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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION ON THE COMPATIBILITY
OF THE EXISTING LEGISLATION IN MONTENEGRO
CONCERNING THE ORGANISATION OF REFERENDUMS
WITH APPLICABLE INTERNATIONAL STANDARDS**

on the basis of comments by

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I. INTRODUCTION

1. On 27 May 2005, the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the compatibility with applicable international standards of the existing legislation in Montenegro concerning the organisation of referendums, with a special focus on the issues of required turnout, majority and the criteria for the eligibility to vote.

2. This request refers to the plan of the Montenegrin authorities to organise a referendum on the independence of the country. At present, on the basis of the Constitutional Charter, which entered into force on 4 February 2003, Montenegro is a member state of the State Union of Serbia and Montenegro. Under the terms of its Article 60, it may however withdraw from the State Union following a referendum in accordance with recognised democratic standards. Article 60 stipulates:

“Upon the expiry of a three-year period the member state shall have the right to initiate the procedure for a change of the state status, i.e. for withdrawal from the State Union of Serbia and Montenegro.

A decision to withdraw from the State Union of Serbia and Montenegro shall be made after a referendum has been held. The Law on Referendum shall be passed by a member state, taking into account recognised democratic standards.

If Montenegro withdraws from the State Union of Serbia and Montenegro, the international documents related to the Federal Republic of Yugoslavia, particularly United Nations Security Council Resolution 1244, shall pertain and apply fully to Serbia as its successor.

The member state that exercises the right of withdrawal shall not inherit the right to international legal personality and all outstanding issues shall be regulated separately between the successor state and the state that has become independent.

If both member states declare in a referendum that they are in favour of changing the state status, i.e. in favour of independence, all outstanding issues shall be resolved in the succession procedure, as was the case with the former Socialist Federal Republic of Yugoslavia.”

3. The Agreement amending the Constitutional Charter, adopted on 7 April 2005, goes further than the Charter. It requires the regulations for the referendum to be founded on internationally recognised standards; it stipulates:

“1. Direct elections to the Parliament of Serbia-Montenegro are to be held separately, in both member states, once elections for republic legislatures are held. The terms of office of the present members of parliament will be extended until those elections are held.

2. The member states will continue to fulfill obligations extant in the Constitutional Charter. They will also continue the work on meeting the conditions for further progress in European integration, including full cooperation with the Hague tribunal. They will work together on achieving progress in the Process of Stabilisation and Association, in accordance with the two-track approach, as arranged with the European Union.

3. Regulations on a possible referendum, in accordance with Article 60 of the Constitutional Charter, must be founded on internationally recognized democratic standards.

The member state organising a referendum will cooperate with the European Union on respecting international democratic standards, as envisaged by the Constitutional Charter.

4. The legislatures of member states and the Parliament of Serbia-Montenegro will adopt paragraphs one and three as an amendment to the Constitutional Charter and the Law on implementing the Constitutional Charter.”

4. At its 48th Plenary Session in October 2001, the Venice Commission adopted an Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia (CDL-INF(2001)023). This interim report contained a legal assessment of a possible referendum on the status of Montenegro. Several of the constitutional issues taken up in the interim report are of relevance in the present context. Although the Commission felt free to reconsider its conclusions – taking into account in particular the legal developments which took place after the adoption of this report – the arguments presented in the previous report must be accorded due attention.

5. The present opinion is based in particular upon:

- a. the Constitutional Charter of the State Union of Serbia and Montenegro (hereafter ‘Constitutional Charter’),
- b. the Agreement amending the Constitutional Charter,
- c. the Constitution of the Republic of Montenegro (CDL-EL(2005)096),
- d. the Law on Referendum of the Republic of Montenegro (CDL-EL(2005)076),
- e. the Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19-20 October 2001) (CDL-INF(2001)023).

6. These texts have been given close consideration in providing the current opinion. Nevertheless, this opinion has to be read as a comparative assessment of the existing legislation in Montenegro and accepted international standards and practice, but not as a prescription of what further legislation in Montenegro might be appropriate.

7. The issues to be addressed in this opinion are the following:

- a. respect for good practice in electoral matters, as a prerequisite;
- b. specific issues :
 - i. the required level of participation,
 - ii. the majority requirements,
 - iii. the criteria for eligibility to vote.

The Commission was not asked to examine the constitutional issues arising in the context of the implementation of the referendum results. These issues were however addressed in its Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia of 2001. The implementation of the referendum results in accordance with the provisions of the Constitution of Montenegro remains a difficult issue for which a solution has to be found.

