domestic courts.

---

4 See Security Council Resolution 1423(2002).

5 See Council Joint Action of 11 March 2002 on the European Union Police Mission.

6 See Article V of Annex 11 to the GFAP.

7 Human Rights Commission, decision on the merits of 7 May 2004 in the case Dzaferovic v. the Federation of Bosnia and Herzegovina.

15. In the opinion of the Human Rights Commission of Bosnia and Herzegovina, the limitation on the relevant police officers' right of access to a domestic court which resulted from the impossibility for them to bring their case before a court competent to examine the merits of their case is compatible with Article 6 ECHR.[8]

16. The Venice Commission recalls that the immunity of international organisations from legal proceedings in courts of member states and other international institutions is generally compatible with public international law. The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems. Therefore, it is with good reason that international organisations and their organs, such as the UN and UNMBiH (and their personnel) are not subjected to legal proceedings in member states and before other international institutions.

17. It is particularly important in the present circumstances that the authority of the United Nations Mission in Bosnia should not be undermined or diminished by allowing IPTF's decisions to be reopened by the national authorities of BiH after the end of the mandate of the same mission.

18. The Commission nevertheless refers to the case-law of the European Court of Human Rights in the field of the immunity of jurisdiction of international organisations.[9] The compatibility of the limitation on the right of access to a court depends on certain factors such as the existence of adequate alternative means for determining the claims. Compatibility in that case rests on the assumption that the latter comply with the ECHR. "Adequate" means providing sufficient guarantees in terms of independence and impartiality and offering adequate procedural guarantees that could be said to fulfil the general requirements of Article 6 ECHR or Article 13 ECHR, as the case may be.[10]

19. If that is not the case, that is to say if the alternative procedure carried out within the international organisation in question is not capable of ensuring compliance with internationally recognised human rights standards, the State in question may not be exempted from its responsibilities under the ECHR.

20. It is so, because compliance with human rights standards is so important that no international mechanism or procedure may be allowed to circumvent it. Consequently, a State may neither engage in international obligations, nor rely on these as a justification for any action or omission, if these obligations result in such circumvention.

---

8 See §§ 92-101 of the Dzaferovic decision.

9 See in particular, in respect of labour disputes, European Court of Human Rights, Waite and Kennedy v. Germany judgment (Grand Chamber) of 18 February 1999.

10 See Application No. 41387/98, A.L. v. Italy, Second Section, inadmissibility decision of 11 May 2000, in respect of the NATO Appeals Board.

21. The Venice Commission underlines that the Human Rights Commission has found[11] that the decertification proceedings before IPTF and the Ministry of Internal Affairs (in that particular case, but the pattern was repeated in several other cases) did not satisfy the requirements of Article 6 ECHR, on account of the lack of public, adversarial, impartial and independent examination of the applicants' rights.

22. It recalls however that Bosnia and Herzegovina did not decide to transfer its powers in the field of police reorganisation to the United Nations: the UN powers derived directly from the GFAP. Bosnia is not free to choose to take back these powers: it follows that it cannot be held accountable for shortcomings in the proceedings carried out by the United Nations.

23. It is therefore of the utmost importance that compliance with international human rights standards be ensured *by the United Nations itself.*[12]

24. In the vetting process, IPTF has failed to provide the relevant police officers with a public, adversarial, impartial and independent examination of their rights,[13] while the review mechanism (see § 8) appeared to be abortive for the larger part.

25. The Venice Commission notes that no justification has been adduced for this failure. The crucial nature of this process in ensuring peace in Bosnia does not explain why, for example, the police officers were not heard in person or allowed to make submissions or challenge allegations against them, or why they were not provided with access to their files and the evidence adduced against them. The need to complete the process speedily, while at the same time preparing to wind down the mission, may explain some of the shortcomings in question. It may not, however, justify them.

26. The Venice Commission considers therefore that it is necessary that the United Nations carry out a review process of the decertification decisions that have been challenged before the Bosnian authorities after the end of 2002.

27. It deems this to be even more so on account of the far-reaching consequences of the decertifications: the policemen who were decertified are prevented from exercising this profession for life.

28. Moreover, the Venice Commission deems an adequate solution within the framework of the United Nations to be highly desirable for the sake of the United Nations' credibility and authority. It must be underlined that in Bosnia, the UN-IPTF has carried out tasks which are certainly more similar to those of a State administration than those of an international organisation proper. It is inconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that it could act or have acted as a State authority and be exempted from any independent legal review.

---

[11] Dzaferovic Decision, §§ 70-72.

[12] See also Articles 1 and 25 of the UN Charter, and Article 14 of the International Covenant on Civil and Political Rights.

[13] Dzaferovic Decision, § 72.

29. The Venice Commission recognises the excellent work the United Nations has done in Bosnia; the tasks performed by the IPTF, also in the area of restructuring of the police forces, are part thereof and the difficulties faced in this respect must certainly not be forgotten or underestimated. But the United Nations should be ready to fulfil IPTF's mission "in accordance with internationally recognised standards and with respect for internationally recognised human rights and fundamental freedoms".[14]

30. The Venice Commission recommends, therefore, that the Security Council set up a review body of (three) independent experts, entrusted with reviewing the approximately 150 decertification cases which have been challenged before the domestic courts. The United Nations might find it appropriate to entrust this body also with completing the certification proceedings in respect of the 237 cases in which a final decision was never taken.

31. In this respect, the Commission notes with appreciation that in a letter addressed on 14 October 2004 to the High Representative of Bosnia and Herzegovina, the UN Under-Secretary-General for Peacekeeping Operations, Mr Jean-Marie Guéhenno, indicated the readiness of the United Nations Secretariat to assist "whatever competent agency may be authorised [by the Security Council] to carry out a review of certification cases, by providing such agency with the relevant files on a case-by-case basis". The Commission welcomes this readiness which would indeed be essential in order for the review body to carry out its tasks.

32. In the proposed SC Resolution, the task and relevant powers should be given to the appropriate national authority (notably the Ministry of the Interior of the FBiH) - in case the review body, in the light of any potential new information provided to it by the applicants in the course of adversarial proceedings, should come to the conclusion that the original recommendation should be reversed - to implement a new recommendation by annulling its own previous decision on decertification.

33. It is recommended that the (three) members of the review body be appointed by the Secretary General, in consultation with the High Representative, also in the latter's capacity as European Union Special Representative.

34. The Venice Commission considers that it would be reasonable to expect the review process of the approximately 150 cases which are currently pending before the Bosnian courts (several of which raise similar issues) to be completed within a relatively short period of time (six months). The review body should be assisted by a small secretariat, which should immediately proceed with preparing appropriate rules of procedure. The decisions should be rendered in both English and the applicant's local language.

IV. Conclusions

35. The Venice Commission considers it highly appropriate that the decertification cases that have been challenged before the Bosnian courts be reviewed by the United Nations.

36. It therefore recommends that a special body be set up by the UN Security Council and mandated to review the decertification cases that have been challenged before the Bosnian authorities.

---

[14] See Article 2, para. 5, of Annex 11 to the GFAP.

37. This review body might be composed of (three) independent experts, appointed by the UN Secretary General, in consultation with the High Representative, also in the latter's capacity as European Union Special Representative.

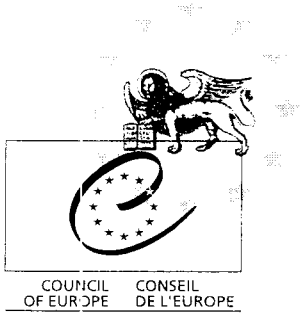
38. This body would be competent to review the recommendations on decertification previously made by IPTF, on the basis of the information previously gathered by IPTF (with the assistance of the UN Secretariat) and in the course of an adversarial procedure in which the former policeman concerned would be allowed to have access to such a file (with the exception of duly classified information) and provide new information.

39. Should the review body come to the conclusion that the original recommendation needs to be reversed, the competent national authorities would have to implement the new recommendation and annul their previous decision on decertification.

40. The Venice Commission considers that this review body, with the assistance of a small secretariat, could be expected to complete the review process within a short period of time (six months).

41. The Venice Commission remains at the disposal of the Bosnian authorities and of the United Nations, should any further assistance be necessary in this matter.

