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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**COMMENTS ON THE PRELIMINARY AGREEMENT CONCERNING
THE ESTABLISHMENT OF A CONFEDERATION BETWEEN
THE FEDERATION OF BOSNIA AND HERZEGOVINA AND
THE REPUBLIC OF CROATIA
(WASHINGTON AGREEMENTS)**

by

Mr Sergio BARTOLE (Italy)

Opinion by prof. Sergio Bartole, University of Trieste, on the preliminary agreement concerning the establishment of a confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia.

The preliminary agreement signed by the Republic of Croatia and the (proposed) Federation of Bosnia and Herzegovina provides for the establishment of a Confederation between the two Parties. It is expressly stated that "the establishment of the Confederation shall not change the international identity or legal personality of Croatia or of the Federation" (art.2). But the Parties agreed to undertake "progressive steps in their economic collaboration", with the aim of establishing a common market and monetary union when conditions are appropriate (art. 4). The adoption of this common purpose restricts the scope of the activity of the Confederation to the economic field especially. Therefore there is'nt any provision in the preliminary agreement dealing with the adoption of a general policy of the Confederation in the field of foreign affairs interesting both the Parties. However, according to art. 5 the Republic of Croatia and the federation of Bosnia and Herzegovina undertake "to agree as soon as possible on defense arrangements".

I am required to give an opinion "on possible amendments" to the constitutional law of the Republic of Croatia "as a consequence" of the mentioned agreement. Art. 2 of the Constitution of Croatia expressly allows the conclusion of alliances with other states which keep untouched "the sovereign right" of the Republic "to decide by itself on the powers to be transferred". The construction of the preliminary agreement does'nt apparently imply that the establishment of the confederation has immediate and direct effects on the internal system of the sources of law of the Republic of Croatia. The acts or decisions of the proposed Confederative Council shall not have direct internal normative effects on the croatian legal system. Their purpose is the coordination of the policies and activities of the concerned Parties within the Confederation. Art. 4 of the agreement suggests that this purpose will be obtained through the enactment of internal regulations and the conclusion of agreements by the Parties. Therefore both the Parties undertake to give internal implementation to the decisions of the Confederation

according to their constitutional provisions. The pursuing of their cooperation and the development of common policies shall imply - with regard to the croatian constitutional system - 1) the adoption of statutes by the Croatian Sabor or decrees by the Government (Cabinet), and 2) the ratification - when necessary - of the agreements reached by the Parties within the scope of the Confederation (art. 80, 110 and 133 of the Croatian Constitution). As far as the mentioned provisions of the Washington agreement are concerned, we are outside the scope of the second part of art.133 of the Croatian Constitution. Powers derived from the Constitution of the Republic of Croatia are not apparently granted to the Confederation.

Entering in the new agreement does not imply for the Republic of Croatia that it has to surrender some sovereignty rights to the confederative Council had to allow this body to interfere with the Croatian internal affairs. The situation which the Republic of Croatia deals with shall be completely different from the situation dealt with by the member states of the European Community which accepted that regulations adopted by the European Community bodies have direct and immediate effects in their internal orders and take the place of previous state normative acts.

The previous croatian rules which are in force before the adoption of the decisions of the Confederative Council and of the agreements between the Parties shall not be abrogated by these decisions directly, when differing from them, but shall have to be repealed by the croatian internal bodies in the way of implementing the confederative decisions.

If this interpretation is correct, the Washington agreement does not require a revision of the Croatian Constitution. According to the opinion of prof. Smiljko Sokol the principles of croatian constitutional law don't allow an internal process of federalization of the Republic of Croatia: the same principles certainly forbid the entry of the Republic of Croatia in a federal state without any revision of that constitution. But the adhesion to the proposed confederation does not imply the participation in a federalization process with other States, for the time being. Therefore it falls within the scope of the provisions of the Croatian Constitution.

Moreover, because the implementation of the Washington agreement does not provide for a grant of powers derived from the Croatian Constitution to the confederative Council, its ratification does not have to be adopted with the special majority required by the second part of art. 133 of the Croatian Constitution.

