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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**Basic elements of the Preliminary Agreement
concerning the Establishment of a Confederation between
the Federation of Bosnia and Herzegovina and the
Republic of Croatia
(Washington, 18 March 1994)**

Submitted by Mr S. NICK (Croatia)

Zagreb, 25 August 1994

**Basic elements of the Preliminary Agreement
concerning the Establishment of a Confederation between
the Federation of Bosnia and Herzegovina and the Republic of
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(Washington, March 18, 1994)**

I. This international agreement is a preliminary agreement because it provides for the conclusion of the principal (final) international agreement on the establishment of a Confederation between the Republic of Croatia and the Federation of Bosnia and Herzegovina.

The international-law and constitutional-law theories define confederation as various forms of alliance between sovereign states on the basis of an international agreement through which they intend to achieve certain goals jointly, each of the states maintaining its international and legal personality (subjectivity).

Like all preliminary agreements, this Agreement contains the main provisions of the expected (final) agreement. It defines measures the Parties are obliged to take in order to create appropriate conditions for the conclusion of the principal agreement and the establishment of the Confederation.

II. The aim of the Preliminary Agreement is to resolve several serious geopolitical, historical and legal problems simultaneously by:

- putting an end to war conflicts in this part of the world and eliminating inter-ethnic, religious, regionalist and other tensions;
- satisfying the feelings of the population in certain parts of Bosnia and Herzegovina (primarily Croats and Muslims, but taking into account the Serb population in Bosnia and Herzegovina), maintaining the territories the division of which is not possible, within an overall integral state structure (Federation of Bosnia and Herzegovina);
- recognizing the desire for closer ties between Croats in Bosnia and Herzegovina and the newly created state of the Republic of Croatia;
- providing access for the Federation of Bosnia and Herzegovina to the Adriatic Sea through the port of Ploče;
- resolving the problem of territorial discontinuity of the Republic of Croatia in the Neum area (both historical problems appeared with the dissolution of the former SFR Yugoslavia);

creating conditions for the co-existence, life in peace and versified co-operation among the population of Bosnia and Herzegovina and between the two neighbouring states.

However, each of these goals is difficult to achieve, even separately. Some of them almost exclude each other. Therefore, the Preliminary Agreement is an agreement in principle and a compromise and a framework agreement. Many of its elements are yet to be worked out in the principal agreement.

III. 1. The Preliminary Agreement provides for the establishment of a Confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia. The Parties have therein expressed their will to establish a Confederation when appropriate conditions are given.

2. The establishment of the Confederation shall not change the international identity and legal personality of the Parties, the Republic of Croatia and the Federation. They will remain independent and sovereign states after the establishment of the confederation, and will, each of them individually, maintain their international and legal subjectivity. Subsequently, citizens of each confederative member state will have only the citizenship of that state. Non-existence of common citizenship is one of the main characteristics of a confederation.

3. The Preliminary Agreement provides for a number of measures, to which the Republic of Croatia and the Federation commit themselves in order to create appropriate conditions for the establishment of a Confederation. The Republic of Croatia and the Federation commit themselves to enact internal regulations and conclude agreements providing for progressive measures (some of them are to be taken immediately and some later, at an unestablished point in time) for economic co-operation with the aim of establishing a common market and monetary union.

a) According to the Preliminary Agreement, the Republic of Croatia and the Federation of Bosnia and Hercegovina shall immediately begin with the co-operation and development of common policies in the following areas: transport, energy, environmental protection, economic policy, the reconstruction of economy, health care, culture, science, education, industrial standardization and consumer protection, migration, immigration and asylum, law enforcement, particularly with regard to terrorism, smuggling, drug abuse etc.

b) The Republic of Croatia and the Federation of Bosnia and Hercegovina shall co-operate with a view to establishing, within a certain period, the following:

- (a) a free trade area providing for the free movement of goods of domestic origin;
- (b) a customs union;

- (c) a common market, in which goods, services, capital and labour shall move freely; and
- (d) a monetary union.

c) The Republic of Croatia and the Federation of Bosnia and Hercegovina shall agree as soon as possible on defense arrangements, including the co-ordination of defense policies and the establishment of Joint Command Staff in the event of war or imminent war threat to either Party.

4. From the abovesaid, the common goals can be seen, which are at the same time the purpose of the expected establishment of the Confederation between the Parties. Of the utmost importance are the following goals: joint defense of any of the Parties, a free trade zone, a common market and a customs and monetary union.

5. The Preliminary Agreement also provides for the establishment of the Confederative Council as a joint body of the Parties to co-ordinate the policies and activities of the Parties within the Confederation. According to the provisions of Article 3, Para 1 of the Preliminary Agreement, the Confederative Council shall be constituted after the establishment of the Confederation, since its objective is to co-ordinate the policies and activities of the Parties "...within the Confederation".

