

Written observations on behalf of the High Representative concerning the Case no. U-31/06

1. Introduction

1.1. On 17 November 2006, Office of the High Representative (hereinafter "OHR") was invited by the Constitutional Court of the Federation of Bosnia and Herzegovina to participate as a party to the proceedings in its case No U-31/06 initiated before the Constitutional Court of the Federation of BiH (hereinafter: the Constitutional Court) by Mr. Miroslav Coric, President of the Government of the Herzegovina-Neretva Canton, in order to assess the constitutionality of certain provisions of the Statute of the City of Mostar ("Official Gazette of the City of Mostar", No. 4/04) which was enacted by Decision of the High Representative.

1.2. On 05 December 2006, the OHR informed the Constitutional Court that due to the status of the OHR under Annex 10 to the General Framework Agreement for Peace as well as the nature of his powers pursuant to the same Annex, the relevant Declarations of the Peace Implementation Council and resolutions of the United Nations Security Council the High Representative could not be a party to the proceedings of Bosnia and Herzegovina. OHR informed Court that the Statute of the City of Mostar was enacted by the High Representative acting in substitution for the City Council of the City of Mostar and that only the City Council of the City of Mostar has standing to act as a party to the proceedings. However, the OHR indicated that it was willing to assist the Court as amicus curiae in this case and requested the Constitutional Court to grant it adequate time to prepare and forward its observations.

1.3. On 15 February, the Constitutional Court invited Prime Minister of Herzegovina-Neretva Canton and the City Council of the City of Mostar as parties to the procedure in the Case No. U-31/06 for public debate scheduled for 06 March 2007. Beside the parties to the procedure, the Constitutional Court also invited OHR to the public debates.

1.4. The remainder of these Observations is structured as follows:

Part 2. OHR observations regarding the Applicant's challenge to Article 23 and 24 of the Statute of the City of Mostar;

Part 3. OHR observations regarding the Applicant's challenge to Article 44 of the Statute of the City of Mostar;

Part 4. OHR observations regarding the Applicant's challenge to Article 16, 17 and 38 of the Statute of the City of Mostar;

2. Regarding the Applicant's Challenge to Article 23 and 24 of the Statute of the City of Mostar

2.1. The applicant has challenged articles 23 and 24 of the Statute of the City of Mostar (Mostar Statute) alleging that the provisions of those articles established political party clubs and caucuses of the constituent peoples which is in contravention with the Federation Constitution, Article ... "equality before the law", since none of the local self-government units in the territory of the Federation has any such regulations.

2.2. The relevant articles of the Mostar Statute read as follows:

Article 23

Clubs

1. City Councilors may form Clubs. The President of the City Council and the Mayor shall receive notification of the establishment of a Club. The notification shall include the name of the Club, the names of its members, and of its chairman.
2. The City Council shall further regulate this matter in its Rules of Procedure.

Article 24

Caucuses of the Constituent Peoples

1. A caucus of each Constituent People shall be established in the City Council.
2. The establishment, organisation and modalities of work of the caucuses referred to in Paragraph 1 shall be further regulated by the Rules of Procedure of the City Council.

2.3. Arguments:

A. The establishment of the caucuses of constituent peoples in the City Council of the City of Mostar through the Mostar Statute is a constitutional obligation under Article VI.C.5) and 6) as introduced by Amendment CI to the FBiH Constitution and is an indispensable element for the protection of vital national interests of the constituent peoples in the City Council.

Article VI.C.5) and 6) (introduced by Amendment CI to the FBiH Constitution) provides the following:

5) Decision making procedures shall be defined by the Statute of the City of Mostar. Notwithstanding any laws providing for voting procedures, the Statute of the City of Mostar may define special voting procedures for the adoption of certain decisions within the City Council.

*6) Vital national interests of constituent peoples shall be protected in the City of Mostar. Issues of vital national interest shall be those defined in Article IV.A.17.a of this Constitution, **provided that the caucuses referred to under that Article shall, for the purpose of the City of Mostar, be the caucuses established by the Statute of the City of Mostar.** The procedure for the protection of national vital interest shall be regulated under the Statute of the City of Mostar. Such procedure shall include the possibility to refer a question of vital interest to the Constitutional Court of the Federation in accordance with the procedure foreseen in Article IV.A. 18 a) item 5 through 8 of this Constitution, if no agreed solution can be reached.*

B. The right of local self-government allows the City of Mostar to establish rules regarding political party clubs. The Federation Constitution explicitly defines the City of Mostar as a "single territorial unit of administration and local self-government[1]. The Constitution also requires this court to protect the right to local self-government[2]. Article 8, paragraph 2) of the Law on Principles of Local Self-Government in the Federation of Bosnia and Herzegovina ("Official Gazette of Federation of BiH" No. 49/06) provides that "Local self-government units shall be independent in decision making process regarding issues from its competence that cannot be limited or denied by the Federation or cantonal authorities, except for cases and within the limits stipulated by the Constitution and the law". The same Law provides in Article 13, paragraph 2), items 1. and 17. that "The Council, within its responsibilities, shall: prepare and adopt statute of the local self-government unit by two-thirds majority; 17. adopt Rules of Procedure.

