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Constitutional reform in Bosnia and Herzegovina

Report

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

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Summary

The Assembly strongly regrets that on 26 April 2006, the Parliament of Bosnia and Herzegovina failed, by just two votes, to reach the required two-thirds majority in the House of Representatives in order to pass constitutional amendments that would have been a first step in the necessary constitutional reform process

This means that the forthcoming elections on 1 October 2006 will be held in violation of Council of Europe commitments, in particular Protocol No. 12 to the European Convention on Human Rights on the prohibition of discrimination, because again only Serbs, Bosniaks and Croats will be able to stand for election to the exclusion of the so-called "Others". The Assembly also regrets that the failure of this first attempt at constitutional reform and the outcome of the referendum in Montenegro on 21 May 2006 are being misused by some of the domestic political forces in the current electoral campaign.

The Assembly expects people and politicians in Bosnia and Herzegovina to again discuss constitutional reform immediately after the October general elections, and if they decide to do this on the basis of the existing proposals, to eliminate at least the entity voting in the House of Representatives and to define more precisely the vital national interest and the related veto mechanism.

The Assembly expects the political leaders who will emerge from the next elections to finally go beyond sectarian political divides and to put the interests of citizens first. 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; in particular, the situation in the Federation of Bosnia and Herzegovina with its 10 cantons will have to be addressed as soon as possible.

As a second step the Assembly therefore urges the authorities of Bosnia and Herzegovina, by October 2010 at the latest, to draft and adopt a new Constitution.

I. Draft resolution

1. Since Bosnia and Herzegovina's accession to the Council of Europe in April 2002, slow but steady progress has been achieved in building a stable, functional and efficient state. Examples are the setting up of a court at State level and the transfer of competences from the Entities to the State in the fields of defence, intelligence, the judiciary, indirect taxation and the forthcoming police reform on the principles of which all parliaments at entity and state level agreed upon in October 2005.

2. To date, however, the continuing weakness of the State and the constitutional necessity to ensure full equality at every level between the 3 constituent peoples have led to a situation where around 60 percent of the GDP is still spent on maintaining state and entity apparatus: there are 3 rotating Presidents at state level, 2 Presidents at entity level, 13 prime-ministers, over 180 ministers, 760 members of various legislative bodies, and 148 municipalities. Furthermore, the voluntary or imposed transfer of a number of competences to the State level has not resulted in a corresponding reduction of the entity apparatus.
3. The Assembly recalls that a key objective of Bosnia and Herzegovina's membership in the Council of Europe is to promote domestic ownership and responsibility for reform. It also recalls its [Resolution 1383](#) (2004) in which it urged the authorities and the political forces in the country to engage in a constructive dialogue on the issue of constitutional reform.
4. The opening of Stabilisation and Association Agreement negotiations with the European Union just before the 10th anniversary of the Dayton Peace agreement in November 2005 makes it even more imperative to take measures to address the generally recognized need to strengthen State institutions that are currently too weak to allow for Bosnia and Herzegovina's further integration into Europe.
5. Different options for a comprehensive constitutional reform were submitted by the Venice Commission, upon request by the Parliamentary Assembly, already in March 2005. Consultations between the leaders of the main political parties in Bosnia and Herzegovina, facilitated by the USA, and with the constant advice of the Venice Commission, resulted in a political agreement on constitutional reform which was finally reached on 18 March 2006 by six political parties and forwarded to Parliament.
6. The reform package provided, *inter alia*, for an increase of the number of Members of Parliament in the state level House of Representatives (from 42 to 87, with 3 seats reserved for the first time to members of non-constituent peoples, the so-called "Others"). The upper house, the House of Peoples, would have 21 instead of 15 members and only competence to decide on the vital national interests' veto that can be invoked by any of the three constituent peoples. The reform also foresaw the indirect election of a State level President and two vice-presidents, whose powers would be reduced, with a rotation of the three members every 16 months instead of 8 at present, the creation of two additional ministries at state level, and a reinforcement of the competences of the Council of Ministers.
7. Although some may have considered these constitutional amendments as being neither comprehensive nor particularly far-reaching, the Assembly considers that they nevertheless represented a first attempt of the citizens of Bosnia and Herzegovina and their representatives to take their future in their own hands and should be welcomed as such.
8. The Assembly therefore strongly regrets that on 26 April 2006, the parliament of Bosnia and Herzegovina failed, by just two votes, to reach the required two-thirds majority in the House of Representatives in order for the constitutional amendments to pass.
9. The Assembly also notes that the failed amendments should have entered into force by 1 May, five months before Bosnia's next general election scheduled for 1 October 2006. It is now clear that the new government will be formed, and quite possibly function for its entire four-year mandate, according to the current constitution, which was part of the 1995 Dayton peace agreement.
10. This means that the forthcoming elections will be held in violation of Council of Europe commitments, in particular Protocol No. 12 to the European Convention on Human Rights on the prohibition of discrimination, because again only Serbs, Bosniaks and Croats will be able to stand for election to the exclusion of the so-called "Others", i.e. everybody not identifying themselves with one of the three constituent peoples.
11. The Assembly also regrets that the failure of this first attempt at constitutional reform and the outcome of the referendum in Montenegro on 21 May 2006 are being grossly misused by some of the domestic political forces in the current electoral campaign: nationalism, ethnic hatred and distrust are again high on the political agenda. This is all the more regrettable since Bosnia and Herzegovina continues to face a dire economic situation and high unemployment, adversely affecting social cohesion and inter-ethnic relations and the sustainable return of internally displaced persons (IDPs).

12. The Assembly in particular condemns the recent statements by the authorities in Republika Srpska (RS) according to which, just like Montenegrins, Serbs in Bosnia and Herzegovina should be entitled to self-determination: a secession referendum in RS has no constitutional basis and the collection of already 50 000 signatures asking for such a referendum has no legal basis.