8. This opinion does not deal with more technical issues addressed in the Law on Referendum of the Republic of Montenegro, or which could be addressed in this Law, such as vote/count procedures, as well as campaign regulations, including the role of state media, advertisement rules and campaign finance. These issues were already commented upon in the OSCE/ODIHR Assessment of the Referendum Law of the Republic of Montenegro published in 2001.¹

9. The OSCE/ODIHR was consulted in the course of the preparation of this opinion and agrees with its conclusions.

¹Assessment of the Referendum Law, Republic of Montenegro, Federal Republic of Yugoslavia, Warsaw, 6 July 2001, accessible at http://www.osce.org/odihr/documents/reports/election_reports/ymntasm_reflaw_06jul2001.pdf.

10. *The present opinion, prepared on the basis of comments by Messrs Anthony Bradley, (United Kingdom), Carlos Closa Montero (Spain) and Kaarlo Tuori (Finland) was examined by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and adopted by the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005).*

II. A PREREQUISITE: RESPECT FOR GOOD PRACTICE IN ELECTORAL MATTERS

11. Any referendum must be organised in full conformity with internationally recognised standards. A consideration of these standards must begin with an examination of European standards. While the Commission has to consider the conformity of the proposed referendum with internationally accepted standards, the Commission is aware that not all the criteria considered in this opinion derive from binding international standards; some relate to statements of standards that are good practice but not binding, such as the Council of Europe and Venice Commission guidelines. The applicable international standards include the general requirements of fair, free and democratic elections, and guidance as to these requirements found particularly in the Code of Good Practice in Electoral matters of the Council of Europe/Venice Commission² and in the Guidelines for constitutional referendums at national level.³ Another source considered in this opinion is international practice and comparative constitutional material. The Commission has also taken into account the specific circumstances of Serbia-Montenegro. Consequently, the result of a referendum has to meet the double test of acceptance (a) within Montenegro and (b) outside Montenegro. While to pass this test of legitimacy the referendum must be conducted in accordance with minimum standards of legality and good electoral practice, its legitimacy within Montenegro and also its acceptance in Serbia and by the international community as a valid indication of opinion in Montenegro may depend in part on the observance of other matters that are desirable but not obligated by international standards.

12. The internationally recognised fundamental principles of electoral law, as expressed for example in Article 3 of the First Protocol to the ECHR and Art. 25 ICCPR, have to be respected, including universal, equal, free and secret suffrage. For a referendum to give full effect to these principles, it must be conducted in accordance with legislation and the administrative rules that ensure the following principles:

- the authorities must provide objective information;
- the public media have to be neutral, in particular in news coverage;
- the authorities must not influence the outcome of the vote by excessive, one-sided campaigning;
- the use of public funds by the authorities for campaigning purposes must be restricted.⁴

13. Free suffrage includes freedom of voters to form an opinion as well as freedom of voters to express their wishes.

14. Moreover, the freedom of voters to form an opinion includes not only the objectivity of public media as mentioned above, but also a balanced access of supporters and opponents to public media broadcasts.⁵

²CDL-AD(2002)023rev.

³CDL-INF(2001)010.

⁴Cf. CDL-AD(2002)023rev, point I.2.3; CDL-INF(2001)010, points II.E-F, H.

⁵Cf. CDL-INF(2001)010, point II.H.

15. The freedom of voters to express their wishes implies that *any question submitted to the electorate must be clear* (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; voters must answer the questions asked by yes, no or a blank vote.⁶ The wording of the question(s) that would be used in a referendum in Montenegro is not yet known. But in a draft referendum law on the state status of the Republic of Montenegro (dated 10 October 2001), the question then proposed was: “*Do you want the Republic of Montenegro to be an independent state with full international and legal personality?*” (Article 6). Such a question would have fulfilled the requirements relating to the question. In Section IV of this opinion, questions which arise as to who should be regarded as composing the electorate for purposes of the referendum will be examined.

16. To make possible the holding of a fair and democratic referendum, and to enable the outcome of a referendum to be accepted as legitimate both in Serbia and Montenegro and in the international community at large, questions of principle or potential difficulty relating to the conduct of the referendum should as far as possible be resolved in advance. If necessary a law should be passed to deal authoritatively with these matters, and this law could include the question to be asked to the electorate. It is desirable that all significant issues surrounding the conduct of the referendum should command the highest possible level of agreement from the major political forces in Montenegro. It may be noted in this regard that in the Agreement of 7 April 2005, paragraph 3,⁷ each member state undertook to cooperate with the European Union on respecting international democratic standards.

