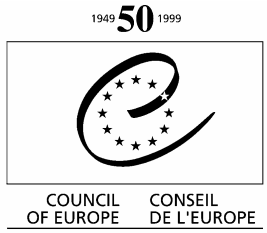

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

DRAFT OPINION ON RESPONSIBILITIES FOR THE CONCLUSION AND IMPLEMENTATION OF INTERNATIONAL AGREEMENTS UNDER THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

For consideration at the meeting of the Sub-Commission on 17 June 1999

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1. At the 36th plenary meeting of the Commission on 16 to 17 September 1998 the representative of the Office of the High Representative (OHR) informed the Commission that the High Representative wished the Commission to study the issues pertaining to consultation and co-operation between Bosnia and Herzegovina and the Entities in concluding and implementing international agreements. The Commission decided to first pursue its consideration of a number of specific international agreements submitted to it by the OHR and then come back to the more general questions. Following the adoption of the Commission's opinion on these specific international agreements at the 37th plenary meeting on 11 to 12 December 1998 (document CDL-INF(98)20), the Sub-commission on the Federal and Regional State asked the working group which had prepared the previous opinion to study the more general questions as well.

2. The working group, composed of Messrs Bartole, Matscher and Tuori with Mr Scholsem in the chair met in Paris on 29 January 1999 and in Bologna on 19 March 1999 together with OHR representatives. *<The Sub-commission examined the draft opinion prepared by the Working Group in Bologna on 19 March 1999 and in Venice on 17 June 1999 and, after amending it, submitted it to the Commission for approval. The present text was adopted by the Commission at its 39th plenary meeting in Venice on 18 to 19 June 1999.>*

3. The present opinion examines questions of competence of Bosnia and Herzegovina (BH) and the Entities from the point of view of BH constitutional law. It is clear that, under international law, BH may validly conclude treaties in areas of Entity responsibility without consulting the Entities. Whether internally BH may do so is a separate question.

4. The opinion does not address questions pertaining to agreements on special parallel relationships between Entities and neighbouring States. These agreements are dealt with in the above-mentioned opinion (CDL-INF(98)20).

5. While it is not the main object of the opinion to address the division of responsibilities between the various institutions of BH, a few words should be said with respect to the role of the Presidency and the Council of Ministers. Article V.3 of the Constitution gives the Presidency the main role with respect to foreign relations and states in particular that the Presidency negotiates treaties of BH. This does however not mean that this role of the Presidency excludes the Council of Ministers, and it would be appropriate for the Ministry of Foreign Affairs to carry out such negotiations at the practical level on behalf of the Presidency and with its consent. This is in accordance with Article 43 of the Law on the Council of Ministers of BH which provides "*The Ministry for Foreign Affairs has responsibility for: foreign policy under the general direction of the presidency. Negotiates treaties and agreements.*" The Minister for Foreign Affairs nevertheless always remains a member of the Council of Ministers and is not individually answerable to the Presidency.

I. The conclusion of international agreements by BH and the Entities

6. The conclusion of certain categories of treaties poses few legal problems. Within areas under the exclusive responsibility of BH at the internal level, such as immigration or asylum, BH may conclude treaties without consulting the Entities. By contrast, the Entities are not competent to conclude any treaties in these fields.

7. Article III.2.(d) of the Constitution explicitly authorises the Entities to conclude international agreements in other areas, subject to the consent of the BH Parliamentary Assembly. This

provision does not explicitly require an early consultation of BH institutions on international agreements Entities wish to conclude. However the Entities would be well advised to consult the BH authorities systematically at an early stage to avoid problems later when the consent of the Parliamentary Assembly is sought. The Commission recommends the establishment of a generally applicable procedure for such consultations.

8. The main legal issue is whether BH has the power to conclude international agreements in areas which are internally within the exclusive responsibility of the Entities. It is clear that BH may be empowered by the Entities to conclude such agreements. This corresponds to a practice provided for in Art. III.5 of the Constitution and to a practical necessity since it will often be impossible for the Entities to conclude in particular multilateral agreements. For such agreements the Entities remain dependent on the willingness of the BH Presidency to negotiate and conclude international agreements and they have no possibility to oblige the Presidency to conclude such agreements if it does not wish to do so.

9. The question is however whether BH may act in these areas without the consent of the Entities. With respect to international agreements, two interpretations of the responsibilities of BH may be put forward: either BH may be said to have a general responsibility under the Constitution to conclude any international agreement, or the responsibilities of BH at the external level may be understood as being parallel to the internal responsibilities and limited to areas for which an explicit responsibility is attributed to BH by the Constitution.

