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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

on the basis of comments by

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INTRODUCTION

1. By letter dated 21 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to give an Opinion on the text of the agreement on the modalities of the first phase of constitutional reform reached by the leaders of political parties in Bosnia and Herzegovina on 18 March 2006. Since the constitutional reform has to be adopted urgently in order to make it possible to take it into account at the parliamentary elections scheduled for October 2006, he expressed the wish to receive the Opinion of the Venice Commission "shortly".

2. The said agreement on the first phase of constitutional reform is quite comprehensive. It contains a revision of five main parts of the Constitution of Bosnia and Herzegovina:

- on Human Rights and Fundamental Freedoms;
- on Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities;
- on the Parliamentary Assembly;
- on the Presidency;
- on the Council of Ministers.

3. Following its submission to the Venice Commission, the text of the political agreement was redrafted in the form of amendments to the Constitution. On 24 March 2006 the Presidency decided to submit the redrafted text to the Parliamentary Assembly with the exception of the Amendment to Article II of the Constitution on Human Rights which was considered as not sufficiently well prepared. In accordance with the wishes of the Presidency, the present Opinion examines the draft Amendments as submitted to Parliament as well as the – not yet finalised- text on human rights.

4. In view of the urgency of the issue and in accordance with the decision taken by the Commission at its 66th Plenary Session on 17 to 18 March 2006, the present Preliminary Opinion was prepared under the responsibility of the reporting members, Messrs. Helgesen (Norway), Jowell (United Kingdom), Malinverni (Switzerland), Scholsem (Belgium) and Tuori (Finland) and sent to the authorities of Bosnia and Herzegovina on 7 April 2006.

5. It is recalled that the Venice Commission already provided an Opinion on one aspect of the reform, the election of the Presidency, in March 2006 (see document CDL-AD(2006)004.

THE CONSTITUTIONAL REFORM PROCESS IN BOSNIA AND HERZEGOVINA

6. The present Constitution of Bosnia and Herzegovina was adopted as Annex IV of the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, the Dayton Agreement. Its main purpose was to end the bloody conflict in the country and not to establish a functional state.

7. In March 2005 the Commission adopted, at the request of the Parliamentary Assembly of the Council of Europe, its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (CDL-AD(2005)004). In this Opinion the Commission concludes that constitutional reform is indispensable and that it will have to be carried out in several stages, with an entirely new Constitution based on a democratic process in Bosnia and Herzegovina (hereinafter referred to as BiH) as the final aim. As regards the first stage of constitutional reform, the Commission notes:

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

In addition, the Commission insists on the urgency of the reform of the Constitution of the Federation of Bosnia and Herzegovina. The agreement on constitutional reform examined in this Opinion only relates to the Constitution of the State.

8. The Opinion of the Venice Commission raised a lot of interest in Bosnia and Herzegovina. With the assistance of a former Principal Deputy High Representative, Donald Hays, now at the US Institute for Peace, a group of experts appointed by the main political parties started to meet to discuss constitutional reform, taking as the point of departure the Venice Commission Opinion. The agreements reached at expert level were further discussed by the leaders of the main political parties and finally, on 18 March 2006, the party leaders approved the agreement on the first phase of constitutional reform. This agreement was facilitated by the US embassy in Sarajevo and also took into account a Venice Commission Opinion on three different proposals to elect the Presidency of Bosnia and Herzegovina (CDL-AD(2006)004.

AMENDMENT I TO ARTICLE III OF THE CONSTITUTION ON RESPONSIBILITIES[1] OF AND RELATIONS BETWEEN THE INSTITUTIONS OF BIH AND THE ENTITIES

General comments

9. In its 2005 Opinion the Venice Commission identified the transfer of responsibilities from the Entities to the State level as a necessary main element for the first stage of

[1] The Dayton Agreement uses the term "responsibilities", the translation provided for the Amendments uses "competencies".

constitutional reform. The very limited powers granted to the State level by the present constitutional text are in no way comparable to the powers exercised by other federal states and they are insufficient to enable Bosnia and Herzegovina to participate in the process of further European integration.

10. It is therefore particularly welcome that this Amendment has as its main purpose the transfer of responsibilities to the State level. The main elements of the reform are:

- Additions and alterations to the list of responsibilities of BiH;
- The introduction of a new list of responsibilities shared between State and Entities;
- A general provision giving to the State level responsibility to take all action required for European integration.

Comments Article by Article

11. If the purpose of the amendments deserves strong support, the drafting of several amendments warrants some critical comment.

Art. III.1 -List of responsibilities

12. Four new items are added to this list:

(a) Sub-section (a) giving to the State level responsibility for defence and security is welcome. This responsibility was already transferred to the State level in the context of defence reform. Defence and security rightly belong to the state level and cannot reasonably be exercised by Entities. This amendment therefore reflects the current situation and brings Bosnia and Herzegovina closer to usual state practice. The meaning of the amendment could be made clearer by adding the word "external" before security.