13. The Assembly also condemns the refusal of the Serb representatives to participate in any meaningful way in the work of the Steering Board of the Police Reform Directorate charged with the implementation of the October 2005 political agreement on Police Reform and the recent decision (24 May) of Serbian parliamentarians to boycott the work of the House of Representatives which prevents the adoption of much needed laws, such as the State level law on Higher education, one of the unfulfilled commitments to the Council of Europe.

14. The Assembly considers that, before the responsibilities for running the state are completely transferred to the domestic authorities, hopefully by June 2007, the country's political forces must absolutely find an alternative to the perpetual confrontation and obstructionism which have so far dominated Bosnian politics.

15. The Assembly strongly believes that the only realistic way out of Bosnia's current constitutional impasse is for the three constituent peoples and their representatives to leave behind their war-time thinking. Serbs, Bosniaks and Croats must show mutual readiness for an open dialogue on all contentious issues: this remains a pre-condition for finding comprehensive and innovative solutions for a future constitutional reform.

16. All citizens of Bosnia and Herzegovina who also hold the citizenship of neighbouring states must realise that they cannot only claim rights but that they also have duties towards the state of Bosnia and Herzegovina. And the civic-minded Bosnians need to abandon their disillusion with the political process and fully engage with it instead.

17. Although it would probably not be realistic to expect that BOSNIA AND HERZEGOVINA move quickly from a system based on ethnic representation to a system based on representation of citizens, drafting a completely new Constitution would certainly in the long run be preferable to trying to improve the Dayton one.

18. As a first step the Assembly expects people and politicians in Bosnia and Herzegovina to again discuss constitutional reform immediately after the October general elections, and if they decide to do this on the basis of the proposals agreed upon so far, to eliminate at least the entity voting in the House of Representatives and to define more precisely the vital national interest and the related veto mechanism. In this respect, the Assembly urges the House of Representatives to take into account all the different recommendations made by the Venice Commission in its Provisional Opinion dated 7 April 2006, both on the text of the failed amendments and on the steps to be taken in the next phase of constitutional reform.

19. The Assembly expects the political leaders who will emerge from the next elections to finally go beyond sectarian political divides and to put the interests of citizens first. 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; in particular the situation in the Federation of Bosnia and Herzegovina with its 10 cantons will have to be addressed as soon as possible.

20. As a second step the Assembly therefore urges the authorities of Bosnia and Herzegovina by October 2010 at the latest, to draft and adopt a new Constitution in order to:

20.1.replace the mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against "Others";

20.2.find efficient and rational decision-making procedures that are not sacrificed to the principle of involving representatives of each constituent people in any decision;

20.3.review the territorial organisation of the State and its division into entities, cantons and municipalities and the repartition of competences between the state and the lower levels with a view to increasing efficiency and sustainability;

20.4.review the necessity of having three official languages;

20.5. examine how to integrate the Brčko District.

21. The Assembly also urges the authorities of Bosnia and Herzegovina to adopt and/or implement, as soon as possible, the laws at state and entity level that are necessary in order to fulfil the remaining Council of Europe commitments, notably:

21.1. the laws on higher education that should include accreditation and financing at state level;

21.2. the State level law on primary and secondary education with a view to ending ethnic segregation in schools;

21.3. the by-laws on a sustainable public broadcasting service;

21.4. the police reform, in accordance with the three principles set by the EU Commission;

21.5. the local government reforms, notably in the Federation, and the reunification of Mostar;

21.6. the laws needed for an effective protection of the rights of all minorities;

21.7. the creation of a state-level supreme court to enhance the reform of the judiciary.

22. The Assembly further reminds the authorities of Bosnia and Herzegovina that the revised European Social Charter, the Charter for the protection of regional and minority languages and the European Outline Convention on transfrontier cooperation remain to be ratified and that the exercise aiming at checking compatibility of all legislation with the provisions of the European Convention of Human Rights should be finalised without further delay.

23. The Assembly also recalls that co-operation with the ICTY and the arrest of MM. Karadžić and Mladić are pre-requisites for any future democratic development in the country. The organisation of a population census at the latest by 2010 and the setting up of a truth and reconciliation commission should also be included on the agenda of the next government.

II. Explanatory memorandum by MM. Çavuşoğlu and Sasi, co-rapporteurs

1. INTRODUCTION

1. In becoming a member of the Council of Europe on 24 April 2002, Bosnia and Herzegovina undertook to honour the obligations placed on all member states under Article 3 of the Organisation's Statute, together with a number of specific commitments set out in [Opinion 234](#) (2002) on Bosnia and Herzegovina's application for membership of the Council of Europe. With a view to ensuring compliance with these commitments, the Assembly decided, pursuant to [Resolution 1115](#)(1997), to closely monitor the situation in Bosnia and Herzegovina as from its accession. The Assembly's first debate on the honouring of obligations and commitments by Bosnia and Herzegovina took place in June 2004 and led to the adoption of [Resolution 1383](#) (2004) and [Recommendation 1664](#)(2004).

2. In [Resolution 1383](#) (2004), the Assembly considered that since accession slow but steady progress had been achieved in building a stable, functional and efficient state. Examples were the setting up of a court at State level and the transfer of competences from the Entities to the State in the fields of defence, intelligence, the judiciary and indirect taxation. But the Assembly also recalled that a key objective of Bosnia and Herzegovina's membership in the Council of Europe was to promote domestic ownership and responsibility for reform and urged the authorities and the political forces in the country to engage in a constructive dialogue on the issue of constitutional reform.

3. Since then, the Co-Rapporteurs have carried out three fact-finding visits to the country, in December 2004, October 2005 and April 2006, the last one on the eve of a much awaited constitutional reform. The present report takes stock of the developments in the field of

constitutional reform and will examine the consequences of the failure of the last attempt at constitutional reform in view of the forthcoming general elections scheduled for 1 October 2006.