Also, Article 20 of the law on Local Self-Government of the Herzegovina-Neretva Canton ("Official Gazette of the Herzegovina-Neretva Canton" No. 4/00) provides that "Internal organization and modalities of work of representative body of local self-government unit shall be regulated in accordance with this Law and Statute." It is clear from the above that the City Council, by its Statute or otherwise, is in a position to provide for the establishment of political party clubs. It is worth emphasizing that such clubs are common in any representative bodies and are necessary for the performance of the functions of such bodies.

2.4. Bearing in mind all the abovesaid, we hereby suggest that the Court determines as unfounded the request of the applicant in relation to Article 23 and 24 of the Mostar Statute.

3. Regarding the Applicant's Challenge to Article 44 of the Statute of the City of Mostar.

3.1. The applicant has challenged Article 44 of the Mostar Statute alleging that in all local self-government units in the territory of Bosnia and Herzegovina, the election of a municipal or city mayor is conducted directly in local elections and that election of the Mostar City Mayor is carried out by elected councilors of the City Council. Therefore, the applicant is of the view that Article 44 of the Mostar Statute is incompatible with the legal norm of Article II.2, paragraph 1, sub-paragraph c) of the Federation Constitution.

3.2. Article 44 of the Mostar Statute read as follows:

Article 44

Election of the Mayor

1. Only Councilors elected to the City Council may be elected as Mayor.
2. The election of the Mayor shall be carried out at the first session of the City Council after the Elections.
3. Every City Councilor shall be entitled to nominate candidates from amongst elected Councilors.
4. Before the elections, the nominees shall declare in writing that they accept their candidacy.
5. A majority of two-thirds of the elected City Councilors shall be required to elect a Mayor. If none of the candidates receives the necessary votes in the first round, a second round will take place between the two candidates who obtained the largest number of votes in the first round. If, due to a tie between candidates in the first round, it is impossible to determine which two candidates received the highest number of votes, a separate round will be organised between these candidates in order to select the candidate(s) who will qualify for the second round. If none of the remaining two candidates receives a two-third majority in the second round, a third round shall take place. In the third round, a simple majority of the elected City Councilors shall be required to elect a Mayor from the remaining two candidates. If the remaining two candidates obtain the same number of votes in the third round, the younger one of the two shall be elected as Mayor.
6. Immediately after the elections, the elected nominee shall declare whether he/she accepts his/her election. If he/she does not accept it, the elections shall be repeated in accordance with the procedure prescribed in this Article.

3.3. Arguments:

A. Article C.7) of the Constitution of the Federation of BiH (introduced by Amendment CI to the Constitution of the Federation of BiH) provides that “ only Councilors elected to the Council of the City may be elected as Mayor of the City of Mostar. The Mayor is elected and removed from office by a majority of two-thirds of elected councilors, in accordance with the Statute of the City of Mostar.”

The provisions of article 44 of the Mostar Statute expressly fulfills the requirements of Article VI.C.7) of the Federation Constitution.

3.4. Therefore, we suggest the Court to determine applicant’s request in relation to Article 44 of the Mostar Statute as unfounded.

4. Regarding the Applicant’s Challenge to Articles 16, 17, and 38 of the Statute of the City of Mostar.

4.1. The applicant has challenged articles 16, 17, paragraphs 1) and 2) and 38, paragraph 1) of the Mostar Statute alleging that the provisions of those articles violate Mostar citizens’ political rights to vote and to stand for election, which are guaranteed by the FBiH Constitution in Article II.2 (2)(b) and the human rights instruments incorporated into the constitution through its annex[3].

4.2. The relevant articles of the Mostar Statute read as follows:

Article 16

Representation in City Council

1. A minimum of four (4) representatives of each Constituent People and one (1) of the Others shall be represented in the City Council.
2. No Constituent People shall have more than fifteen (15) Councilors.

Article 17

Allocation of Seats

1. Each City area shall elect three (3) City Councilors. The remaining seventeen (17) Councilors shall be elected in the area of the City as one electoral constituency (hereinafter: the City-wide list).
2. At least four (4) candidates of each Constituent People and one (1) candidate of the Others from the City-wide list, shall be elected to the City Council.
3. Allocation of seats in the City Council shall be conducted in accordance with the Election Law of Bosnia and Herzegovina.

