

Statement by Helmut Steinberger on the Dayton Agreements (Venice, 25 November 1995)

Caption: On 23 January 1996, in a statement to the European Commission for Democracy through Law, Helmut Steinberger, Independent Adviser to the Delegation of Bosnia and Herzegovina on the application of the Dayton Agreements and Member of the Council of Europe's Venice Commission, evaluates the organisation and operation of the new Bosnian State made up of two territorial entities: the Muslim-Croat Federation and the Serb Republic.

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Dayton Agreements

Statement by Mr Helmut Steinberger

Venice, 25 November 1995

Thank you, Mr President.

I participated in the so-called Proximity Talks in Dayton, in the capacity as an independent adviser on constitutional matters to the Delegation of Bosnia Herzegovina. There were nine delegations in Dayton: the Bosnian, the Croatian and a delegation from Serbia Montenegro, which included members from the so-called Serb Republic. Then five delegations from the so-called Contact Group: France, Germany, Great Britain, Russia and the US, and a delegation from the European Union headed by Mr Bildt from Sweden. Each delegation comprised legal experts and military experts.

I do not want to go into the broader, very complex political background of a possible peace settlement, the attempt, for instance, of the two big powers - Russia and the United States - to ensure spheres of future influence. I shall concentrate on a few issues on the agenda in Dayton, mainly on constitutional aspects pertinent to our Commission.

The United States had presented a draft framework agreement and eleven annexes to it, which were in part based on former efforts like the Copenhagen CSCE document, the Lisbon principles of February 1992 for new constitutional arrangements for Bosnia Herzegovina, or on undertakings which are found in the preamble of the framework agreement which has been distributed here.

The draft framework agreement and each of the annexes were at first discussed within the respective delegations and then negotiated between various delegations, with the American delegation acting as a kind of co-ordinator trying to even out contradictory positions - a quite heavy but meritorious burden, eventually successful, but sometimes quite dramatic, with a lot of tactical finesses.

I can just mention a few highlights from the documents agreed to. The framework agreement provides for the mutual recognition as independent States within their present international borders by the parties, their sovereign equality, provides for the establishment of full diplomatic relations, the endorsement of the boundary demarcations between the two entities within Bosnia Herzegovina. The two entities are the Federation of Bosnia Herzegovina, a federation concluded between the Bosnian Croats and the Bosnian Moslems, and the so-called Serb Republic.

The annexes concerned, just to enumerate briefly:

- Annex I, the cessation of hostilities, the establishment of a multi-national implementation force - IFOR - and the disengagement of forces.

- Annex II, territorial questions including corridors. There are 102 maps annexed to the framework agreement.

- Annex III, elections to be held within several months in the various entities and for the central Government.

- Annex IV, the Constitution which is before you.

- Annex V, an arbitration tribunal.

- Annex VI, human rights - meaning in particular an Ombudsman with quite extensive powers of investigation.

- Annex VII, refugees and displaced persons.

- Annex VIII, commissions to preserve national historical monuments.

- Annex IX, joint public corporations for maintaining lines of communication.

- Annex X, civilian implementation.

- Annex XI, international police task force.

Annex I provides for the stationing for approximately one year of a multi-national military implementation force (60,000), to assist in the implementation of territorial and other military-related provisions of this Annex, in particular, to establish a durable cessation of hostilities, and to use, where necessary, military force to ensure compliance with this agreement. This military force therefore will not be stationed all along the boundary - that is for military purposes not an adequate solution. It will, however, be concentrated in various places to be able, then, to push forward. It provides for the obligation of the parties to refrain from all offensive operations of any type against each other. It provides for the withdrawal of all foreign forces - these are not the forces of the two entities, but foreign forces; the re-deployment of the forces of both entities in several phases behind a zone of separation normally two kilometres in breadth, agreed in Annex II on territorial questions. It provides further for the withdrawal and the transfer of territories agreed, moreover to take confidence-building measures like withdrawal of all heavy weapons and forces to cantonments or barracks, or other designated locations as well as to demobilise forces that cannot be thus accommodated.

IFOR will be acting under Chapter 7 of the United Nations' Charter - that is the Chapter dealing with the breach of peace - and may deploy forces throughout Bosnia-Herzegovina. It will, in the case of breaches I mentioned, use necessary force to ensure compliance, and this should be taken very seriously by the parties. It will act under the authority of the North Atlantic Council. The special chain of command in respect of the Russian contingent, I am sure you are aware of it, goes along the lines of an agreement between the US and the Russian Ministers of Defence.

Territorial provisions. The State of Bosnia consists, as I mentioned, of two entities. The Federation comprises roughly 51% and the Serb Republic roughly 49%, which means more or less a confirmation of results established on the battlefields. The UN protected zones, for instance, of Srebrenica and Zepa shall belong to the Serb Republic, a point very difficult for Bosnia to accept. Sarajevo shall remain the capital: some districts of it may be administered autonomously by the Serb population, a point not easy to accept by the Serb side because the surrounding area of Sarajevo is heavily settled by Serbs. Access to the city shall be unimpeded.

There will be a central State under the name of Bosnia and Herzegovina, a central presidency, a central parliament and a central Government, a constitutional court and a central bank. There is also provision for a common currency in the future.