2. THE DAYTON CONSTITUTIONAL FRAMEWORK

4. BOSNIA AND HERZEGOVINA declared its independence from FRY in 1992, the Federation of BOSNIA AND HERZEGOVINA was created following the Washington agreement in 1994 and the present state of BOSNIA AND HERZEGOVINA is a result of the 1995 Dayton peace agreement (DPA). The DPA comprises 11 Annexes, including the State Constitution (Annex 4) and other provisions designed to build a peaceful, stable country.

5. The Peace Agreement established Bosnia and Herzegovina as a state comprising two Entities, each with a high degree of autonomy: the Republika Srpska (RS) and the Federation of BOSNIA AND HERZEGOVINA. It has often been said that the DPA ended the war but froze the conflict, that it acknowledged the forceful division of the country, by referring to the three constituent people, and that the institutions it provides for are totally unsuited to the development of a functioning democracy based on the rule of law.

6. The State of BOSNIA AND HERZEGOVINA is presently composed of two Entities and one District:

- the Republika Srpska (RS), whose territory is located in the north-western part of BOSNIA AND HERZEGOVINA bordering on Croatia and in the eastern part of BOSNIA AND HERZEGOVINA, bordering on Serbia and Montenegro;
- a Federation of 10 cantons, grouping mainly Croats and Bosniaks. This entity is called the Federation of BOSNIA AND HERZEGOVINA (FBOSNIA AND HERZEGOVINA);
- the District of Brčko, which has a special statute since the 8 March 1999 arbitration award. A corridor in the Brčko District provides the only territorial link between western and eastern RS.

7. The quasi-independence of the Entities, the weakness of the State and the constitutional necessity to ensure full equality at every level between the 3 constituent people have led to a situation where around 60 percent of the GDP today is still spent on maintaining state and entity apparatus: there are three rotating Presidents at state level, two Entity Presidents, 13 prime-ministers, over 180 ministers, 760 members of various legislative bodies, 148 municipalities and 3 official languages with two alphabets.

8. Each Entity has its own Constitution, Government and bi-cameral Parliament, its own army until recently, its own judiciary (including supreme and constitutional courts) and legal system as well as its own education system and tax and customs system. In the Federation the situation is even more complicated: each canton also has its own constitution, government and cantonal assembly and exclusive competences, for example in the field of education or internal affairs.

3. THE PROCESS OF CONSTITUTIONAL REFORM

a. The dogma of equality between constituent peoples

9. On 19 April 2002 a constitutional reform was enacted in both Entities on the basis of the Mrakovica-Sarajevo Agreement concluded under the auspices of the High Representative, by the main political parties in the country. The crux of the reform was to revise the constitutions of the Federation and the Republika Srpska (RS) in accordance with the landmark decision issued in 2000 by the BOSNIA AND HERZEGOVINA Constitutional Court in the constituent peoples' case.

10. The constitutional amendments aimed at giving equal status to the Bosniaks, Croats and Serbs in both Entities: as of the date of this reform, the RS was not exclusively a Serb entity anymore, the same applying to the Federation in the sense that it is not solely Bosniak and Croat. This reform aimed at ensuring a fairer distribution of posts among the constituent peoples in the Entities' governments, the administration and the judiciary on the basis of the

pre-war 1991 census. At the same time it also provided for a complex mechanism to allow representatives of one constituent people to invoke the vital interests' clause, under a procedure involving the Parliament's House of Peoples in each entity.

11. According to the corresponding accession commitment, this decision has been partly implemented: the House of Peoples in the Federation for example still lacks seven Serb delegates. Equality before the law of each constituent people has however led to collective rights being put before every individual's right in the country. Furthermore, the constant fighting for posts and the squabbles about fair distribution and respect for each constituent people's rights have led to a complete sterilization of political debate and to complete disregard of the notion of the common interest of the country as a whole. The general attitude of most political parties is: each constituent people's interests whenever possible, State building when unavoidable and power at all times.

12. Reviewing the electoral legislation within one year of accession in the light of Council of Europe standards was an accession commitment. It has still not been fulfilled: according to Article 5 of the State Constitution, the tripartite Presidency consists of one Bosniak, one Croat and one Serb. The same applies to the House of Peoples, which according to Article 4 of the Constitution, comprises 15 Delegates, 5 Serbs, 5 Bosniaks and 5 Croats. Only Serbs, Croats or Bosniaks can serve as chair or vice chair of both Houses of Parliament. For the 2002 elections to the State Presidency there were 2 separate lists. Voters registered to vote in the RS could only vote for the Serb Member. Voters registered to vote in the Federation received the Bosniak and Croat list and could choose only one candidate. This is a clear discrimination against "Others".

b. Imposed reforms of state institutions

13. On 3 December 2002, the High Representative, Paddy Ashdown, imposed a Law on the Council of Ministers. The law established a permanent Chair of the Council of Ministers (CoM) and 8 Ministries, compared with the 6 existing before. Two of the Ministers are nominated as Deputy Chairs of CoM. There is no longer a rotation of the Chair. Furthermore there will be only one Deputy Minister and not two. At State level, BOSNIA AND HERZEGOVINA now has a Minister of Foreign Affairs, a Minister of Foreign Trade and Economic Relations, a Minister of Finance and Treasury, a Minister of Communications and Transport (splitting of the former Ministry for Civil Affairs and Communications, MCAC), a Minister of Civil Affairs (also split, formerly MCAC), and a Minister of Human Rights and Refugees. Two new ministerial posts were created: a Minister of Justice and a Minister of Security. The Ministry of European Integration became a Directorate under the authority of the Chair.

c. "Voluntary" transfers of competences from the Entities to the State level

14. Since 2003, mainly upon pressure of the international community, the Entities agreed, albeit grudgingly and with a lack of cooperation with regard to implementation, to set up a court at State level and to the transfer of competences from the Entities to the State in the fields of defence, intelligence (creation of OSA and SIPA), the judiciary (creation of the HJPC), and indirect taxation (introduction of the VAT to replace the former sales' tax). A state level law on primary and secondary education was adopted in 2003, but is not been fully implemented to this day, in particular because of Croat resistance.