Article 38

Committees for City Areas

1. There shall be one Committee of the City Council for each City Area (Komisija Gradskog Vijeća za Gradska Područja). Each Committee of the City Council for City Areas (hereinafter: "Committees for City Areas") shall be comprised of the three City Councilors elected from the territory of the relevant City Area pursuant to Article 17, paragraph 1 of this Statute.
2. The Committees for City Areas shall have the following responsibilities:
 - Deciding on the distribution of revenues derived from allocated construction land, in accordance with Article 56 of this Statute;
 - Participating in the decision on announcement of a referendum, in accordance with Article 33, paragraph 3 of this Statute.
3. Decisions of the Committees for City Areas shall be adopted by simple majority.
4. Article 37, paragraphs 3 through 5 of this Statute will apply to the Committees for City Areas. Issues not regulated by this Statute shall be prescribed by the Rules of Procedure of the City Council in accordance with the general principles set forth in this Statute.

4.3. The applicant alleges the following specific violations of the right to vote and to stand for election:

1. That the minimum and maximum limit on the number of councilors that can be elected from any one constituent people unconstitutionally limits the rights of some citizens in Mostar to stand for election. (Article 16 and Article 17)
2. That the rights of the citizens living in the Central Zone to vote and to stand for election are unconstitutionally denied because they are not part of a City Area and therefore do not have the opportunity to vote for a city area list or to stand as a candidate for a city area. (Article 17)
3. That the disproportionate number of voters in each city area gives different weight to votes from the different areas and, as a result, denies or limits the rights of voters in larger city areas in relation to the smaller areas. (Article 17)
4. That each city area is represented by a committee of councilors and that, therefore, citizens in the Central Zone, who are not part of a city area, are denied the right to vote for councilors to represent them on a committee and denied the right to stand for election as a councilor who would take part in a committee representing the Central Zone. (Article 38, para 1)

4.4. Arguments

A. Applicant's challenge to Articles 16 and 17 of the Mostar Statute concern matters within the competency of the state and are, therefore not within this court's jurisdiction to decide. Even if the Court claims to have jurisdiction over matters related to Article 16 and Article 17 of the Mostar Statute, the Court should, before deciding on this matter, obtain Decision of the Constitutional Court of BiH on the compatibility of Chapter 19 of the Election Law of BiH with the Constitution of BiH.

B. The Constitutional Court of the Federation of BiH provided in its earlier Case No. U-11/98 (Official Gazette of the Federation of BiH No. 34/98) that political rights of citizens of the City Central Zone (*to participate in public affairs; to have equal access to public service; to vote and stand for election*) as guaranteed under Article II.2 (2) b) of the

FBIH Constitution were not violated and that the system providing for equal number of seats for representatives from the rank of Bosniaks, Croats and Others in the City Council cannot be considered unconstitutional.

C. Article II,2. of the Federation Constitution refers to internationally recognised rights and freedom which begs the question as to whether the right to vote and stand for election is applicable to the Municipal/City elections.

D. The authorities of Bosnia and Herzegovina have a wide margin of appreciation in establishing an electoral system for the Mostar City Council. Judged in light of the political evolution and historical context of the city, the electoral system for the City of Mostar does not violate the fundamental voting rights of the citizens of Mostar and does not violate rights of certain constituent peoples to be elected to the Mostar City Council.

4.4.1. Argument A. – The applicant’s challenge to Articles 16 and 17 of the Mostar Statute concern matters within the competency of the state and are, therefore, not within this court’s jurisdiction to decide. The challenge to Article 38 cannot stand independently of the challenge to the other two articles.

Article 16 and Article 17, paragraph 1 and 2 of the Statute of the City of Mostar regulate legal matters, which are also regulated in detail by Chapter 19 of the Election Law of Bosnia and Herzegovina (“Official Gazette” of Bosnia and Herzegovina” No. 23/01, 7/02, 9/02, 20/02, 25/02 (Correction), 4/04, 20/04, 25/05, 77/05, 11/06, 24/06)

The Constitutional Court of the Federation of BiH has no competence to decide on constitutionality of the Election Law of BiH. As the Venice Commission concluded in 1998:

[T]he effect of Appendix 3, Article V [of the General Framework Agreement for Peace], is to accord a certain competence to the state legislator in electoral matters, both for elections in the Entities and those at cantonal and municipal level. This must be understood in the special context of Bosnia and Herzegovina, where, given their crucial role in preserving the delicate balance underpinning the peace agreements, electoral matters are dealt with separately and given the same importance as the Constitution itself. In this respect, it is appropriate to recall that the Constitution of Bosnia and Herzegovina is contained in Appendix 4 of the Dayton Agreements, signed and approved by the same parties as Appendix 3 (see also Articles IV and V of the General Framework Agreement). The two annexes should be read in conjunction, and each interpreted in the light of the other.[4]

Therefore, matters related to the modalities of elections in the City of Mostar are within the exclusive competency of the state. The applicant cannot use a challenge to the Mostar Statute in this court as a back door attempt to challenge the state election law. Only the Constitutional Court of BiH is competent to entertain such a challenge.

