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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

60th PLENARY SESSION
(Venice, 8-9 October 2004)

SESSION REPORT

1. Adoption of the Agenda

The Agenda was adopted subject to the addition of a new item 8bis concerning Belarus.

2. Communication by the Secretariat

At the opening of the Plenary session, Mr Buquicchio apologised for the absence of the President of the Venice Commission, Mr La Pergola, who was unable to be present for health reasons.

Mr Buquicchio informed the Commission that Monaco had joined the Council of Europe a few days earlier and that as a consequence Monaco became member of the Venice Commission and a member of the Commission should be appointed at the beginning of 2005.

He also informed the Commission that Romania had asked the Commission for a study on legislative measures for reducing the length of proceedings. This could be discussed at the December session.

3. Co-operation with the Committee of Ministers

Within the framework of its co-operation with the Committee of Ministers, the Commission held an exchange of views with Ambassador Johannes C. Landman, Permanent Representative of the Netherlands to the Council of Europe and with Ambassador Pietro Lonardo, Permanent Representative of Italy to the Council of Europe.

Ambassador Landman informed the Commission of the Ministerial Session of the Council of Europe, which took place in May under the Netherlands presidency. He highlighted two of the decisions which had been taken at the Session. The first was the decision to adopt Protocol 14 to the European Convention on Human Rights, concerning measures to ease the workload of the European Court of Human Rights. The second was the decision to hold a third Council of Europe Summit, which will take place in Warsaw on 15-16 May 2005. The purpose of this Summit will be to affirm the relevance of the Council of Europe, especially regarding its relationship to other European structures, in particular the European Union.

Ambassador Lonardo raised the question of how the Commission could be of help in relation to the Summit, noting that, along with the European Court of Human Rights, the Commission had an important role to play, given that so many issues were legal. In respect of the Council of Europe's relationship with other European institutions, in particular the European Union, Ambassador Lonardo underlined that the "empty chair" problem, that is, the fact that the European Commission does not attend meetings of the Committee of Ministers even though it is invited to do so, was a real one. He also referred to another aspect to be considered at the Summit, the question of the Council of Europe's relevance to the general public.

4. Co-operation with the Parliamentary Assembly

The Commission held an exchange of views with Mr Erik Jurgens, Member of the Committee on Legal Affairs and Human Rights, on co-operation with the Assembly.

Mr Jurgens highlighted the usefulness of the Commission and the Assembly working together. The Assembly could do the fact-finding but an assessment of standards was more difficult for parliamentarians in the Committee on Legal Affairs and Human Rights, who are in the main politicians rather than lawyers.

Mr Jurgens informed the Commission of a report by Mr Frunda of the Assembly on the concept of nation, which could be the subject of a Venice Commission opinion.

He also informed the Commission that the Assembly would be making a report, at the request of Mr Holovaty, on the differences in the concepts of *Etat de droit* and the rule of law. The Commission could be involved in this too once the report has been finished.

Finally, Mr Jurgens welcomed the co-operation agreement between the Parliamentary Assembly and the Venice Commission which had been signed earlier in the week by the President of the Assembly Mr Schieder and by Mr Jowell. He expressed his regret that Mr La Pergola had not been able to attend the session of the Assembly.

Mr Jowell informed the Commission that he had been honoured to sign the co-operation agreement with the Parliamentary Assembly on behalf of the Commission. He noted that he had spoken to many members of the Assembly individually and had had the opportunity both to convey the

Commission's enthusiasm for co-operation with the Assembly and to feel the enthusiasm on the Assembly's side.

5. Follow-up to earlier Venice Commission opinions

In respect of follow-up to the Venice Commission's opinion regarding the judicial system of Bulgaria, Mr Buquicchio informed the Commission that Bulgaria had adopted a new law. The recommendation of the Commission for depoliticising the Supreme Judicial Council by requiring a two-thirds majority in parliament for the election of the parliamentary representatives within the Council was not implemented. Mr Stankov acknowledged the need for further depolitisation and hoped that it would be achieved by 2007.

Mr Khetsuriani informed the Commission about the adoption of the draft Constitutional law of Georgia concerning the status of Adjara. The Constitution of Georgia itself did not provide a definitive solution with respect to the territorial organisation of Georgia. The Commission had worked on the Constitutional Law and submitted conclusions very quickly. Mr Khetsuriani thanked the rapporteurs, Mr Malinverni and Mr Vogel. He noted that some important comments had been made. As a result of some of the comments, the following changes had been made:

- a uni-cameral parliamentary system had been retained, rather than a bi-cameral one
- a simple majority of the House of Representatives is required for a motion of no-confidence in the Council of Ministers rather than the three-fourths majority initially provided for (considered too high)
- the President of Georgia can dissolve the parliament of Adjara only with the consent of the Georgian Parliament
- decisions to abrogate certain laws which do not comply with Georgian law should not be taken by political structures; in its opinion the Commission suggested that the Constitutional Court should be left to decide. Mr Khetsuriani informed the Commission that this had caused heated debate within the drafting committee. In the end, it had been agreed that a solution should be found involving the Constitutional Court. The Parliament of Georgia is entitled to address the Constitutional Court and ask it to abrogate laws if they are against the Constitution or Georgian law. The Constitutional Court can decide to accept the request and suspend laws of the Adjaran parliament. In general, the Constitutional Court should decide on problems regarding laws on the autonomy of Adjara.

Other comments of the Commission, however, had not been taken into account in the new Constitutional Law. In particular, the powers of the central state and the regions should have been better defined. Mr Khetsuriani expressed his hope that work on the Constitution of Adjara will bridge these gaps.

Ambassador Landman found it worrying that not all the Commission's proposals had been taken up, given that Adjara is a key problem. Mr Khetsuriani responded that while republics which existed during the Soviet period enjoyed autonomy, there were no political or historical grounds for the establishment of such autonomy for Adjara. There was a need to maintain autonomy in Abkhazia but there was no valid reason – ethnic or religious – for such autonomy in Adjara. The Constitutional Law on the status of the autonomous Republic of Adjara showed that the path towards decentralisation will be maintained. He would have wished for the opinion of the Commission to be followed to a greater extent but the text of the constitutional law reflected the will of the Georgian Parliament.

Mr Buquicchio recalled that the Commission had organised an important conference in May in Georgia on the constitutional organisation of the state. On this occasion, the Commission had met the President of Georgia, Mr Saakashvili. While the Adjaran case is different, there was a need to give a signal to two other regions, Abkhazia and South Ossetia. Mr Saakashvili had expressed his readiness to discuss with these regions. The Commission is ready to assist where appropriate.