15. On 5 October 2005, the Republika Srpska (RS) National Assembly adopted an Agreement on police reform and restructuring, thus removing a substantial obstacle on Bosnia and Herzegovina's long road toward the European Union. The European Commission wasted no time in confirming that very day that the Agreement was in line with its three main principles for police restructuring in BOSNIA AND HERZEGOVINA: i.) exclusive police competency at the State level, but operational control at the local level, ii) police areas drawn up on grounds of operational efficiency, not political control and iii) no political interference in policing

16. The Agreement did not, however, explicitly outline proposed policing regions (in particular crossing the IEBL, i.e. the Inter-Entity Boundary Line), which had been one of the main points of contention during earlier discussions. The BOSNIA AND HERZEGOVINA Council of Ministers as well as the Federation of BOSNIA AND HERZEGOVINA Parliament (FBOSNIA AND HERZEGOVINA) and FBOSNIA AND HERZEGOVINA Government subsequently adopted the Agreement without any changes; the BOSNIA AND HERZEGOVINA Parliamentary Assembly (BOSNIA AND HERZEGOVINA PA) did do so as well on 18 October. Implementation of this

agreement was to take place over a period of 5 years, with the setting up of a Steering Board of the Police Reform Directorate to pilot the reform.

17. The acceptance of police reform and restructuring in line with principles laid down by the European Union at both entity and State level was one of two remaining conditions to be fulfilled before the European Commission could agree to recommend to the European Council that it open negotiations on a Stabilisation and Association Agreement (SAA) with Bosnia and Herzegovina. The opening of SAA negotiations with the European Union just before the 10th anniversary of the Dayton Peace agreement was agreed on 2 November 2005 and confirmed by the European Council in December 2005 but it was made clear that *inter alia* correct implementation of the police reform would be followed closely and remain a pre-condition for the signature of an SAA.

18. On 3 May 2006, having fallen seriously behind schedule as it sought to maintain the principle of decision making by consensus, the Steering Board of the Police Restructuring Directorate resorted to majority voting. By a seven to one vote, the board opted for a two-level structure of policing in BOSNIA AND HERZEGOVINA: state and local. This ballot confirmed the worst fears of the Republika Srpska government, which continues to argue that the RS police and interior ministry must be integral parts of any new national system. RS Prime Minister Milorad Dodik has regularly denounced the potential for "outvoting" in the directorate since taking office in February 2006. Since 3 May, the Serb representatives have been boycotting the work of the steering Board. This should stop immediately.

4. THE 2006 ATTEMPT AT CONSTITUTIONAL REFORM

a. Content and scope of the proposed amendments

19. There has been since 2003 an ongoing debate among political circles and intellectuals in the country as it is widely acknowledged that there are too many levels of authority, that the institutional set-up is far too complicated and that something needs to be done. How to proceed and what model to choose for the future are still big questions. The debate was also fuelled by a reflection on the role of the HR: some western think tanks produced very critical reports notably during 2003 on his exercise of his powers and on the absence of a clear exit strategy of the international community.

20. Structural complexity and numerous levels of authority exist in other European states. Such systems can work as long as there is a clear agreement on who does what, when and how. Without a minimum amount of trust, a willingness to achieve consensus and, most importantly, a sense of common interest, any complex system such as the one existing in BOSNIA AND HERZEGOVINA is bound to fail. For our part, we think that it is up to the people of BOSNIA AND HERZEGOVINA (all the people, not just the three constituent peoples) to decide how best to organize the country. Any proposal for change should come from within, not from outside. Ten years after the end of the war the time is probably now ripe: all political forces agree on the common goal of European integration but there is still not enough trust and confidence and the compromise making process remains slow and painful.

21. The opening of SAA negotiations with the European Union just before the 10th anniversary of the Dayton Peace agreement in November 2005 made it even more imperative to take measures to address the generally recognized need to strengthen State institutions that are currently too weak to allow for Bosnia and Herzegovina's further integration into Europe.

22. Different options for a comprehensive constitutional reform were submitted by the Venice Commission, upon request by the Parliamentary Assembly, already in March 2005. Consultations between the leaders of the main political parties in BOSNIA AND HERZEGOVINA, facilitated by the USA¹, and with the constant advice of the Venice Commission, resulted in a political agreement which was finally reached on 18 March 2006 by 6 political parties and submitted to Parliament. Only three parties (the Party for BOSNIA AND HERZEGOVINA (SBOSNIA AND HERZEGOVINA), BOSS and the Social Democratic Union (SDU) were opposed for various reasons to this constitutional reform and the Catholic Bishop's Conference also voiced objections.

23. The reform package provided, *inter alia*, for an increase of the number of MP's in the House of Representatives (from 42 to 87, with 3 seats reserved for the first time to members of non-constituent peoples). The upper house, the House of Peoples, would have had 21 instead of

15 members and competence to decide only on the vital national interests' veto that can be invoked by any of the three constituent peoples. The reform also foresaw the indirect election of the a President and two vice-presidents whose powers will be reduced, with a rotation of the three members only every 16 months instead of 8 at present, the creation of two additional ministries at state level, and a reinforcement of the competences of the Council of Ministers. The indirect election of the Presidency by parliament instead of directly by the people was aimed at eliminating one of the drawbacks of the current Constitution, i.e. that only members of the three constituent peoples could stand for elections.

b. The failure of the constitutional amendments

24. On 26 April, the Bosnia and Herzegovina Parliamentary Assembly House of Representatives (HoR) did not adopt the principles of the Proposed Amendments to the Constitution of BOSNIA AND HERZEGOVINA. Out of 42 members of the HoR, 26 voted in favour, while 16 voted against. The required majority for the adoption of the amendments to the Constitution is the two thirds of those present and voting members, which on 26 April would have been 28 votes.