The competence of Bosnia and Herzegovina to regulate modalities is also recognised by Article VI.C.4) as introduced by Amendment CI to the FBIH Constitution which provides the following:

“The City Areas shall be electoral constituencies. The composition of the City Council and the modalities of election shall be regulated respectively by the Statute and the Election Law of Bosnia and Herzegovina in a manner that may derogate from the requirements prescribed in Article VI.A of this Constitution”.

The above provision makes it abundantly clear that the composition of the City Council is a matter that should be regulated by the Statute while the modalities of election should be regulated by the Election Law of Bosnia and Herzegovina. Such distinction does not appear as clearly in the translations of the text published in the Official Gazette. We must emphasize that insofar as the Parliament of the Federation of Bosnia and Herzegovina has not adopted the amendments enacted by the High Representative, the English version, which is the only one signed by the High Representative, prevails over the translations.

As a result, in accordance with the Article III.3.b) of the BiH Constitution, the Entities and any subdivisions thereof must comply fully with the Constitution of Bosnia and Herzegovina, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, *and with the decisions of the institutions of Bosnia and Herzegovina*. In order to respect the said constitutional obligation, the Constitutional Court of the Federation of BiH cannot accept that it is competent to determine the constitutionality of the provisions of certain Articles of the Statute of the City of Mostar which only reflect legal matter regulated by the Election Law of BiH.

Should the Court decide that it is within his competency to decide on this matter, we believe that the Court's decision on determination of constitutionality of Article 16 and Article 17, paragraph 1 and 2 of the Statute of the City of Mostar with specified provisions of the FBiH Constitution depends on the prior decision of the Constitutional Court of Bosnia and Herzegovina. We believe that pursuant to Article VI.3.c) of the Constitution of Bosnia and Herzegovina and relevant articles of the Rules of the Constitutional Court of BiH, the Constitutional Court of the Federation of BiH should refer the issue of compatibility of Articles 19.2, 19.3, 19.4 and 19.5 of the Election Law of BiH with the relevant provisions of the BiH Constitution (Preamble, Article I.2., Article II.2., Article II.4., including the compatibility of the said Articles of the Election Law of BiH with the relevant international instruments provided in Annex I to the Constitution of Bosnia and Herzegovina).

4.4.2. Argument B – The Constitutional Court of the Federation of BiH provided in its earlier Case No. U-11/98 (“Official Gazette of the Federation of BiH”, No. 24/98) that political rights of citizens of the City Central Zone (to participate in public affairs; to have equal access to public service; to vote and stand for election) as guaranteed under Article II.2 (2) b) of the FBiH Constitution were not violated and that the system providing for equal number of seats for representatives from the rank of Bosniaks, Croats and Others in the City Council cannot be considered unconstitutional.

Relevant parts of the Reasoning in the Decision of the Constitutional Court of the Federation of BiH No. U-11/98:

“The Amendment XVI to the Constitution of the Federation of Bosnia and Herzegovina that regulates the general principles of the formation of the city and election of councillors to the City Council, cannot be interpreted separately from the Amendment XXV to the Constitution of the Federation of Bosnia and Herzegovina, which, by paragraph 4 complements the Amendment XVI so that the “other specific characteristics of the City of Mostar shall be taken into account when defining the number of the councillors and the procedures for their election.” The essential characteristic of the City of Mostar is the division on six municipalities and City Central Zone as a sort of a district established by the European Union, where the Federation and Cantonal bodies are primarily located, as well as the other institutions with importance higher than local, which is essential particularity of the City of Mostar even though it has not been particularly mentioned in the Amendment XXV to the Constitution of the Federation. The Constitution of the Herzegovina-Neretva Canton could establish that specific characteristic of the City of Mostar, which has been done by Article 64 a.(3) paragraph 4 of the Amendment I to the Constitution of the Herzegovina-Neretva Canton.

The organization and composition of the City Council Article 64 b.(1) and Article 64 b.(3) of the Amendment I where it is stated that “the City Central Zone is not a municipality” and that the “City Council is comprised of councillors from each municipality” does not mean that of citizens of the City Central Zone are denied the guaranteed political rights to participate in public affairs; to have equal access to public service; to vote and stand for election stipulated by Article II 2 (2) b) of the Federation Constitution because those are the political rights given to each citizen of the Federation and it is not intention of the Amendment I to deprive the citizens of the City Central Zone of their citizen rights, because the citizens may exercise their right to vote and other rights through one of the six municipalities they are affiliated with, which is stipulated by the Statute of the City and by election regulations.

It is regulated by Article V 5 (1) of the Federation Constitution that the “Each Canton shall have a Legislature consisting of one House comprising a number of Legislators determined in proportion to its population but no fewer than thirty and no more than fifty”, and therefore the provisions of the Article 64. b.(3) of the Amendment I, which stipulates that the City Council of the City of Mostar has equal number of seats for representatives of Croat people, Bosniak people and others, which approximately corresponds to the ethnic structure of population from the 1991 Census, cannot be deemed unconstitutional. This provision is in harmony with Amendment XXV which was complemented by Amendment XVI to the Constitution of the Federation of Bosnia and Herzegovina.”