17. Furthermore, the *framework conditions* for a free and fair vote must be guaranteed, such as:

- respect for fundamental rights, in particular freedom of expression and the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes;
- organisation of the referendum by impartial electoral commissions;
- the widest possible access of national and international observers;
- an effective system of appeal.⁸

⁶Cf. CDL-INF(2001)010, point II.E.2.

⁷See above, Introduction, para 3.

⁸Extract from the Code of Good Practice in Electoral Matters, II. 3.3. An effective system of appeal:

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

III. REQUIRED LEVEL OF PARTICIPATION AND MAJORITY REQUIREMENTS

18. The request from the Parliamentary Assembly refers in particular to the issues of required turnout and required majority.

A. The required level of participation

19. The required level of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote.⁹

20. In Montenegro, the Law on Referendums prescribes that “*the decision in a referendum is taken by a majority vote of the citizens who have voted, provided that the majority of citizens with voting rights have voted*” (article 37).

21. According to an inquiry carried out by the Venice Commission that provided information on 33 of the 48 member states of the Council of Europe;¹⁰ 12 of these states, as well as Slovenia, have legal provisions setting a minimum threshold of participation of 50% of registered voters (the only exception is Azerbaijan that requires the participation of 25% of the registered voters). The report by the Commission states: “a quorum of participation of the majority of the electorate is required in the following states: Bulgaria, Croatia, Italy and Malta (abrogative referendum), Lithuania, Russia and “the Former Yugoslav Republic of Macedonia” (decision-making referendum). In Latvia, the quorum is half the voters who participated in the last election of Parliament and in Azerbaijan, it is only 25% of the registered voters. In Poland and Portugal, if the turnout is not more than 50%, the referendum is *de facto* consultative and non-binding (in Portugal, the quorum is calculated on the basis of the citizens registered at the census).”¹¹

22. On this evidence, it appears that no clear and binding internationally recognised standards exist concerning the level of participation in referendums in general. However, taking into account both comparative constitutional material and requirement of legitimacy in the light of the concrete circumstances in Serbia and Montenegro, the Commission concludes that the requirement that the majority of the electorate voted in the referendum for it to be valid is consistent with international standards.

⁹Venice Commission study “Referendums in Europe – An analysis of the legal rules in European states” (CDL-AD(2005)034), I. F. 3.

¹⁰Study on “Referendums in Europe – An analysis of the legal rules in European states” (CDL-AD(2005)034), adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005). Two tables are appended to this report (CDL-AD(2005)034add – national referendums; CDL-AD(2005)034add2 – local and regional referendums). The detailed replies to the questionnaire on the use of referendums (CDL(2004)031), country by country, can be found in document CDL-EL(2004)011.

¹¹CDL-AD(2005)034, para. 112. Constitutional or legal basis: Azerbaijan (article 139.1 of the election code); Bulgaria (electoral legislation); Croatia (article 87.4); Italy (legislative regulation, abrogative referendum); Latvia (article 79; it applies to constitutional revision); Malta (Article 20.1 of the Referenda Act); Portugal (article 115.11); Poland (binding if 50% of electors participate, article 125.3; 50% majority – no threshold - required for constitutional reform Article 235.6); Russian Federation (electoral legislation); Slovakia (article 98.1); Slovenia (article 170.2); and “The Former Yugoslav Republic of Macedonia” (article 73.2).

23. Within Montenegro proposals have been made in the past to abandon the requirement of a minimum turnout for the referendum on independence.¹² The Commission would be opposed to such a step being taken at the present stage. Having regard to the fact that the Law on Referendums (Article 37), which applies to all kinds of referendums, provides for a stated level of participation, it would not be justified for a referendum on independence to require a lower level of participation than a referendum on any other subject.

24. First of all, the issue at stake is possibly the most important decision that a political community may take by democratic means: its independence. Hence, the matter requires the broadest possible commitment of the citizens to the resolution of the issue. The required level of participation should at least be the same as that required when a referendum is used for consultation of the electorate on a policy issue.

25. Secondly, it is sometimes argued that setting a level of participation grants an initial bonus to those who are opposed to the question posed. Lack of participation favours the rejection of the proposal subjected to referendum (whether this is framed in a positive or negative sense). Non-participation by a voter has a result more powerful than a mere vote against, since the latter legitimises the result (whereas an intentional boycott of the referendum puts its legitimacy into question). But whatever the judgement that this attitude may deserve from the point of view of civic culture, a decision to abstain from voting is nevertheless a legitimate attitude that citizens may adopt on a fundamental issue such as national independence. Naturally, there is an unavoidable level of technical abstention (sick people, citizens affected by accidents, who cannot exercise their vote because of personal circumstances) that cannot be taken as arising from opposition to the question asked, even though its effect may be to reinforce opposition to the subject proposed.

