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OPINION

ON THE CONSTITUTIONALITY OF INTERNATIONAL AGREEMENTS CONCLUDED BY BOSNIA AND HERZEGOVINA AND/OR THE ENTITIES

Adopted by the Venice Commission,
at its 37th Plenary Meeting,
in Venice, on 11-12 December 1998

I. Introduction

By letter dated 4 August 1998 the Office of the High Representative asked the Venice Commission to examine the constitutionality of a number of Agreements, the list of which appears at Appendix I, concluded by the Republic of Bosnia and Herzegovina or by Bosnia and Herzegovina (BH) and/or the Federation of Bosnia and Herzegovina (FBH) with the Republic of Croatia on the one hand and by Republika Srpska (RS) with the Federal Republic of Yugoslavia (FRY) on the other.

The present opinion was adopted by the Commission at its 37th Plenary meeting on 11-12 December 1998 upon the proposal of the Sub-Commission on the Federal and Regional State. It was prepared by a working group of the Sub-Commission composed of Messrs Matscher (Austria), Scholsem (Belgium), Tuori (Finland) and Bartole (Italy).

The Agreements raise a number of difficult issues concerning both procedure and substance. As regards procedure, Agreements concluded after the entry into force of the BH Constitution appearing at Appendix IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) but before the establishment of the new institutions raise particular problems. As regards substance, all Agreements have to respect the division of responsibilities between BH on the one hand and the Entities on the other.

In the opinion, the Commission has limited itself to examining the constitutionality according to the Constitution of BH as set out at Appendix IV to the Dayton Agreement. It has not dealt with the constitutionality according to earlier constitutions of the Republic of BH or the constitutionality of Agreements concluded by the Entities under the Entity Constitutions. In addition, the consequences under international law of a possible unconstitutionality are not addressed in the present opinion. While, according to the provisions of Articles 27 and 46 of the Vienna Convention, provisions of internal law may only under very exceptional circumstances be invoked to contest the validity of an international treaty, the situation concerning the Agreements dealt with in the present opinion seems very specific in so far as the two other States concerned, i.e. Croatia and FRY, as co-Parties to the Dayton Agreement, were not only perfectly aware of the constitutional situation in BH but even formally endorsed the BH Constitution and agreed to fully respect the commitments made therein (Article V of the Dayton Agreement).

The present opinion also does not claim to deal exhaustively with all relevant constitutional questions. The Commission has concentrated on those questions which seem decisive for the validity of the agreements or for the further action to be undertaken by the BH authorities. In addition, the Commission is conscious that the decision on the constitutionality of the agreements belongs to the Constitutional Court of BH and that it may only provide a non-binding legal opinion of outside experts. While the Office of the High Representative has provided all information requested by the Commission, such information cannot replace an adversarial legal procedure. Therefore it does not seem impossible that the Constitutional Court of BH may in the future, when called upon to take a decision on the constitutionality of one or the other

Agreement, dispose of additional elements and arrive at different conclusions with respect to certain issues.

II. Agreements ratified before the entry into force of the Constitution

General procedural considerations

Section 5 of the Transitional Arrangements appearing in Annex II to the Constitution contains the following rule on treaties:

> "Any treaty ratified by the Republic of BH between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any Member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty."

The Commission was informed by the Office of the High Representative that both treaties mentioned below were disclosed to the Members of the Presidency in accordance with this provision and that no request to denounce either of the treaties was made. There are therefore no procedural reasons to doubt the validity of these Agreements.

- Preliminary Agreement on the Establishment of a Confederation between FBH and the Republic of Croatia

The Commission considers the establishment of a confederation between an Entity and another State as clearly inconsistent with the sovereignty and territorial integrity of BH and therefore as unconstitutional. While the Agreement itself falls short of the establishment of a confederation, this purpose is not legitimate under the BH Constitution which provides as an alternative the possibility to conclude agreements on special parallel relationships. It is clear that, as from the entry into force of the new Constitution, the Washington Agreement may be used as a basis for the conclusion of agreements only to the extent it is compatible with the new Constitution.

This Agreement, which was concluded before Dayton, has to be regarded as superseded by the new Constitution.