Venice Commission



European Commission
for Democracy through Law

Venice, 11 March 2005

CDL-AD (2005) 004
Or.Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE CONSTITUTIONAL SITUATION IN BOSNIA AND HERZEGOVINA AND THE POWERS OF THE HIGH REPRESENTATIVE

Based on comments by

Mr J. HELGESEN (Member, Norway)
Mr J. JOWELL (Member, United Kingdom)
Mr G. MALINVERNI (Member, Switzerland)
Mr J.-C. SCHOLSEM (Member, Belgium)
Mr K. TUORI (Member, Finland)

adopted by the Venice Commission
at its 62nd plenary session
(Venice, 11-12 March 2005)

I. INTRODUCTION

1. On 23 June 2004 the Parliamentary Assembly of the Council of Europe adopted Resolution 1384 on "Strengthening of democratic institutions in Bosnia and Herzegovina". Paragraph 13 of the Resolution asks the Venice Commission to examine several constitutional issues in Bosnia and Herzegovina. It is worded as follows:

> *"13. The scope of the OHR[1] is such that, to all intents and purposes, it constitutes the supreme institution vested with power in Bosnia and Herzegovina. In this connection, the Assembly considers it irreconcilable with democratic principles that the OHR should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal remedy. The Assembly asks the Venice Commission to determine how far these practices comply with Council of Europe basic principles, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, the Assembly asks the Venice Commission to make a comprehensive assessment of the conformity of the Constitution of Bosnia and Herzegovina with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter of Local Self-Government, as well as of the efficiency and rationality of the present constitutional and legal arrangements in Bosnia and Herzegovina."*

2. Five members of the Commission, Messrs Helgesen, Jowell, Malinverni, Scholsem and Tuori were appointed as reporting members. Three of them, Messrs Jowell, Scholsem and Tuori, participated, accompanied by Mr Markert from the Secretariat, in a fact-finding visit to Sarajevo and Banja Luka on 24-27 October 2004. This delegation is particularly grateful for the efficient support it received from the Council of Europe Office in Sarajevo during the visit. Following this visit a draft opinion was prepared, discussed and finally adopted at the 62nd plenary session in Venice.

3. The issue of the powers of the High Representative is best understood and analysed within the framework of the constitutional situation in Bosnia and Herzegovina. The present opinion therefore firstly addresses the efficiency and rationality of the constitutional arrangements in the country; then it examines the compatibility of the Constitution with the European Convention on Human Rights and lastly it examines the compatibility with European standards of the exercise by the High Representative of his powers.

II. THE HISTORICAL BACKGROUND

4. To understand the present constitutional situation in Bosnia and Herzegovina (BiH), a federal state composed of two Entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), it is indispensable to briefly outline the historical developments which led to the present – unique – situation. The tragic war which followed the declaration of independence is well known. The main constitutional texts applicable in the country were adopted during this war or at its end. The Constitution of the Republika Srpska was originally adopted in 1992 as the constitution of a separatist entity claiming to be an independent state. It was based on the concept of a unitary state.

---

[1] Office of the High Representative.

5. The Constitution of the second Entity, the Federation of Bosnia and Herzegovina, adopted in June 1994 was part of the Washington Agreement and reflected an American-brokered compromise between Bosniacs and Croats. This was reflected in Art. I.1 of the Constitution which states that "Bosniacs and Croats, as constituent peoples (along with Others) and citizens of the Republic of Bosnia and Herzegovina ... transform the internal structure of the territories with a majority of Bosniac and Croat population ... into a Federation". Decisions on the constitutional status of the territories with a majority of Serb population were left to future negotiations. The Constitution established a highly decentralised federation of ten Cantons, with five Cantons having a primarily Bosniac, three Cantons having a primarily Croat and two Cantons having a mixed Bosniac/ Croat character. At the Federal level, complicated arrangements were foreseen to ensure that the numerically smaller Croat population could not be outvoted by the Bosniacs. In addition to a directly elected first chamber an indirectly elected second chamber, the House of Peoples, composed of an equal number of Croat and Bosniac representatives, was established. In this House "decisions that concern the vital interest of any of the constituent peoples" required the consent of the majority of the delegates from both peoples. There were a number of complicated constitutional arrangements ensuring that, also within the executive, both constituent peoples enjoy equal influence.

6. The Constitution of the State of Bosnia and Herzegovina was agreed at Dayton as Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Due to its being part of a peace treaty, the Constitution was drafted and adopted without involving the citizens of BiH and without applying procedures which could have provided democratic legitimacy. As was pointed out to the Commission delegation during its visit to BiH, it constitutes the unique case of a constitution never officially published in the official languages of the country concerned but agreed and published in a foreign language, English. The Constitution confirmed the legal continuity of the Republic of Bosnia and Herzegovina, which had become independent from the former Yugoslavia, under the name of Bosnia and Herzegovina with a modified legal structure. The two already existing units, the RS and the FBiH, were confirmed as Entities of BiH. Bosniacs, Serbs and Croats were described as "constituent peoples". The Constitution granted only extremely weak powers to the state of BiH, leaving most powers to the two Entities. At the state level, power-sharing arrangements were introduced, making it impossible to reach decisions against the will of the representatives of any constituent people. A House of Peoples as a second chamber was established, a vital interest veto for all three constituent peoples in both chambers was introduced as well as a collective Presidency of three members with a Serb from the RS and a Bosniac and Croat from the Federation.

7. Both Entities were obliged by the Constitution to bring their own Constitutions into conformity with the State Constitution within three months. While this was not done in time or completely, main contradictions with the State Constitution were removed. With respect to the RS Constitution, this was done following an opinion provided by the Venice Commission at the request of the High Representative[2]. Nevertheless the fact remained that both Entity Constitutions were conceptually very different, the RS being conceived as a unitary Entity dominated by Serbs, the FBiH being a decentralised Federation with power shared at the Federal level between Bosniacs and Croats.

8. Another consequence of Dayton was the establishment of the office of a High Representative with the task of facilitating the implementation of the peace agreement. His mandate was originally defined in not very precise terms in Annex X of the Agreement. During

[2] Document CDL(1996)56final.

the initial phase the High Representative did not exercise legally binding powers. This proved insufficient for him to move the peace process forward. At the Bonn Peace Implementation Conference (PIC) on 10 December 1997 the Peace Implementation Council therefore welcomed the intention of the High Representative to henceforth issue binding decisions. Following this Conference the High Representative started to impose legislation and to remove officials from office who did not fulfil their duty to implement the peace agreement. This is generally referred to as the use of the Bonn powers by the High Representative.

9. Finally, the establishment of the Brčko district as a further territorial unit was a consequence of arbitral awards delivered pursuant to a provision of the peace agreement[3]. The present Opinion will not go into the peculiar features of this rather small district. Its existence should however be noted as a further complicating factor in the territorial set-up.

10. The next major step in the constitutional development was due to the decision of 1 July 2000 of the Constitutional Court of BiH in the "constituent peoples" case[4]. The Court examined some constitutional provisions of the RS which granted a privileged position to Serbs within the RS. The Court ruled that such provisions were incompatible with the Constitution of the State and that members of all three constituent peoples had to have equal rights throughout BiH. The international legal instruments incorporated into the BiH Constitution did not allow the granting of privileges to already dominant groups but only affirmative action in favour of minorities. The decision had wide-ranging consequences especially for the FBiH since both Bosniacs and Croats enjoyed a constitutionally enshrined privileged position there. The RS Constitution did have fewer obvious contradictions with the decision since its text was based on an approach giving equal rights to all citizens. Practice in the RS was however quite different, and the Constitutional Court found a pervasive pattern of discrimination of non-Serbs within the RS.

11. The implementation of the decision of the Constitutional Court was the subject of much discussion, including opinions of the Venice Commission (CDL-INF(2001)006 and CDL-AD(2002)024). In the end an agreement between major political parties within BiH was reached, and in April 2002 and October 2002 the High Representative imposed the amendments to the Entity Constitutions which were part of this Agreement. The basic approach chosen was based on the equality of constituent peoples throughout the territory. Power-sharing provisions, including a vital interest veto, similar to the provisions at State level were introduced in both Entities and the Cantons, and rules allocating the most important positions equally among the three constituent peoples were included in the respective Constitutions. As a result of these historical developments, BiH now on the one hand continues to be divided into different units – two Entities, one of which is subdivided into 10 Cantons – originally set up to ensure the control of the respective territories by one (or in the case of the FBiH and the two mixed Cantons, two) constituent people(s). On the other hand, the representatives of the three constituent peoples now constitutionally have in these various units a strong blocking position, even where they represent only a very limited number of voters.