6. Albania

Mr Bartole presented the draft *amicus curiae* opinion on the interpretation of Articles 125 and 136 of the Constitution of Albania regarding the appointment of highest judges. This opinion had resulted from a request for an *amicus curiae* opinion by the Constitutional Court. Following the refusal by Parliament to give its consent to the presidential nomination of a judge of the Constitutional Court, the President of the Republic had asked the Court to interpret constitutional articles on the nomination of judges of the Constitutional and Supreme Courts. The reporting members came to the conclusion that when giving its consent to such presidential nominations, the Albanian Parliament has the power to decide upon the merits of the nominations and not only whether formal requirements were met. However, the reporting members recommended that the Standing Orders of the Assembly be amended in order to allow for an open debate of the presidential nominations by the Assembly thus giving the President the necessary information about the reasons for a refusal of consent.

The electoral law and election administration in Albania were discussed under item 21 "Other business".

The Commission adopted the *amicus curiae* opinion on the Interpretation of Articles 125 and 136 of the Constitution of Albania (Appointment of Highest Judges) as it appears in CDL-AD(2004)34 based on comments by Messrs Bartole and Cardoso da Costa (annexed).

7. Armenia

a. Constitutional reform

Mr Torossian informed the Commission that three sets of proposals for amendments to the Armenian Constitution were currently pending before the National Assembly: one prepared by the ruling coalition, one by the radical opposition, and two prepared by opposition members of parliament. Parliament would have to choose one of the three texts, and subsequently three readings would be necessary for the text to be finalised. The second and most important reading was planned to take place in February/March 2005. The third reading would then only address minor points. The referendum was planned for June 2005. The Commission, which had already been requested to assess the three drafts, would be called upon assessing the single draft resulting from the works of the National Assembly before the second reading.

Mr Tuori explained that only the first and, very recently, the second draft had been received by the Commission in English, and that the working group was currently examining them. Mr Tuori underlined that the choice of regime was an essentially political one, given that any regime was in principle capable of being compliant with European standards of democracy, the rule of law and respect for human rights. If a Presidential regime was chosen, however, it was imperative to provide parliament with sufficient powers of control over the President's powers. Mr Tuori noted that it appeared that the draft prepared by the ruling coalition to a large extent corresponded to

the one submitted to the failed referendum of May 2003, which constituted a step backwards in respect of the text which the Armenian authorities had prepared in co-operation with the Commission in 2001. The reporting members intended to submit their opinion on the three draft proposals for constitutional amendment in December 2004.

b. Law on the procedure for conducting gatherings, meetings, rallies and demonstrations

As regards the Law on the procedure for conducting gatherings, meetings, rallies and demonstrations (CDL(2004)042), Ms Flanagan recalled that the reporting members had prepared a draft opinion to be discussed at the previous session, in which they had explained that the law in question was excessively complicated, the right of assembly was over-regulated and allowed for restrictions on the basis of criteria which were not foreseen in Article 11 of the European Convention on Human Rights. Ms Flanagan also recalled that in June Mr Torossian had expressed the wish to provide the Commission with certain explanations regarding the law: accordingly, the examination of the draft opinion had been postponed. Mr Torossian's explanations had subsequently been received: they indeed provided some useful information concerning the law. The reporting members remained however of the opinion that the law needed to be amended. It contained distinctions between categories of demonstrations and criteria for restrictions of public events which did not correspond to the European Convention on Human Rights. In addition, excessive formalism surrounding the procedure for notifying a demonstration and obtaining authorisation risked discouraging demonstrations.

Mr Torossyan informed the Commission that the Armenian authorities planned to revise the law in question before March 2005, taking into account the Venice Commission's opinion.

The Commission adopted the opinion on the Law on the procedure for conducting gatherings, meetings, rallies and demonstrations as it appears in document CDL-AD (2004)039.

8. Azerbaijan

Mr Buquicchio informed the Commission of a successful seminar with the Constitutional Court of Azerbaijan on the role of precedents (national, foreign and international) for constitutional courts. On this occasion, Mr Buquicchio had also met Mr Aliyev, President of the Republic. The Commission hoped to resume work on the Electoral Code soon, in co-operation with ODIHR, and to work on the reform of the Constitution with a view to reinforcing the role of parliament, as soon as the Azerbaijan authorities were ready to do so. Both points had been raised by the working group of the Committee of Ministers known as the Ago Group, which would be visiting the Caucasian countries before the end of this year.

8bis. Belarus

Messrs Russell and Bartole, reporting members, presented the draft opinion on the referendum scheduled for 17 October 2004, prepared following an urgent request by the Parliamentary Assembly. The people of Belarus were asked to reply to a simple question, authorising at the same time the present incumbent to continue in office beyond the presently authorised two terms and amending the Constitution by removing the term limit. The proposed referendum had a plebiscitarian character and was not in conformity with European standards. The personal and the constitutional question should not be mixed and the personal question was in direct contradiction with Belarus legislation and granted an illicit privilege to a single person. The

Venice Commission had earlier concluded that the powers of the President in Belarus were excessive and it seemed particularly undesirable in such a situation to enable a President to stay in office indefinitely. It was also questionable whether the required conditions for a free and fair vote existed in Belarus.

In the discussion several members supported the conclusion in the draft opinion that the plebiscitarian character of the referendum was unacceptable but pointed out that it could not be regarded as a universal standard that a head of state was prevented from staying in office for more than two terms. Mr Bartole agreed that this rule was general only for presidential systems of government. The draft opinion was clarified accordingly.

The Commission adopted the Opinion on the referendum of 17 October 2004 in Belarus as it appears in document CDL-AD(2004)029.

9. Bosnia and Herzegovina

a. Follow-up to Assembly Resolution 1384

The Secretariat recalled that Assembly Resolution 1384 asked the Venice Commission to examine the compatibility of the powers of the High Representative with democratic principles, as well as the compatibility of the Constitution of Bosnia and Herzegovina with the European Convention of Human Rights and the European Charter of Local Self-Government and the efficiency and rationality of the constitutional arrangements in the country in general. Five members, Messrs Helgesen, Jowell, Malinverni, Scholsem and Tuori, were designated as reporting members on this issue and a delegation would go to Bosnia and Herzegovina before the end of the month to prepare the opinion.

The High Representative, Lord Ashdown, welcomed the timely request by the Parliamentary Assembly. The opinion to be delivered by the Venice Commission could provide an important impetus to move forward in Bosnia and Herzegovina. The text of the speech by Lord Ashdown appears at Appendix I to this report.

b. Law on amendments to the draft Law on the Ombudsman for Human Rights in Bosnia and Herzegovina

Mr Tuori recalled that Bosnia and Herzegovina currently had three Ombudsman institutions (one at the level of the State and one in each entity), which was costly and confusing for the public. The Commission, whose assistance in the streamlining of these institutions had been requested by the Ministry of Human Rights and Refugees, organised a meeting in April 2004, at which certain guidelines for restructuring the Ombudsman institutions were agreed upon. In brief, it was proposed to establish a single institution at the state level, composed of one Ombudsman and two Deputies. The three persons would be appointed at the same time by the National Assembly for a period of six years, and would serve for two years as Ombudsman and four years as Deputy Ombudsman.