- Agreement on the Adoption of the Constitution of the FBH and Preliminary Agreement concerning the Future Economic and Military Co-operation between the FBH and the Republic of Croatia

The Commission notes that the commitments resulting from this Agreement were presumably to a large extent carried out already. The Commission is not aware to which extent the measures agreed by the Military Interim Team, to which reference is made, are still relevant and can therefore not provide a final opinion.

III. Agreements ratified (or signed without reservation as to ratification) between the entry into force of the Constitution (14 December 1995) and the elections to the new constitutional institutions (September 1996)

General procedural considerations

The Agreements in this category were ratified after the entry into force of the Constitution. Section 5 of the Transitional Arrangements is therefore not applicable, at least not directly.

The Commission was informed that these agreements, as well as all other agreements concluded between 1 January 1992 and 31 November 1996, had nevertheless been notified to the Members of the Presidency upon their taking office. This disclosure was motivated by the desire to ensure transparency and was not based upon a legal obligation under Section 5 of the Transitional Agreements.

The Agreements, with the exception of the *Agreement on the Establishment of the Joint Council for Co-operation* which was treated as an Agreement not requiring ratification, were all ratified in a procedure inconsistent with the provisions of the new Constitution. The Constitution provides that the Presidency is responsible for "negotiating, denouncing and, with the consent of the Parliamentary Assembly, ratifying treaties of BH" (Article V.3.d) and that the Parliamentary Assembly shall have responsibility for "deciding whether to consent to the ratification of treaties" (Article IV.4.d). In contradiction with these provisions, the Agreements were ratified by the government of the Republic of BH, without the involvement of the Parliamentary Assembly or the Presidency, on the basis of Article 34 of the 1994 Law on the Government of the Republic of BH adopted under the previous Constitution.

This disregard for the Constitution, which had already entered into force on 14 December 1995, seems due to the fact that the institutions provided for by the new Constitution had not yet been established and that the elections to them did not take place until September 1996. For this transitional period a solution therefore had to be found and this solution was not provided for directly by the text of the Transitional Arrangements.

The Commission was already consulted on this problem, not with respect to international treaties but with respect to ordinary legislation. In its *Opinion on legislative powers in BH in the period between the entry into force of the Constitution set out in Annex IV to the Dayton Agreement (14 December 1995) and the elections of 14 September 1996* (CDL (96) 94) it came to the following conclusions:

> "10. Article IV of the new Constitution of Bosnia and Herzegovina contains provisions on a Parliamentary Assembly. This Parliamentary Assembly is different from the Assembly of the Republic of Bosnia and Herzegovina existing under the previous Constitution.
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> 11. Following the rule on immediate entry into force of the new Constitution, contained in its Article XII.1, at first sight the Assembly of the Republic would lose its legal basis upon signature of the Dayton Agreement and therefore cease to be able to

validly enact legislation or other decisions. A different conclusion may however result in particular from the Transitional Arrangements contained in Annex 2 to the Constitution.

12. Section 2 of the Transitional Arrangements on the continuation of laws is worded as follows: "all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

This provision does not cover legislation adopted after the entry into force of the new Constitution, but only previously enacted legislation. The very absence of a provision on legislation adopted during the transitional period might however be regarded as an indication that such legislation was not envisaged.

13. On the other hand, section 4 of the Transitional Arrangements provides under the heading "offices" as follows: "until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law".

Within the terminology of the Dayton Constitution, a parliamentary body may be covered by the expression "governmental offices, institutions, and other bodies". This results from Article III.1 where the word institution is applied to all State organs, including the Parliamentary Assembly. Moreover, section 2 of Annex 2 cited above calls "governmental" the competent body, which determines the continued validity of previous legislation.

By contrast, the application of the words "until superseded by applicable agreement or law" to a parliamentary body seems problematic since parliament has its main legal basis in the Constitution and the new Constitution has already superseded the previous Constitution.

14. The wording of the Transitional Arrangements therefore seems ambiguous and an answer has to be found by applying general principles to the interpretation of the Constitution contained in the Dayton Peace Agreement.