25. Positions publicly taken before the session did not alter in most cases. Representatives from the six political parties who signed the Agreement on the changes of the BOSNIA AND HERZEGOVINA Constitution on 18 March were all but one in favour of the proposal. A member of the SDA ("Stranka demokratske akcije" or "Party for Democratic Action", which is predominantly Bosniak in composition) voted against. Several former members of the HDZ BOSNIA AND HERZEGOVINA ("Croat Democratic Union") in the House of Representatives, who supported the position of the recently formed "HDZ 1990", including Martin Raguž, the current Speaker of the HoR and a member of the PACE Delegation, also voted against.

26. The Party for BOSNIA AND HERZEGOVINA, one of the parties in government and one of the eight parties that was present when the negotiations on the constitutional changes started, had publicly come out against the proposed amendments earlier in the year, and left the negotiations before their conclusion. The main objection to the Proposed Amendments related to the so called "entity vote". That is a provision present in the current voting system in the PA, which stipulates that at least one third of the votes for a decision to pass have to come from the territory of each of the entities. In an effort to adopt the amendments, some additional solutions, which could lead to a compromise on this issue, were offered to the representative of the HDZ 1990 and the Party for BOSNIA AND HERZEGOVINA, but they were rejected.

27. Although some may have considered these constitutional amendments as being neither comprehensive nor particularly far-reaching², we consider that they nevertheless represented a first attempt of the citizens of Bosnia and Herzegovina and their representatives to take their future in their own hands and should be welcomed as such. Indeed, instead of reforms being imposed by the High Representative or transfers of competences agreed upon under pressure of the International Community this attempt was for the first time submitted to Parliament where it -democratically- failed to be adopted.

28. For many observers however, it was obvious from day one that the parties treated the whole process as a power game³. Parties from Republika Srpska (RS) entered the negotiations under condition that Bosnia's division into entities would not be on the table, nor would the "entity voting system" in the House of Representatives be discussed -- even though these two aspects of Bosnia's post-war set-up had been identified by most independent observers as among Dayton's key deficiencies.

29. It is this voting system, the insistence on it and its political implications, which is to blame for the failure of the constitutional initiative, not a handful of individual representatives who voted against the proposal.

30. The entity voting system consists of decision-making procedures in Bosnia's state-level parliament whereby all decisions need to be taken by a majority that includes one-third of the delegates from each entity. According to many expert opinions, most notably those issued by the Venice Commission, this protection against majority rule by the largest ethnic group is redundant since all decisions need to be approved anyway by the upper chamber of parliament, which can block any decision that threatens the national interest of one people.

31. Parties from RS insisted on keeping this system for purely political purposes – this mechanism has ensured that nothing can be done in Bosnia without the explicit approval from the RS.

32. An important feature of the protection provided by entity voting in the House of Representatives is that there is no remedy to overcome blockage. This was particularly significant in the context of another proposal contained in the amendments, which would have introduced a procedure for indirectly electing the Bosnian presidency, which would subsequently appoint the prime minister. Preserving entity voting would have meant that the RS would have been in a position to indefinitely block the formation of a state-level government.

33. This is a decisive difference to disputes involving national interests in the House of People, where the issue is eventually referred to the Constitutional Court, whose decisions are binding. Of its nine judges, two are from each of the three constituent peoples, while three are foreigners. This makes it impossible to predict whether a specific issue will indeed be ruled as involving the national interest of a particular people, and it certainly does not allow much room for abusing the right to invoke the national interest protection clause. For political purposes, then, the entity voting system is a much more powerful instrument.

34. It is also a powerful instrument to ward off any attempts in a second phase of constitutional reform, a possibility announced before the conclusion of the first phase, to tackle the entity set-up. Any second phase would under these circumstances have had to accept the entity structure as a given.

35. This system of voting has been particularly unfair to the smallest constituent people, the Croats, who would indeed be in an unequal position with the two other peoples and would never be able to realize any of the benefits the model provides to the other two peoples. "Others", who do not identify with any of the three constituent peoples, would be in a similar situation.

36. The lesson from this constitutional episode is thus straightforward: a key reason for its failure was the unanimous insistence by all RS parties on keeping entity voting. Should the international community have the appetite for another effort at "facilitating" constitutional change it will need to address this issue more thoroughly and resolutely since it is nothing but a demonstration of war-time thinking from the RS. If the failed proposal is to be more successful in parliament – and it is likely that future reform initiatives will take it as their point of departure – the entity voting clause must be dropped. The parties from RS need to be persuaded that protection mechanisms need to be equal for all, and that in today's peaceful environment the House of Peoples provides such protection for any truly genuine issue of national interest.

5. CONSEQUENCES OF THE FAILURE OF CONSTITUTIONAL REFORM

a. General Elections called for 1 October 2006

37. The failed amendments should have entered into force by 1 May, five months before Bosnia's next general elections scheduled for 1 October 2006. It is now clear that the new authorities will be formed, and quite possibly function for their entire four-year mandate, according to the current constitution, which was part of the 1995 Dayton peace agreement.

38. This means that the forthcoming elections will be held in violation of Council of Europe commitments, in particular Protocol No. 12 on the prohibition of discrimination, because again only Serbs, Bosniaks and Croats will be able to stand for election which excludes the so-called "Others", i.e. everybody not identifying themselves with one of the three constituent peoples.

39. As required by law, the Central Election Commission announced on 4 May that general elections will take place on 1 October. Given the rejection of the constitutional reforms, these general elections will comprise entity-based direct elections to the State of BOSNIA AND HERZEGOVINA Presidency and House of Representatives, elections for the Federation House of Representatives, and for the ten cantonal assemblies in the Federation; elections for the President and two Vice-Presidents of Republika Srpska, as well as the RS National Assembly.

