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COMMENTS ON THE PROPOSED CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA (WASHINGTON AGREEMENTS)

by

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OPINION ON THE PROPOSED CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

The following opinion is based on the text of the proposed constitution of the federation of Bosnia and Herzegovina contained in document CDL (94) 28 of 22 June 1994. All quotations of articles, if not otherwise indicated, refer to that proposed constitution.

Human Rights

1. Article II A 1 undertakes to incorporate a number of international instruments relating to human rights - listed in the Annex - into domestic law. The provision says, the rights and freedoms contained in the listed instruments "are to be applied throughout the territory". From the legal point of view it is left open whether these provisions are to be applied as part of the constitutional law or as part of the "normal" law.

2. The most difficult problem of such an incorporation of international instruments is due, however, to the fact that the provisions of these international instruments are different, if not contradictory. The most prominent example is the abolishment of the death penalty. Article 6 of the International Convenant on Civil and Political Rights does not abolish the death penalty but the 6. Additional Protocol to the ECHR does. There is a clear contradicition. Which provision shall be applied in Bosnia and Herzegovina? Another example is article 13 of the International Convenant compared with article 1 of the 7. Additional Protocol the the ECHR. And there are other examples.

3. To avoid problems of interpretation as to which provision shall be applied, the following solution could be adopted: A provision is inserted to the effect that if such differences in the text of the various instruments arise, the provision will be applied which is the most favourable for the applicant in any proceedings or the most

favourable in the interests of the protection of human rights.

4. Such an effect is not achieved by article II A 2 in the present wording. This provision contains an obligation of the Federation which must be fulfilled by further legal acts. But that is not the question. It should be guaranteed that the whole judiciary and administration shall apply the rights and freedoms granted on the highest level.

5. There may be different opinions as to whether it is advisable additionally to list fundamental rights in article II A 2 para. 1. But if done so, the list should be complete. For instance there is not only the right to fair criminal proceedings but also to fair civil proceedings. Not mentioned are the right to marry, the right of the child to acquire a nationality, the right to favourable conditions of work, the right to an adequate standard of living, the right to leave the country and there are other examples.

6. It would be preferable in article II A 2 para. 2 to formulate as follows; "to vote and stand for free elections".

7. The most serious problem for Bosnia and Herzegovina, the problem of the rights of minorities, are not dealt with in detail in the proposed constitution. It is not overlooked that international instruments dealing with the rights of minorities are incorporated into the domestic legal order, nevertheless there are doubts whether this is an adequate solution to the specific problems Bosnia and Herzegovina are facing.

8. For the protection of human rights a Human Rights Court shall be established. It seems that this court shall have a comprehensive competence (article IV C 19). Under the condition that according the existing law in Bosnia and Herzegovina everbody has the right to appeal against any administrative act or measure (for instance arrest or seizure of objects) to a court alleging the violation of human rights and finally to the Court of Human Rights, there are no objections. If that is not the case, there would be a wide gap in the protection of human rights, since administrative acts and measures would fall outside the control by the Human Rights Court.

9. The Human Rights Court shall (article IV C 21) be competent to deal with appeals alleging another court has not delivered jugment within reasonable time. Such a provision is to be welcomed. On the other hand the text leaves open the

question what the Human Rights Court may do in such a case. May the Human Rights Court give certain orders to the slow court? There are doubts whether this would be in conformity with the independence of the judiciary. Shall the Human Rights Court decide the case instead of the slow court? If that is the case the Human Rights Court will become an overburdened court, having to deal with very different cases (civil cases, criminal cases, cases in trade law, bankruptcy and so on). There are doubt whether the court can cope with such a task.

Ombudsmen

10. Many provisions are contained in the proposed constitution concerning the ombudsmen, but no provision concerning the question what the ombudsmen actually may do. Only the means the ombudsmen have, initiate proceedings in courts or examine official documents, are indicated, but it is left open whether the ombudsmen may give recommendations to the administration or may take any other action. According to the text the ombudsmen may only report to administrative authorities. The main function of the ombudsmen should be to recommend solutions for the cases brought befor them.

Distribution of competences between the federation and the cantons

11. It is unknown how many cantons will be established. But there will be not so many and the cantons will be relatively small. According to the well established principle for federal states, the federation has only those competences expressly transferred to it. These competences enumerated in article III 1 are in my view unsufficient. The federation would not be competent to legislate in civil law (and only partly in criminal law), press law, labour law, environmental law, just to mention some examples. To have different laws in such matters in the various Cantons, in my view, is not to the benefit of the population.

12. The federal parliament has the right to taxation (article III 1 j), the Cantons have the same right (article III 4 1 and V 6 f) and the municipalities equally have such a right (article VI 4 c). This is situation which may be burdensome for the population. What in case the federation, the Canton and the municipality raises a 30 percent tax on income? This means a 60 percent incometax. Certainly the financing of all parts of the state is an important problem. It is astonishing that

this question is not dealt with in the present constitution. A distribution of competences to levy taxes is of utmost importance.