(b) The present sub-section (g) "*International and Inter-Entity criminal law enforcement, including relations with Interpol"* becomes sub-section (h) with a different text "***Implementation of*** *international and inter-Entity criminal law enforcement* ***regulations****, including relations with Interpol"*. This new wording is much narrower and therefore seems at variance with the overall aim of the constitutional reform of granting more powers to the State level. It seems to take away from the State level the power to regulate, leaving to it only the power to implement. This is contrary to usual practice in federal states where often entities implement State law but not vice versa. It also risks undermining the current constitutional basis for existing State level legislation in the criminal law field and on the State Investigation and Protection Agency. The Commission therefore urges to reconsider this rephrasing.

(c) The new sub-section (i) gives to the State level responsibility for the State Court and the BiH Prosecutor's office. This provides an explicit constitutional basis for existing State institutions which seem indeed indispensable. However, the wording does not at all define the responsibilities of these institutions and does not really fit into a list of responsibilities but should be part of an Article defining state institutions. A new Article VI.a immediately following the provisions on the Constitutional Court would be more appropriate in this respect. The relationship of this sub-section with sub-section 2.(c)

below which gives to the State level a shared competence on "judiciary" should also be clarified.

(d) Finally, the proposed sub-section (m) giving to the State level *"remaining competencies as regulated by law"* is difficult to accept. It seems to open the door for the State level to assume by ordinary law responsibility for any matter without amending the Constitution. This is not acceptable in a federal state and in contradiction with Art. III.3.(a) giving the residual power to the Entities. The intention may be to refer to matters transferred in accordance with Art. III.5 and to responsibilities resulting from other constitutional provisions. In this case the sub-section could be replaced by "*any other matter within the responsibility of the institutions of Bosnia and Herzegovina under this Constitution*". Otherwise this sub-section will have to be deleted.

Art. III.2 - List of shared competencies

13. This list would be newly introduced into the Constitution. Its heading should be clarified to read "*The following competencies are shared between the institutions of Bosnia and Herzegovina* ***and the Entities****."*

14. The underlying assumption that some areas should not entirely be dealt with either at State or Entity level but divided between both levels seems reasonable and justified. Until now this principle is not at all reflected in the text of the Constitution, although e.g. the responsibility for electoral issues is indeed divided between both levels. In principle, this addition is therefore welcome. However, in this case it is necessary to define according to which criteria the responsibilities are divided. There are several possibilities. For example, the State level could be responsible for legislation and the Entities for execution. Or the role of the State level could be limited to define general principles as framework legislation. Or the subject matter could be divided with the State level e.g. being responsible for some taxes and the Entities for others. As it stands, the impact of this list remains unclear.

15. Moreover, it would be desirable to add a supremacy clause, making it clear that State law prevails with respect to inconsistent Entity law. The introduction of shared competencies will also require the development of consultation mechanisms between the State and the Entity level.

16. Finally, sub-section (h) is inappropriate for the same reasons as sub-section 1.(m) above and should be deleted.

Art. III.3 – Responsibilities of the Entities

17. The only amendment to Art. III.2 now becoming Article III.3 provides that special parallel relationships of Entities with neighbouring States have to be consistent with European standards. This seems appropriate although probably of limited significance. It should be noted that the residual competence remains with the Entities.

Art. III.6 – Additional Responsibilities

18. The new Art. III.6.(b) makes it clear that transfers of responsibilities from the Entities to the State cannot be revoked without the consent of the State and the Entities. This is a welcome clarification.

19. The new Article III.6.(c) is of paramount importance. It gives to the State level the responsibility to negotiate with the European Union and to adopt and implement all measures necessary for the implementation of commitments to the European Union. The text is broadly drafted and seems to leave no gaps. It would enable the country to take full part in European integration and thereby rectify a fundamental shortcoming of the present Constitution. It is true that this provision does not allow to have a comprehensive picture of the respective responsibilities of the State and the Entities and that a lack of clarity may result in difficulties for its implementation. Nevertheless, under present political circumstances in BiH, this drawback seems a small price to pay for the important progress the provision makes possible.

Summary on competencies

20. The Commission is aware that the present constitutional reform process takes place under considerable time pressure. The distribution of responsibilities between the State and the Entities remains a sensitive issue in BiH and it seems therefore unlikely that all ambiguities in the proposed text can be resolved quickly. The Parliamentary Assembly may therefore wish to adopt the draft Amendment, subject to the modifications in the lists of responsibilities proposed above (Art. III.1.(h) and (m) and Art. III.2.(h)), and revert to the issue of distribution of competencies after the elections in a more systematic way. The proposed Amendment leads to an overall improvement in the distribution of responsibilities between the State and the Entities and corresponds to a pressing need. However, it does not seem based on a systematic reflection on the needs of the country but on a piecemeal approach. For example, in the lists of responsibilities of the State level several matters usually dealt with in federal states at the central level are missing such as civil law, criminal law, labour law or maritime law.