26. Regarding international practice, a minimum turnout of 50 % of the registered voters seems appropriate for a referendum on the change of state status. It was for example applied in the 1991 referendums on the independence of Slovenia and “the Former Yugoslav Republic of Macedonia”. However, the change of state status in the Pacific Associated states to the US required a larger share of voters having voted (75%).

27. In short, the present requirement in the Law on Referendums is in conformity with international standards. However, the Commission makes the following observations on this matter:

- (a) the higher the level of participation, the more political authority will be attached to the result of the referendum, both inside and outside Montenegro;
- (b) in present circumstances any departure from the present requirement that a majority of the electorate should have voted should be made only with the agreement of the main political forces in Montenegro; and
- (c) to abandon or to reduce the present requirement, even with the agreement of the main political forces, would be likely to weaken the authority of the result of the referendum.

28. There is however a connection between the required level of participation and the requirement of a stated majority of support from the electorate, and this topic is considered in the next section of this opinion.

¹²Cf. particularly the Draft Referendum Law on the State Status of Montenegro, of 10 October 2001, Article 9 and before.

B. The majority requirements

29. The required majority makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate. If a simple majority of those voting is not sufficient, there are two different kinds of possible majority requirements:

- (A) a rule requiring a qualified majority of those voting (that could be e g 55%, 60% or 65%);
- (B) a rule requiring that there must, in addition to a simple majority of those voting, also be a specified number of Yes votes (e g 35%, 40%, 45% or 50%) of the total national electorate.

30. The Constitution of Montenegro makes no provision on these matters. In addition to the already discussed required level of participation of 50%, the Law on Referendums states that the decision is to be taken by a majority vote of those citizens who vote (Article 37).

31. A study of comparative material relating to the general practice on referendums shows that only a few European countries require a specific majority.¹³ The following approval rates are necessary: approval of half of the electorate in Latvia, for constitutional revisions submitted to referendum (§ 79 of the Constitution); approval of a quarter of the electorate in Hungary (Art. 28C/6 of the Constitution), one-third of the electorate in Albania (Art. 118. 3 of the electoral code) and Armenia (Art. 113 of the Constitution). In Denmark, a constitutional amendment must be approved by 40% of the electorate (§ 88 of the Constitution); in other cases, the text put to the vote is rejected only if not only the majority of voters vote against it, but also 30% of the registered electorate (§ 42.5 of the Constitution).

32. It is therefore not unusual that the Montenegro Law on Referendum does not contain any special majority requirement. However, it has to be taken into account that the proposed referendum is one dealing with the crucial issue of the independence of the country.

33. Indeed, it must be emphasised that the most stringent rules on majority apply to self-determination referendums. In Lithuania a constitutional amendment affecting the position of the State as an independent democratic republic must be approved by 75% of the electorate (Article 148.1 of the Constitution); “the Former Yugoslav Republic of Macedonia” requires approval of a majority of the electoral body for the association or dissolution of a union or community with other states (Constitution, Article 120.3) and Slovakia (art. 93.1 and 97.1 of the Constitution) requires union or secession to be approved equally by an absolute majority of the registered voters. The 1990 Soviet secession law allowed secession only when accepted by 66% of eligible voters in the Republic, but was not applied.

34. In its ruling on constitutional aspects of the possible secession of Quebec,¹⁴ the Canadian Supreme Court held that *democracy means more than simple majority rule*. Hence, if a referendum were to be conducted, a clear majority in favour should exist. The Court said: *we refer to a “clear majority” as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question and in terms of the support it achieves* (87). Nevertheless, the Court refrained from defining what, in quantitative terms, a “clear majority” could be, saying: *it will be for the political actors*

¹³CDL-AD(2005)034, para. 113-115.

¹⁴[1998] 2 S.C.R. Reference on Secession of Quebec.

to determine what constitutes a “clear majority on a clear question” in the circumstances under which a future referendum may be taken.

35. Following these recommendations, the Canadian Parliament enacted the Clarity Act¹⁵ that establishes in section 2(3): *In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province ceases to be part of Canada, the House of Commons should take into account the views of all political parties represented in the legislative assembly of a province whose government proposed the referendum on secession [...].*

36. While therefore the absence of any requirement of a specific level of support for a referendum on independence is not inconsistent with internationally recognised standards, the Commission emphasises that there are reasons for requiring a level higher than a simple majority of those voting, since this may be necessary to provide legitimacy for the outcome of a referendum.