We note that the new legislation regulating the modalities of election have not modified the status of the citizens residing in the Central Zone. As such, the reasoning adopted by the Court in the above mentioned case remains valid.

4.4.3. Argument C – Article II,2 of the Federation Constitution refers to internationally recognised rights and freedom which begs the question as to whether the right to vote and stand for election is applicable to the Municipal/City elections

There is no question that the FBiH Constitution enshrines the rights to vote and to be elected, both in the text of the constitution and through the annexed human rights instruments. The question is whether those rights apply to city council elections in Mostar. The constitution specifically states that; “All citizens shall enjoy the rights (...) to vote and to stand for election.”[5] However, the language does not specify for which bodies and at which level of authority citizens are empowered to exercise those rights.

Clearly, citizens in the Federation are not guaranteed the right to vote for every legislative or appointed office at every level of authority of the Federation. Citizens in the Federation do not vote directly for delegates to the House of Peoples, the president or vice-president, or the cantonal governments.

The Federation constitution itself determines the bodies for which citizens have a right to vote and to be elected. The constitution explicitly requires direct, democratic elections for the House of Representatives, canton legislatures, and municipal councils.[6] There is no such constitutional requirement for elections to city councils. In fact, the constitutional provisions related generally to cities, and specifically to the City of Mostar, give the relevant authorities wide discretion in regulating elections to the city council.[7]

The absence of any constitutionally protected rights to vote or to stand for election to a city council is entirely consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has held, in a long string of cases, that Article 3 of Protocol 1 of the European Convention guarantees a right to vote and a right to stand for election to a **“legislature, or at least one of its chambers if it has more than two.”**[8] While the term “legislature” is not necessarily limited to mean only the state parliament, the ECHR has explicitly ruled that it does not include municipal councils.[9]

Citizens in the City of Mostar have no constitutionally guaranteed right to vote for city council or to stand as a candidate for city council. Therefore, the applicant’s complaint against articles 16, 17 and 38 of the Mostar Statute must fail.

4.4.4. Argument D – Judged in light of the political evolution and historical context of the city, the electoral system for the City of Mostar does not violate the fundamental voting rights of the citizens of Mostar.

If this court were to find that the constitutional rights to vote and to stand for election extend to the election of the Mostar city council, then an analysis of the case law of the ECHR clearly establishes that the election provisions contained in articles 16, 17, and 38 of the Mostar Statute meet the human rights standards protected in Article 1 of Protocol 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

It is a well-established principle in ECHR jurisprudence that the right to vote and the right to stand for election are not absolute rights and that those rights may be subject to limitations.[10] It is also well-established that “states have a wide margin of appreciation in this sphere” and that “any electoral system must be assessed in light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”[11]

In evaluating the election law of BiH, the Venice Commission made the following observations about the context in which election systems developed in BiH:

[T]he distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives.[12]

[T]here remain circumstances requiring a political system that is not a simple reflection of majority rule but guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.[13]

The specific history and context of the development of the Statute of the City of Mostar are also highly relevant for any legal review of elections to city council. The following history is excerpted from the report of the “Commission for Reforming the City of Mostar,” 15 December 2003 (emphasis added).

The Commission’s work is the culmination of a process that began in March 1994 with the signing of the

Washington Agreement. The framework for the BiH Federation was signed on 1 March 1994, and the Agreement on the Constitution of the Federation of BiH was signed on 18 March 1994. As a part of these founding documents, it was agreed that the Mostar City Municipality would be governed by an EU Administration for up to two years, to facilitate the post-war transition, coordinate reconstruction in the destroyed city and initiate the basic development of essential structures in the City in the critical early years.

A Memorandum of Understanding (MOU) was signed in Geneva on 6 April, emphasising commitment to the development of a unified, multiethnic city, return, freedom of movement and the temporary establishment of the EU Administration in Mostar (EUAM).

The Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina was signed in Dayton, Ohio on 10 November 1995. Twenty months after the Washington Agreement, this sought to strengthen the political, economic and social integration of the Federation within the larger framework for peace in the country. In addition to calling for full implementation of the EUAM MOU, this document reaffirmed agreement on a set of principles for the Interim Statute for the City of Mostar, including support for the unity of the city under an interim structural agreement.

By signing the Rome Agreement on 18 February 1996 the parties agreed to support the process of unifying the City of Mostar, and to adopt the EU's plan for reform and reconstruction. The issues addressed in the Agreement included a commitment to return, the development of a unified police force and the delimitation of the Central Zone. The Interim Statute was adopted on 7 February 1996, and viewed as an important transitional stage in the development of Mostar; as an interim, and therefore temporary, arrangement to ensure the basic administration of the City and government services while a permanent legal structure was negotiated, drafted and adopted.

Six municipal districts, or "City-Municipalities," were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). The Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration.