The draft law under consideration (CDL(2004)063), subsequently prepared, reflected in most part the conclusions of the April meeting. In the view of the reporting members, however, it was necessary to spell out more clearly the modalities of the appointment and the respective roles and functions of the Ombudsman and of its Deputies. As regards the competence of the State of Bosnia and Herzegovina to proceed with the restructuring, Mr Tuori underlined that the

Constitution of BiH clearly stated that responsibility for human rights protection and the future shape of human rights institutions were in the hands of the State. Nevertheless, it was up to the Entities themselves to make the necessary amendments to their Constitutions and/or legislation.

Mr Hugh Chetwynd, acting Head of the Council of Europe's Office in Sarajevo, informed the Commission that parliament had suspended examination of the draft law. The Ministry for Human Rights and Refugees intended to amend the draft law in the light of the Venice Commission's opinion, prior to submitting it again to Parliament.

The Commission adopted the Opinion on the draft Law on amendments to the Law on the Ombudsman for Human Rights in Bosnia and Herzegovina as it appears in document CDL-AD(2004)031.

c. New draft amendments to the Constitution of the Federation of Bosnia and Herzegovina

In the absence of Mr Scholsem the Secretariat presented the draft opinion on the constitutional amendments in the field of local government, recalling that two earlier versions of these amendments had already been examined by the Commission and that the opinion was a follow-up to these earlier comments.

Mr Sadikovic expressed the view that the problem in his country was too many layers of government. The reform at the Federation level did not seem very pertinent. The Commission should concentrate on an overall reform of the constitutional situation as requested by Assembly Resolution 1384.

The Commission adopted the Opinion on the new draft amendments to the Constitution of the Federation of Bosnia and Herzegovina, as it appears in document CDL-AD(2004)32.

10. Georgia

With reference to the draft law on Restitution of Housing and Property to the Victims of the Gerogian-Ossetian conflict (CDL (2004)088), Mr van Dijk explained that it constituted a very important step towards remedying part of the damages caused by the conflict in question and, as such, it had to be welcomed. Nevertheless, the draft lacked certain important substantial provisions, notably on the criteria to be followed by the Commission for Housing and Property Issues in deciding upon claims for property restitution. Mr van Dijk underlined the need for the law to ensure the adequate protection of the rights of all the individuals concerned – both the returnees and the current occupants of the property in question.

Mr Paczolay noted that the draft law only concerned the Georgian-Ossetian conflict and underlined the need for the Georgian authorities to address similar issues with respect to Abkhazia.

The Commission adopted the opinion on the draft Law Restitution of Housing and Property to the Victims of the Georgian-Ossetian conflict as it appears in document CDL-AD (2004)037.

11. Italy

Mr Tuori informed the Commission about a request from the Parliamentary Assembly of the Council of Europe for an opinion on the compatibility of the Italian "Gasparri" Law on the media and "Frattini" Law on the conflict of interest with the standards of the Council of Europe in the field of freedom of expression and media pluralism, especially in the light of the case-law of the European Court of Human Rights.

A working group, composed of Messrs. Helgesen, Tuori, Grabenwarter, Paczolay, and Ms Thorgeisdottir had been set up. It would further be assisted by external experts in media matters. The working group planned to visit the Italy shortly.

Ambassador Lonardo declared that Italy relied upon the jurists of the Commission, their personal direct experience, legal ability and capability, to reach in their usual manner an independent legal opinion .

12. Russian Federation

Mr Paczolay presented the draft opinion on the draft Constitutional Law on modification and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation providing for the introduction of a written procedure at the Court. The draft Constitutional Law had been drafted by members of the Constitutional Court and submitted to the legislature. The aim of the amendment was to introduce the possibility of written proceedings before the Constitutional Court where previously only oral hearings had been allowed. The possibility of written proceedings was limited to a narrow number of cases, "where analogous normative provisions are at issue", which the rapporteurs had understood as where a case was similar to a previous case. The rapporteurs had found the draft Constitutional Law to be generally in conformity with European standards, since written proceedings are quite common. The main problem would be to clarify what an "analogous provision" means. However, this was not a pressing issue.

Mr Baglay thanked the reporting members. He informed the Commission that the reform had been prompted by the high number of cases submitted to the Constitutional Court, a large percentage of which were from individuals, which raised questions which had been addressed previously on numerous occasions. The Constitutional Court did not want to have to decide all these cases by oral hearing. He noted that this reform would improve the efficiency of the Constitutional Court's work.

The ensuing discussion touched on the wider issue of the merits of oral and written proceedings.

The Commission adopted the Opinion on the Draft Constitutional Law on modification and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation providing for the introduction of a written procedure at the Court (CDL-AD(2004)035).

13. Serbia and Montenegro

- *Serbia*

The Secretariat informed the Commission that work on the new Constitution was to be speeded up following the local elections which had just taken place.

- *Montenegro*

An expert body was at the moment finalising its recommendations on the adoption of the new constitution. A Venice Commission delegation could visit Montenegro once these recommendations were available.

- *Kosovo*

Mr Constas reported to the Commission that the draft opinion on the possible establishment of human rights review mechanisms in Kosovo had been discussed within the Sub-Commission on International Law on 7 October. The Rapporteurs, Messrs Helgesen, van Dijk, Nolte, Malinverni and Scholsem, had presented an analysis of the main human rights issues which were being experienced in Kosovo but had pointed out that the Commission's mandate only related to the possible institutional solutions to the lack of human rights review mechanisms in Kosovo. They had proposed, as a medium-term solution, the setting up of a Human Rights Court for Kosovo, to review the acts of UNMIK and KFOR or any other international organisation provisionally administering Kosovo. They had also proposed a short-term, compromise solution, targetting each of the three potential institutional sources of human rights violations (UNMIK, KFOR and the Provisional Institutions of Self-Government) individually. This proposal consisted in the creation of two advisory bodies competent to review acts by UNMIK and KFOR respectively and in the setting up of the Special Chamber of the Supreme Court on Constitutional matters, already foreseen in the Constitutional Framework, with additional competence over individual human rights cases concerning PISG authorities.

Mr Helgesen explained that a delegation of the working group had visited Kosovo at the beginning of September to prepare the opinion. In the course of the visit, the rapporteurs had met with people working in the different international organisations (including UNMIK, OSCE, OHCHR and UNICEF), who were fully committed to human rights protection and were doing a marvellous job in such a complex and difficult scenario. The Working group had intended to provide all these people with some assistance and additional tools for fulfilling the objective of giving people in Kosovo an adequate level of human rights protection. However, the Rapporteurs were conscious of the limited mandate they had received and also of the limited extent to which an institutional approach may impact on the human rights situation in Kosovo.