Federal parliament

13. Article IV A 13 para 1 provides for immunity of members of both houses of parliament. As far as para. 1 is concerned it is unclear what is meant by "any acts carried out within the scope of their respective authority". It would be preferable to state that this relates to voting as well as to oral or written utterances in parliament only. It would by unjustified that a member of parliament would be neither criminally nor civilly liable for what he is doing for instance in the election campaign.

14. Article IV A 13 para 2 gives rise to the question what happens to a member of parliament in case of apprehension in the act of committing a crime. A member of parliament seen by a policeman committing a murder shall not be arrested immediatly?

15. According to article IV A 16 para 1 the president may dissolve both houses of parliament if unable to enact necessary legislation. Who decides what "necessary legislation" is? No duty is imposed on the president or government to take care for new elections. What happens when the parliament is dissolved according to para 2 because the budget is not adopted? In such a case there is not budget. That means an ex-lex situation; the state may not spend any money and not get any taxes. To dissolve the parliament if it is unable to adopt the budget is no solution to the problem and does not change the situation to the better. It would be advisable to add some provision containing rules for a provisional arrangement for such a case. Probablely the easiest way would be to stipulate that the existing budget is regarded to be valid for a certain time.

16. A special problem poses article IV A 18. If the parliamentarians do not find a common stand on a question of "vital interest of any of the constituent peoples" it is no solution to have the question referred to the Constitutional Court. The Constitutional Court is a court, and as such he decides legal, but not political questions. The Constitutional Court may loose its authority - authority being vital to the court - if he decides against the vital interests of one of the constituent peoples and may become unable to fulfill its task. Therefore, to resolve political

issues is a task not of the Constitutional Court but of the politicians.

17. As to the powers of the parliament it is interesting to note that nearly no control of the administration by parliament is provided for in the proposed constitution. No right of interrogation of the government members is provided for nor the right of parilamentarians to express in resolutions their wishes about the exercise of the executive power. No provision is made as to the control of public accounts and administration of public funds by an organ like a "court de comptes".

18. Unclear in many aspects is the relationship between the two houses. To which house legislative proposals are to be submitted by government? Has government actually the right to submit legislative proposals? Can a person simultameously belong to the House of Representatives and the House of Peoples? These are just some questions which are left open.

19. There is no provision declaring the exercise of the function of a member of parliament free, not bound by a mandate of the electrate.

The executive power

20. It should not be the task of the Constitutional Court to decide whether the president or the vice-president "is otherwise unworthy to serve" as provided for in article IV B 2 para. 1. Only the decision in legal questions may be reserved to the Constitutional Court. Therefore, it is up to Constitutional Court to decide whether the president has violated the constitution - so the phrase "violated the oath of office" is interpretated - but not whether the president on grounds of moral or political grounds is unworthy to serve.

21. There is not objection to provide for policial responsibility of the president and the vice-president towards parliament. A two-thirds majority vote of both houses against the president (vice-president) is a clear indication that the president (vice-president) has lost (politically) confidence. There is no need to involve the Constitutional Court.

22. As to the competences of the president (article IV B 7 a) it may be just stated that the competence of "signing" international agreements is very unpractical. It is unusal and in practice impossible that the president signs all international agreements. Obviously it is meant that the president shall "conclude" all

international agreements.

23. Since the president is only "nominating" the government, the question is open who "appoints" the government because parliament is only competent to "approve" the Cabinet. Article IV B 5 para. 1 is quiet unclear. Who is going to nominate the Prime Minister? The president alone or together with the vice-president? The question is left open.

24. According to article IV B 5 para. 1 members of government must be appoved by a majority of (only) the House of Representatives, on the other hand a vote of no-confidence needs a majority of both houses of parliament. The logic of the parliamentarian system is that government at any time must be supported by parliament. In the phase of the creation of gonvernment this might be assured by a positive vote (vote of appoval) or just by presentation of the government parliament giving the possibility of a vote of no-confidence. There is no logic if only one house has to approve government, but the majority vote of both houses is needed to remove the government by a no-convidence-vote.

25. Article IV B 6 gives rise to many questions. As to the involvement of the Constitutional Court, reference is made to what has already been said above. Comparing the 1. and the 3. sentence of para. 1, decisions "that concern the vital interests" may only be those referred to in the 3. sentence. Therefore, it would be clearer to formulate the 1. sentence: "Decisions of the Cabinet according to Article IV B 3 (2), IV B 9 and VIII 1 are taken unanimously if so required by one-third of the ministers present", and to delete the 2. and 3. sentences. It would be logical that, if under these circumstances there is no unanimous vote, there is no decision either. However, para 2 of the present provision refers the decision in such a case to the president or vice-president, execpt a decision according to IV B 3 (2). This puts the president (vice-president) in an awkward position. Whatever decision the president (vice-president) takes, the decision shows openly that he goes not conform with the majority or minority in the Cabinet. From the political point of view either the majority or the minority has obviously lost the confidence of the president or vice-president.