12. The extremely limited responsibilities explicitly granted by the BiH Constitution to the State were insufficient for ensuring the functioning of a modern state. Using some general provisions within the BiH Constitution and interpreting provisions extensively, it proved possible to somewhat extend the powers of the State level. Opinions of the Venice Commission contributed to this process[5]. Examples are the setting up of a court at BiH level and the transfer or assumption of responsibilities in the fields of defence, intelligence, the judiciary and indirect

[3] The final award dates from 5 March 1999.
[4] The full text of the decision appears in document CDL(2000)81.
[5] See below at 23.

taxation. It should be acknowledged that these transfers or assumptions were unlikely to have happened without the High Representative having taken the lead.

III. RESULTS OF THE FACT-FINDING MISSION OF THE VENICE COMMISSION DELEGATION

13. During its visit to BiH the Venice Commission delegation was struck by the degree of interest in constitutional reform. It met with representatives of the major political parties, often at the highest level, with the Constitutional Commissions of the various parliaments, as well as with representatives of the Constitutional Court and civil society. There was equal interest in discussing the powers of the High Representative.

14. As regards constitutional reform, the delegation found unanimity within the FBiH that the present constitutional arrangements in the FBiH are neither efficient nor rational. Power is dispersed between too many levels and usually exercised by a unit too small to fulfil its functions effectively. There are too many bureaucracies and too many posts for politicians: for example, within the FBiH, an Entity with about two and a half million inhabitants, there are 11 ministers of justice in addition to the minister of justice at State level who also exercises powers within the territory of the FBiH. Within the FBiH there was unanimity to strengthen the State level and at the same time the municipal level, notwithstanding the fact that municipal reform had been blocked in the FBiH for years. There were various approaches as to what should remain in between those two levels. The preferred solution on the whole seemed to be the setting up of administrative regions based on economically integrated areas while abolishing both Entities and Cantons. Such regions have already been introduced for the purposes of indirect taxation and are envisaged for the police. However, it was always emphasised that reform should not take place within the FBiH only. Any meaningful reform had to include the abolition of both Entities, including the RS. A streamlining of procedures at all levels was considered desirable by most interlocutors, although some favoured maintaining the vital interest veto in its present form.

15. Within the RS the picture was quite different. Some political forces there (SDS, PDP) considered the present constitutional provisions at the State level perfectly adequate, while others (SNSD) were open to strengthening State powers to enable the country to efficiently participate in European integration. However, there was absolute unanimity that there could be no question of the RS being abolished. Abandoning the RS would be regarded by all Serbs as equivalent to defeat in the war and mean that all sacrifices had been in vain. By contrast, according to Serb interlocutors, within the RS the vital interest veto was being abused and should be reformed.

16. As regards the compatibility of the BiH Constitution with the ECHR many interlocutors, especially among Bosniacs, took it for granted that the constitutional provisions on the election of the Presidency and the House of Peoples are discriminatory provisions in violation of the ECHR.

17. With respect to the exercise of the Bonn powers by the High Representative, there were widely diverging positions. Within the FBiH, it was generally acknowledged that the past use of the High Representative's powers had been indispensable to move the country forward. Most progress in the country was in fact due to decisions by the High Representative. Consequently some interlocutors favoured maintaining the powers of the High Representative fully until a reform of the constitutional system had taken place or even expanding those powers. Other voices were more critical and considered that the country no longer needed the use of such powers which should be gradually phased out.

18. Within the RS the attitude towards the Bonn powers was generally critical, even strongly hostile. The President of the RS handed over to the delegation a voluminous file alleging numerous gross violations of human rights through the use of the Bonn powers.

19. Lord Ashdown, the High Representative, seemed open to gradual change. While in some instances the use of the Bonn powers was still necessary, not least to force the RS to co-operate with the International Criminal Tribunal for the former Yugoslavia (ICTY), in some areas he had already stopped using his powers. BiH had to be able to participate in European integration on its own and he could not replace lack of action by the authorities in that respect. The position of Lord Ashdown is explained more fully in his address to the Venice Commission, delivered at its 60th Plenary Session in October 2004[6].

20. The visit by the delegation made many challenges facing BiH quite clear. There is a powerful wish for the country to participate in European integration with the final aim of becoming a member of the EU. However, the conclusion of a Stabilisation and Association Agreement as the first step in this direction will require institutions at State level far more effective than those existing at present. Moreover, the division existing within the country between the various ethnic groups remains a major concern. While a lack of interethnic trust following a bloody war is not surprising, the various ethnic groups have to live and work together, and not just side-by-side. The continued existence for example of a largely segregated education system therefore remains a major stumbling block on the way towards a better future.

IV. EFFICIENCY AND RATIONALITY OF THE PRESENT CONSTITUTIONAL ARRANGEMENTS

1. The State level

a) Responsibilities of the State level

21. The list of responsibilities of the State appearing in Art. III.1 of the State Constitution is extremely narrow:

> "*a. Foreign policy.*
> *b. Foreign trade policy.*
> *c. Customs policy.*
> *d. Monetary policy as provided in Article VII.*
> *e. Finances of the institutions and for the international obligations of Bosnia and Herzegovina.*
> *f. Immigration, refugee, and asylum policy and regulation.*
> *g. International and inter-Entity criminal law enforcement, including relations with Interpol.*
> *h. Establishment and operation of common and international communications facilities.*
> *i. Regulation of inter-Entity transportation.*
> *j. Air traffic control".*

According to Art. III.3.(a):

---

[6] See document CDL-PV(2004)003Appendix I.

"All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."

This weakness of the State is confirmed by Art. VIII.3 on Finances which makes the State dependent on contributions from the Entities:

"The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly."

It should also be noted that the only Court explicitly provided for at the State level is the Constitutional Court.

22. There are however a number of provisions providing an opening towards increased responsibilities of the State. The human rights provisions appearing in the Constitution and the principle of free movement of goods, services, capital and persons in its Art. I.4 can be used to justify additional State responsibilities. There is also a provision in Art. III.4 that the Presidency may facilitate inter-Entity cooperation. The most important opening is however provided by Art. III.5:

"Additional Responsibilities.

a. Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

b. Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects."

23. On the basis of such provisions the responsibilities of the State have already been extended. The Venice Commission contributed to this process in the past, inter alia by adopting opinions "on the need for a judicial institution at the level of the state of Bosnia and Herzegovina"[7] "on the competence of Bosnia and Herzegovina in electoral matters"[8] and "on the scope of responsibilities of Bosnia and Herzegovina in the field of immigration and asylum"[9]. Nevertheless, it is obvious that the extensive interpretation of state responsibilities has clear limits. More recently, additional state responsibilities in the areas of defence and intelligence services were based on the provision in Art. III.5.(a) that BiH shall assume responsibility for such other matters as are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of BiH. The transfer of powers by the Entities was used as the basis for additional responsibilities in the fields of indirect taxation and the judiciary. In all cases the High Representative played a decisive role to bring about these changes.

---

[7] CDL-INF(1998)017.
[8] CDL-INF(1998)016.
[9] CDL-INF(1999)006.

24. On the basis of this progress already achieved, representatives of some RS based parties argued during the visit of the delegation to BiH that there was no need for an amendment to the State Constitution and that any required transfers of responsibilities could be carried out on the basis of the provision for voluntary transfers of responsibilities in Art. III.5.(a).

25. The Commission does not share this position. First of all, it is obvious that the responsibilities of the State of Bosnia and Herzegovina cannot be compared with the powers enjoyed by European federal states such as Switzerland, Belgium, Austria, Germany or Russia. In these countries legislative powers are mainly concentrated at the federal level, there is a strong federal executive, financial resources are mainly controlled by the federal level and federal courts ensure respect for federal law. None of this applies in BiH.

26. With such a weak state Bosnia and Herzegovina will not be able to make much progress on the way towards European integration. The negotiation of a Stabilisation and Association Agreement with the EU requires institutions at the State level with the necessary capacity and expertise to deal with the wide range of issues covered by such agreements. The EU will want to have a single interlocutor and definitely not be willing to negotiate with the two Entities separately. BiH will need the necessary legislative powers to create the conditions for the conclusion of such an agreement and to implement it. And, not least, BiH will be expected to ensure the effective implementation of such an agreement within both Entities. At present, the State level is not able to effectively ensure compliance with the commitments of the country with respect to the Council of Europe and the international community in general. With respect to the EU it is unthinkable that BiH can make real progress with the present constitutional arrangements. The EU will not countenance the kind of delay, indecision and uncertainty that a multiplicity of governments entails.