21. While this lack of a comprehensive approach is acceptable for a first step, it does not provide a long-term solution. It is in the interest not only of the State level but also of the Entities to have a stable catalogue of competencies, providing a basis for long-term planning and policies. The Commission therefore recommends to undertake, as part of a second phase of constitutional reform after the elections, a systematic reflection on a coherent and stable distribution of competencies between both levels.

AMENDMENT II TO ARTICLE IV OF THE CONSTITUTION ON THE PARLIAMENTARY ASSEMBLY

General comments

22. The main aim of the Amendment is to move from a bicameralism with two equal chambers to a new system where the House of Peoples (hereinafter referred to as HoP) would have only limited powers with a focus on the vital national interests veto. The new

structure of the Article, systematically putting the House of Representatives (hereinafter referred to as HoR) first, reflects this aim. The reform would be a step in the direction of the Venice Commission recommendation to abolish the HoP and to streamline decision-making within the State institutions.

Art. IV.2. on Structure and Election of the Parliamentary Assembly

23. Sub-section (b) would increase the number of members of the HoR from 42 to 87. The previous number was indeed very low for a national parliament of a state of the size of BiH. The increased responsibilities of the State level would seem to justify an increase in the membership of this House. It should also be noted that the amendment introduces three set-aside seats for Others.

24. Sub-section (d) would increase the number of members of the HoP from 15 to 21. The justification of the increase in the membership of this House is less apparent since its powers are greatly reduced. Nevertheless, this is an issue entirely within the discretion of the national authorities. If they feel that this increase is required to ensure that the House adequately represents the political spectrum, this step seems justifiable.

25. More problematic is the circumstance that membership in this House remains limited under sub-section (d) to people belonging to one of the three constituent peoples. In its Opinion the Venice Commission noted that the previous composition of this House along similar lines seemed to contradict Art. 14 of the ECHR in conjunction with Article 3 of the First Protocol to the ECHR.

26. Following the reform the House of Peoples would however no longer be a full legislative chamber but a body dealing mainly with the vital national interests veto. It seems therefore questionable whether Article 3 of the First Protocol and thereby Article 14 of the ECHR would still be applicable. The problem of the compatibility of this provision with Protocol Nr. 12 to the ECHR remains however. In the absence of any case-law on this Protocol, it can be interpreted only with prudence. Paragraph 18 of the Explanatory Report to the Protocol reads as follows:

> *"18. The notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the judgment in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judgment of 28 May 1985, Series A, No. 94, paragraph 72). ...."*

27. In the present case the legitimate aim could be seen in the main role of the House as a body in which the vital national interests veto is exercised. The BiH Constitution reserves the right to exercise this veto to the three constituent peoples and does not give it to the Others. From that perspective it would not seem required to include "Others" in the composition of this House. The other responsibilities of the House, to participate in the

election of the Presidency and to approve constitutional amendments- though not beyond criticism-, do not lead to a different result. They show that the function of the HoP is to be a corrective mechanism, ensuring that the application of the democratic principle reflected in the composition of the HoR does not disturb the balance among the three constituent peoples. The need for such a mechanism seems still to be felt in BiH. In that case it seems possible to regard this need as a legitimate aim justifying an unequal treatment of Others in respect to representation in the HoP.

Article IV.3 on Term and Eligibility of Members

28. According to sub-section (c) members of the Parliamentary Assembly may not hold any other elected public office or position in accordance with the Law on the Conflict of Interests. This text seems to constitutionalise the Law on the Conflict of Interests. It would be preferable to either regulate the incompatibilities directly in the Constitution or to put that the scope of the incompatibility is to be regulated by law.

Article IV.5 on President and Vice Presidents of the Houses of the Parliamentary Assembly

29. It is the understanding of the Venice Commission that the second sentence of sub-section (a) as well as sub-section (f) may in no case be construed as prohibiting the election of a person belonging to the Others to one of these position. This would be an inadmissible discrimination. The Venice Commission understands these, and other similar provisions thereafter, as only precluding the election of two persons from the same constituent people to two such positions, based on the legitimate aim of avoiding a dominant position of a constituent people.

30. With respect to sub-section (f) a mechanism will have to be found to resolve cases when two or more persons belonging to the same constituent people are actually elected to these positions. The elections to the office of Prime Minister are the latest to take place and members of all groups should be able to be candidates for this most powerful position in the state. It could be provided that the President of a House has to resign if a person belonging to the same group is elected Prime Minister and that nobody from the same group as the President of the HoR can be candidate for the HoP.