37. As regards the choice between a rule requiring the support of a specific proportion of the total national electorate (B in paragraph 29 *supra*) and a rule requiring a qualified majority of those who vote (A in paragraph 29 *supra*), the Commission would not recommend the latter since that could mean approval of a fundamental change being given on a very low turnout.

C. Summary

38. The Venice Commission in its Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia¹⁶ which examined the effect of the Law on Referendums, recommended that a referendum on the status of the country should be subject to the requirement of a specific majority for the approbation, and opposed the deletion of the rule on the level of participation without replacing it by a rule requiring a determined majority.

39. In the face of state practice, it can be concluded, firstly, that referendums on independence, the change of state status and comparable situations always require *at least* a required level of participation. Secondly, decisions as to self-determination have in practice been commonly accepted and thus legitimised by being approved by more than 50% of registered voters.

40. In the light of the Commission’s knowledge of the practice in many countries, and in the absence of any compelling evidence of international requirements to the contrary, the Commission concludes that the requirement in the present Referendum Law (namely, that the result of a referendum may be decided by a simple majority of those voting in the referendum, provided that at least 50% of the electorate have voted) is not inconsistent with international standards. The Commission would oppose any proposal to simply remove the requirement that at least 50% of the electorate have voted. However, in order that the result of a referendum should command more respect, the Commission considers that the political forces in Montenegro may wish to agree to change the present rules for the proposed referendum, either by adopting a higher percentage rate for participation, or by requiring support for the decision by a percentage of the electorate to be defined.. A change of this kind would certainly be consistent with international standards and would help to ensure greater legitimacy for the outcome.

¹⁵Clarity Act 29th June 2000.

¹⁶CDL-INF(2001)023, paras 22-24 and 28.

41. In line with the Interim Report¹⁷, the law should specify how the number of eligible voters should be determined. The Commission also recommends that the law should be amended to specify that this number should be determined and announced on a specific date prior to the holding of the referendum.

42. The essential challenge is however that the criterion for the required majority used in the law should be accepted within Montenegro. Therefore, the Venice Commission invites all political parties to reach a negotiated solution on the majority required in order to ensure the legitimacy of the referendum. This should also make it easier to ensure the implementation of the referendum result in accordance with the provisions of the Constitution of Montenegro.

IV. CRITERIA FOR ELIGIBILITY TO VOTE

A. The right to vote of citizens of Montenegro resident in Serbia

43. One of the issues explicitly raised in the request from the Parliamentary Assembly concerns the compatibility with applicable international standards of the existing legislation in Montenegro on criteria for the eligibility to vote in the referendum. This request is to be understood in the framework of the discussion on whether Montenegrin citizens resident in Serbia should be entitled to vote in the proposed referendum on independence for Montenegro. Conversely, the issue of citizens of Serbia resident in Montenegro being able to vote also arises. The Minister of Public Administration and Local Self-Government of the Republic of Serbia addressed on 12 July 2005 a letter to the Venice Commission arguing in favour of the right of Montenegrin citizens living in Serbia to vote in the referendum. In June 2005, the Government of Serbia presented a list of more than 260,000 Montenegrin citizens living in Serbia who should be entitled to vote in the referendum. This is an extremely high number with respect to the total size of the electorate of Montenegro. At the last presidential elections, the number of registered voters was indicated as slightly less than 460,000.

44. Article 8 of the Law on Referendum of the Republic of Montenegro provides:
“The right to pronounce themselves in a referendum shall be enjoyed by the citizens who, pursuant to election laws, enjoy voting rights.”

45. Article 11 of the Law on the Election of Councillors and Representatives of the Republic of Montenegro provides:

“1. A citizen of Montenegro, who has come of age, has the business capacity and has been the permanent resident of Montenegro for at least twenty four months prior to the polling day shall have the right to elect and be elected a representative.

2. A citizen of Montenegro, who has come of age, has the business capacity and has been the permanent resident of Montenegro for at least twenty four months prior to the polling day, and a citizen residing on the territory of the municipality, as the constituency, for at least 12 months prior to the polling day, shall have the right to elect and be elected a councillor.”

46. The Law on Presidential Elections contains a similar provision.

47. Thus, under the applicable legislation Montenegrin citizens resident in Serbia do not have the right to vote in elections held in Montenegro. Consequently, they will not have the

¹⁷Cf. CDL-INF(2001)023, para. 26.

right to vote in a referendum held in Montenegro unless the law is changed to permit this and to authorise the preparation of a special register of electors for this purpose.