The central Government shall be competent for foreign policy; foreign trade policy; customs policy; monetary policy to the extent of a special provision on the central bank, competent for the finances of the institutions of the central Government including its international obligations; international and inter-entity criminal law enforcement; establishment and operation of common and international communications; regulations of inter-entity transportation; air traffic control; the regulation of citizenship of Bosnia Herzegovina; immigration, asylum policy and refugees. There will be a citizenship of Bosnia Herzegovina, i.e. the central State, and a citizenship of each entity to be regulated by each respective entity. Citizens of either entity, thereby, are citizens also of Bosnia Herzegovina. In international relations like diplomatic protection, the citizenship of the central Government will be pertinent. This catalogue of powers of the central Government is rather restricted, but the Constitution provides for expanding, extending this catalogue in a few special clauses.

The central Government shall consist of two chambers even though original drafts had been inclined towards an one-chamber solution, which was given up during the negotiations. One chamber - the House of Peoples - shall comprise fifteen delegates, two-thirds from the Croat-Moslem Federation and one-third from the Serb Republic, all delegates being selected by the parliamentary bodies of the respective entity.

The House of Representatives - the second chamber - shall comprise 42 members, two-thirds again elected from the Federation, one-third elected from the territory of Serb Republic. All members of the House of Representatives shall be directly elected from their respective entities in accordance with an election law to be adopted by the parliamentary assembly (this is composed of the two chambers of the central Government).

All legislation shall require approval of both chambers, normally decided by a majority of those present and voting. There is a rather refined vital interest clause - I will not go into it, it can be found in Article 4 Section 3; you may find the procedure in (d) and (f).

The House of Peoples may be dissolved by the presidency or by the House itself. The presidency of the central Government shall consist of three members, one Bosnian, one Croat and one Serb, directly elected by popular vote from the territory of the Federation and of the Serb Republic respectively. The members of the presidency shall appoint from among themselves a Chair. The method of selecting the Chair of the presidency by rotation or otherwise shall be determined by the parliamentary assembly, a decision subject in particular to the *vital interest* clause of Article 4 Section 3. There is a second *vital interest* clause for the decisions of the presidency contained in Article 5 Section 2 (a), as distinct from the first one in the parliamentary Assembly with no possibility of referring the issue to the Constitutional Court who only, in the first case, would review the regularity of the procedure, not of the substance whether there is an encroachment on the vital interests of one of the three groups.

The presidency shall nominate the Chair of the Council of Ministers who requires the approval of the House of Representatives - a strong element of a parliamentary regime-type. The Chair then nominates the Ministers who all need approval by the House of Representatives. No more than two-thirds of all Ministers may be appointed from the territory of the Croat-Moslem Federation. The respective Deputy Ministers shall

not be of the same constituent people as their respective Minister. They also need the approval of the House of Representatives. Upon a vote of no-confidence by the parliament, the Council of Ministers shall resign.

So much to the powers of the central State.

The entities shall have responsibility for all matters not assigned to the central Government. This includes, for instance, maintaining defence forces who, of course, will not be allowed to use force against each other. Each entity may establish a special parallel relationship with a neighbouring State if this relationship is consistent with the Constitution of Bosnia Herzegovina, including its sovereignty and territorial integrity. In case of disputes, the Constitutional Court shall decide on that.

The provisions on the Constitutional Court, you will find in Article 6. Let me just mention that it will be composed of nine members, four to be selected by the House of Representatives of the Federation, and two by the Assembly of the Serb Republic, the three remaining members shall be selected by the President of the European Court of Human Rights after consultation with the presidency. The scope of jurisdiction you will find in Article 6 Section 3. It is a rather extensive jurisdiction. To decide any dispute that arises under this Constitution between the entities and the central Government and between the entities themselves or between institutions of Bosnia Herzegovina. Such disputes may be referred by a member of the presidency, the Chair of the Council of Ministers, by the Chair or the Deputy Chair of either chamber of the parliament, by one quarter of the members of either chamber of the parliamentary assembly, or by one quarter of either chamber of the legislature of an entity.

The Constitutional Court shall, moreover, have jurisdiction over issues referred by any court in Bosnia Herzegovina concerning whether a law on whose validity its decision depends, is compatible with the Constitution, with the European Convention on Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina, and the same applies concerning the existence or the scope of general rules of international public law pertinent to a court's decision.

The Constitution contains a quite comprehensive guarantee of human rights and fundamental freedoms as set forth in the European Convention on Human Rights with priority over all domestic law. Such priority is also provided for the general principle of international law, and the Constitutional Court - as I just mentioned - has jurisdiction to enforce this in specific cases.

In order not to be too long, Mr President, allow me a few final remarks.

Having been exposed to the draft of the Constitution by the United States and a draft - slightly different - by the European Union, both trimmed very slender and slim for the undoubtedly legitimate reason to cut down possible controversies that might endanger a peace settlement, I have tried in particular in the negotiations of my delegation, the American delegation and the delegation from the European Union, to act in the spirit of our Venice Commission and to try to bring this Constitution home to the family of post-communist European constitutions, and the criteria of the rule of law, which we have so often discussed and agreed upon here. And while I, of course, never acted nor pretended to act in the name of our Commission, for which I had no mandate whatsoever, I quite often referred to the work of our Commission and tried to act in the spirit of the ideas that have evolved over the years since 1990 within this room.

Measured by our criteria, this is an imperfect Constitution. It nevertheless contains some quite satisfactory elements, for instance, the guarantee of human rights, as I have mentioned, as set forth in the European Convention on Human Rights, the jurisdiction of the Constitutional Court to guarantee the priority of these rights and the general rules of international law and its jurisdiction over very substantive other subject-matters.

The whole work initialled at Dayton and to be signed in Paris is still *peace on paper*. Whether it will ever assume reality will depend on the political will of all sides. I do not dare to make any prophecy in that regard.

Thank you, Mr Chairman, thank you, distinguished colleagues, for your patience.