Mr Helgesen recalled that a series of international human rights instruments were applicable in Kosovo. Kosovo was being administered by UNMIK and KFOR, but the latter, as international organisations, and their members enjoyed immunity from legal proceedings. While personal immunity could be waived (and indeed had been waived in a number of cases), institutional immunity prevented any independent review of UNMIK and KFOR acts, which were potentially capable of violating human rights.

Serbia and Montenegro, despite having territorial sovereignty over Kosovo, could not be held accountable for acts committed by UNMIK or KFOR. Accordingly, notwithstanding that Serbia and Montenegro had ratified the European Convention on Human Rights, Kosovo people were prevented from bringing individual complaints against acts by UNMIK or KFOR before the European Court of Human Rights.

The Working group considered that the possible extension of the jurisdiction of the ECtHR over the UN (UNMIK) or NATO (KFOR) was not a realistic objective, given that the process of

achieving such extension through either an amendment of both the ECHR and the Council of Europe Statute or a parallel agreement was likely to take longer than the period of existence of the provisional administration in Kosovo.

Medium-term and a short-term solutions had instead been envisaged, as already pointed out by Mr Constas. The Working Group did not doubt that UNMIK and KFOR were fully committed to human rights. However, it considered that it was necessary for the international organisations provisionally administering Kosovo to give a signal to the Kosovo people and to the world that human rights were a serious concern and that they did not shield their acts from independent scrutiny.

Mr Nolte pointed out that the proposed UNMIK and KFOR advisory bodies would be internal to these organisations, but that their members would be independent.

Mr Jürgens stated that it could be argued that UNMIK as an interim administrator of a part of the territory of another State, had to apply the "law of the land" and therefore be bound by the ECHR.

Mr Jean-Christian Cady, Deputy Special Representative of the Secretary General for Police and Justice, welcomed the opinion of the Commission and expressed its satisfaction that a number of his previous remarks and comments had been taken into account by the Sub-Commission. He pointed out that UNMIK, a UN body, incorporated human rights standards and had the will and the capacity to respect them fully. A number of internal mechanisms supervising respect for human rights existed within UNMIK and the other pillars. UNMIK had also created the conditions for PISG to respect human rights standards. On the other hand, prosecution of members of UNMIK staff had been possible, the Secretary General having each time lifted the immunity.

Mr Cady considered that the Commission ought to focus on how to ensure respect for human rights after the departure of UNMIK from Kosovo.

Mr Thomas Toussaint, Chief Legal Adviser of KFOR, explained the while KFOR still retained the power to detain and to carry out searches, and rightly so, this power was nowadays only exercised in a very limited and exceptional circumstances and under the supervision of the Legal Advisor on the basis of written standards and procedures. The suggested Advisory Board which would complement the review by the Legal Advisor could indeed prove useful. However, the decision to set up such a body could not be taken by KFOR, but by a higher NATO authority.

Mr Nolte underlined the need to differentiate between the personal immunity of UNMIK staff members and the institutional immunity of UNMIK itself. It was essential, as a matter of principle, that acts by UNMIK, which exercised tasks which were certainly more similar to those of an administration than those of an international organisation, should be subjected to independent review.

The Commission adopted the opinion on "human rights in Kosovo:possible establishment of review mechanisms (CDL-AD(2004)033).

14. Turkey

This item was dealt with within the framework of the Sub-Commission on International Law (see item 18).

15. Ukraine

a. Procedure of amending the Constitution of Ukraine

Ms Flanagan presented the draft opinion on the Procedure of amending the Constitution of Ukraine, drawn up on the basis of comments by Ms Thorgeirsdottir, Mr Tuori and herself. The three draft proposals for amending the Constitution all deal with the distribution of powers between the President and the Parliament. The first draft law on amending the Constitution (no. 4105), adopted in the first reading in December 2003 was rejected by the Verkhovna Rada in its second reading in June 2004. The second draft law on amending the Constitution (no. 3207- 1) failed to obtain the necessary approval, while the third draft law on amending the Constitution (no. 4180), which was vitually identical to draft law no. 4105 was submitted to the Verkhovna Rada and adopted in its first reading on 23 June 2004. If a second vote on Draft Law no. 4180 were to be taken, it would be on the agenda of the Verkhovna Rada during its Autumn session.

The Monitoring Committee of the Parliamentary Assembly had suggested that the reforms should be postponed until after the presidential elections due on 31 October 2004, and asked the Commission to give its opinion on the procedural issues involved. Ms Flanagan noted that two possible interpretations of the relevant constitutional articles (Articles 158 and 159) were possible: one allowed the successive submission of amendments to the constitution within one year of a similar text failing to be adopted by Parliament, the other prohibited this. She said that the opinion emphasised the need for constitutional certainty and recommended that a decision by the Constitutional Court of Ukraine should be sought on this issue.

The Commission adopted the Opinion on the Procedure of amending the Constitution of Ukraine as it appears in document CDL-AD(2004)30.

b. Law on the status of indigenous (autochthonous) peoples

In respect of the draft law on the status of Indigenous peoples of Ukraine (CDL(2004)079), Mr van Dijk explained that, while the preparation of a specific piece of legislation in this field was to be welcomed, the draft law seemed not to take into due account the differences between “indigenous peoples” and “national minorities”; reference in the draft law to numerical criteria, for example, was confusing and inappropriate.

Ms Lazarova added that the draft law needed to be complemented by more detailed and precise provisions on the Assembly of Indigenous Peoples as a consultative body and on the right of persons belonging to indigenous peoples to be elected.

The Commission adopted the opinion on the draft Law on the Status of Indigenous Peoples of Ukraine (CDL-AD (2004)036).

c. Law on the office of the Public Prosecutor

Ms Suchocka presented the draft opinion on the draft Law amending the Law of Ukraine on the office of the Public Prosecutor. This opinion had been prepared on the basis of the individual comments by Ms Suchocka and Mr Hamilton, which had been discussed and endorsed at the June plenary session. The draft Law had been prepared to fulfil one of the obligations entered into by Ukraine upon its entry to the Council of Europe, that is, to transform the role and functions of the public prosecutor's office to bring it into line with European democratic standards. However, the draft Law does not fulfil this obligation and moreover would make permanent a number of features which according to the Constitution were only meant to be transitional. Although the draft Law contained some marginal improvements, it was not a fundamental reform. The reporting members highlighted a number of matters which were cause for serious concern. These included an over-centralisation of power with the public prosecutor, infringements of the principle of the separation of powers, powers given to the public prosecutor which would more appropriately be exercisable by a court, an unclear relationship between the public prosecutor and the executive, a threat to press freedom, powers of representation which were too widely drawn and provisions on the independence of the public prosecutor which were not in accordance with the texts of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.