27. For a number of reasons, a voluntary transfer of responsibilities seems clearly insufficient to make the country fit for future integration into the European Union:

a) a comprehensive and not a piecemeal transfer of responsibilities will be required;

b) a transfer not only of legislative powers but also of executive agencies and financial resources will be required; this goes far beyond what was hitherto achieved on a voluntary basis;

c) due to the financial and economic situation in the country, it will not be possible to continue simply creating further layers of bureaucracy at the State level in addition to the multiple bureaucracies at the lower level; whole structures will have to be transferred;

d) the progress achieved hitherto was to a large extent due to the efforts of and facilitation by the High Representative; his role is however bound to decrease in the future;

e) the constitutional situation should be transparent for the citizens and for outside partners; the main rules therefore have to be set forth in the Constitution.

28. The Commission therefore considers a revision of the State Constitution to strengthen the responsibilities of the State to be indispensable. It points out that Art. X of the Constitution provides for a procedure for amending the Constitution. This reform will require the consensus of majorities within all three constituent peoples. The interest of all peoples in BiH in European integration should make it possible to achieve such a consensus.

b) The functioning of the institutions

29. BiH is a country in transition facing severe economic problems and desiring to take part in European integration. The country will only be able to cope with the numerous challenges

resulting from this situation if there is a strong and effective government. The constitutional rules on the functioning of the state organs are however not designed to produce strong government but to prevent the majority from taking decisions adversely affecting other groups. It is understandable that in a post-conflict situation there was (and is) insufficient trust between ethnic groups to allow government on the basis of the majoritarian principle alone. In such a situation specific safeguards have to be found which ensure that all major groups, in BiH the constituent peoples, can accept the constitutional rules and feel protected by them. As a consequence the BiH Constitution ensures the protection of the interests of the constituent peoples not only through territorial arrangements reflecting their interests but also through the composition of the state organs and the rules on their functioning. In such a situation, a balance has indeed to be struck between the need to protect the interests of all constituent peoples on the one hand and the need for effective government on the other. However, in the BiH Constitution, there are many provisions ensuring the protection of the interests of the constituent peoples, inter alia: the vital interest veto in the Parliamentary Assembly, the two chamber system and the collective Presidency on an ethnic basis. The combined effect of these provisions makes effective government extremely difficult, if not impossible. Hitherto the system has more or less functioned due to the paramount role of the High Representative. This role is however not sustainable.

The vital interest veto

30. The most important mechanism ensuring that no decisions are taken against the interest of any constituent people is the vital interest veto. If the majority of the Bosniac, Croat or Serb delegates in the House of Peoples declare that a proposed decision of the Parliamentary Assembly is destructive to a vital interest of their people, the majority of Bosniac, Serb and Croat delegates have to vote for the decision for it to be adopted. The majority of delegates from another people may object to the invocation of the clause. In this case a conciliation procedure is foreseen and ultimately a decision is taken by the Constitutional Court as to the procedural regularity of the invocation. It is noteworthy that the Constitution does not define the notion of vital interest veto, contrary to the Entity Constitutions which provide a (excessively broad[10]) definition.

31. It is obvious, and was confirmed by many interlocutors, that this procedure entails a serious risk of blocking decision-making. Others argued that this risk should not be overestimated since the procedure has rarely been used and the Constitutional Court in a decision of 25 June 2004[11] started to interpret the notion. The decision indeed indicates that the Court does not consider that the vital interest is a purely subjective notion within the discretion of each member of parliament and which would not be subject to review by the Court. On the contrary, the Court examined the arguments put forward to justify the use of the vital interest veto, upheld one argument and rejected another.

32. The Commission is nevertheless of the opinion that a precise and strict definition of vital interest in the Constitution is necessary. The main problem with veto powers is not their use but their preventive effect. Since all politicians involved are fully conscious of the existence of the possibility of a veto, an issue with respect to which a veto can be expected will not even be put to the vote. Due to the existence of the veto, a delegation taking a particularly intransigent position and refusing to compromise is in a strong position. It is true that further case-law from the Constitutional Court may provide a definition of the vital interest and reduce the risks inherent in the mechanism. This may however take a long time and it also seems inappropriate to leave such

[10] See below at 54.

[11] Decision No. U-8/04 on the vital interest veto against the Framework Law on Higher Education.

a task with major political implications to the Court alone without providing it with guidance in the text of the Constitution.

33. Under present conditions within BiH, it seems unrealistic to ask for a complete abolition of the vital interest veto. The Commission nevertheless considers that it would be important and urgent to provide a clear definition of the vital interest in the text of the Constitution. This definition will have to be agreed by the representatives of the three constituent peoples but should not correspond to the present definition in the Entity Constitutions which allows practically anything being defined as vital interest. It should not be excessively broad but focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture[12].

Entity veto

34. In addition to the vital interest veto, Art. IV.3.d) of the Constitution provides for a veto by two-thirds of the delegation from either Entity. This veto, which in practice seems potentially relevant only for the RS[13], appears redundant having regard to the existence of the vital interest veto.

Bicameral system

35. Art. IV of the Constitution provides for a bicameral system with a House of Representatives and a House of Peoples both having the same powers. Bicameral systems are typical for federal states and it is therefore not surprising that the BiH Constitution opts for two chambers. However, the usual purpose of the second chamber in federal states is to ensure a stronger representation of the smaller entities. One chamber is composed on the basis of population figures while in the other either all entities have the same number of seats (Switzerland, USA) or at least smaller entities are overrepresented (Germany). In BiH this is quite different: in both chambers two-thirds of the members come from the FBiH, the difference being that in the House of Peoples only the Bosniacs and Croats from the Federation and the Serbs from the RS are represented[14]. The House of Peoples is therefore not a reflection of the federal character of the state but an additional mechanism favouring the interests of the constituent peoples. The main function of the House of Peoples under the Constitution is indeed as the chamber where the vital interest veto is exercised.

36. The drawback of this arrangement is that the House of Representatives becomes the chamber where legislative work is done and necessary compromises are made in order to achieve a majority. The role of the House of Peoples is only negative as a veto chamber, where members see as their task to exclusively defend the interests of their people without having a stake in the success of the legislative process. It would therefore seem preferable to move the exercise of the vital interest veto to the House of Representatives and abolish the House of Peoples. This would streamline procedures and facilitate the adoption of legislation without endangering the legitimate interests of any people. It would also solve the problem of the discriminatory composition of the House of Peoples[15].

---

[12] In "the former Yugoslav Republic of Macedonia" laws that directly affect culture, use of language, education, personal documentation, use of symbols as well as certain laws in the area of local self-government and certain amendments to the Constitution require the consent of a majority of members of parliament from the communities not in the majority in the population.

[13] Two-thirds of the members of both Chambers are elected from FBiH.

[14] The compatibility of this arrangement with the European Convention on Human Rights will be examined below at V.

[15] See below at V.2.

The collective Presidency

37. Article V of the Constitution provides for a collective Presidency with one Bosniac, one Serb and one Croat member and a rotating chair. The Presidency endeavours to take its decisions by consensus (Art. V.2.c)). In case of a decision by a majority, a vital interest veto can be exercised by the member in the minority.

38. A collective Presidency is a highly unusual arrangement. As regards the representational functions of Head of State, these are more easily carried out by one person. At the top of the executive there is already one collegiate body, the Council of Ministers, and adding a second collegiate body does not seem conducive to effective decision-making. This creates a risk of duplication of decision-making processes and it becomes difficult to distinguish the powers of the Council of Ministers and of the Presidency. Moreover, the Presidency will either not have the required technical knowledge available within ministries or need substantial staff, creating an additional layer of bureaucracy.

39. A collective Presidency therefore does not appear functional or efficient. Within the context of BiH, its existence seems again motivated by the need to ensure participation by representatives from all constituent peoples in all important decisions. A single President with important powers seems indeed difficult to envisage for BiH.

40. The best solution therefore would be to concentrate executive power within the Council of Ministers as a collegiate body in which all constituent peoples are represented. Then a single President as Head of State should be acceptable. Having regard to the multi-ethnic character of the country, an indirect election of the President by the Parliamentary Assembly with a majority ensuring that the President enjoys wide confidence within all peoples would seem preferable to direct elections. Rules on rotation providing that a newly elected President may not belong to the same constituent people as his predecessor may be added.