48. In this connection, the Commission notes that by Article 7 of the Constitutional Charter of the State Union, ‘*A citizen of a member state shall have equal rights and duties in the other member state as its own citizens, except for the right to vote and be elected*’. In other words, the Constitutional Charter does not require equality between the political rights of Montenegrin citizens resident in Serbia and Serbian citizens resident in Montenegro.

49. In its Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia (CDL-INF(2001)023), the Venice Commission in 2001 addressed the issue of voting rights:

“25. As regards the right to vote in the referendum, under the referendum law any citizen of the FRY resident for at least two years in Montenegro has this right. It is fully in line with international standards that in a federal State each citizen votes in the federated entity of his residence, irrespective of the fact of a possible entity citizenship. This voting rule corresponds to present practice in Montenegro for parliamentary elections and, while there may be arguments in favour of allowing all citizens to vote on the question of independence, the right to vote in a referendum should follow the right to vote in elections. A different rule would entail a substantial risk of double voting since Montenegro citizens resident in Serbia may vote in Serbian elections. The Commission therefore fully shares the assessment by ODIHR¹⁸ that the residency requirement is justified in principle, although it seems excessive to require 24 months residence.”

50. It has to be acknowledged that this report was adopted in a different context, when Montenegro was still part of the Federal Republic of Yugoslavia and the Constitutional Charter of the State Union and its Article 7 did not exist. The developments which have occurred since then justify a thorough re-examination of the arguments used by the Commission in 2001.

51. The 2001 report first refers to the practice in other federal states. In federal states, as a general rule, political rights are exercised at the residence of the voter and not at his or her place of origin. In many federations this already results from the fact that there is solely a national citizenship and no citizenship at the level of the federated entities. But even in federations with two levels of citizenship such as Switzerland and Bosnia and Herzegovina¹⁹ voting takes place at residence and not in the entity of which the person is a citizen. In the former Yugoslavia the same approach was followed, including within Montenegro on the occasion of the 1992 referendum which decided that Montenegro should be part of the Federal Republic of Yugoslavia.

52. To take an example of state practice on referendums in a non-federal state, in the United Kingdom it was readily accepted that those voting in referendums on the future structure of government in Scotland, Wales and Northern Ireland would be those named in the current electoral register as the electorate for the territory in question. There was no attempt to provide e.g. Scottish people resident in London with the right to take part in the referendum on devolution to Scotland or, conversely, to exclude English people resident in Scotland from this

¹⁸Assessment of the Referendum Law, Republic of Montenegro, Federal Republic of Yugoslavia, Warsaw, 6 July 2001, accessible at http://www.osce.org/odihr/documents/reports/election_reports/yu/mntasm_reflaw_06jul2001.pdf.

¹⁹Only residents of the Brčko District, which is not an Entity, who would otherwise be disenfranchised at the national level by virtue of the constitutional rules on elections on the basis of the two Entities, vote at national elections in the Entity of which they are citizens.

vote. The practice in Switzerland in the referendums leading to the setting up of the canton of Jura is also interesting in this context. In Switzerland, there not only exists a citizenship of the cantons but also of the municipalities. When referendums were organised in a part of the canton of Berne in order to ask citizens whether they would like to create a new canton (this process led to the creation of the canton of Jura), the Swiss citizens residing in the concerned territory were allowed to vote, whatever their municipal citizenship, while the citizens of these municipalities residing outside this territory were not.

53. It might be questioned whether the practice of other federal states remains relevant for the State Union of Serbia and Montenegro which, *de facto* if not *de iure*, largely functions as a confederation. While the State Union remains a single subject of international law, both member states behave independently in most respects. In contrast to the situation in a federal state within the State Union the link between the individual and the separate entities within the Union seems, for the person concerned, more important than the link between the individual and the State Union. For the person resident in a member state other than the member state of which he or she is a citizen, the situation resembles to a greater degree than in 2001 the situation of an expatriate wishing to vote in his or her country of origin. Nevertheless, the situation cannot be entirely assimilated to a vote by expatriates. It has also to be borne in mind that there is no binding international standard requiring that expatriates should have the right to vote, although Resolution 1459 of the Parliamentary Assembly on the abolition of restrictions on the right to vote takes a position in favour of allowing expatriates to vote in their country of origin. This is however not a binding text and the European Court of Human Rights has implicitly accepted²⁰ that expatriates may be excluded from the vote.

54. While in the current situation the Commission does not attach the same weight to the argument of practice in other federal states as it did in 2001, it nevertheless notes that this practice remains an argument against the existence of an international standard giving Montenegrin citizens resident in Serbia the right to vote.

