

**OPINION ON POSSIBLE AMENDMENTS TO THE CREATION CONSTITUTION FOLLOWING THE WASHINGTON AGREEMENTS PROVIDING FOR THE ESTABLISHMENT OF A CONFEDERATION BETWEEN THE REPUBLIC OF CROATIA AND THE FEDERATION OF BOSNIA HERZEGOVENIA**

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Having carefully read the Agreement on the establishment of a confederation between the Federation of Bosnia Herzegovina and the Republic of Croatia, in the light of the Croatian Constitution, I have come to the conclusion that there are no major contradictions between the two documents, that the possible future confederation would not infringe Croatian sovereignty and that Croatia can perfectly well ratify this agreement, subject to a few minor changes to its Constitution.

My conclusions are based on the following considerations:

1. Article 2 of the Agreement expressly states that "establishment of the Confederation shall not change the international identity or legal identity of Croatia or of the Federation". Thus, the authors of the Agreement were concerned to safeguard the sovereignty and independence of the two States, and this has produced the hypothesis of a traditional confederation of the States in which the constituent States remain subjects of international law in their own right and retain their sovereignty. The establishment of a Federal State is in no way envisaged. Article 1 of the Constitution, which provides that Croatia is a Unitary State, is, thus, fully respected.

Further, the agreement does not infringe Article 2 of the Croatian Constitution, which states that "the sovereignty of the Republic of Croatia is inalienable, divisible and untransferable".

2. Article 3 of the Agreement certainly provides for the establishment of a "Confederative Council", whose function is to co-ordinate the activities of two States within the Confederation. However, this body certainly does not have greater powers than the traditional bodies of most international organisations of which Croatia is a member. It does not have the power to pass law making measures which are directly applicable to the nationals of the two States. On the contrary, the Agreement states that it is the two States who must pass the necessary internal legislation. The authors of the Agreement even took the precaution of ensuring perfect equality between the two parties, but providing that each shall have an equal number of representatives on the Council, that Council decisions may only be adopted by a majority of the members of each party, and that the Presidency shall alternate between the two States (Article 3 of the Agreement).

3. Like all international treaties, the Agreement does limit the sovereignty of the two States on those points which are the subject of specific co-operation. However, this is the nature of all convention based international commitments.

The right to conclude such agreements, or even to join international organisations, is also expressly provided by the Croatian Constitution itself. Article 2 expressly provides that the Croatian Parliament may take decisions "in association, in allowances with other states" and that "the Republic of Croatia may conclude allowances with other States, obtaining the sovereign right to decide by itself on the powers to be transferred and the right freely to withdraw from them".

These provisions are reiterated and elaborated in Articles 132 ss of the Croatian Constitution.

4. The areas for co-operation laid down in Article 4 are not more extensive than those provided for in many other co-operation treaties between States.

It is to be noted in particular that, in economic affairs, the agreement institutes neither a common market nor a customs union. These are referred to only as goals to be achieved in the future. To this end, the two States only commit themselves to "undertake progressive steps... with the aim of establishing the common market and monetary union when conditions are appropriate". For the moment the two States are simply required to co-ordinate their activities and have common policies in a certain number of areas, as laid down in Article 4, paragraph 1, letters (a) (i).

In short, this article does not impose precise obligations on the two States, but simply sets out goals.

5. Article 5 of the Agreement certainly deals with a more sensitive and delicate aspect of sovereignty, because it provides for the conclusion of military agreements between the two States. But the possibility of such agreements is expressly provided in Article 133 of the Croatian Constitution, which sets out the ratification procedure to be followed for this kind of agreement. Paragraph 2 of that article even specifically requires a two thirds majority vote of the Parliament for approval of international treaties "which grant international organisations or alliances powers derived from the Constitution". Hence, even this point does not necessarily require constitutional amendments.

6. Lastly, Article 6 lays down that each Party shall guarantee the other Party a "right of passage" on their respective territories. This is clearly a slight "infringement" of the territorial integrity of the two States, but one which has been freely agreed to on the basis of reciprocity. This restriction on sovereignty seems to me to come within the hypothetical situation envisaged by Article 133, paragraph 2 of the Croatian Constitution.

The territorial rights which the two States grant each other under Article 6 of the Agreement and which have been elaborated in the two annexed agreements, are nevertheless rights which establish an objective situation, similar to those established by treaties which determine a border. Such treaties may not, in theory, be unilaterally denounced, but must, if necessary, be renegotiated on the request of the one of the Parties. Moreover, Article 7 of the first agreement and 5 of the second agreement expressly provide that they shall remain in force for a period of 99 years "except as otherwise agreed by the Parties". Since unilateral denunciation before expiry of this term is not legally possible, a problem seems to arise in respect of Article 2, paragraph 5 of the Croatian Constitution, which provides for Croatia's right to enter into "alliances with other States", the term "alliance" being understood as also including confederations of the kind discussed here" but which, above all, reserves Croatia the right to "freely to withdraw from them". This last provision would therefore have to be modified or supplemented in order to take into account the two agreements mentioned above, which may not be denounced.

7. Apart from this point, it should not be overlooked that by establishing a Confederation, the two States are committing themselves to a process of close collaboration for a long period. Should Article 7 of the Agreement be interpreted as prohibiting its unilateral denunciation? I am not sure. However, both States show a very clear willingness to establish a relationship of special co-operation, which is qualitatively different from that which they may have with other States. This willingness deserves to be included in the Constitution. An article on Croatian basic law could say that Croatia is engaging in particularly close and special relations with the Federation of Bosnia Herzegovina, with which it has established (or will establish) a Confederation.