The Commission adopted the Opinion on the draft Law amending the Law on the office of the Public Prosecutor of Ukraine as it appears in document CDL-AD(2004)38.

16. Other constitutional developments

- *Republic of Korea*

The Commission held an exchange of views with Mr Young-chul Yun, President of the Constitutional Court of the Republic of Korea. Mr Young-chul Yun outlined recent developments with regard to the role of the Constitutional Court as an intermediary between the people and the governing structures. Striking the right balance between law and politics through constitutional adjudication was a main challenge for the Court. Recently the Court had dealt with about 1200 applications, half of which were constitutional complaints. Cases related to, *inter alia*, impeachment of the President, conscientious objectors, the relocation of the capital city and finger printing.

Mr Young-chul Yun noted that the Republic of Korea co-operated fruitfully with the Commission since 1999. He expressed his appreciation for the Commission's role in fostering democracy and the rule of law not only in Europe but also worldwide, pointing out that the Korean legal system is based on the continental model, embracing European values, which were also universal.

He also informed the Commission that the necessary domestic procedures had been set in motion to enable the accession of the Republic of Korea to the Enlarged Agreement.

- *Egypt*

Mr Omar Sherif, Vice-President of the Supreme Constitutional Court of Egypt informed the Commission that his participation was with a view to developing contacts and to finding a way of co-operating further with the Commission. The Supreme Constitutional Court in Egypt followed the European model of constitutional adjudication and its case-law was well-developed. The only problem was that, as decisions were only given in Arabic, they were not easily accessible

internationally. For that reason, the Constitutional Court is currently setting up a database with decisions in English.

- *"the Former Yugoslav Republic of Macedonia"*

Ms Lazarova Trajkovska informed the Commission that, following a successful popular initiative, a referendum would take place on 7 November 2004 in her country in order to abrogate the recently adopted law redrawing municipal boundaries. This law was a key element for the implementation of the Ohrid Agreement. A challenge to the referendum was already pending before the constitutional court and, if the referendum were successful, the court would probably have to deal with its implementation.

- *United Kingdom*

The Rt Hon Lord Woolf of Barnes, Lord Chief Justice of England and Wales, informed the Commission on constitutional reform in the United Kingdom. A Bill to abolish the office of Lord Chancellor and replace it with a Secretary of State, to establish a Supreme Court and to set up a Judicial Appointments Commission was currently before the House of Lords (upper house of parliament). The incorporation of the European Convention on Human Rights had been a great success: it was applied and infusing the legal system. However it had highlighted that some UK institutions did not fit in with European models.

This was true in particular with regard to the office of Lord Chancellor, who, as Head of the Judiciary, Speaker of the House of Lords and most senior member of the Cabinet, had functions inconsistent with the principle of the separation of powers. Although in practice such functions had been exercised with restraint and respect for the separation of powers, the current extent of the Lord Chancellor's powers and the need for the judiciary to be seen to be independent argued in favour of reform. The proposal was now to have a separate speaker of the House of Lords and to divide responsibilities of the Lord Chancellor in respect of the courts between the Lord Chief Justice, as head of the judiciary, and the Minister of State for Constitutional Affairs.

The need for a Judicial Appointments Commission had also been accepted in the interests of transparency. The Commission would be composed of 15 people, a majority of whom would be judges, and would appoint on the sole criteria of merit. The proposal to establish a Supreme Court was more controversial. The aim of the proposal would be to separate the House of Lords in its legislative capacity from its activities as Final Court of Appeal. The Supreme Court would have much the same jurisdiction as the Appellate Committee of the House of Lords but would also deal with devolution issues, currently dealt with by the Law Lords in Privy Council.

17. Report of the Meeting of the Ethics Committee (7 October 2004)

Ms Suchocka informed the Commission that the Committee had agreed at its meeting the previous day to submit to the Commission for adoption at its next Plenary Session additions to the Commission's Rules of Procedure dealing with potential conflicts of interest. The precise wording of the proposals was still being discussed. No separate code of ethics for the Venice Commission members seemed to be necessary. The proposed rules would in particular include the disclosure of potential conflicts of interest by the member concerned and non-participation in votes in cases of conflicts of interest. Members should also be prudent in publicly commenting decisions by the Commission.

18. Report of the Meeting of the Sub-Commission on International Law (7 October 2004)

Mr Constas, who had chaired the meeting, informed the Commission on the results and conclusions of the meeting (see items 13 and 14 above). There had been three items for discussion.

a. Human Rights in Kosovo: possible establishment of review mechanisms

See item 13, Serbia and Montenegro.

b. Report on the supremacy of international human rights treaties

Mr Dutheillet de Lamothe informed the Commission about the report which had been prepared at the request of the Head of the Constitutional Commission of the Turkish Grand National Assembly on the case-law of countries which have adopted the supremacy of treaties on fundamental human rights and freedoms. He noted that this was a working document, which needed to be completed for the December session. He stressed that this was a report of the Commission, not an opinion, and therefore fact-based. He also underlined that the report had been prepared on the basis of information contained in the Commission's CODICES database, which was not an exhaustive source of information. Further to discussion in the Sub-Commission, it had been agreed that in addition to the decision references based on CODICES, reference would be made for each decision to the date of the decision and the court which delivered it. Discussion had shown that there was a need to update, complete or even delete some elements from the report and an e-mail would be sent from the Secretariat inviting all members to check the parts concerning their country and provide further information where appropriate.

c. Reflection on the status of international human rights treaties

Mr Constas informed the Commission that the Sub-Commission on International Law had discussed the idea of carrying out a study on the status of international human rights treaties to include non-European experience, especially that of the USA and UN system. There was a proposal to organise a UniDem seminar in co-operation with IACL on this topic next year, which could provide the basis for the study.

19. Co-operation with the International Association of Constitutional Law

Ms Saunders, President of the International Association of Constitutional Lawyers (IACL) and Mr Buquicchio signed the co-operation agreement between IACL and the Venice Commission approved by the Commission at its 59th Plenary Session (CDL(2004)071rev).

Ms Saunders noted that the overlapping interests and membership of the IACL and the Commission meant that it made sense to co-operate. She looked forward to co-operating in the organisation of a seminar on the status of international human rights treaties.

20. UniDem

Mr Bartole informed the Commission of the results of the meeting of the National Co-ordinators of the UniDem Campus for the legal training of civil servants which took place in Trieste on 4 October 2004.

Participants in the meeting had expressed their appreciation for the work carried out by the Secretariat and noted that the seminars were becoming increasingly successful. They had looked at possibilities for further development, if additional financial support from other countries was forthcoming. One idea was a summer school for young civil servants. Mr Bartole noted that only 5 seminars would be possible in 2005 with current levels of funding. Mr Jambrek underlined that the summer school initiative was well worth pursuing and indicated that he may be able to report further on this in December.