40. 47 parties and 10 independent candidates registered for the elections. The introduction of "passive voter registration" based on identity cards means that the pool of eligible voters will be some 15 per cent larger than under the former system whereby would-be voters had to re-

register before each election. Another change is that the official electronic media campaign is being reduced from 60 to 30 days. Parties will also be allowed to spend two-thirds less money per voter during their campaigns. The entire process is expected to cost the country between KM 8 and 9 million.

41. The electoral campaign which has already started promises to be nationalistic and dirty: all the three main "ethnic" parties, SDA (Bosniak), SDS and SNSD (Serb) and HDZ as well as HDZ 1990 (Croat) again rely on nationalistic arguments and spread fear of the other communities in Bosnia in order to secure their ethnic communities' vote. This is all the more regrettable since BOSNIA AND HERZEGOVINA continues to face a dire economic situation and high unemployment, adversely affecting social cohesion and inter-ethnic relations and the sustainable return of internally displaced persons (IDPs).

b. Other consequences

42. On 18 May 2006 Council of Ministers (CoM) Chairman Adnan Terzić narrowly survived a Serb-initiated no-confidence vote over his reluctance to establish a State Commission to investigate the wartime missing of Sarajevo. On 24 May the Serb deputies began a boycott of Parliament in response to Terzić's intransigence. Even after a CoM decision to establish the Commission, the Serbs continued to boycott Parliament until recently. RS Prime Minister Milorad Dodik from the SNSD, who toppled the SDS Government of the RS back in February 2006 also refuses Serb participation in the Steering Board for Police reform (see above, § 18). Despite resignation of the RS Police Chief Andan in April 2006, no progress has been made either in the search and arrest of Mladić and Karadzic and cooperation with the ICTY remains insufficient.

c. Delays in fulfilling CoE Commitments

Local self government

43. At the State level, the European Outline Convention on Transfrontier Co-operation and its Amending Protocols have not yet been ratified, the deadline having expired two years ago. Local democracy continues to follow different developments in the two Entities.

44. In the Federation of Bosnia and Herzegovina (FBosnia and Herzegovina), a Law on the Principles of Local-Self Government has been adopted. However, the constitutional amendments to the Federation Constitution, necessary for its full implementation, were rejected in the House of Peoples by the Croat representatives who want to keep the existing prerogatives at cantonal level. This leads to the impossibility to apply the Law on Local Self-Government, which had been prepared with the assistance of the CoE.

45. In the RS, there has been some transfer of ownership of utilities and property issues to the local authorities. However, the local municipalities and towns are still with insufficient competences, compared with European standards.

State level law on higher education

46. On the other hand, since January 2003, when at the request of the Office of the High Representative, the Council of Europe launched the process of drafting a state-level higher education law for Bosnia and Herzegovina, no progress has been made. The main provisions of the law included creating a state-level institution for recognition and quality assurance, raising the level of competency for higher education from the cantons to the entity level in the Federation when the necessary constitutional changes were enacted and integrating universities into one legal entity.

47. The discussions on the draft law became highly politicised and the draft law submitted to parliamentary procedure in January 2004 was blocked in Parliament by the Croat caucus by invoking 'vital national interest'. The results were two fold: on the one hand, the BOSNIA AND HERZEGOVINA Constitutional Court ruled that a clause on language was unconstitutional and reaffirmed the notion that all three constituent languages must be treated equally at all higher education institutions in BOSNIA AND HERZEGOVINA. The Constitutional Court also ruled that education was a vital national interest, thereby requiring a majority vote by all three caucuses in the House of Peoples. The law was rejected by the Croat caucus in July 2004, resulting in the

loss of a large World Bank loan and BOSNIA AND HERZEGOVINA being ranked as one of the lowest in Europe in regard to its implementation of Bologna Process reforms.

48. In November 2005 under the auspices of the Prime Minister and the then EU President, the UK Ambassador to BOSNIA AND HERZEGOVINA, another process was launched to develop a draft that was politically palatable to all parties. On 11 April 2006, after months of lobbying by the International Community, the State Minister of Civil Affairs convened a meeting of all the country's Ministers of Education. The Ministers agreed that four pending education laws - a draft law regulating higher education law, a draft law creating a state-level education agency, and draft laws on pre-school and vocational education and training law—needed urgently to be forwarded to Parliament for consideration and adoption.

49. The passage of these laws, a CoE commitment, is important both for the continuation of negotiations on a Stabilisation and Association Agreement with the European Union and for the creation of uniform education standards and norms in all parts of Bosnia and Herzegovina.

50. The draft produced by the working group was accepted at the highest political level with the exception of accreditation of higher education institutions. Following consultations by the Prime Minister with other political party leaders, an amendment was introduced that would put decision making functions for accreditation at the level of the state.

51. The draft law passed the Council of Ministers on 1 June 2006, but without the support from the Serbs. The draft law is now being considering by the Parliament. In the meantime, a Bosnian-Serb Parliamentarian introduced a draft law into the BOSNIA AND HERZEGOVINA Parliament in the autumn of 2005 and in June 2006 the RS Government forwarded a draft entity higher education law to the RS National Assembly. Both drafts essentially would create two higher education systems within BOSNIA AND HERZEGOVINA along entity lines.

52. With the Republika Srpska reluctant to see any authority transferred to the State level, and the Croats opposed to any transfer of existing cantonal powers to anything other than the State, these fundamental divisions will without doubt re-surface during parliamentary procedure and block the adoption of this law before the elections. We urge Parliament to adopt this law without further delay, and to provide for accreditation and financing at state level.

53. Similarly, Mostar unification remains stalled, with an agreement on the 2006 budget arrived at on only after intervention by the High Representative in May 2006.

Other commitments

54. We also urge the authorities of Bosnia and Herzegovina to adopt and/or implement, as soon as possible, the laws at state and entity level that are necessary in order to fulfil the remaining Council of Europe commitments notably:

- the State level law on primary and secondary education with a view to ending ethnic segregation in schools and implementing the 9 year curriculum;
- the by-laws on a sustainable public broadcasting service;
- the police reform, in accordance with the three principles set by the EU Commission;
- the laws needed for an effective protection of the rights of all minorities, especially Roma;
- the creation of a state-level supreme court to enhance the reform of the judiciary.