Article IV.6 on sessions of the Houses of the Parliamentary Assembly and session of the Parliamentary Assembly

31. Under the new constitutional arrangements it seems likely that there will more often be a need for an extraordinary session of the HoR than of the HoP. It would therefore seem preferable to provide in sub-section (c) for extraordinary sessions of each House and not of the Parliamentary Assembly as a whole.

Article IV. 7 on competencies of the House of Representatives

32. The list of responsibilities of the HoR seems comprehensive and appropriate. However, the double reference to international obligations in sub-sections (b).iii. and (b).iv. seems redundant.

Article IV.8 on competencies of the House of Peoples

33. Sub-section (b) would give to the HoP the (co-)responsibility to adopt constitutional amendments. Since constitutional amendments also appear in the list of matters subject to the vital national interest veto, the HoP would have a double role in this respect. One could therefore consider deleting this responsibility.

Article IV.9 on legislative procedure

34. In sub-section (a) it is unclear how a member of the HoP could introduce legislation in the HoR. This power should be reserved to the CoM and members of the HoR.

35. To avoid a contradiction with Art. X, the voting provision in sub-section (d) should be qualified *"Unless otherwise provided for by this Constitution…"* This provision, as well as sub-section (b) and (c) go beyond legislative procedure and should be moved to section 4.

36. Sub-section (e) providing for a veto by two-thirds of the members of the HoR from one Entity was retained from the present constitutional text. Its continued existence should therefore not be a motive for opposing constitutional reform. Moreover, from the international perspective this veto based on the need to have minimum support throughout the territory is less problematic than the vital national interest veto. Having regard to the proposed wording on the vital national interest veto, this Entity veto seems largely redundant since in such cases a vital national interest veto would be likely to occur in the HoP anyway. The abrogation of this provision could therefore be considered. If it were politically impossible to abrogate it , it would be logical to limit it to cases where specific Entity interests are concerned. In particular this veto could be limited to the area of responsibilities shared between State level and Entities. For the reasons stated above, this provision does however not seem to be of major practical importance.

37. Sub-section (f) provides for decisions in the HoP to be taken by simple majority, sub-section 10.(e) below requires a majority of delegates, Article V.2.(e) a "majority vote" of the caucus.

38. It should be noted that sub-sections (h) and (i) give to one caucus of the HoP and not to the House as such the power to amend laws. See also the remark on Art. IV.10.(e) below.

Article IV.10 on the vital national interests veto

39. The new sub-section (a) seems to enhance the status of the vital national interests veto into a kind of natural inalienable human right. This is entirely inconsistent with the aim of reducing the scope of this veto which should be considered as an exceptional institutional arrangement justified by the continued lack of trust among the three constituent peoples and not as a natural right. This provision should be scrapped.

40. Sub-section (c) lacks normative content and does not add anything to sub-section (b). It could be deleted as redundant.

41. The Venice Commission recommended in its March 2005 Opinion to define the scope of application of the vital national interests veto clearly and narrowly to avoid excessive blocking of decision-making. It also considered the definition of vital national interests in the Entity Constitutions as too broad. Sub-section (d) now introduces a definition of vital national interests, based on the present definition in the Entity Constitutions. Some of the items on this list seem difficult to interpret. As in the Entity Constitutions the purpose of defining vital interests by providing a list of subject matters regarded as falling under this notion is undermined by a blanket provision in subsection xii., giving to a two-thirds majority of any caucus the right to declare anything a vital national interest. If it is politically not possible to delete sub-section xii, which opens the door to the arbitrary invocation of vital national interests, it may be preferable not to define vital national interests at all but to leave this definition to the Constitutional Court

42. Under the procedure as drafted in sub-section (e), there seems to be no role for the HoP as such and no discussion within this House, only within the caucuses. The HoP therefore has scant existence as a chamber of its own. The reference to a *"previous item*" in (e).i. is unclear.

AMENDMENT III AMENDING ARTICLE V OF THE CONSTITUTION ON THE PRESIDENCY

General Comments on Amendments III and IV

43. The main aim of the Amendments is to strengthen the powers of the Council of Ministers and increase its efficiency and reduce the role of the Presidency. This is entirely in line with the Opinion of the Venice Commission. In addition, the Commission would have preferred having a single President instead of a collective Presidency. This does however not seem politically possible at the moment. Nevertheless Amendment III takes a first step in this direction.

Comments article by article

Article V. Opening section

44. While maintaining the existence of a collective Presidency of three members, this provision reflects a positive development by distinguishing one President and two Vice-Presidents. It should be noted that the subsequent sections give far more powers to the President than to the Presidency. It would therefore be more consistent to start this section by stating *"BiH has a President and two Vice-Presidents forming together the Presidency. The President of BiH is at the same time the President of the Presidency of BiH"* With respect to the last sentence of the section, the Venice Commission understands it as not excluding the possibility to elect Others to the Presidency (see paragraph 29 above). This applies also to Article V.2.(d) below.