55. Another argument used in the 2001 report was the risk of double voting, arising from the fact that hitherto Montenegrin citizens resident in Serbia could exercise their electoral rights in Serbia. This corresponds to the tradition of the former Yugoslavia that all citizens could vote at their place of residence. Article 7.2 of the Constitutional Charter of the State Union opens the door for a different practice. It provides that “A citizen of a member state shall have the same rights and duties in the other member state as its own citizens, except for the right to vote”. Article 4 of the law on citizenship of the Republic of Serbia was amended in December 2004 in the sense that a citizen of the other member state of the State Union has equal rights on the territory of the Republic of Serbia with the exception of the right to vote. This may in the future prevent Montenegrin citizens living in Serbia from exercising their right to vote in Serbia. Such a step, disenfranchising a considerable number of people, would however be regarded by many observers as a violation of the Serbian Constitution and electoral legislation, which, at least in their traditional interpretation grant to all citizens of the State Union resident in Serbia²¹ the right to vote. The conformity of this measure with Article 3 of the First Protocol to the European

²⁰See e.g. the obiter dictum of the European Court of Human Rights in the case *Matthews v. United Kingdom* (1999) 28 EHRR 361, para. 64: “...The position is not analogous to that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction.”

²¹The Serbian language has two words for the term citizen, *državljanin* and *građanin*. The term *građanin* is used for determining electoral rights and traditionally includes all citizens of Yugoslavia respectively the State Union resident on the territory.

Convention of Human Rights could also be questioned. It seems in any case by no means sure that the Serbian authorities will indeed take the step of disenfranchising what might be more than 260,000 existing voters.

56. Nevertheless, it must be concluded that the argument that granting the right to vote in Montenegro to Montenegrin citizens resident in Serbia would result in these persons being entitled to vote in both member states of the State Union may no longer be as persuasive as it was in 2001.

57. If therefore some arguments used by the Commission in 2001 no longer carry the same weight, there are other arguments which continue to preclude voting rights in Montenegro being granted to Montenegrin citizens living in Serbia. It remains in principle desirable to apply the same rules for the eligibility to vote in elections and referendums. If the referendum is successful, the Montenegrin parliament will be called upon to take decisions implementing its results. That parliament should therefore be accountable to the same electorate as is taking the decision in the referendum.

58. This alone may not however be regarded to preclude moving from a system of voting rights based on residence to a system of voting rights based on citizenship. The Venice Commission does however not consider such a step appropriate in this context and at the present stage.

59. First of all, it has to be acknowledged that the Republican citizenship in the former Yugoslavia was often based on a tenuous link with the Republic concerned. Republican citizenship was inherited from the father and it was possible to have the citizenship of a Republic where one had never lived or which one might have never visited. While there were possibilities to change one's Republican citizenship, there was no incentive to do so since in practice Republican citizenship had no consequences.

60. In line with its Code of Good Practice in Electoral Matters, the Commission considers decisive that introducing at this stage major new rules would undermine the legitimacy of the referendum.²² The issue of a referendum on the independence of Montenegro is not a new one. As set forth above, in 1992 there was a referendum in favour of Montenegro forming a renewed Federal Republic of Yugoslavia together with other Republics willing to do so. The political forces favouring the independence of Montenegro did not accept the results of this referendum as final and gained ground following the break between the Government of Montenegro and the Milošević regime in Serbia. When the Commission examined the constitutional situation in the Federal Republic of Yugoslavia in 2001, there was already a fully-fledged debate on the referendum, including the question of who would be entitled to vote in it. Under such circumstances, any change in the voting rules made now will be regarded as motivated by the desired consequences for the result of the referendum and should be avoided. In particular, it is essential that the voters' lists are reliable. Any attempt to add at the present stage more than 260.000 persons living outside Montenegro to these lists could only undermine the credibility and reliability of the voters' lists.

²²*Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev., para. 63)* "Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections."

61. Under these circumstances the Commission is of the opinion that it would contradict the Commission's own standards to change the relevant rules and give the right to vote in the referendum to Montenegrin citizens living in Serbia.

B. Right to vote of Serbian citizens living in Montenegro

62. If it seems therefore acceptable that Montenegrin citizens living in Serbia are not entitled to vote in the referendum, it would conversely seem desirable that citizens of Serbia resident in Montenegro should have this right. This would correspond to the standard practice in federal states and in the former Yugoslavia and also to previous practice in Montenegro. Recently some decisions of courts in Montenegro rejected, on the basis of Article 7.2 of the Constitutional Charter of the State Union, requests by newly arrived citizens of Serbia to be included in the voters' list. However, on 5 December 2005 the General Session of the Supreme Court of Montenegro decided that citizens of Serbia, who are resident in Montenegro and meet the other requirements of the law, are entitled to vote within Montenegro and are to be included in the voters' lists. This issue has therefore been resolved in a satisfactory way.