15. According to Article I.1 of the Constitution, Bosnia and Herzegovina is not a new State but it continues its legal existence under international law as a State. This also results clearly from Article XII.1 according to which the new Constitution enters into force "amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". It is therefore clear that the State of Bosnia and Herzegovina continued to exist throughout the whole period. As a State it had to exercise the attributes of State power proper to any State under international law. The organs of the State therefore had to be able to effectively exercise their powers. Since the new parliamentary organs did not come into existence before the elections on 14 September 1996, a denial of the continued existence of the Assembly of the Republic of Bosnia and Herzegovina would mean that for a period of 10 months no parliamentary or legislative body would have existed at the level of the State of Bosnia and Herzegovina. This is difficult to conceive, and in the absence of any clear provision in the text itself, the principle of continuity requires the continued existence of a parliamentary organ of the State of Bosnia and Herzegovina.

16. However, this continued existence would seem to be very limited.

17. First of all, it is obvious that the Assembly of the Republic, acting as an organ of Bosnia and Herzegovina, could only act within the sphere of responsibilities given to the parliamentary organs of Bosnia and Herzegovina (as distinct from the Entities) by the new Constitution.

18. In addition, the powers of the Assembly were only justified on the basis of the principle of necessity. The Assembly was not a competent organ by virtue of the new Constitution, with the full powers given by the new Constitution to the new institutions. It only continued to exist to avoid the absence of the existence of any competent body and its actions were only justified to the extent that such a lack of a competent body had to be avoided. The Assembly of the Republic could therefore only deal with current matters and not take any measures going beyond what is necessary to ensure the continuity of the State. This limitation may be difficult to determine, as is for example the case for the current matters a government still can expedite during a governmental crisis. The limits can however be, if necessary, assessed by the Constitutional Court and, provisionally, by the High Representative under the conditions of Article 2.1.d of Annex 10 to the Dayton Agreement."

The same reasoning seems appropriate with respect to international treaties. As a general rule, the BH institutions were therefore justified to act on the basis of their previous constitutional attributions with respect to such Agreements which were necessary to ensure the continuity of the State and only within the limits of the responsibilities of BH as distinct from the responsibilities of the Entities. With respect to the following Agreements, the Commission will therefore be guided by the application of the principles of continuity and necessity.

- Agreement on the Establishment of the Joint Council for Co-operation

This Agreement was signed on 14 December 1995, the day of entry into force of the new Constitution, by the presidents of the Republic of BH, Croatia and FBH. According to its Article 5, the Agreement comes into force on the day of its signing.

The main purpose of this Agreement is to establish a joint Council for co-operation. The Commission notes that a more recent *Agreement on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia* (see below) was already approved by the BH Parliamentary Assembly. This Agreement will replace the present Agreement. In addition it should be noted that the new Agreement on special parallel relations between FBH and Croatia also provides for the establishment of a joint Council for co-operation, in this case between FBH and Croatia.

Under these circumstances, the present Agreement is about to be superseded by subsequent developments and it does not seem necessary to examine it in detail.

- Agreement between the Government of BH, the Government of FBH and the Government of the Republic of Croatia on Mutual Execution of Court Decisions in Criminal Matters

Procedural questions

This Agreement was signed on 26 February 1996 and subsequently ratified by the government of the Republic of BH according to the procedure under the law of 1994. The ratification was published on 4 April 1996. As set out above, the procedural validity of the Agreement will therefore depend on the question whether it was really necessary at the time to conclude such an Agreement to ensure the continuity of the State of BH.

It is certainly true that the establishment of law and order are a priority in a country just having experienced a war and that co-operation with a neighbouring State in such matters may well be decisive. Nevertheless, it should be noted that the Agreement only refers to the transfer of sentenced persons and to the supervision of conditionally sentenced persons in the other country. It is hard to see why the transfer of sentenced persons should have been so urgent and decisive for the reconstruction of the State and why it should not have been possible to wait for the establishment of the constitutional institutions. It was therefore not justified to conclude the agreement without respecting the procedural rules set out in the new Constitution.

Substantive questions

As regards the substance of the Agreement, it should be noted that both BH and FBH are parties to the Agreement. The Constitution of BH does not expressly provide for the joint conclusion of an international agreement by BH and an Entity. While Article III.2.d of the Constitution expressly grants to the Entities the right to conclude international agreements with the consent of the Parliamentary Assembly, it does not mention the conclusion of agreements jointly with BH. And, in general, the constitutional system of BH seems based on a strict separation between responsibilities of BH and responsibilities of the Entities. No express provision is made for joint or mixed responsibilities as are found in the constitutions of European federal States.