The EU Administration worked to implement the Interim Statute and to prepare the ground for further normalisation of the city. This was a challenging goal, as there were few local authorities or politicians interested in promoting real reform or progress on behalf of the citizens of Mostar. Elections were organized by the EUAM and held on 30 June 1996, yet the elected officials failed to address the problems facing Mostar as a whole, focusing on the narrow interests of their parties and "their" peoples whom they claimed to represent.

These early agreements were temporary arrangements made under imperfect circumstances, and they proved to be inadequate in many ways. However, they enabled the first small steps for rebuilding the war-shattered area. The six City-Municipalities created by the interim arrangement were not developed according to historical districts or democratic legal procedure, but simply reflected the purely undemocratic demarcation lines established through war. As administrative units based solely on the demographic of the "dominant peoples" within, these units serve not the citizens of Mostar, but specific national groups. These initial steps provided a provisional structure for interim solutions.

The EU Administration ended its mission in July 1996, and was followed by a follow-on mission led by the Special Envoy, before transferring responsibilities on 6 January 1997 to the Office of the High Representative and a broad set of international agencies involved in the peace implementation and development process.

The Interim Statute provided an interim solution and framework for Mostar's gradual recovery from war and the consequences of economic destruction and transition. Before its adoption, there was no established rule of law, and no legislation that might support its terms and intentions. It provided for the provision of a minimal level of services, and for the slow reconstruction of community and social life. It neither guaranteed nor precluded the development of a city established along more standard guidelines. However, it provided preliminary opportunities for gradual cooperation among the war-torn communities, and was an initial part of the normalisation process.

The Interim Statute was envisioned "as the floor and not the ceiling," and as a starting point for on-going serious discussions aimed at increasing the abilities and efficiency of the central administration of Mostar.

Unfortunately, the reforms of the Interim Statute aimed at increasing the effectiveness and efficiency of the central authorities through the empowerment of the City Council and the development of the Central Zone did not occur. The following summarizes the most blatant inefficiencies and problems plaguing the administration of Mostar today, and over the past several years:

- The Central Zone was never achieved according to the plans of the Interim Statute.
- Power and authority were usurped from the City Council and the supporting City Administration by the administrations in the six City-Municipalities.
- The City remained divided, with rampant parallelism and a complete lack of cooperation between the Mayor and Deputy Mayor (who by law represent different national groups).
- City finances remained divided through the existence of two separate treasuries in the City, as well as additional budgets in each of the six City-Municipalities.
- Redundancy was rampant, with duplicative administrative structures at the level of each of the six City-Municipalities as well as the essentially impotent City Administration. This resulted in seven separate bureaucratic structures and expenses for services such as transportation, housing, education, health care, infrastructure, property affairs and cadastre and numerous other services.
- There was a constant and conscious lack of coordination between the six City-Municipalities and the City in spite of the fact that such coordination was a requirement of the Interim Statute.

The level of waste and duplication in this dysfunctional system has been and continues to be significant, with approximately 550 employees working on these issues at the City-Municipality level, and 124 employees working at the (virtually powerless) City level. The impact of such expensive administrative overhead on businesses in terms of investment and job creation is also clear. At a public forum with Mostar's business leaders, a clear concern was that all money paid in taxes is spent simply on the administration of government – not on regional development initiatives that could improve Mostar's economic future.

Finally, the dysfunctionality of Mostar is affecting democracy and progress in less visible ways as well. The disconnect between politicians and the citizenry is growing, as there is a perception that politicians are only interested in securing their own interests, not doing the will of the people. The triumph to date of cronyism and corruption in government has tarnished the notion of public service, replacing this concept with one of personal gain through public means. Citizens' electoral choices are not based upon serious consideration of the issues, platforms and qualifications of candidates, but on the ongoing manipulation of voters through the politics of fear. Unfortunately for the citizen taxpayers of Mostar, serious reform and problem-solving has not been forthcoming from the authorities and political parties. The spirit and intent of the Interim Statute was frozen and neglected, and the intended goals of the City – centralized competencies, effective administration and basic functionality – were never achieved.

Since 1994, the International Community at various levels has consistently urged authorities to work together to develop a more efficient Mostar, and local officials committed themselves to such change, in word if not in deed. At the Federation Forum held on 3 February 1997, the relevant authorities committed themselves to ensuring freedom of movement throughout Mostar, and agreed on the constitution of the six City-Municipalities by 14 February. Additional commitments aimed at the normalisation of Mostar were made at the Federation Forum on 20 August 1997. The Peace Implementation Council (PIC) has supported the progressive development of Mostar throughout this process. Specific attention to the situation in Mostar has been a feature of many of the PIC discussions, as early as meetings in Florence on 13 June 1996, and in London on 5 December 1996. At the PIC meeting in Bonn in December 1997, the Council again noted its concern that "serious problems of local administration, notably in Mostar, continue to exist," and urged authorities to "ensure that the City of Mostar and its unified City Administration is operational in all aspects, in accordance with the City Statute. This includes dissolution of the union of the three City-Municipalities in West Mostar." In Madrid in 1998 the PIC called on the Herzegovina-Neretva Canton to establish an integrated judiciary, including the City of Mostar, and stated that the future establishment of the capital of the Federation in Mostar depends on fulfilment of several conditions, including the establishment of a "truly unified city administration [that] exists under one leadership with one budget, and operating effectively." In July 2000, the PIC Steering Board noted with great interest the encouraging attempts by responsible