By establishing the Confederative Council, the Preliminary Agreement also provides for another important element of the future Confederation by envisaging a joint confederative body. The very existence of such a body as a "confederative assembly" is what makes a confederation different from an ordinary political union. Since it is composed of representatives of its member states, the Confederative Council is not a government body but, by its nature, is similar to international conferences. It can be seen from Article 3, Para 1 of the Preliminary Agreement that the jurisdiction of the Confederative Council is limited by the very objective for which the international confederative treaty is being concluded.

Each Party shall have equal number of members in the Confederative Council. Decisions require approval by the majority of the members from each Party. The President of the Council is elected for the period of one year, rotating among the Council members of each Party.

Since the links among sovereign countries united in an alliance of states (called either confederation or otherwise but having the major characteristics of the contents of the term "confederation") can be of different kinds and tightness and guided by different objectives - ranging for example, from the Swiss Confederation (until 1789 and 1815-1848), to the European Union, it is of utmost importance to establish a relation between the members of confederation and joint confederative bodies when determining the nature of the Preliminary Agreement

of the future Confederation. By observing its functions and jurisdictions, future relations between the members of the Confederation become obvious.

Each member of the Confederation shall independently pursue its policies and activities, while the Confederative Council shall co-ordinate them. Since the decisions require majority vote of all the members from each confederative member state, there is no possibility for outvoting, i.e. imposing the will of one member of the Confederation over the other.

Another characteristic of a confederation, generally accepted in theory and practice of both international law and constitutional law (except if explicitly agreed otherwise by means of an international treaty), is the fact that decisions by the Confederative Council adopted by approval (Confederative Assembly) are not automatically obligatory for citizens of confederative member states, but become law and therefore obligatory only when the individual member states of the Confederation adopt them, i.e. enact into law in a regular procedure. Confederative bodies do not have immediate jurisdiction over the citizens of confederative member states; a procedure of adopting and enacting a confederative decision into internal law of the individual member state is required.

Possible delegation of some jurisdictions from confederative member states to the Confederation, if both confederative member states agree so, shall have to be separately regulated by an international treaty between the confederative member states, and such "confederative authority" shall derive from the authority of the confederative member states. Usually, a confederation does not have uniform taxation system nor uniform budget.

On the basis of the above said, since the Confederative Council shall only be a co-ordinator between two independent policies and activities of the confederative member states, in order to achieve other mutual objectives of the Parties - i.e. common market, customs and monetary union - it will be necessary to conclude new international agreements between the member states of the Confederation, as provided for in Article 4, Paragraph 1 of the Preliminary Agreement.

In order to further regulate their relations, the Parties have concluded two agreements, on the basis of Article 6 of the Preliminary Agreement, the texts of which are enclosed to the Preliminary Agreement as Annex I and II:

1. the Agreement granting the Federation of Bosnia-Herzegovina access to the Adriatic Sea through the territory of the Republic of Croatia, and
2. the Agreement granting Croatia transit through the Federation of Bosnia and Herzegovina.

ad1. The Agreement grants the Federation of Bosnia and Hercegovina an unrestricted access to the Adriatic Sea in accordance with the 1982 UN Convention on the Law of the Sea and the 1965 Convention on the Transit of Land-Locked States, in such a way that the Republic of Croatia shall lease a plot of land within the Port of Ploče, which will have the status of a free zone, for 99 years. The Agreement provides for the way of access to this free zone as well as the way of using it. The Agreement also provides for a Joint Commission that will assist in implementing the Agreement and settlement of possible disputes (by arbitration).

ad2. The Agreement grants the Republic of Croatia unrestricted transit - to and from the Republic of Croatia - between the eastern and western borders of the municipality of Neum with the Republic of Croatia, for the period of 99 years. The Agreement provides for the way of using this right to transit, for the establishing of the Joint Commission which will assist in implementing the Agreement, and for the way of settling any possible disputes.

A more detailed arrangement of the relations between the confederative member states shall be, on the basis of the above mentioned principles and provisions of the Preliminary Agreement, determined by the principle (final) international agreement by which the Confederation shall be established.

In accordance with the above mentioned, it should be concluded that after creating the above mentioned favourable conditions for establishing the Confederation, especially after finding the final political and legal solution to the status of the Federation of Bosnia and Hercegovina as one of the Parties, and respecting each Parties' constitutional provisions on uniting with other states, the conditions shall be created for concluding the principle (final) international treaty on the establishment of the Confederation between the Republic of Croatia and the Federation of Bosnia and Hercegovina.

dr Stanko Nick