

The Croatian Constitution and the Washington Agreements of 18 March 1994

Comments by Mr C. ECONOMIDES (Greece)

Further to our Commission's decision of 13-14 May 1994 with regard to the aforementioned subject, I wish to make the following remarks:

1. The question is as follows: in order to become a party to the Washington Agreements of 18 March 1994 and to enter into the commitments envisaged for it in these agreements, does the Republic of Croatia need to change its Constitution?
2. The Washington Agreements comprise:
 - a. a preliminary agreement concerning the establishment of a Confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia;
 - b. an agreement granting the Federation of Bosnia and Herzegovina access to the Adriatic through the territory of the Republic of Croatia;
 - c. an agreement granting the Republic of Croatia transit through the Federation of Bosnia and Herzegovina. These documents are accompanied by the proposed Constitution of the Federation of Bosnia and Herzegovina as agreed on by the Croats and Moslems of that state.
3. The provisions of the Croatian Constitution relevant to the first question are as follows: article 1, para. 1, article 2, paras 1 and 5 (basic provisions), article 133, para. 2 (international agreements) and article 135, paras 1, 2, 3 and 4 (association and secession). The official English translation of these paragraphs is attached.
4. First, it should be noted that the Croatian Constitution does not use the term "confederation" or "union" with other states, but merely the term "alliance": "The Republic of Croatia may conclude alliances with other states ..." (article 2, para. 5); "International agreements which grant international organizations or alliances powers ..." (article 133, para. 2.); "Procedure for the association of the Republic of Croatia in alliances with other states ..." (article 135, para. 1). However, the term "alliance" as referred to in the aforementioned provisions is used in the general sense, and not necessarily in the most restrictive sense of a military alliance. In the general sense, the term alliance is defined as a "combination in pursuit of common interests, especially by sovereign states or political groups" (New Shorter Oxford English Dictionary) or a "confederation of nations by formal treaty" (Webster's New Collegiate Dictionary). We believe that there is no doubt that the term "alliance" as used in the Croatian Constitution covers the sense of a military alliance, but it also goes beyond this meaning and covers the confederation between the Republic of Croatia and the Federation of Bosnia and Herzegovina, which of course, is broader than a military alliance (see article 4 of the preliminary agreement on the establishment of a Confederation). In other words, if the sole problem had been the term "alliance", we would have been bound to conclude that it was not necessary to amend the Croatian Constitution.
5. In fact, however, we believe that it will be necessary to amend the Croatian Constitution for the following reason:

Article 2, paragraph 5 of this Constitution states that: "The Republic of Croatia may conclude alliances with other states, retaining the sovereign right to decide by itself on the powers to be transferred and the right freely to withdraw from them". The final article of the preliminary agreement concerning the establishment of a Confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia states the following: "This Agreement shall enter into force upon signature and remain in force until otherwise agreed by the Parties" (article 7). Clearly, article 2 of the Constitution, which stipulates that Croatia has the right to withdraw freely, or unilaterally, from alliances, and article 7 of the agreement, which requires the consent of the other party, namely the Federation of Bosnia and Herzegovina, are irreconcilable. Accordingly, for Croatia to accept the agreement on the establishment of a confederation in a legal, constitutional way, it will have to amend (or delete, as appropriate) the final part of article 2, para. 5 of its Constitution.

6. An additional less important difficulty may arise from article 1, para. 1, which states: "The Republic of Croatia is a unitary and indivisible democratic and social state." If Croatia becomes a confederal state, it ceases as a result to be a unitary state, and joins the group of what is referred to as "unions of states" or composite states. However, we consider that this point is of theoretical rather than practical importance, particularly in view of article 2 of the agreement on the establishment of a confederation, which states: "The establishment of the Confederation shall not change the international identity or legal personality of Croatia or of the Federation."
7. Finally, another difficulty, which is also largely theoretical, may arise from article 2, paragraph 1 of the Croatian Constitution, which states that: "The sovereignty of the Republic of Croatia is inalienable, indivisible and untransferable". However, it is true that the Croatian Constitution makes a distinction between sovereignty, which is untransferable, and powers, even those enshrined in the Constitution, which may be transferred to other states or international organisations (article 2, para. 5 and article 133, paragraph 2). This distinction is somewhat arbitrary and artificial, because when national powers are transferred to an external body, a transfer of some degree of sovereignty is also inevitable. Therefore we need to examine whether the agreement on the establishment of a confederation, which will gradually evolve, and the agreement granting access to the Adriatic through Croatian territory can be reconciled with article 2, paragraph 1 of the Constitution (sovereignty untransferable). But as already stated, this issue is largely a theoretical one.
8. Obviously, if the Republic of Croatia is to ratify and accept the Washington Agreements, articles 133, para. 2 and 135, paras. 1, 2, 3 and 4 of the Constitution will have to be applied. In particular, the Croatian Sabor will be required to reach a decision by qualified majority basis (2/3 of all representatives) and then the issue will have to be put to the Croatian people in the form of a referendum.
9. Finally, we believe that the Croatian Constitution should be amended for the reasons set out in point 5 of this report. If it is decided to proceed with this amendment, it would be desirable for the competent authorities (articles 136 and subsequent articles) also to examine the problems raised in points 6 and 7.