Mr Buquicchio informed the Commission about the following ideas for the holding of UniDem Seminars in 2005:

- special status of international human rights treaties
- legal protection against acts by the international community
- organisation of elections by an impartial, which would be funded by the European Commission within the framework of the joint programme "Democracy through free and fair elections"
- second chamber in federal and regional states, a proposal from the Congress for Local and Regional Authorities in Europe

21. Other Business

Mr Buquicchio suggested that the joint recommendations of the Venice Commission and OSCE/ODIHR on the electoral law and electoral administration in Albania, which had already been discussed at the last session, should now be adopted, it being understood that the Commission thereby did not pronounce itself on the need to revise the constitution in respect of issues contained in the report. Mr Omari stated that he could accept the text based on this understanding.

The Commission adopted the joint recommendations of the Venice Commission and OSCE/ODIHR on the electoral law and the electoral administration in Albania (CDL-EL(2004)002rev).

22. Date of the next session

The Commission confirmed the date of its 61st Plenary Session: 3-4 December 2004; Sub-Commission meetings as well as a meeting of the Council for Democratic Elections will take place as usual on the day before the Plenary Session.

A P P E N D I X I

SPEECH BY THE HIGH REPRESENTATIVE, LORD PADDY ASHDOWN TO THE VENICE COMMISSION: VENICE, 8 October 2004

I am very grateful for this opportunity to speak to the Commission as you embark on your assessment of the conformity of the Constitution of BiH with the Convention for the Protection of Human Rights and Fundamental Freedoms, and your examination of the role of the so called Bonn Powers. I welcome the fact that the Commission is carrying out this work, at the behest of the Parliamentary Assembly. This is very timely at the present stage of BiH's development and the International Community's engagement in peace stabilisation there.

That is why I very much wanted to come to Venice today so that I can outline to you in person my own approach to these issues.

I and my Office will, of course, also be at your disposal when you come to Bosnia and Herzegovina later this month, and at any point as your important work proceeds.

Let me begin by briefly setting the context, before coming to the specific issues of your inquiry.

It is now nearly nine years since the war in Bosnia and Herzegovina was brought to an end with the signing of the Dayton Paris Peace Accords.

I think everyone knew at the time that the constitutional structure Dayton created to end a very violent war would not be an easy one within which to build a functional state. Let us not forget that, in that war, 250,000 of BiH's four million citizens had lost their lives, and two million were made homeless.

Ending that war was the priority of priorities, and in that aim the Dayton agreement has succeeded spectacularly. It was far from certain, in the months following the agreement and the deployment of IFOR, that the peace would hold. Indeed, most commentators predicted failure. But it hasn't happened, and nine years later, the prospect of hostilities resuming is – I believe – remote.

But BiH has not just stood still in that period, as the Parliamentary Assembly's resolution rightly acknowledges. Indeed, slowly but surely, BiH has moved forward. Today, a million of those refugees have returned to their homes, the physical infrastructure of the country has been largely repaired, freedom of movement is now taken for granted; the currency is the most stable in the Balkans; elections, under entirely BiH auspices, are well run, fair and peaceful; and bit by bit, BiH is starting to acquire the institutions required by any functioning state.

Nine years on, BiH has now reached crucial way markers on its long road to membership of the two institutions best able to secure its long term peace and prosperity – NATO and the European Union. It is close to entering Partnership for Peace and beginning negotiations on a Stabilisation and Association Agreement with the EU.

A great deal of the credit for this goes to the people of BiH, many of whom have worked hard to turn their country around and to put the past behind them. They are the real heroes. And we often do not give them the credit they deserve. But people in BiH will also tell you, as they consistently tell opinion pollsters, that this progress would not have been possible without heavy-

duty engagement by the IC in general and the OHR in particular, and without the use of the Bonn Powers.

But times move on, and we need to move with them. BiH has evolved a great deal since the war ended, and it is right and timely that we should now consider how both the constitutional architecture of the country and the international presence in BiH should evolve too.

As the Parliamentary Assembly's resolution noted, 'The constitutional order prescribed by the Dayton Peace Agreements… is extremely complicated and contradictory. As the outcome of a political compromise to end the war, it cannot secure the effective functioning of the state in the long term and should be reformed once national reconciliation is irreversible and confidence is fully restored'.

I am not sure we have quite reached that point of irreversibility yet. But we are getting close to it.

But BiH has not waited to make certain agreed changes to its constitutional set up, which I shall describe in a moment.

When I arrived in BiH over two years ago I set as my objective 'putting BiH irreversibly on the road to Statehood and membership of the EU.' I made clear that Dayton and the BiH Constitution should be viewed as the foundation and not the ceiling. And, like all foundations, this one can be built on.

Since then we have sought to facilitate the evolution of BiH's constitutional order and institutional framework in a manner that will underpin rather than undermine the functioning of the State. Our strategy has been to follow a functional approach – moving from one key sector to the next - redressing the deficits of the Dayton structure by streamlining and unifying institutions.

Contrary to the impression that is often given, especially outside BiH, the majority of what has been achieved has been the result of bringing together local actors through commissions to tackle different aspects of Bosnia and Herzegovina 's key source of dysfunctionality - the weakness of the BiH State . In this way, by establishing internationally chaired, but domestically comprised Commissions on Defence Reform, Indirect Tax Reform, Intelligence Reform, and, most recently, Police Restructuring, we have, not through High Representative imposition, but through consensus, managed to address some of the most difficult and most sensitive issues of constitutional competence on a sector by sector approach. Indeed these reforms, involving as they do changes to the distribution of competencies agreed at Dayton , cannot be imposed.

There is a mechanism within the Dayton Constitution – namely Article III.V.b – that allows for a transfer of competence from the Entities to the State, but only with the expressed consent of both Entities and by extension all three peoples. This is the mechanism we have used. This consent was freely given for each of the key reforms of the past two years – tax reform, defence reform, judicial reform, and, hopefully, at the end of this year, on police reform too.

While none of these reforms have required a formal change to BiH's Constitution, they have profoundly changed the political settlement enshrined in Dayton , by strengthening BiH's State at the expense of its two entities. However, it is clear to us all that only so much progress can be made without changing the BiH constitution itself.

All this is good – but not sufficient.

If BiH wishes to join the EU and NATO it will need a fully functioning state and nothing less. BiH political leaders are already beginning to realise that they face a choice: to maintain the current constitution and pay the economic, social and political consequences, or make the constitutional changes required to make Bosnia and Herzegovina a stable, functional and prosperous country within the European Union.

I do not believe that the people of BiH will accept that their constitution should be a barrier to their security and prosperity.

However, we cannot remove that barrier for them.