Article V.1

45. The obligation to work co-operatively with other institutions should not concern the President alone but President and Presidency.

Article V.2 on election and the term of office

46. The Venice Commission adopted an Opinion on the three alternative proposals for electing the Presidency at its last session (CDL-AD(2006)004). It would serve no purpose to re-open this discussion at the present moment. The absence of a dead-lock breaking mechanism if the HoR refuses to confirm the proposal of the HoP is however a concern.

Article V.4 on duties and powers of the President

47. The emphasis on the powers of the President (as opposed to the Presidency) is welcome.

48. In sub-section (a).iii. it would be more in line with the responsibility of the Council of Ministers to conduct foreign policy to put *"shall,* ***upon the proposal of the Council of Ministers,*** *appoint and dismiss ambassadors and envoys, in accordance with State law."*

49. The wording of sub-section (a).ix. seems misleading and should be harmonised with Art.V.4.2.(a). Sub-section xi. seems problematic since it would enable the Parliamentary Assembly to give new duties to the President.

50. The wording of sub-section (b).i should be reviewed. "Regulating" defence is not very clear but would seem of normative character and not appropriate for the Presidency. A better wording could be, inspired by the Law on Defence *"Exercising supreme command and control of the armed forces in accordance with the law and perform other duties in the area of defence as provided for by law"*.

51. Sub-section (b).ii would seem to contradict Art. VI.1.(a) on the selection of judges of the Constitutional Court which is not a provision to be amended. It can only be reconciled with this provision if this prerogative remains formal and the Presidency is bound to appoint the persons selected in accordance with Art. VI.1.(a). With this clarification, this competence seems welcome by involving the State level in an appointment procedure for important state positions hitherto reserved to the Entities and an international body. If, however, the intention were to also amend Art. VI in this respect, it seems questionable whether the choice of constitutional judges should be left entirely to the Presidency.

52. In section (c) the terminology law/ legislation should be harmonised.

53. The requirement in sub-section (c).iii. that the Parliamentary Assembly as a collegiate body with two Houses should provide a written reply seems cumbersome. A more meaningful procedure would be:

- The President sends the text with his explanation back to the HoR;
- The HoR re-examines the text and votes again (the majority of the members as opposed to the majority of those present could be required for such a vote);
- If the HoR adopts a different text, this text is sent to the HoP, otherwise directly back to the President;
- The President then has to sign the text.

Article V.5 on disability of the President/ Vice Presidents in performing duties

54. Provisions should be added
- On the death of a member of the Presidency;
- On temporary incapacity of a Vice-President (required because of sub-section 4.(b).

Article V.6 on impeachment of the President/ Vice President

55. Sub-section (b) provides for an impeachment of a President or Vice-President also for "incompetence". This mixes in an inappropriate way legal and political responsibility. The purpose of impeachment procedures is to provide a solution when a President commits serious violations of the law. It should not apply in cases when parliamentarians consider the President incompetent.

56. In sub-section (c) the usual terminology (House of Representatives, not House of Representatives of the Parliamentary Assembly of BiH) should be used. Moreover, it is difficult to envisage that the House as such introduces this motion. One third of its members would be more appropriate.

57. The requirement of approval by the majority of the members of the people from which the member of the Presidency comes seems totally inappropriate. First of all, it would seem based on the assumption that each member of the Presidency has to come from a constituent people. Secondly, it introduces into the HoR as the body representing all citizens of BiH an inappropriate ethnic division apparent nowhere else in the Constitution.

58. If it is considered necessary to protect members of the Presidency against impeachment by a parliamentary majority composed of members from other ethnic groups, it would be less objectionable and more in line with the overall approach chosen for the constitutional reform to require for the impeachment the consent of the majority of the caucus in the HoP having nominated this member. Sub-section (a) would have to be amended accordingly.

Article V.8 on succession

59. It should be clarified that the caucus in the HoP having nominated the member of the Presidency has the right to nominate the successor.

Article V.9 on criminal liability of the President/Vice-Presidents

60. Sub-section (a) exempts the President and Vice-Presidents from criminal liability for official acts. This exemption should be extended to civil liability by either deleting the word *"criminal"* or adding the word "*civil"*.

AMENDMENT IV TO ARTICLE V.4 OF THE CONSTITUTION ON THE COUNCIL OF MINISTERS

Article V.4bis.Opening section

61. The aim of the reform is clearly reflected in the first section providing that "*The Council of Ministers is the institution of executive authority for the State of Bosnia and Herzegovina."* It is clearly stated that the Council of Ministers (hereinafter referred to as CoM) is accountable and responsible to the Parliamentary Assembly (and not to the Presidency). This is welcome although it would be more correct to speak of responsibility to the HoR since there is no link (and should be no link) with the HoP. The President of the CoM is now also called Prime Minister.