The Council of Ministers

41. This solution would involve a substantial strengthening of the Council of Ministers which would receive the bulk of the powers of the Presidency. This would also remove complications and contradictions within the present system: now, there seems to be a considerable risk of overlap between the responsibility of the Presidency for executing decisions of the Parliamentary Assembly (Art. V.3.e) and the responsibility of the Council of Ministers to carry out the policies and decisions of the State level (Art. V.4.a). The financial arrangements would also be streamlined. At present the budget needs to go through four bodies (Council of Ministers, Presidency, both chambers of the Parliamentary Assembly) and the Parliamentary Assembly receives reports on expenditures by BiH from the Council of Ministers and on expenditures of the Presidency from the Presidency.

Conclusion

42. To sum up, the decision-making mechanisms at BiH level are not efficient and rational but cumbersome and with too many possibilities of blocking the taking of any decision. While it would be unrealistic to expect the total abrogation of mechanisms such as the vital interest veto, the criteria should be restricted and qualified. The extent to which it is possible to streamline the legislative and executive structures should also be examined.

c) Citizens or peoples as the basis of the State

43. The Constitution of Bosnia and Herzegovina incorporates a large number of international human rights instruments, grants priority to the European Convention on Human Rights over all

other law, underlines the democratic character of the state and puts strong emphasis on the prohibition of discrimination. On the other hand, the state institutions are structured not to represent citizens directly but to ensure representation of the constituent peoples. Some legal problems resulting from this approach will be examined below in Part V of this Opinion. However, beyond specific legal problems this approach raises more general concerns. First of all, the interests of persons not belonging to the three constituent peoples risk being neglected or people are forced to artificially identify with one of the three peoples although they may for example be of mixed origin or belong to a different category. Moreover, there is a strong risk that all issues will be regarded in the light of whether a proposal favours the specific interests of the respective peoples and not of whether it contributes to the common weal. Finally, elections cannot fully play their role of allowing political alternance between majority and opposition. Each individual is free to change his political party affiliation. By contrast, ethnic identity is far more permanent and individuals will not be willing to vote for parties perceived as representing the interest of a different ethnic group even if these parties provide better and more efficient government. A system favouring and enshrining a party system based on ethnicity therefore seems flawed.

44. It would certainly not be realistic to expect that BiH move quickly from a system based on ethnic representation to a system based on representation of citizens. This will certainly be a long-term process. Nevertheless the Commission wishes to encourage people and politicians in BiH to start examining the extent to which the mechanisms of ethnic representation are really required and to replace them progressively by representation based on the civic principle.

2. The structure of the State

45. The historical developments set forth above resulted in BiH as an extremely decentralised federation, consisting of two Entities, one of them again an extremely decentralised federation. This structure seems neither rational nor efficient but there is no consensus on what should be changed. There is general agreement that BiH has to remain a decentralised state and that local self-government should be strengthened. However, there is no consensus at all on which levels of government should exist between State and municipality. As set forth above, within the FBiH it is generally accepted that the present arrangements are not sustainable and there is broad consensus on abolishing both Entities and replacing them by regions of economic-administrative character. Within the RS based parties, there is however no support whatsoever for abolishing the RS.

46. There seems no doubt that any attempt to revise the Constitution abolishing the Entities, even if the required majority of two-thirds within the House of Representatives were to be attained, would meet with a vital interest veto of the Serb representatives (and an Entity veto from the RS). It could not be questioned that this veto really concerns a vital interest of the Serb people. Moreover, it seems only appropriate to require in the multi-ethnic context of BiH that major constitutional amendments have to be agreed between the three peoples. Therefore the option of abolishing the Entities does not seem to be available for the foreseeable future and structural reform will have to take place within the FBiH.

47. This may be regretted since a federation of two entities will always be problematic. Moreover, the present structure of the State is largely based on the ethnic principle and maintaining it risks reproducing and reinforcing the ethnic divisions. Accepting the continued existence of the RS will also reinforce the wish of many Croats of having their own entity. Nevertheless, it seems neither possible nor desirable to impose from abroad the abolition of the

RS. The Commission therefore feels obliged to recommend solutions based on the continued existence of the two Entities.

3. *The Federation of Bosnia and Herzegovina*

a) *Territorial Structure*

48. Within the FBiH there is a general attitude which could be regarded as paradoxical: on the one hand, there is general agreement that present structures are neither efficient nor rational and not even financially sustainable. On the other hand there is no willingness to undertake a thorough reform of the Federation structures if this reform does not in parallel involve abolishing RS. Within the RS there is however no willingness to question the existence of the Entity or to compromise the structure of the RS, even if it would encourage reform of the Federation.

49. This situation cannot continue. The Commission fully shares the general opinion that structural reforms of the FBiH are imperative. An area of its size, population and economic state of development cannot afford such complicated arrangements. The FBiH has about two and a half million inhabitants. There are 11 governments, the Federation government and the ten cantonal governments, each with its own bureaucracy in addition to the State government which also exercises responsibilities on the territory of the FBiH. Under these circumstances more than 50% of GDP within BiH go into financing the bureaucracy[16] and only a smaller part into public investment or services to the inhabitants. This is not what citizens are entitled to expect from government. Moreover, the situation is not improving but expenses for payment of civil servants, who receive above-average salaries, are growing and will simply become impossible to finance.

50. It would therefore be unrealistic for the FBiH to postpone reform in the vague hope of the reform or demise of the RS. Action must be taken now to ensure its own best interests.

51. The most radical reform option would be to simply abolish the Cantons, thereby creating a situation similar to the RS. This option seems in principle desirable and would provide for more efficient government. It may however, at least in the short term, not seem acceptable to Croats who do not have their own Entity and would thus be without a territory in which they are in the majority. It may be easier to reduce the number of Cantons. On its own, this would however not be sufficient to solve the problem.

52. From the point of view of the Commission, a logical step forward would be to concentrate the legislative function at the FBiH level, making the Cantons structures of a mainly executive nature. At present within BiH, legislative and executive responsibilities tend to be exercised in parallel by the same usually quite low level body. Thus the FBiH Constitution assigns the bulk of legislative and executive responsibilities to the Cantons. The trend in European federal countries is however towards a mainly executive federalism, concentrating legislative tasks at the central level and leaving executive tasks to the entities which are closer to the citizen. In the FbiH, with its small and economically weak cantons it seems impossible to

---

[16] The Communiqué of the Steering Board of the PIC of 3 February 2005 states: "The Steering Board called on the State and Entity authorities to address the unsustainable cost of governance – now consuming more than 50 percent of GDP. The sprawling administrative structure means that citizens are paying too much money for too little service. The status quo is fiscally unsustainable – if this issue is not addressed in the first half of 2005, it may be impossible by as early as the end of this year for the authorities to meet all their obligations in regard to civil servants' salaries."

have a sophisticated legislative process at the Cantonal level. Moreover, at the FBiH level, adequate respect for the interests of the constituent peoples can be ensured, including through an – even modified – vital interest veto. There is therefore no ethnic rationale for keeping legislative responsibilities at the Cantonal level. On the other hand, the carrying out of executive tasks at the Cantonal level would ensure that the activities of the public administration reflect the preferences of the local majorities.

53. The Commission therefore recommends, if abolishing the Cantons seems politically impossible, a concentration of legislative tasks at the level of the FBiH. This should permit a streamlining of the administration both at the level of the FBiH and the Cantons. This implies a complete review of the FBiH Constitution which, at present, grants only limited powers to the Federation while leaving the remaining powers to the Cantons. The respective powers of the Entity and the Cantons will also have to be defined far more clearly. At present, citizens are often confronted with Entity and Cantonal (or even municipal) bodies acting in parallel[17].

b) Decision-making processes

54. The FBiH Constitution provides for a vital interest veto of the constituent peoples within the second chamber, the House of Peoples. In contrast to the situation at the State level, Art. IV.A.17.a of the Constitution provides a definition of vital interests. The list of vital interests provided in this Article seems however excessively broad. Moreover, it does not have much legal effect since, at the request of two-thirds of the members of the caucus of a constituent people, *any* issue is regarded as one concerning a vital interest. In the end this leaves the definition of vital interest to each caucus and opens the door to abuse. The procedure provided before the Constitutional Court to resolve the question whether there is a vital interest seems inappropriate and gives to the Court the task of deciding on a political issue without sufficient guidance in the text of the Constitution[18]. A precise and not too broad definition of vital interest would be preferable.