It has consistently been the view of Peace Implementation Council and successive High Representatives, including me, that, provided the Parties observe Dayton – and there remains a question mark on this in respect of Republika Srpska's compliance with The Hague, then the Constitution of Bosnia and Herzegovina should be changed only by the prescribed procedures by the BiH Parliamentary Assembly and not by the International Community. In other words, that, provided Dayton is observed, the powers of the High Representative begin and end with the Dayton texts, and that any alteration to the constitution enshrined therein is a matter for the people of BiH and their elected representatives to consider.

The days when Bosnia and Herzegovina 's future is thrashed out in a marbled European palace, or on the grounds of an American air force base, are gone. We have reached a stage in BiH's political development where only the people of BiH can agree what kind of country they want to live in.

That Bosnia's political community seems to be waking up to this reality is, in my view, extremely welcome. A bloated, costly and unresponsive public administration; overlapping competencies; a failure to apply economies of scale in key services like education and health care; the absence of a single market and a country-wide economic space; the difficulties faced by law enforcement and security agencies working in such a fragmented and overly-decentralised institutional environment; the inability of the State to ensure that laws and international obligations are implemented – all these rob money from citizens that should be spent on them and undermines their right to good government. Every day in Bosnia , they are faced with examples of problems that stem from the deficiencies of the Dayton constitutional settlement.

A calm, rational debate about how the people of BiH, all the people of BiH, should, by consensus agreement, begin to change their constitution to create a system of government capable of serving the citizen, is, in my view, while not yet a priority, nevertheless approaching the point where it will become a necessary imperative that we should seek to encourage, not to thwart. That the elected representatives in the Parliaments of Bosnia & Herzegovina and its entities have started to make inroads in key sectors such as Defence, Taxation, the Judiciary and Policing represents a very good start. But, as I hinted at the outset, I believe we will need to go further.

But how?

There are some, inside Bosnia & Herzegovina as well as in the international community, who would like to see the so called great powers host a great conference, a second Dayton if you like, in which BiH's problems will be solved in a matter of three or four weeks. This, in my view, is

both undesirable and unachievable. Such a conference would distract from the key priority for now, which is entry into PfP and SAP – and thus take place in a vacuum, outside the safe framework that contains it, and divorced from the social and economic imperatives that should drive it. In short, our priority now is PfP and SAP. Nothing should distract us from those destinations. But once we have reached them, the basic constitutional questions you have been asked to address, cannot be avoided.

Which brings me to one of the key questions before you – the role of the Office of the High Representative and the use of the Bonn Powers nine years after the Peace Agreement was signed.

As you will recall, when the Office of the High Representative was established, the High Representative did not use, executive authority. Carl Bildt, and initially his successor Carlos Westendorp, struggled to implement peace in BiH, and to restore its most basic attributes, such as freedom of movement, or a stable currency, without any executive authority at all. They spent two years locked in sterile negotiation with many of the people who had caused the war in BiH in the first place, while the people of BiH continued to suffer. The return of refugees, for example, was paralysed by many of the thugs and militants who intimidated potential returnees with impunity.

Quite rightly, the PIC decided that this could not continue. It explicitly urged – in the conclusions of its meeting in December 1997 – explicit authority on the High Representative to impose measures on an interim basis when the parties were unable to reach agreement, to remove public officials from office and to take other measures to ensure the smooth implementation of the Peace Agreement.

Since then, the Bonn Powers have been used to drive forward peace implementation in BiH in a number of crucial respects – from removing officials who wantonly prevented refugees from returning, to imposing common license plates (critical to freedom of movement), or establishing key pillars of economic stability such as the currency.

But it is perfectly natural, and legitimate, that, now, the question should be asked whether these powers are really still necessary, nearly a decade after Dayton ; and whether they are compatible with the ECHR.

Essentially we are talking about two types of powers: the legislative power of the High Representative, in which I substitute myself for the local authorities; and the 'international' power, in which the High Representative can remove officials from office.

As an aside, let me make it clear that, as my staff well know, I regard the use of my powers as always an expression of failure, not of success.

Now, let me address these powers in turn.

First, the legislative, or substitution authority:

The High Representative has the power to substitute for local authorities and to adopt, on their behalf, decisions to overcome obstruction by local actors. He may use these powers in order to enact laws, decisions of a government or any other kind of legislation that falls within the realm of the local authorities, within the limits of Dayton . These Decisions are made on a provisional basis until the domestic authorities are in a position to adopt identical legislation by themselves.

The laws enacted by the High Representative are comparable to other Laws adopted by the relevant BiH authorities. Legislation imposed by the High Representative is subject to the judicial remedies available under domestic law. In what is now well-established jurisprudence, the Constitutional Court has declared that it can review the constitutionality of laws put in place by the High Representative when he "substitutes" for local authorities.

The High Representative's "international" powers are slightly different. Here, the High Representative acts in his capacity as High Representative and uses powers that were given solely to the High Representative. As you rightly note, these Decisions are not justiciable, i.e. they cannot be reviewed by any Court in BiH. These powers have been used to address issues of an exceptional character such as removals, suspensions, fines or blocking orders. The philosophy behind such decisions is that the High Representative, as final interpreter of the Civilian Aspects of the GFAP, has been entrusted with the power to take extraordinary measures to surmount the extraordinary obstacles facing peace implementation. These powers are, thus, of an essentially political nature.

Before I go into more detail about the use of my "international" powers, let me say a few words about the use of the substitution powers.

Although many a crucial breakthrough in Bosnia and Herzegovina has been made possible by the power of the High Representative to enact legislation, I have tried to follow a broad policy framework for the use of my powers and to adapt their use to the specific situation of Bosnia and Herzegovina as it strives to meet the conditions set by the European Union's Feasibility Study and the NATO Partnership for Peace benchmarks. It is clear that the European Union cannot negotiate Bosnia 's EU membership with the OHR. Those negotiations can only be undertaken with a self-governing sovereign state. Which is why I have, since the European Commission published its Feasibility Study report nearly a year ago, pursued a 'self-denying ordinance' with regard to the legislative requirements laid down by Brussels . The BiH authorities do it alone, or not at all.

But my approach to the use of my 'legislative' powers goes beyond the scope of the EU integration agenda, broad as that agenda is. Across the range of public policy issues we face, my objective has been to strengthen those institutions and sources of political accountability, almost exclusively at State level, that in the long term will replace my office: an independent judiciary, police force, a communications regulator; a transparent and clean political system, the Ombudsman's Office, the Auditor's Office – all with a view to create the preconditions for the withdrawal of the High Representative.

It is one of the paradoxes of peacekeeping that the establishment of many of these institutions that will, in time, allow us to 'get out', have required us, in the short term, to plunge further in. But the figures relating to the number of legislative impositions I have had to make show that this strategy is beginning to yield results. In 2002, 69 pieces of legislation or amendments to legislation were imposed, thirty-five inherited from my predecessor. This figure fell to 42 in 2003 while I have so far enacted only three laws in 2004.