Article V.4bis.1 on election and mandate

62. Sub-section (a) provides for the election of the CoM at the beginning of each new term of parliament. There should however also be a provision on the election of a new CoM following a vote of no confidence or the resignation of the CoM.

63. The Venice Commission understands sub-section (e) as not excluding the election of a person belonging to the Others (cf. paragraph 29 above).

Article V.4bis.2 on election of the President of the Council of Ministers

64. In this section it should be clarified whether there are not some decisions requiring a majority of the members of the HoR. The general rule in Art. IV.9.(d) is the majority of those present and voting. It could be considered to require the majority of the full membership of the HoR in the first two ballots. For systematic reasons, a reference to the dissolution of the Parliamentary Assembly by the President if the third ballot fails (cf. Art. IV.11.(d)) should be made.

Article V.4bis.3 on election of Ministers

65. Sub-section (b) seems superfluous, raises problems and should be deleted. It is obvious that the list of Ministers of any coalition government is agreed in talks with the political parties forming the coalition because otherwise the slate of ministers will not be approved by parliament. This should however be left to the political process and not be the subject of a constitutional rule. Otherwise the process gets excessively rigid and unnecessary issues (who decides who is a qualified candidate?) arise.

66. In sub-section (c) it could be considered whether to require the majority of the members for the first ballot.

Article V.4bis.4 on term of office

67. There is no rule concerning the term of office of individual ministers (as opposed to the CoM as a whole).

68. The vote of no confidence in the Council of Ministers and the resignation of the Prime Minister entailing the resignation of the entire CoM should be regulated in the Constitution. These are matters which should not be left to the law.

Article V.4bis.5 on competencies and Article V.4bis.6 on powers and duties of the President of the Council of Ministers/the Prime Minister and Ministers

69. The list of powers of the CoM in Art. V.4bis.5 reflects the new role of the CoM as the main executive organ of BiH. In sub-section (c) a reference to the powers of the Presidency in defence matters should be added to avoid contradictions. Art. VIII.1 of the Constitution has to be harmonised with sub-section 5.(g).

70. There are a number of references to normative and other acts:
- Sub-section 5.h refers to decrees and regulations of the Council of Ministers;
- Sub-section 6.1.(d) enables the Prime Minister to suspend decrees and regulations issued by Ministers;
- Sub-section 6.2.(b).1 refers to "laws, regulations and acts of the CoM;
- Sub-section 6.2.(b).4 refers to regulations of individual Ministers.

71. First of all, the reference to "laws" of the CoM should be an obvious mistake. Laws can only be adopted by the Parliamentary Assembly. Otherwise it is not clear whether the system established is clear and coherent. It would be advisable to define different notions such as "decrees", "regulations" or "acts" in the Constitution although this may be left to the next stage of constitutional reform. In order to ensure the coherence of the CoM, it could be envisaged to require for all normative acts the signature of the competent minister and the countersignature of the Prime Minister.

Article V.4bis.7 on additional provisions

72. It seems appropriate to leave the list of Ministries and the decision-making within the CoM to the law. In particular, the Commission strongly welcomes the fact that in this way it has been possible, contrary to some earlier drafts, to avoid the introduction into the text of the Constitution of ethnic rules on the composition of and decision-making in the CoM.

73. Other issues are however too crucial for the relations between the State organs to be left to ordinary legislation. This concerns in particular the conditions under which a vote of no confidence may be exercised within the HoR but also the resignation and recall of the CoM. There is also a need to amend Article VIII of the Constitution and include e.g. rules on the audit of expenditure. This latter issue may however also be tackled in the second phase of constitutional reform.

Summary on Amendments II to IV on the State organs

74. Taken together, the amendments on the State organs constitute an important step forward. Decision-making becomes far more efficient, although the Commission would urge to reconsider some parts of the vital national interests veto, and provisions which directly discriminate are removed. BiH would become a parliamentary democracy, the form of government most appropriate in a complex multi-ethnic state.

DRAFT AMENDMENT TO ARTICLE II OF THE CONSTITUTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

General comments

75. The political agreement originally submitted to the Venice Commission also contained a new Article II of the Constitution on Human Rights. This text was however not forwarded by the Presidency to the Parliamentary Assembly since there were doubts whether the draft was indeed a sound basis for constitutional reform in this area. The BiH authorities nevertheless expressed the wish to receive comments from the Venice Commission also on this draft Amendment in order to be able to prepare an improved version.