10. This depends in particular on the interpretation of Article III.1.(a) of the Constitution giving BH responsibility for foreign policy. This provision may either be understood as giving BH responsibility for conducting international relations in whatever field and thereby the capacity to conclude any international agreement, or as referring only to foreign relations at the political level and not including agreements of a more technical character or as including agreements for which the political aspects prevail over the technical aspects. To give an example: the accession of BH to the Statute of the Council of Europe would undoubtedly be a political act and could be based on the BH responsibility for foreign policy, whereas accession to the Social Charter of the Council of Europe would mainly concern social and labour law, two fields reserved to the Entities, and might therefore be considered as requiring the consent of the Entities. Of course, the distinction will not always be clear-cut and a treaty which might well be regarded as technical with repect to its substance may become political due to specific considerations, e.g. a crisis in the relations between the States concerned.

11. A number of arguments may be advanced in favour of requiring Entity consent for international agreements touching Entity responsibilities at the internal level:

    - The general distribution of responsibilities as provided for in particular in Art. III.3.(a) heavily favours the Entities and it would seem plausible to have this tendency also reflected at the external level;

    - The BH Constitution tends to give exclusive responsibilities; it would therefore be appropriate to leave the various fields in their entirety, including their external aspects, within the responsibility of the Entities;

    - Under Art. III.2.(d) of the Constitution the Entities may conclude international agreements with the consent of the BH Parliamentary Assembly: this shows that international agreements are not exclusively reserved to BH;

- The external competence should not be a device enabling BH to gain influence in areas reserved to the Entities;

- It will be very difficult for BH to conclude international agreements in areas under the exclusive responsibility of the Entities for which BH will lack the appropriate technical competence;

- If the Entities have to implement the Agreement later, they should have a role in the decision on whether the Agreement is concluded.

12. There are however a number of arguments of equal weight in favour of granting BH a general responsibility to conclude international agreements without prior authorisation by the Entities:

- The BH Constitution puts particular emphasis on safeguarding the international position of BH: this is apparent from Art. I.1, from the references to sovereignty, territorial integrity and partly also international personality in the Preamble and Arts. III.2.(a), III.5.(a) and VI.3.(a) and from the numerous references to international aspects throughout the text (e.g.: the first four responsibilities enumerated for the Presidency in Art. V.3.(a) to (d) all concern foreign policy);

- The very weakness of BH as a federal State indicates the necessity to safeguard its international position;

- Art. III.2.(b) of the Constitution emphasises the primary responsibility of BH for all international obligations;

- Granting this possibility does not seem to entail particular risks for the interests of the Entities since, within the institutional set-up of BH, the House of Peoples is able to protect the interests of the Entities and to prevent any encroachment of BH on areas of Entity responsibility;

- It is very difficult to separate foreign policy from technical areas: if accession to the Council of Europe is a political act and covered not only by Art. III.1.(a) but also by Art. I.1, it will nevertheless oblige the Entities to take important steps within their fields of responsibility, in particular with respect to the judicial system.

13. The Commission does not feel called upon to pronounce itself on this important legal question at the present stage. As set out above, arguments of considerable weight may be advanced in favour of either approach and it is up to the organs of BH, in particular to the Constitutional Court, to take the final decision. In addition, instead of a general rule that agreements touching Entity responsibility do or do not require Entity consent, one could also differentiate on the basis of whether elements of foreign policy or elements of a specific subject matter within the responsibility of the Entities prevail. For the moment it seems sufficient to point out the main arguments and a way of proceeding in practice. There are also good reasons in favour of a pragmatic approach based on consultations and co-operation leaving the legal question undecided.

14. In many areas BH will not be able to conclude meaningful agreements without the co-operation of the Entities. On the other hand, the Entities may not conclude agreements without the consent of the BH Parliamentary Assembly. Co-operation is therefore in the

interest of both sides and, indeed, it has already started. In its *Opinion on the constitutionality of international agreements concluded by BH and/or the Entities (CDL-INF (98) 20)* the Commission noted, and approved in principle, the practice of concluding joint agreements to be signed both by BH and an Entity. In a statement of the BH Presidency of 10 March 1997 it is set forth that "the Agreements exclusively under the competence of BH shall be signed in accordance with the previously established procedure; the agreements which create commitments and rights for the Entities shall be signed by the authorised member of the BH Presidency and the authorised representative of the Entity." One may well wonder whether such a sweeping statement is really within the powers of the Presidency; nevertheless it has to be noted that the BH Presidency is aware of the need for co-operation with the Entities in this respect.