Nevertheless, this and subsequent Agreements were jointly concluded by BH and FBH and the respective institutions seem to have considered such a procedure appropriate and perhaps even necessary. This can be explained by the fact that BH is an unusually weak Federation. Most responsibilities are assigned to the Entities while the responsibility for foreign policy naturally remains with BH. Under these circumstances, it seems plausible that many international Agreements will touch upon responsibilities both of BH and of one of the Entities. Co-operative mechanisms therefore have to be found and a reasonable way of ensuring full harmony between the State and the Entity level seems to be the conclusion of such joint agreements. The Commission sees no reason to object to them in principle, provided the respective agreement touches upon the responsibilities both of BH and the Entity concerned.

In the present case, the participation of BH is in particular justified by the BH responsibility for “international and inter-Entity criminal law enforcement” under Article III.1.g of the Constitution and the participation of FBH by its overall responsibility for its criminal justice system.

As regards the substance of the Agreement, there seems therefore no reason to doubt its constitutionality.

- Treaty on Customs Co-operation between the Government of Republic of BH, the Government of FBH and the Government of the Republic of Croatia

This Agreement was signed on 24 March 1995 before the entry into force of the Constitution and ratified in February 1996 during the transitional period, again without respecting the constitutional provisions on the ratification procedure. The substance of the Agreement is very technical, setting out not so much general rules of customs policy but regulating co-operation between authorities on the ground. Even taking into account the high importance of trade with a neighbouring State, the necessity of rapid ratification seems doubtful. This is confirmed by the fact that the Agreement was ratified eleven months after its signature. It would therefore have seemed possible to wait seven more months until the new institutions were established. In addition, according to its Article 18, the treaty was to be provisionally applied as from the day of its signing. Under these circumstances, it would have been perfectly possible to prolong this provisional application until the establishment of the new institutions and then submit the text to the newly elected Presidency and Parliamentary Assembly. The ratification of the Agreement can therefore not be regarded as valid.

Under these circumstances, it does not appear necessary to examine the substance of the Agreement in detail. Since at the time of ratification a customs policy of BH could not yet have been defined, it is difficult to see how an Entity could conclude such an agreement without violating the responsibility of BH for customs policy under art. III.1.c of the BH Constitution. The reference to a customs region of FBH in art. 2 in particular seems unconstitutional.

- Agreement on the Return of Refugees

This is again an Agreement signed in March 1995 and ratified in February 1996 by the government of the Republic of BH according to the procedure under the law of 1994. The return of refugees was and remains obviously of the highest importance for the reconstruction of BH. The Commission, while it does not have sufficient elements to assess the urgency of the Agreement in detail, cannot exclude that ratification during this period was justified having regard to the principles of necessity and continuity as set out above.

With respect to substance, the Commission notes that this is a further Agreement having both BH and FBH as parties. This again seems unobjectionable, taking into account that the *Agreement on Refugees and Displaced Persons* appearing at Annex VII to the Dayton Agreement obliges both BH and FBH to take all necessary steps for the return of refugees and that Article III.5.a of the Constitution provides that BH shall assume responsibility for such other matters as are provided for in Annexes V-VIII to the Dayton Agreement.

It should be noted that the Agreement is applicable to refugees coming from the whole territory of BH while, with respect to the return of refugees, Article 4 refers to the territory of the Federation only. While such arrangements may have been

justifiable when the Agreement was concluded, it would now seem appropriate for the BH authorities to examine together with the Entities, and subsequently Croatia, the possibility of extending the application of this article also to persons wishing to return to RS.

- Agreement on Waiving Visas
- Protocol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH
- Protocol on the Temporary Application of the Agreement on Waiving Visas

The situation with respect to these three texts seems somewhat confusing. *The Agreement on waiving visas* was signed on behalf of the government of the Republic and Federation in March 1995. The *Protocol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH* was, on the Bosnian side, signed on the same day by the government of the Republic of BH only. According to its Article 4, the *Protocol* enters into force within fifteen days from the date of its signature and shall be applied until the *Agreement on Waiving Visas* enters into force. Nevertheless, both Agreement and Protocol were ratified together (publication on 23 February 1996) by BH. In addition, the *Protocol on the Temporary Application of the Agreement on Waiving Visas* was concluded between BH and Croatia on 26 February 1996 pending the entry into force of the *Agreement on waiving visas*. This *Protocol*, according to its text, entered into force on 4 March 1996 and temporarily limits the application of the provisions of the *Agreement on Waiving Visas* to citizens of BH residing on the territory of FBH. Despite the ratification of the Agreement by BH, it therefore does not seem to have become applicable and the original Protocol was replaced by the *Protocol on the Temporary Application of the Agreement on Waiving Visas*.