But the establishment of a Confederation implies the creation of a special sovranational order, separate from the general international order. The Parties of the Confederation agree to enter in a special, mutual and distinct relationship. This relationship affects the common decision process concerning the decisions in areas interested by the rules of the confederative agreement providing for the cooperation between the Parties of the Confederation and the development of common policies. According to the purposes of the agreement the Confederation has to have a permanent standing and the Parties are engaged to deal in common with the areas mentioned in art. 4.1 of the agreement on a permanent basis. The common decisions shall not be the result of an ad hoc policy, adopted on a day by day basis, but shall flow from a continuous and institutionalized activity of cooperation. We can say that according to the agreement the Parties are engaged to give the priority to the common decision making process not only over the separate and distinct international relations with other States, but also over individual internal decisions of the Republic of Croatia.

But if there is such a priority, the powers "derived from the constitution of the Republic of Croatia" are certainly limited even though they are not directly granted to the Confederative Council. That is to say, the establishment of the Confederation implies an institutionalization of a decision making process which restrict, on a permanent basis, the freedom of decision of the croatian governing bodies.

Somebody could object that the limitation of the powers of the croatian constitutional organs is a natural consequence of the Washington agreement, which is not dissimilar from the normal consequences of the international engagements. The objection could be correct but it missed the point that with the creation of the Confederation the Republic of Croatia is engaged to a permanent

joint enterprise with the Federation of Bosnia and Herzegovina, in the prescribed fields, and that this permanent joint enterprise affects also the relations of the Republic of Croatia with other States which are confronted with a new organization on a not occasional basis.

1) Rebus sic stantibus, it would be advisable to revise the constitution of Croatia mentioning the croatian membership of the confederation explicitly. Such a provision would allow - if the constitutional bodies of the Republic of Croatia would judge them convenient - other constitutional reforms. The permanent basis of the confederative cooperation could require the establishment of a simplified procedure for the internal ratification and implementation of the decisions of the Confederative Councils and the bypassing of the general provisions of the art. 133 of the Croatian Constitution without exempting the Croatian Cabinet from the parliamentary inspection. The italian experience of the membership of the European Community, as well as that of other member States of the European Community, has showed that the relations between the executive and legislative bodies are a very delicate constitutional item in presence of institutionalized forms of international cooperation. Moreover the appointment or the election of the croatian representatives in the Confederative Council could be provided for by specific new constitutional "rules", or the belonging of the representative powers to the ordinary diplomatic structures of the Republic could be confirmed.

2) Two additional agreements grant: a) the Federation of Bosnia and Herzegovina access to the adriatic sea through the territory of the Republic of Croatia, and b) the Republic of Croatia transit through the Federation of Bosnia and Herzegovina. Both these agreements don't directly establish specific rights on behalf of the people interested in the transit through the territory of the Federation of Bosnia and Herzegovina and in the access to the adriatic sea through the Republic of Croatia. Therefore these people don't have rights in the legal order of the Confederation. The two agreements affects the relationship between the two Parties of the Confederation only and establish mutual rights and duties in behalf of

them without any regard to the people concerned whose rights shall be established in the internal legal systems of the Parties on the basis of the internal acts which the Parties adopt to implement the two additional agreements.

Such an approach to the problem of the personal rights flowing from the two additional agreements is consistent with the choice of adopting for the cooperation between the Republic of Croatia and the Federation of Bosnia and Herzegovina what prof. Antonio La Pergola calls the old fashioned model of confederation, which does not give direct relevance to the problems of the guarantee of the personal rights within the legal order of the Confederation. Actually, according to the documents I received from the Secretary of the Venice Commission and I has been able to consult, the Washington agreement for the establishment of the Confederation between the Republic of Croatia and the Federation of Bosnia and Herzegovina does not make any reference to the Council of Europe instruments or other international instruments concerning human rights. Therefore it differs from the proposed constitution of Federation of Bosnia and Herzegovina, whose annex explicitly refers to human rights instruments.

But there isn't, obviously, any reason contrary to the adoption of some specific constitutional rules by the constitutional bodies of the Republic of Croatia to give a special, internal constitutional guarantee to the personal rights flowing from the Washington agreements.

The problem is that the proposed constitution of the Federation of Bosnia and Herzegovina takes a line different from the line I have suggested in this paper. It does not make any reference at all to the agreement for the proposed Confederation. But the fact that the Commission of Venice was requested by the Croatian side to give an opinion on possible amendments to the Constitution of Croatia as a consequence of the Washington agreements, suggests that the Republic of Croatia does not judge that draft constitution as a binding precedent.