55. As is the case for State level, here too one may wonder whether the bicameral structure of the legislature is really rational and efficient. In the House of Peoples each constituent people has 17 members with 7 members for the Others, although within the Federation the percentage of Serbs in the population is quite small.

56. The distribution of executive powers seems also excessively cumbersome and complicated. Art. IV.B.7 of the Constitution distributes responsibilities between the President, the Vice-Presidents, the Prime Minister, the Deputy Prime Ministers and Ministers. Even in an independent state, this would be excessive and this is even more the case in a federated entity. The number of political offices should be reduced. One may wonder whether a Presidency is at all needed in an entity in addition to the government. One gets the impression that efficient and rational decision-making is entirely sacrificed to the principle of involving representatives of each constituent people in any decision. A government and an executive can however not function if each office-holder is regarded as a delegate of a specific ethnic community able to act only for this community and not as somebody entrusted with an office on behalf of the entity as a whole.

---

[17] The Bosnia Daily No. 927 of 26 January 2005 writes: "... every firm is subject of control, for example, three market inspections (municipality, cantonal and federal). In practice, that means that if employer gives bribe, two other inspections will visit him/her, but if he doesn't, all three inspections will be regular visitors of the firm."

[18] Cf. the Opinion of the Commission on the implementation of the decision of the Constitutional Court through the constitutional amendments in RS (document CDL-AD(2002)024 at 11). The reasoning there also applies to the parallel provision in the FBiH Constitution.

57. At present constitutional reform strengthening local self-government is already being discussed within the Constitutional Commission of the Federation[19] and the Commission encourages the adoption of such constitutional amendments. Such a reform would correspond to the generally acknowledged need to strengthen both the State and the municipal level while reviewing the powers of the levels in between.

58. The Commission would also like to recall that in the year 2000 it took part in a process of reform of the Federation Constitution at the request of the Constitutional Commission of the FBiH parliament. This process of reform was interrupted due to the political priority of the implementation of the Constitutional Court decision on the constituent peoples. However, at the time it seemed promising and allowed the identification of a number of shortcomings in the FBiH Constitution as well as possible solutions. The Commissions is available to resume this exercise.

59. In conclusion, the Commission notes that constitutional arrangements in the FBiH are neither efficient nor rational. It recommends concentrating legislative responsibilities at the FBiH level and undertaking similar reforms as those recommended for the BiH level with respect to the vital interest veto mechanism and the streamlining in particular of the executive organs. The role of local self-government should be strengthened. Moreover, a comprehensive reform of the FBiH Constitution seems desirable. In the medium term, moving from a system based on ethnic representation to an Entity based on citizenship should also be considered.

4. ***The Republika Srpska***

60. As a unitary entity, the RS does not have the same structural problems as the FBiH. However, the lack of a regional structure within the RS makes it all the more important to strengthen local self-government. This need was generally acknowledged within the RS where the consensus that BiH needs strong local self-government is shared. This consensus is however not yet reflected in the RS Constitution. While its Chapter VI on territorial organisation contains a list of municipal responsibilities, a commitment to the principle of self-government is absent. A constitutional reform strengthening self-government seems therefore a priority.

61. The main problem concerning the functioning of the institutions that was raised by many interlocutors was abuse of the vital interest veto mechanism. This mechanism in the RS is identical to the one in the FBiH and was indeed introduced in parallel with the present version of the FBiH mechanism in the framework of the implementation of the Constitutional Court decision on the constituent peoples. It has the same weaknesses as the FBIH mechanism and the Commission supports reviewing it in parallel. The preferable approach would seem to be to develop a definition of vital interest and a mechanism for resolving disputes which would be parallel in the constitutions of the two Entities and *mutatis mutandis* the State. In this way a constituent people "losing" part of a veto position in an Entity where it is a minority would at the same time gain by governing more easily where it is in the majority while still having to respect the legitimate interests of the other constituent peoples.

62. In the framework of the implementation of the Constitutional Court decision in the "constituent peoples" case, the RS introduced into the Constitution an ethnic approach, which is based on the equality of constituent peoples and distributes official functions between

[19] See the Opinions of the Commission appearing in documents CDL-AD(2004)014 and 032 and CDL(2004)073.

representatives of constituent peoples and Others. The reason was that under the previous, officially ethnically neutral text of the Constitution, non-Serbs were massively discriminated against. As is the case within BiH and the FbiH, it would certainly be desirable to make efforts to build up trust between the communities in the RS so as to arrive in the future at a Constitution based on the equality of citizens and not of peoples.

5. The future perspective

63. In the considerations set forth above, the Commission has concentrated on constitutional changes which seem realistic in the short and medium term. In addition the more long-term perspective of moving from a state based on peoples to a state based on citizens has been raised. Many of the suggested amendments would constitute important steps towards a more citizen-oriented approach.

64. In this more distant perspective, the issue of ownership of the constitutions and their democratic legitimacy also has to be raised. The Constitutions of BiH and the FBiH were political compromises to overcome armed struggle and the main focus was their contribution to the establishment of peace. They were negotiated in foreign countries in a foreign language and can in no way be considered as reflecting a democratic process within the country. The RS Constitution, especially at the origin, was a Constitution drafted in a state of war and was not based on the RS being part of BiH or the wish of the population to integrate with Europe and be in line with European standards. Its aim was to defend the interests of one people and it reflected the legal tradition of the former Yugoslavia.

65. It seems questionable whether any of the three Constitutions provides a sound basis for the future. It is desirable for the citizens at some stage to decide to have an entirely new constitution based on their own wishes and drafted during a period without ethnic strife. This moment may not yet have arrived but when it does it will be crucial that new constitutions not be perceived as being imposed by some ethnic groups on others. A consensus between Bosniacs, Serbs and Croats will be required if this is to be undertaken successfully. Even if this reform is not for tomorrow, one should not lose sight of its desirability. The ultimate goal should be to have democratically legitimate constitutions prepared with the participation of all political forces and civil society in a public and transparent process.

V. THE COMPATIBILITY OF THE CONSTITUTION OF BOSNIA AND HERZEGOVINA WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

1. General considerations

66. The provisions of Article II.2 of the Constitution of BiH set out:

> *"**International Standards.** The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."*

At first sight it should be presumed that the Constitution is in full conformity with the ECHR, to which it gives priority over all other law. Nevertheless, the provisions of the Constitution on the composition and election of the Presidency and the House of Peoples are often considered to be

incompatible with the ECHR. In its Opinion on the electoral law of Bosnia and Herzegovina[20] the Commission has already raised concerns as to the compatibility of these provisions with international standards and the present Opinion partly takes up again arguments developed there. No other problems of compatibility of the BiH Constitution with the ECHR are apparent and the Commission will therefore limit its examination to these two provisions. However, it cannot be overlooked that these two possible contradictions reflect an underlying tension between a constitutional system based on collective equality of ethnic groups and the principle of individual rights and equality of citizens.

2. *Composition and Election of the Presidency*

67. Under the terms of Article V of the Constitution,

> *"The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska."*

This means in particular that:

- to be elected member of the Presidency a citizen has to belong to one of the constituent peoples;
- the choice of the voters is limited to Bosniac and Croat candidates in the FBiH and Serb candidates in the RS; and
- Bosniacs and Croats can be elected only from the territory of the FBiH and not from the RS, Serbs only from the RS and not from the FBiH.

68. In a federal State special arrangements ensuring an appropriate representation of the Entities within the federal institutions are unobjectionable. In principle, in a multi-ethnic State such as Bosnia it appears also legitimate to ensure that a State organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined. The Constitutional Court of BiH referred to this problem in the following terms in its decision concerning constituent peoples in the Entity constitutions:

> *"65. A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph: "The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of Republika Srpska." One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation. He thus represents neither Republika Srpska as an entity nor the Serb people only, but all the citizens of the electoral unit Republika Srpska. And the same is true for the Bosniac and Croat Members to be elected from the Federation."*

69. If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular

[20] CDL-INF(2001)21.

ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the Entity from which they were elected. It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation. The identity of interests in this ethnically-dominated manner impedes the development of a wider sense of nationhood.