76. From the legal point of view, there seems no need to revise this Article of the Constitution in an urgent procedure before the next general elections. Art. II.2 of the Constitution provides for the direct application of the European Convention of Human Rights and its Protocols and grants to it priority over all other law. Article II.4 of the Constitution contains strong language on non-discrimination and secures to all persons the enjoyment of the rights provided for in 15 international agreements. In principle, this seems sufficient to ensure a high level of human rights protection in the country.

77. It is however understandable that the people of Bosnia wish to have their own catalogue of human rights which would reflect a consensus within the country on human rights protection. The pure enumeration of rights as set forth in Article II.3 does not seem satisfactory in this respect. Moreover, the Human Rights Commission provided for in Art. II.1 of the Constitution and Annex VI to the Dayton Agreement no longer exists. It is therefore indeed desirable to review the role of the Constitutional Court in this respect. This would however involve more a review of Article VI than of Article II.

78. If the wish to revise the present Article II appears therefore legitimate, the revision should not lead to difficulties and discrepancies with respect to the international commitments of the country. Only a result of high quality would justify a revision. The result achieved hitherto however does not seem convincing. The approach chosen raises a number of problems.

79. The drafters have opted to include in the Constitution three comprehensive lists of rights. As a consequence the individual rights are drafted in general terms and restrictions and limitations do not appear in these lists. The issues to be resolved when drafting a catalogue of human rights are however primarily the exact scope of these rights and the extent to which such rights can be restricted. As an example, Articles 5 and 6 of the European Convention on Human Rights are drafted with great care defining the scope of the rights guaranteed and possible restrictions. Such articles can be applied by the courts far more easily.

80. The permissible limitations appear in draft Article II.6 and this provision is applicable to all rights guaranteed. It can therefore only establish very general principles and not differentiate between different rights. While, however, the right to assembly can

be limited, this is not the case for the right to life or the right not to be tortured. The problem is exacerbated by the fact that the catalogue of rights is particularly broad and includes a large number of economic, cultural and social rights. Limitations to such rights, which depend to a large extent on action by the authorities and the availability of resources, can however not be drafted in the same way as restrictions of fundamental freedoms. Moreover, the issue of possible derogations is not addressed at all.

81. There are three lists of rights guaranteed: fundamental rights, civil and political rights and economic, social and cultural rights. Fundamental rights can however not be regarded as a separate category distinct from e.g. civil and political rights. The distribution of rights among these lists is also not always convincing, e.g. the right to a healthy environment should appear as a social and not as a fundamental right and the freedom of religion should not be regarded as a social right.

82. The effectiveness of human rights protection depends on the remedies available. A very broad and ambitious but vague catalogue of rights such as foreseen in the draft gives the impression of programmatic language not really destined to be applied by courts to concrete cases. The Venice Commission has already stressed in other cases the need for a precise drafting of human rights provisions[2]. In the draft the courts receive insufficient guidance on which to base their decisions and they risk not being able to fulfil the expectations raised by the broad language of the constitution. Or, on the other hand, if courts were to take seriously e.g. their task of protecting the right to a healthy environment, they could encroach on the prerogatives of the legislature and the executive. In this respect the authorities could consider introducing into the Constitution an article on the objectives of the State, which would have as the primary function to provide guidance to the legislature. The provision that Bosnia is a social State would fit into such an article, possibly as a new section following Article I.2, and the right to a healthy environment could be replaced by a sentence that Bosnia and Herzegovina aims at protecting the environment for the benefit of the present and future generations.

83. The Commission would therefore urge the authorities of Bosnia and Herzegovina to reconsider the approach chosen and prepare an entirely different text.

Comments article by article

84. Since the Commission is not convinced that the draft is a good basis for further consideration, it has limited its comments on individual sections of this Article to some particularly important issues.

Draft Article II.1. on general provisions

85. In sub-section (a) the application of the principle of equality is limited to citizens. It should be extended to all individuals as is the case in sub-section (c) for the related principle of non-discrimination. The reference in sub-section (b) to the protection of ethnic and collective rights in accordance with international and European standards is problematic. The term "ethnic rights" is not used internationally and the scope of the protection of collective rights is disputable. Many rights which may be considered

[2] See e.g. the Opinion on the draft Constitution of Ukraine (CDL-Inf(1996)006).

collective can also be understood as individual rights to be exercised collectively (e.g. the right to education in the mother tongue cannot be claimed by a single individual but only by a certain number). There seems no need to introduce a distinction among various categories of rights.

Draft Article II.3.(b) on civil and political rights and freedoms

86. A large number of the rights enumerated here have to be secured to all individuals and not only to citizens, including in particular all rights related to due process and fair trial.

Draft Article II.4 on rights of national minorities

87. It might be appropriate to provide a definition of national minority in the text. The principle should be inserted that special measures may be taken in favour of persons or groups of persons who are in an unequal position in order to enable them to fully enjoy human rights under equal terms.