55. We further remind the authorities of Bosnia and Herzegovina that the revised European social Charter, the Charter for the protection of regional and minority languages and the European outline convention on transfrontier cooperation remain to be ratified and that the exercise aiming at checking compatibility of all legislation with the provisions of the European Convention of Human Rights should be finalised without further delay.

56. We also recall that cooperation with the ICTY and the arrest of Karadžić and Mladić are pre-requisites for any future democratic development in the country. The organisation of a population census at the latest by 2010 and the setting up of a truth and reconciliation commission should also be included on the agenda of the next government.

57. Apart from the failure of the constitutional reform, two other events are fuelling the pre-electoral nationalistic rhetoric: one is the ongoing suit against Serbia-Montenegro for aggression and genocide before the International Court of Justice in The Hague and the other is the outcome of the secession referendum in Montenegro on 21 May.

b. The genocide suit against Belgrade in The Hague

58. Hearings in Bosnia & Herzegovina's genocide suit against Serbia & Montenegro at the International Court of Justice in The Hague (ICJ) concluded on 9 May. Although initiated already in 1993 by the then Republic of Bosnia & Herzegovina against Slobodan Milošević's Federal Republic of Yugoslavia, procedural wrangles, political upheavals and arguments over the court's competency to try the case delayed the opening of proceedings until 27 February this year.

59. Buoyed by previous ICTY prosecutions and verdicts, the BOSNIA AND HERZEGOVINA legal team expressed confidence that it had demonstrated both that genocide had been committed during the 1992-95 war and that the former Yugoslav People's Army, the Yugoslav security services and Milošević's government had been deeply implicated. Belgrade's lawyers, on the other hand, continued to contend that the suspension of Yugoslavia's UN membership during the period rendered the ICJ incompetent to try the case.

60. As the first ever genocide suit by one state against another, the case is historic. It is also fraught with potentially explosive political implications. The seventeen judges must first rule on whether they are competent to assess the merits of the case. Given mixed precedents, it is far from certain that they will proceed. If they do, however, other precedents make it likely that BOSNIA AND HERZEGOVINA will win, probably before the end of the year. Such a victory would help assuage, particularly among Bosniaks, the demand for justice that the Hague Tribunal has largely failed to meet; but it could also poison future relations with Serbia and complicate inter-ethnic (and inter-ethnic) relations inside BOSNIA AND HERZEGOVINA.

61. Since any massive reparations bill would be beyond Belgrade's means to pay, it could have the effect of inciting lasting grievances on both sides. Republika Srpska politicians, meanwhile, have raised the ante by their longstanding denunciation of the suit and propagation of the notion that a ruling in favour of BOSNIA AND HERZEGOVINA would somehow "abolish" the RS. Bosniaks have been only too eager to embrace this idea.

c. The outcome of the Montenegro referendum on 21 May 2006

62. On 21 May 2006 Montenegro chose to become an independent state. The referendum held on the future status of the Republic of Montenegro offered voters the choice between independence and remaining in the State Union with Serbia. The result saw 55.5% of the voters vote in favour of independence. The turn-out exceeded 86 percent, which illustrated the political awareness of the electorate and the democratic maturity of Montenegro.

63. Following the outcome of the referendum, the National Assembly of Montenegro adopted a Declaration of Independence on 3 June 2006. Montenegro is now a new, independent and sovereign state with full international legal personality. In accordance with the 2003 Constitutional Charter of the State Union of Serbia and Montenegro, the Republic of Serbia is the successor state to the State Union, also as regards the membership in international organisations.

64. The referendum in Montenegro was almost immediately exploited by RS leaders who called for a similar secessionist operation. The RS Prime Minister announced a full state visit to Banja Luka of Serbian PM Kostunica, which prompted sharp reactions from both the State authorities and the High Representative recalling that the RS was not a sovereign state. We regret that the outcome of the referendum in Montenegro on 21 May 2006 is now being grossly misused by some of the domestic political forces in the current electoral campaign: nationalism, ethnic hatred and distrust are again high on the political agenda. This is all the more regrettable since Bosnia and Herzegovina continues to face a dire economic situation and high

unemployment, adversely affecting social cohesion and inter-ethnic relations and the sustainable return of internally displaced persons (IDPs).

65. We in particular condemn the recent statements by the authorities in Republika Srpska (RS) according to which, just like Montenegrins, Serbs in Bosnia and Herzegovina should be entitled to self-determination: a secession referendum in RS has no constitutional basis and the collection of already 50 000 signatures asking for such a referendum has no legal basis.

66. It is worth recalling in this connection that the possibility for each party to the State Union to hold a referendum for independence was laid down in the Constitutional Charter of the State Union of Serbia and Montenegro (2003). After the elapsing of the three-year moratorium, on 1 March 2006 the Parliament of Montenegro adopted the Law on the Referendum on State Legal Status (LRSL) and decided to pursue the process which then led to the secession from the State Union.

67. The current Dayton Constitution does not provide for any possibility for a referendum, neither on independence nor on any other subject. Furthermore, Montenegro was a Republic already in Tito's times: this has never been the case for Republika Srpska which exists only since the Dayton Peace Agreement. Any talk about a possible secession of Republika Srpska should therefore stop immediately.

68. In this climate, it has unfortunately become clear that there is no prospect of constitutional reform before the elections.

6. NEXT STEPS TO BE TAKEN

69. We strongly believe that the only realistic way out of Bosnia's current constitutional impasse is for the three constituent peoples and their representatives to leave behind their war-time thinking. Mutual readiness for an open dialogue on all contentious issues remains a pre-condition for finding comprehensive and innovative solutions for a future constitutional reform. The Serbs need to accept that the Republika Srpska cannot persist under its current name⁴ and the political philosophy of its founders; the Bosniaks need to overcome their current tendency to victimization and develop innovative concepts of decentralization and protection of those who are not a majority. The Croats, who are the smallest constituent people, cannot continue to claim equal rights as a constituent people and at the same time demand specific minority rights.