Having regard to the geographical situation of BH, it seems plausible that rules on transit of BH citizens through Croatia were of the utmost urgency. It also seems correct that only BH concluded the Protocols since BH is responsible for "immigration, refugee, and asylum policy and regulation".

By contrast, the content of the *Protocol on the Temporary Application of the Agreement on Waiving Visas* as the only text presently in force meets with objections. The Protocol reserves the benefits of free travel exclusively to BH citizens residing on the territory of FBH while referring citizens residing on the territory of RS to a supplementary Protocol which does not seem to have been concluded. Such a discriminatory treatment of one part of the citizens of the State does not seem permissible within a federal State and the Protocol therefore has to be regarded as unconstitutional.

- Agreement on Economic Co-operation

This Agreement was again signed on behalf of the Republic of BH and FBH governments on 24 March 1995 and ratified by the government of Republic of BH under the law of 1994 during the transitional period in March 1996.

Trade with Croatia and economic co-operation with Croatia were obviously very important for BH during this period and a certain urgency cannot be denied.

Nevertheless, the ratification during a transitional period of such a comprehensive Agreement with a neighbouring State and major economic partner cannot be justified as necessary.

In addition, the Agreement meets with objections of substance. It is not even very clear who are the parties to the Agreement. According to its Preamble, the Agreement was agreed by the two governments, i.e. Croatia on the one side and the government of the Republic and Federation on the other. Articles 1 and 15 seem to limit the applicability of the Agreement to FBH. It seems however inconceivable in a Federation to regulate major questions of foreign trade policy and customs policy with effect for one Entity only. Due to the principle of free movement of goods and services throughout BH enshrined by Article I.4 of the Constitution, any such agreement has major repercussions on the other Entity. The reference in the preamble to the Confederation Agreement between Croatia and FBH also shows that this Agreement is inappropriate following the new situation created by the Dayton Peace Agreement.

This Agreement therefore has to be regarded as unconstitutional.

IV. Agreements concluded or to be concluded by BH and/or FBH with Croatia after the setting up of the institutions provided for by the new Constitution

- Agreement on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia

With respect to this Agreement, the correct constitutional procedure seems to have been followed and the Commission sees no reason to doubt the constitutionality of this Agreement.

- Protocol on the Establishment of Navigation on Internal Navigation Routes of the Sava River and its Tributaries between the Republic of Croatia and BH

Different versions of this Protocol were submitted to the Commission during the period of its consideration. Its text is difficult to assess without a more complete knowledge of both the legal and factual background. The Commission therefore refrains from expressing an opinion on this agreement.

- Draft Agreement between the Republic of Croatia and BH on the Establishment of a Motorway Construction Company for the Zagreb-Bihać-Dubrovnik and Ploče-Sarajevo-Osijek Motorways

This draft Agreement is to be signed by the governments of Croatia, BH and FBH. It involves the setting up of a joint company for the carrying out of construction work and does not address public law questions such as the necessary planning permits. It has a mainly private law nature.

V. Agreements concluded by the RS with the FRY

- Precept on Temporary Regulations of Commodities and Services with the FRY

The Commission notes that this text is not an international agreement but an internal regulatory text. It may well also be already superseded by later texts, in particular the *Decree on Regulation of Traffic of Goods and Services with the FRY* (see below).

The Precept regulates trade and customs arrangements with the FRY. According to Articles III.1.b and III.1.c of the Constitution, foreign trade policy and customs policy are the responsibility of the BH institutions and this Precept therefore clearly violates the BH Constitution.

- Protocol on the Trade of Goods and Services between the Republic of Serbia and the RS

This protocol regulates the trade between RS and the Republic of Serbia as the main component of the FRY. It again violates the BH responsibility for foreign trade and customs policy. Such agreements can also not be concluded by one Entity since they have important repercussions on the other Entity due to the free movement of goods and services within BH (see above).