26. Nothing justifies to grant immunity to the executive organs as does article IV B 10.

27. There are certain gaps as far as the executive power of the federation is

concerned. What happens, if a vote of no-confidence is voted? May such a vote concern only the whole government or only certain members? Who is ruling until a new government is established?

28. Where is the pinciple of the rule of law contained in the proposed constitution?

Judiciary

29. It is regarded essential that the procedural rules for courts are common for the whole state in civil and criminal proceedings. Article IV C 3 cannot be welcomed.

30. There is no need to grant immunity to judges.

31. The judges shall be nominated by the president and the vice-president. This gives these persons a very strong position. Such a regulation may serve as a transitional provision, but normally highest courts, in the interest of independence, should propose their future members (three persones) to the president. The president may choose between the proposed persons.

32. It is not expressly stated that judges are irremovable. The principle of yearly advanced allocation of cases to judges is not contained in the prospoed constitution. But such a provision is an important element in the protection of the independence of judges.

33. As to the Constitutional Court and his competences, it is most interesting to state that the most important case is not covered: the case that a canton or the federation has made legislation not being competent to do so. The authorities of the Canton do not have any possibility to challenge the laws of the federation alleging, the federation is not competent to adopt such a law and vice versa. For a federation it is of great importance that the Consitutional Court may declare a law incompatible with the distribution of competences and to repeal such a law. Only in such a way the distribution of competences can be assured.

34. It might be considered to give to the Constitutional Court the competence to control elections to the parliament of the federation, the larilaments of the Cantons and to thre Governing Councils of the municipalities.

Cantonal Governments

35. It is diffucult to understand article V 2 para 2. Is it actually the intention that the cantonal government may delegate all its resposabilities to municipalities or the Federation Government, so that they have nothing to do? This cannot be the idea!

36. The intention behinde article V 3 is unclear. Why should only the Cantons with a Bosniac-majority or a Croat-majority be able to establish Councils of Cantons? On the other hand, are the tasks provided for such Councils not tasks for the cantonal parliament ? What does it mean that such Councils shall "advise their representatives in the House of People"? If such advice would be binding it would not be in conformity with the free mandate.

37. The term of office of the cantonal parliment (two years) is very short. Are there any reasons for such a short periode?

38. No provision is made for immunity of members of the cantonal parliament as is done for members of the federal parliament. Or shall be left to the cantonal constitution?

39. A general problem - not only relevant in this context - pâses article V 8 para 3. To remove the contonal president from office requires a two-thirds majority. This seems to be very democratic, however, this is not the case. If a two-thirds majority is required, in reality not the majority decides, but a minority. If an absolute majority requests the removal of the president, it is impossible to remove him. Only if it possible to convince the minority which is necessary for a two-third majority, it is possible to act in such a way as intended by the majority. Therefore, a two-third majority means that a minority can block the majority. A two-thirds majority, therefore, is not "more democratic" but the protection of the minority. It should be reconsidered - in that light - whether a two-third majority is adequate wherever provided for.

40. A similar general problem is containt in article V 8 para 4. If the office of the president becomes vacant, anorther president shall be elected "within thirty days". Again such a provision seems to underline the importance of the office of the president, there shall be only a very short periode of time without an elected president. But such a provision can turn out to the contrary. What happens if parliament is not in position to keep to the time-limite? Nobody can force parliament to keep the time-limite, and there might exist political reasons why the time-limite

cannot be kept. What, however, are the legal consequences? Some may say, by not keeping to the time-limit, parliament has lost the competence to elect a new president. Some may say, such a consequence was not envisaged. But what is the purpose of such a provision? The view of those is shared who do not see any purpose in such a provision. They will lead only the difficulties. The easiest solution is either to elect a vice-president of the Canton or to stipulate that another member of the Cantonal Executive - for instance the oldest - takes up the presidents office until new election is possible.

41. Article V 11 para 3 (see also article VI 7 para. 4) provides for the removal of judges by consensus of the judges of the Supreme Court. This is a dangerous provision because for every reason or for no reason at all a judge may be removed. A limitation for the removal of judges for disciplinary reasons or in case of inability to fulfill his office could be acceptable.

42. Article VI 2 para 2 provides for a statute of each municipalitiy. Shall every municipalitiy have a different statute, as provided for in article VI 4 a? The statute of municipalities should be a law of the Canton.

43. As to article VI 7 para 4 see remarks under 41.

44. According to article VII 3 international agreements shall form part of the law of the federation. This may give rise to difficulties if such agreements are not directly appicable. As to article VII 4 para 1 see remark under 22.

45. As to part IX. of the constitution it should be pointed out that the present constitution must be adopted by the Constituent Assembly, therefore, it is not yet valid and provisions as to the Constituent Assembly make no sense.

Vienna, August 23, 1994