70. All citizens of Bosnia and Herzegovina who also hold the citizenship of neighbouring states must realise that they cannot only claim rights but that they also have duties towards the state of Bosnia and Herzegovina. And the Bosnian voters need to abandon their disillusion with the political process and fully engage with it instead.

71. Although it would probably not be realistic to expect that BOSNIA AND HERZEGOVINA move quickly from a system based on ethnic representation to a system based on representation of citizens, drafting a completely new Constitution would certainly in the long run be preferable to trying to improve the Dayton one.

72. As a first step we expect people and politicians in BOSNIA AND HERZEGOVINA to again discuss constitutional reform immediately after the October general elections, and if they decide to do this on the basis of the proposals agreed upon so far, to eliminate at least the entity voting in the House of Representatives and to define more precisely the vital national interest and the related veto mechanism. In this respect, we urge the House of Representatives to take into account all the different recommendations made by the Venice Commission in its Provisional Opinion dated 7 April 2006, both on the text of the failed amendments and on the steps to be taken in the next phase of constitutional reform.

73. We hope the political leaders who will emerge from the next elections finally go beyond sectarian political divides and put the interests of citizens first. 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; in particular the situation in the Federation of Bosnia and Herzegovina with its 10 cantons will have to be addressed as soon as possible.

74. As a second step we would therefore urge the authorities of Bosnia and Herzegovina by October 2010 at the latest, to draft and adopt a new Constitution in order to:

- to replace the mechanisms of ethnic representation by representation based on the civic principle notably by ending the constitutional discrimination against "Others";
- to find efficient and rational decision-making procedures that are not sacrificed to the principle of involving representatives of each constituent people in any decision;
- to review the territorial organisation of the State and its division into entities, cantons and municipalities and the repartition of competences between the state and the lower levels with a view to increasing efficiency and sustainability;
- to review the necessity of having three official languages;
- to examine how to integrate the Brčko District.

Reporting committee: Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).

Reference to committee: Reference No. 3246 of 26 June 2006

Draft Resolution unanimously adopted by the committee on 27 June 2006.

Members of the committee: Mr György **Frun**da (Chairperson), Mrs Hanne Severinsen (1st Vice-Chairperson), Mr Mikko **Elo** (2nd Vice-Chairperson), Mr Tigran **Torosyan** (3rd Vice-Chairperson), Mr Aydin **Abbasov**, Mr Pedro **Agramunt**, Mr René André, Mr Birgir **Árman**sson, Mr Giuseppe Arzilli, Mr Jaume **Bartumeu Cassany**, Mrs Mertixell Batet, Mrs Gülsün Bilgehan, Mrs Mimount Bousakla, Mr Luc Van den Brande, Mr Patrick **Breen**, Mrs Beáta Brestensktá, Mr Milos Budin, Mr Mevlüt **Çavuşoğlu**, Ms Lise **Christoffersen**, Mr Boriss Čilevičs, Mr Georges **Colombier**, Mrs Herta Däubler-Gmelin, Mr Joseph Debono Grech, Mr Juris Dobelis, Mrs Josette Durrieu, Mr Mátyás Eörsi, Mr Per-Kristian Foss, Mrs Urszula **Gacek**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Marcel Glesener, Mr Charles Goerens, Mr Stef Goris, Mr Andreas Gross, Mr Alfred Gusenbauer, Mr Michael **Hagberg**, Ms Gultakin Hajiyeva, Mr Michael **Hancock**, Mr Andres Herkel, Mr Elmir Jahić, Mr Erik Jurgens, Mr Evgeni Kirilov, Mr Konstantin Kosachev, Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Eduard **Lintner**, Mr Tony Lloyd, Mr Mikhail Margelov, Mr Bernard Marquet, Mr Frano **Matušić**, Mr Miloš Melčák, Mrs Nadezhda Mikhailova, Mr Neven Mimica, Mr Paschal Mooney, Mr João Bosco Mota Amaral, Mr Zsolt Németh, Mr Ibrahim **Özal**, Mr Theodoros Pangalos, Mr Leo Platvoet, Ms Maria **Postoico**, Mr Christos Pourgourides, Mr Anatoliy Rakhansky, Mr Johannes Randegger, Mr Dario Rivolta, Mr Armen Rustamyan, Mrs Katrin Saks, Mr Rudy Salles, Mr Kimmo **Sasi**, Mr Adrian Severin, Mr Samad **Seyidov**, Mr Vitaliy Shybko, Mr Leonid Slutsky, Mr Michael Spindelegger, Mrs Elene **Tevdoradze**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mr José Vera Jardim, Mrs Birutė Vėsaitė, Mr Oldřich Vojtř, Mr David Wilshire, Mrs Renate Wohlwend, Mr Emanuelis Zingeris, ZZ....

N.B. The names of those members who were present at the meeting are printed in bold.

Secretariat of the committee: Mrs Ravaud, Mrs Chatzivassiliou, Mrs Theophilova-Permaul, Mrs Odrats

¹ In particular by Don Hays, former Deputy High Representative, now working for the USIP (United States Institute for Peace, the American Ambassador in BOSNIA AND HERZEGOVINA, with the support of the US State Department.

² Haris Siladzic, now President of SBosnia and Herzegovina, whom we saw in April, considered in particular that the international community, by calling upon Parliament to adopt the amendments as a first step in the process of constitutional reform, was in fact giving legitimacy to Republika Srpska, according to him an entity based on aggression and genocide.

³ See "Overcoming the War in the Heads: Renewing Bosnia's Constitutional Debate", policy brief by CEIS (Center for European Integration strategies), 4 May 2006.

⁴ There is currently a case pending before the Constitutional Court precisely on that issue.