70. Furthermore, members of the three constituent peoples can be elected to the Presidency but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. Moreover, the Election Law (based on the corresponding provisions of the Constitution) clearly excludes Others, i.e. citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and to stand for election under Article 25 of the ICCPR or with the equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention for the Protection of National Minorities to formally exclude members of minorities from a public office.

71. With respect to the ECHR it has to be taken into account that Art. 14 ECHR provides that "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*" A violation of this article can therefore only be assumed if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature.

72. However, it has also to be taken into account that BiH has ratified Protocol No. 12 to the ECHR, which guarantees the enjoyment of any right set forth by law without discrimination. This Protocol will enter into force soon, on 1 April 2005, and the prohibition of discrimination will thereby be extended to cover the right to elect a President or stand for election as President.

73. One might however still wonder whether under the specific, fairly exceptional, conditions of BiH such an apparent discrimination may be justified. The European Court of Human Rights in its decisions *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987and *Melnychenko v. Ukraine* of 19 October 2004 seemed willing to leave to States a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

74. In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination.

75. This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common

European standards. It has now ratified the ECHR and its Protocol No. 12. As set forth above, the situation in BiH has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

76. This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the rules on the Presidency to make them compatible with international standards while maintaining the political balance in the country.

77. A multi-ethnic composition can be ensured in a non-discriminatory way, for example by providing that not more than one member of the Presidency may belong to the same people or the Others and combining this with an electoral system ensuring representation of both Entities. Or, as suggested above, as a more radical solution which would be preferable in the view of the Commission, the collective Presidency could be abolished and replaced by an indirectly elected President with very limited powers.

3. Composition and election of the House of Peoples

78. With respect to the House of Peoples of BiH, Art. IV of the Constitution provides:

> *"1. House of Peoples.*
> *The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).*
> *(a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska."*

Therefore:

- only citizens identified as belonging to one of the three constituent peoples can be elected to the House of Peoples;
- Serbs can only be elected to the House of Peoples from the Republika Srpska, Bosniacs and Croats only from the Federation of Bosnia and Herzegovina;
- within the House of Peoples of the Federation, only the Bosniac and Croat delegates may take part in the election; other delegates are deprived of the right to vote in this respect.

These rules raise particular problems with respect to the Federation. As regards the right to vote, this right applies also to indirect elections. In the Federation not all members of the Federation House of Peoples may vote but only the Croat and Bosniac members. There is therefore no equality between the parliamentarians. In the RS the situation is somewhat different since all members of the National Assembly may take part in the election although their choice is limited to Serb candidates. Although these rules reflect the same difficulties of mixing ethnic and territorial concepts as expressed in relation to the BiH Presidency, it is difficult to find a legal rationale for this different treatment of the same election in the two Entities, especially since this

question is regulated by the Constitution of the State and not individually by the Constitutions of the Entities.

79. With respect to the right to stand for election, as in the case of the BiH Presidency, persons not identifying themselves as Bosniac, Croat or Serb are completely excluded. In addition, entity and ethnicity are linked and only Serbs from the RS and Croats and Bosniacs from the Federation may be elected. No Serb from the Federation and no Croat or Bosniac from the RS may sit in the House of Peoples, which is a chamber with full legislative powers. A significant part of the population of BiH therefore does not have the right to stand for elections to the House of Peoples.

80. The House of Peoples is a Chamber with full legislative powers. Article 3 of the (first) Protocol to the ECHR is thereby applicable and any discrimination on ethnic grounds is thereby prohibited by Art. 14 ECHR. As to a possible justification, the same considerations as with respect to the Presidency apply. While it is a legitimate aim to try to ensure an ethnic balance within Parliament in the interest of peace and stability, this can justify ethnic discrimination only if there are no other means to achieve this goal and if the rights of minorities are adequately respected. For the House of Peoples it would for example be possible to fix a maximum number of seats to be occupied by representatives from each constituent people. Or, as argued above, a more radical solution which would have the preference of the Commission, could be chosen and the House of Peoples simply be abolished and the vital national interest mechanism be exercised within the House of Representatives.

4. Compatibility with the European Charter of Local Self-Government

82. The Constitution of BiH does not contain any provision on local self-government. Since local self-government is within the responsibility of the Entities, this is not surprising. However, having regard to the general consensus in BiH in favour of strong local self-government, it would seem appropriate to introduce a reference to this principle into the text of the Constitution.

5. Conclusions

83. In conclusion, the rules on the composition and election of the Presidency and the House of Peoples raise concerns as to their compatibility with the European Convention on Human Rights. The rules on the composition and election of the House of Peoples seem incompatible with Art. 14 ECHR, the rules on the composition and election of the Presidency seem incompatible with Protocol No. 12, which enters into force for BiH on 1 April 2005.

VI. THE COMPATIBILITY OF THE POWERS OF THE HIGH REPRESENTATIVE WITH COUNCIL OF EUROPE STANDARDS

1. The scope of the powers of the High Representative

84. As set forth above, the High Representative derives his powers from Annex X to the Dayton Agreement making him the *"final authority in theatre regarding the interpretation of this Agreement on the civilian implementation of the peace settlement"* and giving him, inter alia, the power to *"facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation."*

85. The powers of the High Representative resulting from this Annex were extensively interpreted at the Bonn Peace Implementation Conference of 10 December 1997. In the Conclusions of the Conference it is stated:

> *"The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:*
>
> *a. timing, location and chairmanship of meetings of the common institutions;*
> *b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;*
> *c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation."*

86. The main actions undertaken by the High Representative on this basis[21] were, on the one hand, to impose legislation, both at state level and within the Entities, including amendments to the Entity constitutions, and, on the other hand, to remove from office civil servants or elected public officials (including the President of an Entity and a member of the Presidency of BiH) who failed to co-operate in the implementation of the Dayton Agreement with a particular focus on lack of co-operation with the International Criminal Tribunal for the Former Yugoslavia (ICTY). There are other individual acts of the High Representative, e.g. on business licenses, but these raise legal issues of a similar nature and will not be examined separately. From a political point of view, these actions by the High Representative seem to have been beneficial. Without them, BiH would not have been able to achieve the progress it has already made. This opinion is not only expressed by the representatives of the international community but widely shared by the local population and most politicians, at least in the FBiH. As set forth in Resolution 1384, it is however certainly not a normal situation that an unelected foreigner exercises such powers in a Council of Europe member state and the justification for these powers for the future merits not only political but also legal consideration. The powers can be qualified as emergency powers. By their very nature, emergency powers have however to cease together with the emergency originally justifying their use.

2. The power to enact legislation

87. The High Representative has enacted many laws, both completely new laws and amendments to existing legislation, and has even amended Entity Constitutions. As set forth above, the legislative process in BiH is unduly cumbersome and provides far too many opportunities to block the adoption of legislation. The politicians representing the various constituent peoples tended to be unable or unwilling to reach an agreement on most matters. The power of the High Representative to enact legislation therefore provides a safety valve making it possible to adopt urgently required legal texts. It also seems a fair assessment to state that these decisions of the High Representative were generally taken in the best interest of the country, were responsible for much of

[21] The decisions of the High Representative are accessible at the web site of OHR http://www.ohr.int.

the progress made by BiH hitherto and were a necessary basis for the implementation of the reforms bringing the country closer to European standards. Generally, these decisions seem to have been beneficial for the people of BiH. In particular, they were decisive for establishing freedom of movement throughout BiH and for facilitating the return of refugees.

88. On the other hand, the concerns with respect to this power are very weighty. The democratic principle of the sovereignty of the people requires that legislation is adopted by a body elected by the people. Art. 3 of the (first) Protocol to the ECHR requires the election of the legislature by the people, and this right is deprived of its content if legislation is adopted by another body. As a member state of the Council of Europe, BiH is responsible for the commitments with respect to the Organisation and this responsibility has to be fulfilled by the country and not by the international community.

89. It also has to be taken into account that the power over such decisions by the High Representative is limited. Politically, the High Representative is responsible before the Peace Implementation Council (PIC) and his decisions often refer to declarations of the Steering Board of the PIC. This is however not a responsibility to the people of BiH (although the personal commitment of the present High Representative and his predecessors to the well-being of the people of BiH is beyond doubt). Legally, the Constitutional Court of BiH exercises judicial control of the constitutionality of the content of legislation enacted by the High Representative in the same way as for legislation adopted by the Parliamentary Assembly of BiH. However, it does not examine whether there was enough justification for the High Representative to enact the legislation instead of leaving it to the democratically elected organs of BiH[22].