Only by continuing these efforts will we ensure that the problem of dependency is properly tackled. As we move further away from Dayton and closer to Brussels , this downward trend must continue, and I intend to ensure that it does.

In short, the closer we get to the EU and NATO, the less the need for these extraordinary powers.

But what of my other powers, my so-called “international powers”. Here the danger is not one of ‘dependency’ and domestic ‘passivity’. Indeed, the very existence of these powers continues to enable the International Community to accelerate reforms while shifting the burden on to the domestic authorities.

The lack of checks and balances of independent institutions and the inertia of the public opinion in Bosnia and Herzegovina explains why, too often, it falls to the international community to step in. The removal of officials has come to be seen as an immediate and effective sanction in the absence of efficient courts and against the backdrop of an inadequate system of parliamentary or popular political accountability.

Yet here we stumble across another paradox of internationally sponsored peace implementation. With each dismissal by the High Representative, it could be argued, comes a diminution in the incentives to put in place the kind of structures of accountability whose absence makes these dismissals necessary in the first place. By solving the problem by fiat, we remove the incentive for BiH to enact its own systems for solving the problem.

So how have these international powers been used? The overwhelming majority of these decisions have targeted people who have either offered active assistance to indicted war criminals or who have blatantly failed to cooperate with the Tribunal, despite this being a central tenet of the Dayton agreement, itself an internationally binding obligation on all the parties.

Let us not forget that the only future for the people of BiH, as everyone in the country and in the broader international community is agreed, is within the European Union and NATO. Nothing offers a better prospect of lasting peace and prosperity than membership of these two key institutions.

Yet today, after nine long years of painful reform, not a single war criminal, high ranking, middle ranking, or of no rank whatsoever, has been arrested by the Republika Srpska authorities, who have also comprehensively and totally failed to co-operate in any way in the arrest of Radovan Karadzic or Ratko Mladic. This failure entitles one to ask, nine years after Dayton , whether the Republika Srpska itself is in gross and flagrant contravention of the Dayton settlement upon which the peace of the whole country is based.

I have to tell you quite frankly, I make no apology for using my powers against those individuals or groups or political parties who so threaten the country’s peace, and obstruct the ICTY in its mandate. And I will continue to do so if need be.

I have described the genesis of the Bonn Powers, and of the High Representative’s power to remove officials from office.

The international community felt strongly that after all Bosnia and Herzegovina had been through, and the failure of the outside world to prevent those horrors, that it would intolerable to preside over a post war environment in which war was in effect continued by other means. We were not prepared to accept that hard-line officials could sabotage the provisions of the Dayton Agreement with impunity, or to cripple various governments and parliamentary assemblies, or hobble the legislative process, rendering it incapable of passing the legislation necessary to cement democracy and re-start the economy.

But is all this still justifiable in 2004? And is it compatible with the ECHR and other relevant conventions?

Removals certainly amount to depriving individuals of certain of their rights that are listed under the ECHR and its additional protocols (such as the right to stand for election, right to an effective judicial remedy,…). Such deprivations are usually accepted on an exceptional and temporary basis in order to achieve a legitimate goal.

In BiH's case, the goal is the implementation of the peace agreement – an incremental process, which has proceeded frustratingly slowly, and which has remained fragile and prone to slide backwards, as was, for instance, the case in post-war Germany under the Allied Commissions.

That said, I am very conscious of the apparently draconian nature of the powers entrusted by the PIC in my Office.

I do not claim blithely that the aim, however laudable, justifies the means. I am very much aware of the impact of the decisions I take on people's lives, which is why I weigh these decisions very carefully indeed.

And I am clear that removal decisions cannot and must not apply in perpetuity. The removal decisions specifically acknowledge the temporary nature of the ban they impose on individuals. Those sanctions will cease to have effect when the High Representative decides so. In most of the latest decisions concerning removals for failure to cooperate with the ICTY, a specific term has been included to ensure that the sanctions will be automatically lifted when Republika Srpska is in full compliance with Bosnia and Herzegovina 's international obligations to cooperate with the ICTY.

One final point about the powers: Several United Nations Security Council resolutions have reaffirmed that the High Representative is the final authority under Annex 10 of Dayton and that he can make binding decisions as he judges necessary on issues as elaborated by the PIC in Bonn. These resolutions were taken under Chapter VII of the UN Charter. BIH has specific obligations under the UN Charter to accept and carry out decisions of the Security Council. Moreover, as you may know, obligations stemming from the UN Charter enjoy a special status in the international sphere. Therefore, it would be unreasonable to analyse the Bonn powers in a vacuum. They must be considered within the framework of the UN Charter.

But the real answer, of course, to concerns about the Bonn Powers and the role of the High Representative and OHR, is to make haste towards the day when the Office of the High Representative can close, when the Bonn Powers can be decommissioned, and BiH can make its own way in the world as a sovereign state, genuinely deciding its own destiny.

That is the goal which we are determined to work towards. As I have said time and again, my job is to get rid of my job. I am quite clear that the OHR is now into the terminal phase of its mandate. One of the first things I did when I became High Representative was to introduce our Mission Implementation Plan to guide the OHR to the end of its mandate without constantly taking on new issues. I am determined to get us out of the nooks and crannies of everyday life in BiH. As soon as we responsibly can (and the sooner it can safely be done, the better), we hand tasks over – to the BiH authorities, as in the case of refugee return; the auditors office, the Communications Regulatory Authority, the Election Commission or the High Judicial and Prosecutorial Council.

So, the OHR will continue with its gradual withdrawal from issues such as refugee return, education and human rights – in line with the OHR's Mission Implementation Plan. The Bonn

Powers will continue to be used less and less until a point in time – in the not too distant future - when there will be neither a High Representative nor the Bonn Powers. This is what we are working towards. This is what I am working towards.

The sooner the BiH authorities take the steps that are required, by themselves, including constitutional reform that will ensure a fully functional state applying basic European human rights standards, the sooner this moment will arrive.

I very much hope that in the meanwhile, the Council of Europe, the Venice Commission and others will continue to encourage and assist BiH to debate, develop and adopt the constitutional reforms that will ensure a fully functional BiH serving all its citizens and meeting its international obligations.

LIST OF PARTICIPANTS

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Lord Paddy ASHDOWN, High Representative, European Union Special Representative

EGYPT/EGYPTE
Justice Adel OMAR SHERIF, Deputy Chief Justice, Supreme Court of Egypt

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Kosovo
Mr Rexhap HAXHIMUSA, President of the Supreme Court (Apologised/Excusé)

TURKEY/TURQUIE
Mr Burhan KUZU, Head of Constitutional Commission, Turkish Grand National Assembly (Apologised/Excusé)

UNITED KINGDOM/ROYAUME-UNI
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