politicians in Mostar to find pragmatic forms of cooperation across the ethnic divide which aim at establishing normal life in the city and its eventual unification. In this context, the continued financial contribution of the European Union was welcomed, as was the Mostar Document signed between representatives of the European Union and of the city of Mostar and its six City-Municipalities. The Board took note of the announcement by the City authorities that they would begin working on the final status of Mostar.

Most recently, on 26 September 2003, the PIC Steering Board issued a communiqué, noting that it “supports the aim of a unified City in accordance with European standards, which promotes the rights of all people and will not allow dominance of one part of the population of Mostar. The Steering Board considers the solution of the Mostar question as essential for the sustainable and peaceful development of BiH.” The International Community’s support for reform has been public and clear, and the Mostar authorities have continually professed their agreement. However, they failed to meet their stated obligations. Numerous agreements and MOUs were developed and signed by the appropriate authorities in cooperation with the International Community, and the continued reiteration of the goals for the City of Mostar has remained the same since 1994. However, action has failed to keep pace with rhetoric. The time that has passed has allowed for discussion and debate, development of general and specific implementation and reform plans and general infrastructure and systemic development. But it has also increased the financial desperation of the city and its people, stalled business development and fostered continued division. Throughout this challenging, gradual and often obstructed process, the citizens of Mostar have demonstrated their desire and hope for a normal life by consistently returning to their pre-wars homes, to re-build their lives and their beloved communities. This trend has been particularly evident since 2001. It is critical to note that as progress has been made in harmonising legislation across governmental levels, in ensuring the protection of human rights, in supporting a representative police force and in reducing elements of crime and corruption throughout BiH, more and more people have been able to make the decision to return. The changing environment created space for people to make this important choice.

While it is clear that there is still work to be done to ensure full implementation of Annex VII, any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of Others, through protection of vital national interests. This imperative drove the work of the Commission.

Following months of discussion, the High Representative supported the idea of assisting in the establishment of a multiethnic, cross-party commission that would include representatives from all of the levels of government that may be called on to make changes to their legislation or constitutions. This Mostar City-based commission, nominated by the Mostar Mayor and Deputy Mayor and appointed by the City Council on 15 April, met 15 times from April through July to discuss needed reform. During the process, the OHR and OSCE served as the secretariat of the commission, leaving the commission members fully responsible for the negotiations. The work of the commission in the spring of 2003 was guided by a set of principles outlined in a letter from the High Representative on 15 April, and presented in the Executive Summary of this report.

All of the stakeholders involved agreed that the current situation in Mostar is untenable. While this first commission was able to agree on many issues of structure and process, it failed to develop a comprehensive and final recommendation for Mostar’s reform. However, it did identify many of the relevant issues, participated in open and lively debate concerning the essence of the principles and uncovered many of the difficult issues that would have to be addressed for reform to be successful.

The Commission for Reforming the City of Mostar was established by the High Representative on 17 September 2003. The decision establishing this Commission was the culmination of the process that has been ongoing since 1994. While there had been hope that a reform process would be initiated and implemented over the past years, a comprehensive solution had not been presented. Although progress had been made in return, economic development and government accountability and transparency in many parts of the country, it became clear that Mostar continued to suffer from a dysfunctional and duplicative system that failed to serve its citizens.

It was in this context that the High Representative imposed the Mostar Statute on 28 January 2004. In that decision, the High Representative took specific note of the following (emphasis added):

Noting that the Steering Board, at its meeting held at Political Directors’ level on 26 September 2003, considered the resolution of the Mostar question as crucial to the sustainable and peaceful development of

Bosnia and Herzegovina;

Bearing in mind the special status given to Mostar under the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, signed on 10 November 1995, and in the Annex thereto which establishes principles for the Interim Statute for the City of Mostar;

Further bearing in mind that the political authorities at the “City” and the “City-Municipality” levels have hitherto failed to unify the City of Mostar under the said Interim Statute, and have, rather, used the City-Municipalities to create parallel institutions and divide the City;

Mindful of the need to consolidate the administrative, functional and legal unity of the City of Mostar in a manner that promotes efficiency in the delivery of services, guarantees the fundamental rights of all citizens, ensures the collective rights of the constituent peoples and prevents dominance by one segment of the population of Mostar;

Acknowledging the work of the Commission for Reforming the City of Mostar established by the High Representative on 17 September 2003 (hereinafter: “the Commission”);

