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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**QUESTIONS TO BE DISCUSSED
CONCERNING THE CONSTITUTIONALITY
OF INTERNATIONAL AGREEMENTS
CONCLUDED BY BOSNIA AND HERZEGOVINA
AND THE ENTITIES**

**Meeting of the Sub-Commission
on Federal and Regional States
(Venice, 15 October 1998)**

SECRETARIAT MEMORANDUM

*The list of agreements submitted to the Commission has changed with respect to the initial request by letter from the Office of the High Representative of 4 August 1998. New agreements are about to be concluded on special parallel relations between the Federation of Bosnia and Herzegovina (FBH) and Croatia and concerning access by Croatia to Bosnian territory and access by Bosnia to Croatian territory. **The agreements appearing in the list of agreements under the numbers 5, 6, 13, 15, 17 and 18 are superseded by these subsequent developments and the Commission's opinion on them is no longer required. They have been omitted from the files. On the other hand, a further Agreement, No.26, has been added.***

Constitutionality is to be examined exclusively with respect to the Constitution of Bosnia and Herzegovina (BH), not with respect to the constitutions of the Entities. Possible consequences of unconstitutionality under international law are outside the scope of the opinion to be prepared.

The following list of questions to be discussed has been prepared by the Secretariat to facilitate the examination by the Sub-Commission. It does not claim to be exhaustive. Articles cited refer to the Constitution of BH.

Many questions are already addressed in the preliminary opinion by Mr Bartole (CDL (98)73). It should be noted that this opinion was prepared on the basis of the original request and refers also to agreements no longer submitted to the Commission.

I. Agreements concluded by FBH and/or BH

1. Preliminary Agreement FBH-Croatia on Establishment of a Confederation

- Is this Agreement superseded by subsequent events (cf. Bartole), in particular by Dayton and the draft agreement on special parallel relations, which is to be concluded?

2. Agreement on the adoption of the FBH Constitution and Preliminary Agreement on future economic and military co-operation FBH-Croatia

- Adoption of the Constitution no longer relevant
- Point 1 and 2 no longer relevant
- Point 3 still applicable (basis for EU administration) and constitutional?
- Point 4 presumably no longer relevant

Agreements 3 to 12: Ratification by government according to old rules instead by Presidency with the consent of the Parliamentary Assembly

- Application of principles of continuity and necessity (cf. CDL (96)94 and opinion by Bartole)
- Additional step: Consent by Parliamentary Assembly under Art. III.2.(d) also to be replaced by government participation or not necessary for trilateral agreements?
- Signature by government of the Republic and Federation in No. 7 to No. 10 (with correction in No. 12 for No 7)

3. *Agreement Croatia-BH-FBH on the establishment of a Joint Council*

- Dates from 14 December 1995, day of entry into force of Dayton Constitution, does procedural problem apply? If so, necessity?
- Superseded by subsequent events?
At the BH level:
NB: Draft Agreement No. 14 purports to replace this Agreement
At the FBH level:
Council part of the various special parallel relations agreements (which have not yet entered into force)?
NB: In the first of the drafts for special parallel relations there was a provision (Art. 7 of the annex to draft Agreement 13) providing that the relevant provisions of the new agreement supersede Agreement 3 upon the entry into force of the new agreement. Subsequent draft agreements (17) no longer contain a similar provision.
- Touches responsibilities of BH, in particular III.1.a (foreign policy). Possible because of BH participation? "Discrimination" of RS by not being represented in the matters within BH competence (art. II.2)?

4. *Agreement BH-FBH-Croatia on mutual execution of court decisions in criminal matters*

- Procedural problem, necessity applicable?, cf. Bartole
- BH competence under art. III.1.(g), FBH competence because FBH responsible for criminal justice system
- Application to RS excluded by supplementary agreement
- Substance does not seem to raise particular constitutional problems

7. *Treaty on customs co-operation BH-FBH-Croatia, including 12. correction*

- Procedural problem, necessity applicable?, cf. Bartole (NB: art. 18: provisional application)
- Non-involvement of RS compatible with BH competence for customs policy for all of BH? Repercussions on RS because of free movement of goods (art. I.B.4). Justified because of agreement by BH government? Or Agreement as technical administrative agreement outside the area of customs policy? (NB: wide interpretation of customs policy in the Commission's opinion on the compatibility of the Constitutions of the Entities with the Dayton Constitution (CDL (96)56final) concerning art. III.1 of the FBH Constitution)
- No further constitutional problems apparent

8. *Agreement BH-FBH-Croatia on the return of refugees*

- Procedural problem, necessity applicable?, cf. Bartole
- Non-involvement of RS problematic? But cf. Agreement No. 26
- Interpretation of art. III.5.(a) in conjunction with Annex 7 to Dayton

9. *Agreement BH-FBH-Croatia on waiving visas with Protocol BH-Croatia and 11. Protocol BH-Croatia on its temporary application*

- Procedural problem, necessity applicable?, cf. Bartole (NB: Protocol entered into force before Dayton, see art. 4)
- According to Protocol No. 11, the provisions of the agreement are applicable only to FBH residents, pending settlement for RS residents after elections in BH. Discrimination of RS residents?
- Justified as temporary measure at the time? Still now?
- Justification for FBH co-signing the Agreement (but not Protocols)? Ratification/publication by BH only?

