

Speech by the High Representative, Paddy Ashdown, to the Venice Commission

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.