15. BH and the Entities therefore seem on the way to finding a pragmatic approach to the question which does not violate any legal principles. The Commission urges them to go further and define a generally applicable consultation procedure for all international agreements touching upon Entity responsibilities. The Commission notes that such a pragmatic approach has precedents. In the Lindau Agreement of 1958 between the Federation and the Länder in Germany both sides expressly maintain their legal position while agreeing on consultation mechanisms.

16. In addition, BH would seem well advised to introduce new legislation governing the conclusion and implementation of international agreements. Legislation dating from the period prior to the entry into force of the Constitution is obviously no longer adapted to the unique constitutional situation of the country.

17. As a conclusion the Commission therefore notes with respect to the conclusion of international agreements within BH:

- International agreements in areas within the responsibility of BH at the internal level may be concluded by BH without consulting the Entities;

- The Entities may, with the consent of the BH Parliamentary Assembly, conclude international agreements in their areas of responsibility and would be well advised to enter into early consultations with BH organs when wishing to enter into such agreements;

- Consultation mechanisms between BH and the Entities should be established for international agreements to be entered into by BH which concern responsibilities of the Entities at the internal level.

II. The implementation of international agreements

18. Appropriate early consultations should enable problems to be avoided when international agreements concluded by BH have to be implemented at the Entity level. The Commission underlines in this respect the general obligation of the Entities under Art. III.2.(b) of the Constitution to provide all necessary assistance to the government of BH in order to enable it to honour its international commitments. This is a clearly defined obligation of the Entities and BH may address the Constitutional Court under Art. VI.3.(a) of the Constitution whenever this obligation is not honoured.

19. As an additional step one might consider whether BH might substitute Entity action required by an international agreement but not taken by the Entity despite the international commitment. The Austrian Constitution provides an international precedent for responsibility passing in such a situation from an entity to the Federation. Its Art. 16.(4) provides: " The *Länder* are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of international agreements; should a *Land* fail to comply punctually with this obligation, competence for such measures, in particular too for the issue of the necessary laws, passes to the *Bund.* …" This also corresponds to the practice in Switzerland.

20. In the absence of an explicit provision to this effect in the BH Constitution the Commission hesitates to affirm that the legal situation in Bosnia is similar to Austria. The proper way to deal with such issues under the BH Constitution is to address the Constitutional Court under Art. VI.3.(a). Nevertheless, if despite a decision of the Constitutional Court an Entity still fails to take the steps necessary to honour an international commitment, it seems possible to assume that, in order to avoid becoming responsible for a violation of international law, BH then may take the required measures as part of its foreign policy responsibility under Art. III.1.(a) and as necessary to preserve the sovereignty and international personality of BH under Art. III.5.

III. The international agreements listed in Annex I of the BH Constitution

21. With respect to the international human rights agreements listed in Annex I to the Constitution, BH is under an obligation by virtue of Art. II.7 of the Constitution to become a Party to them if this is not already the case.

22. According to the information provided to the Commission, BH is indeed, as a successor State of the former SFRY, a Party to the various UN Conventions listed in this Annex.

23. The same is not true with respect to the three Council of Europe Conventions:

- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

- The European Charter for Regional or Minority Languages

- The Framework Convention for the Protection of National Minorities.

On 30 September 1996 governmental decrees ratifying these three treaties were published in the Official Gazette of BH. However, no instrument of ratification, approval, acceptance or accession was ever deposited with the Secretary General of the Council of Europe with respect to any of these treaties, although in an Aide-Mémoire of November 1996 the Directorate of Legal Affairs of the Council of Europe drew the attention of the BH authorities to the necessary international procedures. Only on 24 May 1999 the Minister of Foreign Affairs of BH asked the Committee of Ministers of the Council of Europe to invite BH to accede to the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities.

24. In effect the situation with respect to the three conventions has to be distinguished:

- The Committee of Ministers of the Council of Europe may, under the terms of Art. 20 of the *European Charter for Regional or Minority Languages*, invite a State that is not a member of the Council of Europe to accede to the Charter.

- The Committee of Ministers of the Council of Europe may, under the terms of Art. 29 of the *Framework Convention for the Protection of National Minorities*, invite a State that is not a member of the Council of Europe to accede to the Convention.

- By contrast, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* is, pending the entry into force of Protocol No. 1 to the Convention, not open to accession by non-member states of the Council of Europe. BH therefore cannot accede at the moment.

25. BH therefore has now undertaken the steps which are required at the moment. Once the invitations to accede to the Charter and the Framework Convention have been received, the authorities of BH are under a constitutional obligation to deposit instruments of accession with respect to these two treaties.