90. To sum up, the need for the wide powers exercised by the High Representative certainly existed in the early period following the conclusion of the Dayton Agreement. However, such an arrangement is fundamentally incompatible with the democratic character of the state and the sovereignty of BiH. The longer it stays in place the more questionable it becomes. There is a strong risk of perverse effects: local politicians have no incentive to accept painful but necessary political compromises since they know that, if no agreement is reached, in the end the High Representative can impose the legislation. So why take responsibility and not leave it to the High Representative? A dependency culture incompatible with the future development of BiH risks being created.

91. The Commission notes that the present High Representative himself seems conscious that this power should be used only in exceptional cases and that the quantity of legislation imposed by the High Representative has been reduced since 2002. While it may be premature to immediately abrogate this power of the High Representative, its use should gradually be abandoned, preferably in parallel with a constitutional reform making the legislative process in BiH more efficient.

3. Removals from office by the High Representative

92. The various High Representatives have taken a large number of individual decisions over the years. Most of them concern the removal from office of civil servants or elected politicians. They also, however, include sanctions such as removal from functions in a political party or the freezing of bank accounts. The Commission will focus in its consideration on the removals from office. More than 60 such decisions concerning politicians from the RS were handed over to the

[22] See the decisions by the Constitutional Court U 9/00 of 3 November 2000, U16/00 of 2 February 2001, U 25/00 of 23 March 2001 and U 26/01 of 28 September 2001.

delegation by the President of the RS, Mr Cavic. The majority of removals by the High Representative is based on non-co-operation with the ICTY. There are however also removals for corruption or mismanagement of public assets or other offences such as interference with the judiciary or not carrying out duties as a judge. Earlier decisions refer to obstructing the implementation of the Dayton Agreement by not respecting the institutions established by the Agreement (establishment of parallel institutions). The decisions always take immediate effect. They include a bar to holding future public office which is not limited in time (usually until the High Representative lifts the ban). However, recently the High Representative has taken the initiative of starting a process of rehabilitation of some of the persons dismissed earlier.

93. The decisions by the High Representative are not subject to appeal. The ordinary courts do not have jurisdiction and the Constitutional Court hitherto has in all cases challenging his powers submitted to it declined to take jurisdiction[23]. Several cases are pending before the European Court of Human Rights.

94. The termination of the employment of a public official is a serious interference with the rights of the person concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required.

95. In this context the Commission is certainly not called upon to enter into a quasi-judicial scrutiny of the individual decision of the High Representative. It can only provide a broad general assessment of the compatibility of these decisions with international standards. The removals by the High Representative certainly pursue a legitimate aim and are based on serious grounds. Non-co-operation with ICTY is a serious violation of the international obligations of the country, and corrupt practices as well as the establishment of parallel institutions to the legitimate state institutions also justify tough sanctions. Subject to a detailed case-by-case analysis, the sanction of dismissal does not seem disproportionate to the alleged offences.

96. The main concern is however that the High Representative does not act as an independent court and that there is no possibility of appeal. The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of BiH. He pursues a political agenda, agreed by the international community, which serves the best interests of the country and contributes to the realisation of Council of Europe standards. As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.

97. It would have been unrealistic to have insisted on immediate full compliance with all international standards governing a stable and full-fledged democracy in a post-conflict situation such as existed in BiH following the adoption of the Dayton Agreement. The addressees of the decisions of the High Representatives were often powerful individuals and the actions taken by them were generally actions taken in the perceived interest of their political party or ethnic community. It would furthermore have been unrealistic to expect that the BiH judicial system should have been capable of effectively dealing with such actions in the early post-conflict

[23] See in particular the decision by the Constitutional Court U 37/01 of 2 November 2001. However, in a recent decision on admissibility of 29 September 2004 a chamber of the Constitutional Court rejected an application against a dismissal by the High Representative for non-exhaustion of local remedies. This may indicate that judicial control will after all become possible.

period. It is therefore understandable that the decisions were not made subject to control by th courts of BiH. This situation can however not last forever but, also taking into account th important reforms of the judiciary carried out at the request of or imposed by the Hig Representative, the day must come when such decisions are made subject to full judicial contrc and made the responsibility of the proper national institutions.

98. It is not up to the Commission to indicate a precise date when such a transfer should tak place although it should not be in the too distant future. But even pending such transfer, th present practice will have to be substantially modified to make it acceptable as an interin solution. The continuation of such power being exercised by a non-elected political authorit without any possibility of appeal and any input by an independent body is not acceptable. As a urgent step the Commission recommends setting up an independent panel of legal experts whicl would have to give its consent to any such decision of the High Representative. Having regard t the confidential nature of many elements of the file, this might be a body composed o international experts[24].

99. In order for such a body to work effectively, it will be necessary to define the possibl measures to be taken by the High Representative and the offences justifying such measure clearly and precisely. The conclusions of the Bonn conference are not precise enough to enable legal panel to determine the justification of individual removals. Furthermore, the issue of th duration of the ban on the holding of future public office and of possible rehabilitations will alsc have to be addressed. In this respect, the Commission welcomes as a first step the recent decisio of the High Representative to initiate a process of rehabilitation of some the persons dismissec earlier. If the office of High Representative were to be terminated in the near future, there woulc no longer be a political body enforcing respect for the previous decisions of the Higl Representative but their legal validity would not automatically cease.

4. Conclusions

100. The Commission appreciates the fact that the use of the Bonn powers by the Higl Representative was beneficial for BiH and its citizens and a necessity following a bloody war However, this practice does not correspond to democratic principles when exercised without due process and the possibility of judicial control. Its justification becomes more questionable ove time. The Commission therefore calls for a progressive phasing out of these powers and for the establishment of an advisory panel of independent lawyers for the decisions directly affecting the rights of individuals pending the end of the practice. While BiH may still need more guidance from the international community, this could be provided by more subtle means. At present, the High Representative is at the same time the EU Special Representative. If he were to retain only the role of EU Special Representative comparable to the practice in "the former Yugoslav Republic of Macedonia", this would allow the transformation of the role of the High Representative from a decision-maker into that of a mediator. The interest of the people of BiH in European integration should ensure the effectiveness of this role .

VII. SUMMARY OF MAIN CONCLUSIONS

101. To sum up, the time seems ripe to start a process of reconsideration of the present constitutional arrangements in BiH and the impetus provided by the Parliamentary Assembly in

[24] Cf. the proposal made by the Venice Commission with respect to Kosovo in document CDL-AD(2004)033.

this respect is most welcome. Constitutional reform is indispensable since present arrangements are neither efficient nor rational and lack democratic content.

102. A central element of the first stage of constitutional reform has to be a transfer of responsibilities from the Entities to BiH by means of amendments to the BiH Constitution. This is an indispensable step if any progress is to be achieved in the process of European integration of BiH. This step will be difficult since, as with other constitutional amendments in BiH, it will have to be based on consensus among the representatives of the three constituent peoples. Constitutional reform cannot be imposed. Another element of the first stage should be a streamlining of decision-making procedures within BiH, especially with respect to the vital interest veto, and a reform of the provisions on the composition and election of the Presidency and the House of Peoples which seem either now or following the entry into force of Protocol No. 12 on 1 April 2005 incompatible with the ECHR. The reform of the vital interest veto at the State level could best be carried out in parallel with similar reforms in both Entities.

103. Another pressing issue is the territorial organisation of BiH. In the view of the Venice Commission, any solution implying abolishing the two Entities seems unrealistic in a medium term perspective since this would not be accepted within the RS. A reform of the structures within the FBiH cannot be put on hold in the vague hope of a change of approach in the RS. The most realistic option for such reform, which would also be in line with general European trends, would be to concentrate legislative responsibilities within the FBiH at the Entity level. At the same time, local government in both the FBiH and the RS should be strengthened. Completely abolishing the Cantons would be an even better solution but this may not be politically possible for the moment.

104. Further constitutional reforms, changing the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the medium and long term. If the interests of individuals are conceived as being based mainly on ethnicity, this impedes the development of a wider sense of nationhood. In this context the people of BiH will also have to decide whether they want to replace their present Constitution negotiated as part of a peace treaty by an entirely new Constitution which would enjoy full democratic legitimacy as the fruit of a democratic constituent process in BiH.