In addition, the consent of the BH Parliamentary Assembly, which under Article III.2.d of the Constitution is required for Entity agreements, has not been sought or obtained (cf. below under *Trade Agreement* for the question whether a trade agreement may be an agreement on special parallel relations).

- Draft Agreement on Special Parallel Relations between the FRY and the RS

It should be noted that this Agreement provides that its entry into force is subject to ratification by the Parliamentary Assembly of BH. Under the BH Constitution it seems questionable whether agreements of special parallel relations require the consent of the Parliamentary Assembly of BH. According to Article III.2.d of the Constitution this consent is required for international agreements in general. However, agreements on special parallel relationships are governed by a different provision of the Constitution, Article III.2.a, which does not mention the consent of the Parliamentary Assembly. The word "also" in Article III.2.d indicates that both procedures have to be considered separately. This is confirmed by the fact that Article VI.3.a gives to the Constitutional Court a specific responsibility to control, upon the request of the institutions mentioned in this article, the constitutionality of agreements on special parallel relationships. It is therefore the understanding of the Commission that the agreements on special parallel relations do not require the consent of the BH Parliamentary Assembly.

Nevertheless, the Agreement has not entered into force according to its text. In addition, according to press reports, a new such Agreement between RS and FRY is being prepared. It seems therefore sufficient to briefly identify the most problematic parts of the Agreement.

Article 5 of the Agreement provides that the member of the BH Presidency from RS is Vice-President of the Council for Co-operation. Since the members of the Presidency of BH act on behalf of BH, it is not possible for the Entities to adopt rules on the rights and obligations of members of the BH Presidency.

Article 6 establishes a list of fields for the activities of the Council for Co-operation. In particular, the following fields encroach upon BH responsibilities:

- emigration, immigration and asylum conflicts with the BH responsibility under Article III.1.f of the Constitution for Immigration, Refugee, and Asylum Policy and Regulation;
- the same consideration applies to "regulating the crossing of State borders";
- harmonising foreign policy and the approach to third-world countries and international organisations conflicts with the BH responsibility on foreign policy under Article III.1.a of the Constitution;
- the same consideration applies to "resolving the issue of succession of the Former Socialist Federal Republic of Yugoslavia".

The aim of creating a unified market and the commitment to the principle of the freedom of movement of people, goods and capital (Article 12) encroach in particular upon the BH responsibilities for foreign trade and customs policy and immigration. Other fields such as citizenship (under Article I.7 of the BH Constitution Entity citizenship only exists within the framework of BH citizenship) and the fight against terrorism and organised crime may also, depending on the scope of co-operation, encroach upon BH responsibilities. In this context it is to be regretted that there is no general provision limiting the activities of the Council for Co-operation to areas within the responsibility of RS under the BH Constitution.

Other parts of the Agreement, such as the non-aggression clause in Article 9, typical of agreements concluded between sovereign states, though in principle to be welcomed, may also be regarded as violating the foreign policy prerogative of BH and the responsibilities of the Standing Committee on Military Matters provided for by Article V.5.b of the BH Constitution..

- Trade Agreement

As regards procedure, it is not foreseen to submit the draft Agreement to the BH Parliamentary Assembly for its consent, as required by Article III.2.d of the Constitution for international agreements concluded by the Entities. The only exception foreseen by the Constitution is that, according to Article III.2.a, special parallel relationship agreements are not subject to the consent of the BH Parliamentary Assembly (see above). The present Agreement claims to be based on this Article III.2.a.

It seems questionable, but may remain open here, whether an agreement limited to a specific field such as trade can be regarded as a special parallel relationship agreement. In any case, special parallel relationship agreements may only be concluded for areas for which the Entities are responsible. Since foreign trade policy is reserved to BH, the Entities cannot conclude trade agreements. The Agreement is therefore unconstitutional.

- Decree on Regulation of Traffic of Goods and Services with the FRY

See the comments on the *Precept on temporary regulations of commodities and services with the FRY.*

- Decree on the Amendment to the Decree on Regulation of the Exchange of Goods and Services with the FRY

This decree amends other unconstitutional texts and has to be considered invalid together with them.