Draft Article II.5 on interpretation of rights and freedoms

88. It should be stated explicitly that the case-law of European and international human rights protection mechanisms should be taken into account when interpreting the respective rights.

89. Sub-section (c) seems redundant having regard to Article X.2 of the Constitution.

Draft Article II.6 on limitations to human rights and basic freedoms guaranteed by the Constitution

90. A better wording would be*: "Restrictions on the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. Any restriction shall be proportionate to the situation that has dictated it."*

Draft Article II.7 on the Ombudsman

91. The principles of independence, impartiality and immovability of the Ombudsman during his or her term should be included.

Draft Article II.8 on submission of complaints to the Constitutional Court that relate to protection of individual and collective rights

92. It would be more logical to review Article VI of the Constitution instead of including provisions on constitutional court procedure in Article II. At present the Constitutional Court has appellate jurisdiction on constitutional issues under Article VI.3.(b). If one introduces a direct constitutional complaint procedure as foreseen, the continued need for this procedure might be questioned.

93. The present drafting of this draft Article appears unrealistic and risks flooding the Constitutional Court with a large number of complaints, thereby threatening the efficiency and credibility of this body.

a) Other constitutions providing for individual access to the Constitutional Court require the exhaustion of ordinary remedies before the case can be brought before the Constitutional Court. Without such a filter, the Constitutional Court risks being flooded with applications. This risk is exacerbated by the very broad catalogue of rights guaranteed in the draft and the fact that access is provided already in case of immediate danger of violation.

b) The 60 days deadline for a decision by the Court seems unrealistic.

c) The rules on standing in sub-section (c) also seem too generous and increase the risk of overburdening the Court. Legal persons and associations should have the right to appeal to the Court if their own rights are violated but not on behalf of the rights of their members.

Summary on the draft Amendment on human rights

94. With respect to the proposed revision of Article II of the Constitution on Human Rights, the Commission notes that there is no urgent need to revise this Article. It would certainly be desirable to base human rights protection within BiH on rights defined within the country and not on international texts. To this end a broad discussion should take place within the country involving civil society. The procedure chosen for preparing the present amendments, which was required due to the urgent need to revise the Constitution before the elections, does not appear appropriate in this respect.

95. Moreover the text resulting from this process, which was primarily focused on institutional issues, is not of sufficient quality to be adopted. While some elements such as the social state clause may be moved to other parts of the Constitution, the text as a whole should be reviewed on the basis of a different approach, not simply enumerating rights but defining their scope and possible restrictions. An overburdening of the Constitutional Court has also to be avoided.

96. A complete redrafting of the text with the involvement of civil society is impossible in a few weeks. The Commission therefore recommends to postpone the revision of Article II of the Constitution to a second phase of constitutional reform, taking place after the elections.

CONCLUSIONS

97. The Venice Commission is pleased that the main political parties in BiH have been able to agree, sooner than expected after the adoption of its Opinion on the constitutional situation in BiH and the powers of the High Representative (CDL-AD(2005)004), on a constitutional reform package. Adoption of this package before the forthcoming elections is crucial since the reform removes the electoral provisions directly discriminating against

a large number of citizens of BiH which would have undermined the legitimacy of the vote.

98. Moreover, the reform addresses the issues identified as priorities for reform by the Venice Commission. It grants additional powers to the State level, a step which is indispensable if BiH wishes to take part in European integration and which brings the country closer to the situation in other federal Stats. The reform increases the efficiency of the State institutions by strengthening the Council of Ministers and the House of Representatives and reducing the role of the collective Presidency and the House of Peoples. Some of the amendments proposed should be redrafted and not all proposals for reform go as far as the Venice Commission may have wished. In its earlier Opinion it already noted that constitutional reform would have to be a long-term process and that not everything could be done immediately since there is still a lack of trust among the ethnic groups. It will therefore be necessary to follow up this first step and carry out further reforms in the future. One part originally foreseen as part of the reform, the new human rights text, is in any case not ripe for adoption and should be postponed to the next phase of reform after the elections.

99. Having made these qualifications, the importance of the reform, both with respect to its practical consequences and as a signal from BiH to Europe that the country is resolved to take the steps required for European integration, cannot be overestimated. Politics in any democracy is based on compromise and progress may sometimes seem slow. This is all the more true in a multi-ethnic country having gone through a tragic conflict. It is therefore to the credit of the party leaders in BiH that they have been able to achieve a compromise on constitutional reform which includes difficult compromises for all sides. Adoption of this compromise by the Parliamentary Assembly would show an increased capacity of BiH to take its fate in its own hands. The opportunity to strengthen the powers of the State level, to streamline decision-making and to show to Europe that BiH is capable of overcoming old divisions in the interest of European integration should not be missed.