Welcoming the efforts undertaken by the political parties involved in the said Commission which culminated in concrete proposed solutions to various key issues relating to the reorganization of the City of Mostar;

Convinced that said proposed solutions provide a sound basis for the establishment of the aforementioned guarantees and safeguards, and, further contain carefully negotiated power-sharing provisions aimed at enabling the citizens of Mostar to build a foundation for a progressive future predicated upon, inter alia, protection of national vital interests;

Encouraged that said proposed solutions emerged from the broadest possible consensus with respect to the reorganization of the City of Mostar;

Regretting that the parties involved in the Commission failed to reach a consensus on two outstanding issues and convinced that the resolution of said issues would significantly improve applied standards of governance in the City while maintaining an electoral architecture reflective of the sui generis circumstances in Mostar arising from profoundly conflicting interests among its constituent peoples.

Bearing in mind that the Steering Board of the Peace Implementation Council, at its meeting held in Brussels on 11 December 2003, ‘committed itself to give its full support to the implementation of a solution to the issue of Mostar based on a single coherent city administration with effective guaranteed power-sharing mechanisms which prevent any one people having majority control of the City Council and to act to ensure that implementation of the plan in the coming months has the necessary political and economic support”;

In reviewing limitations placed on voting rights, the test is whether:

- The limitations curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness;
- They are imposed in pursuit of a legitimate aim; and
- The means employed are not disproportionate.[14]

The Mostar Statute clearly passes this test. No qualified citizen of Mostar is denied the right to vote or to stand for election. In fact, the applicant has not alleged a complete denial of the right to vote or be elected. He merely asserts that voters in different parts of the city cast votes that carry different weight in city council elections and that they have different opportunities to stand for election. However, there is no requirement in human rights law that all votes carry equal weight.[15]

In deciding a challenge to the elections in the City of Sarajevo, the Constitutional Court of Bosnia and Herzegovina held that it was necessary for all three constituent peoples to be “given minimum guarantees for the participation on the city council irrespective of the election results since that is the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina.” (Emphasis added).[16] Obviously, the guarantee of a minimum representation “irrespective of the election results” can also give a disproportionate weight to some votes and can dramatically impact the right to stand for election. Respecting the equality of

constituent peoples is one of the legitimate aims of the Mostar statute. Creating effective power sharing mechanisms, which prevent any one people having majority control of the City Council, as stated in the Mostar Commission Report and the Decision of the High Representative, is one other legitimate aim.

The means employed to create these power sharing mechanisms are clearly not disproportionate to the aims in the context the long, difficult history of peace implementation in Mostar and the important role that Mostar plays in the wider context of peace implementation in the Federation and in the entire state. As the ECHR stated in the *Mathieu-Mohin* case; "The aim is to defuse the language disputes in the country by establishing more stable and decentralized organizational structures." (...) In any consideration of the electoral system in issue, its general context must not be forgotten."^[17]

As the integral part of the Observations we attach a copy of the "Recommendations of the Commission –Report of the Chairman" of the Commission for Reforming the City of Mostar, dated 15 December 2003.

Notes:

[1] Constitution of the Federation of Bosnia and Herzegovina, article VI.C.1.

[2] Constitution of the Federation of Bosnia and Herzegovina, Article IV.C.3.10(3).

[3] Universal Declaration of Human Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[4] Opinion on the Competence of Bosnia and Herzegovina on Electoral Matters, CDL (1998) 069e-restr.

[5] Article II.2.(2)(b) Constitution of the Federation of Bosnia and Herzegovina.

[6] Articles IV.A.1.3, V.2.5 (3), VI.3 (3) of the Constitution of the Federation of Bosnia and Herzegovina.

[7] Articles VI.A (4) and VI.C(4) of the Constitution of the Federation of BiH.

[8] *Mathieu-Mohin and Clerfayt v. Belgium*, 9267/81. decided 2 March 1987. See also Decision of the Constitutional Court of BiH No. AP 35/03.

[9] *Salleras Llinares v. Spain*, 52226/99, 12/10/2000. See also, *Booth-Clibborn and others v. United Kingdom*, 11391/85, 5 July 1985.

[10] *Mathieu-Mohin and Clerfayt v. Belgium*, supra, *Matthews v. The United Kingdom*, 18 February 1999, *Sadak and Others v. Turkey*, 11 June, 2002, *Aziz v. Cyprus*, 22 June 2004, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, 11 January 2007. Decision of the Constitutional Court of BiH No. AP 35/03.

[11] *Mathieu-Mohin and Clerfayt*, supra.

[12] Opinion on the Electoral Law of Bosnia and Herzegovina, CDL-INF(2001), at paragraph 23.

[13] *Id.*, at paragraph 24.

[14] *Mathieu-Mohin v. Belgium*, supra.

[15] *Liberal Party v. United Kingdom*, 18 December 1980.

[16] Decision of the Constitutional Court of BiH in Case No. U 4/05.

[17] Supra, at paragraph 57.