10. Agreement BH-FBH-Croatia on economic co-operation

- Procedural problem, necessity applicable?, cf. Bartole. NB: provisional application according to art. 16
- Ambiguous whether valid only for FBH (cf. arts. 1 and 15) or for BH, two governments as Parties in the Preamble, reference to confederation agreement
- Touches responsibilities of the Entities, therefore not valid for RS without RS agreement
- Touches customs and trade policy, possible to conclude such an agreement just for one entity (cf. under No. 7 above)?

14. Draft Agreement BH-Croatia on interstate Council for Co-operation

- NB specific reference to constitutional competencies in art. 3
- Responsibilities seem mostly covered by art. III.1 of the Constitution
- Only: may co-operation with the international community for the reconstruction of BH (third indent of art. 3) be regarded as part of foreign policy? Art. III.5?
- Consent by Parliamentary Assembly and ratification by Presidency required or not a treaty in the sense of arts. IV.4.(d) and V.3.(d).? (these articles use the word treaty, art. III.2.(d) uses the word agreement)

16. Draft Protocol BH-Croatia on the resumption of navigation

- Covered by BH competence for foreign policy and foreign trade?
- BH competence for inter-Entity transportation (art. III.1.i), applicable also for international transport links going through both Entities?
- Art. III.1.(h) seems to refer to telecommunication and not to transport
- Consent by Parliamentary Assembly and ratification by Presidency required or not a treaty in the sense of arts. IV.4.(d) and V.3.(d).?
- Encroachment on Entity competence? RS will have to apply agreement, see its text, but its non-participation might be justifiable because of the character as a framework agreement according to Bartole.

19. Draft Agreement BH-FBH-Croatia on motorway construction

- Is this an agreement in the sense of Art. III.2.(d) or does this article not cover contracts? Is it applicable to trilateral agreements with the participation of BH?

- Partly to be constructed on RS territory, therefore RS agreement required? Or not necessary due to exclusively commercial character?
- Legal basis for BH participation? Art. III.1.(i) (cf. above Agreement No. 16)

II. Agreements concluded by RS

20. Precept on temporary regulations of commodities and services with FRY

- Not an international agreement
- Superseded by no. 24?
- Violation of BH responsibility for trade and customs policy?

21. Protocol RS-Serbia on trade in goods and services

- Consent by Parliamentary Assembly of BH not given, violation unless III.2.(a) applicable
- Violation of BH responsibility for trade and customs policy
- Superseded by No. 24?

22. Agreement on special parallel relations RS-FRY

- Why does art. 14 require ratification by BH Parliamentary Assembly?
- Character as a framework agreement justified by the necessarily general character of such agreements?
- Touches practically all BH responsibilities under art. III.1 (cf. Bartole), no saving clause
- Consistent with the sovereignty of BH, art. III.2.(a)

23. Trade Agreement RS-FRY

- If the Agreement falls under III.2.(a), consent of BH Assembly not required (cf reference to this article in the Preamble of the Agreement). Otherwise violation of III.2.d
- Violation of BH responsibility for trade and customs policy?

24. RS Decree on Regulation of Traffic in goods and services with FRY and amending Protocol No.24a

- Is not an international Agreement
- Violation of BH responsibility for trade and customs policy?

25. Agreement on economic co-operation RS-Montenegro

- Montenegro not a State, but III.2.(a) and (d) also applicable sub-entities, cf. Bartole
- If the Agreement falls under III.2.(a), consent of BH Assembly not required. Otherwise violation of III.2.d

- Unconstitutional because BH responsibilities under III.1.(b) – foreign trade policy- and III.1.h communications facilities (for transport see above under No. 19) are concerned?

26. Protocol RS-Croatia on the procedure of organised return

- No indication as to BH Parliamentary Assembly consent, violation of art. III.2.d?
- Violation of a BH competence for the return of refugees under Art. III.5.(a) in conjunction with Annex 7 to the Dayton Agreement?
- Compatibility with obligations of the Parties under Annex 7 to the Dayton Agreement on refugees and displaced persons outside the scope of the tasks of the Commission