C. Residency requirement

63. As regards the requirement of a 24 months period of residence before being entitled to vote, this was regarded as excessive by the Commission in its Report of 2001. Since the Constitution of Montenegro confers the right to vote on every citizen aged over 18, it is arguable that, in the absence of strong justification, the legislation seems to go too far under Montenegrin constitutional law in disenfranchising for 24 months citizens who have returned to Montenegro after living elsewhere. Under the European Convention on Human Rights, the right to vote under Article 3 of the First Protocol is not absolute but may be subject to limitations. While a state has a margin of appreciation in stating the conditions for voting, such conditions must not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; they must serve a legitimate aim and must not be disproportionate.²³ A residence test in itself is acceptable,²⁴ but is the length of the period justifiable?²⁵ The primary remedy for someone aggrieved by the 24 months requirement would be to seek a remedy in the national courts, on the basis that it conflicts with the right to vote guaranteed by the Constitution. However, so far as international standards are concerned, a lesser requirement (say of 6 months) would surely fall within the state's margin of appreciation.²⁶ A limit of 12 months might also be acceptable at Strasbourg, depending on the reasons advanced for imposing the limit. Nevertheless, if in other respects the referendum is conducted in a satisfactory manner, it is doubtful whether maintenance of the 24 month rule would bring the legitimacy of the referendum into question.

²³See *Matthews v United Kingdom* (1999) 28 EHRR 361, para 63. Also *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1, paras 51-52 and *Hurst v United Kingdom* (No 2) (2005).

²⁴See *e.g. X v United Kingdom* (1979) 15 DR 137 and *X v United Kingdom* (1982) 28 DR 99. In *Bruno Py v France* (decided 11 January 2005), the Court upheld a 10-year residence requirement in very special circumstances in *New Caledonia*.

²⁵In the *United Kingdom*, there is a requirement of residence in the relevant electoral area but this is not subject to a waiting period, except in the case of Northern Ireland, where a period of three months residence in Northern Ireland is required before an elector is registered. The reason for this special rule is to discourage residents in the Republic of Ireland moving across the border to vote in Northern Ireland elections.

²⁶In its *Code of Good Practice in Electoral Matters*, adopted in October 2002, the Venice Commission stated that a residence requirement may be imposed as a condition of voting but that it should not exceed six months. Cf. I. 1.1 c.

V. CONCLUSIONS

64. The Venice Commission considers that the legislation of the Republic of Montenegro on the referendum as it stands does not violate applicable international standards with respect to the issues raised by the Parliamentary Assembly. The Commission emphasises that existing international standards are open-textured, based as they are on the varied constitutional practice of many countries, and leave a great deal to the judgment and traditions of individual countries. However, this does not necessarily mean that the envisaged referendum on independence should be carried out on the basis of the existing legislation. On the contrary, the Commission strongly recommends that serious negotiations should take place between the majority and opposition within Montenegro in order to achieve a consensus on matters of principle concerning the conduct and implementation of the proposed referendum, in particular as regards the specific majority that should be required to ensure that the outcome of the referendum is accepted by all major political groups in Montenegro. The European Union, which by virtue of the agreement on amending the Constitutional Charter of the State Union of 7 April 2005 plays a specific role in this respect, could facilitate such negotiations. The referendum will enjoy sufficient legitimacy to be a solid base for the independence of Montenegro only if a consensual solution is found on the majority required. A consensus in this respect should also facilitate the implementation of the referendum in accordance with the rules set forth in the Constitution of Montenegro. Other issues on which agreement should be sought in such negotiations include the wording of the referendum question, the rules on campaigning and funding of the campaigns, neutrality of the public media, conduct of the voting and related matters.

65. As regards the issue of the right of Montenegrin citizens in Serbia to vote, the Commission cannot recommend a change of major scope to the present electoral rules which would imply adding more than 260,000 people to the voters' list. Such a change at the present stage would be incompatible with the necessary stability of the voting rules and jeopardise the legitimacy of the referendum as well as the reliability of the voters' list.

66. As regards the carrying out of the referendum, there are applicable international standards which will have to be respected. At the moment it can only be stated that the applicable legislation does not prevent the authorities from complying with such standards. International observation of the referendum could certainly contribute to ensuring respect for these standards.