- Agreement between the Government of the Republic of Montenegro and the Government of RS

This Agreement was not submitted to the BH Parliamentary Assembly. It is therefore unconstitutional unless it may be regarded as an agreement on a special parallel relationship. In principle, Article III.2.a provides for such special parallel relationships only with neighbouring States. Montenegro is an Entity of a neighbouring State. Having regard to the increasing tendency under international law to allow Entities to enter into international commitments, a tendency confirmed by the BH Constitution, and to the fact that agreements with neighbouring Entities do not seem to raise more risks for the interests of BH than agreements with neighbouring States, there seems to be no reason to deny the applicability of Article III.2.a to agreements with neighbouring Entities. As regards its substance, the Agreement covers wide areas of mutual co-operation and may be regarded as an agreement establishing a special parallel relationship. Article III.2.a is therefore applicable and the consent of the BH Parliamentary Assembly is not required.

However, again, the responsibilities of BH have to be respected. Since the provisions of the Agreement are very imprecise, it is not easy to determine whether provisions violate the BH Constitution. It is therefore to be regretted that no reference to the need to safeguard the responsibilities of BH is included in the text of the Agreement. Such a reference should be added. As the Agreement stands, in particular the closer integration in the field of telecommunications (cf. Article III.1.h of the BH Constitution) and air traffic (cf. Article III.1.j of the BH Constitution) seem problematic.

- Protocol on the Procedure of Organised Return

There is no provision to submit this draft Protocol to the consent of the BH Parliamentary Assembly. The draft Agreement concerns a very specific area in which BH responsibilities exist and cannot be regarded as a special parallel relationship agreement which would have to be of a more general nature. In addition, there is no reference to the main agreement which would have to be supplemented by this Protocol. In the absence of such a main agreement, the Protocol seems to go beyond a purely administrative arrangement and to have to be considered as an international agreement in the meaning of Article III.2.d of the Constitution.

The consent of the BH Parliamentary Assembly is therefore required.

A P P E N D I X I

- Preliminary Agreement on the Establishment of a Confederation between FBH and the Republic of Croatia, signed on 18 March 1994
- Agreement on the Adoption of the Constitution of the FBH and Preliminary Agreement concerning the Future Economic and Military Co-operation between the FBH and the Republic of Croatia, signed on 18 March 1994
- Agreement on the Establishment of the Joint Council for Co-operation, signed on 14 December 1995
- Agreement between the Government of BH, the Government of FBH and the Government of the Republic of Croatia on Mutual Execution of Court Decisions in Criminal Matters, signed on 26 February 1996
- Treaty on Customs Co-operation between the Government of BH, the Government of FBH and the Government of the Republic of Croatia, signed on 24 March 1995
- Agreement on the Return of Refugees, signed on 24 March 1995
- Agreement on Waiving Visas, signed on 24 March 1995
- Protocol on the Conditions for Entering or Transiting the Republic of Croatia by Citizens of the Republic of BH, signed on 24 March 1995
- Protocol on the Temporary Application of the Agreement on Waiving Visas, signed on 26 February 1996
- Agreement on Economic Co-operation, signed on 24 March 1995
- Draft Agreement on the Establishment of an Inter-State Council for Co-operation between BH and the Republic of Croatia, signed on 30 March 1998
- Protocol on the Establishment of Navigation on Internal Navigation Routes of the Sava River and its Tributaries between the Republic of Croatia and BH, signed on 16 October 1998
- Draft Agreement between the Republic of Croatia and BH on the Establishment of a Motorway Construction Company for the Zagreb-Bihač-Dubrovnik and Ploče-Sarajevo-Osijek Motorways
- Precept on Temporary Regulations of Commodities and Services with the FRY
- Protocol on the Trade of Goods and Services between the Republic of Serbia and the RS, signed on 14 March 1997

- Draft Agreement on Special Parallel Relations between the FRY and the RS, signed on 28 February 1997
- Trade Agreement, signed in March 1997
- Decree on Regulation of Traffic of Goods and Services with the FRY
- Decree on the Amendment to the Decree on Regulation of the Exchange of Goods and Services with the FRY
- Agreement between the Government of the Republic of Montenegro and the Government of RS, signed on 25 March 1998
- Protocol on the Procedure of Organised Return