

Written observations of the OHR Legal Department concerning the request of the applicant in Case No. U42-01

Comments made on behalf of the Office of the High Representative for Bosnia and Herzegovina on the Request for the assessment of constitutionality of the Agreement on the Establishment of Special Parallel Relations Between the Federal Republic of Yugoslavia and Republika Srpska (RS Official Gazette 26/01).

Introduction

In a letter dated 13 February 2002 to the High Representative for Bosnia and Herzegovina, Vice President of the Constitutional Court of Bosnia and Herzegovina, Judge Mirko Zovko, requested comments and remarks on the request of Mr. Beriz Belkic, member of the Presidency of Bosnia and Herzegovina, for evaluation of the constitutionality of the *Agreement on Establishment of Special Parallel Relations between the Federal Republic of Yugoslavia and Republika Srpska* (hereinafter: *Agreement*).

The issues presented by Mr. Belkic can be divided into three main categories, which are analyzed below: 1) Legal Basis for Conclusion of the Agreement 2) Conformity of the Agreement with the BiH Constitution and 3) Consistency with the Constitutional Court Jurisprudence regarding use of Languages.

With regard to the legal basis for the Agreement, Mr. Belkic contends that, because the *Agreement* was concluded without the consent of the BiH Parliamentary Assembly, it is in violation of Article III.2.d of the BiH Constitution, which concerns Agreements concluded by Entities with States and international organizations.

In addition, Mr. Belkic argues that those provisions of Article 2 of the *Agreement* which provide for co-operation between the Parties in the areas of "crime prevention", "defense", "economy and use of natural resources", "privatization and denationalization" and "planning", are contrary to the BiH Constitution, as they are not in accordance with the division of State/Entity competencies set forth therein.

Finally, Mr. Belkic notes that the publication of the *Agreement* in the Official Gazette of Republika Srpska (RS) in the Serbian language, ekavian dialect and Cyrillic script is contrary to the Decision of the Constitutional Court of Bosnia and Herzegovina "which guarantees constituent status of all three peoples even at the level of the Entities including equality of the Bosnian, Croatian and Serb languages and Cyrillic and Latin alphabets."

The High Representative welcomes the opportunity to cause the following comments, which are made through me in my capacity as Head of the Legal Affairs Department of the Office of the High Representative (OHR) and Deputy High Representative for Legal Affairs, to be supplied to the Court.

I have also taken the liberty of attaching the response of the OHR to a request from the Commission for Constitutional Issues of the Republika Srpska concerning whether the vital interests of any one or more of the constituent peoples of Bosnia and Herzegovina has been threatened by the *Agreement*.

In the follow sections of these comments, the arguments made by Mr. Belkic will be addressed in turn.

I. Legal Basis for the Agreement

In his request, Mr. Belkic refers to Article III.2.d of the BiH Constitution, which reads as follows:

Each Entity may also enter into agreements with states and international agreements with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of Agreements do not require such consent.

Mr. Belkic asserts that the *Agreement* was concluded in violation of this provision, in that the BiH "Parliamentary Assembly" has neither consented to the *Agreement* nor has it ever adopted legislation that would provide for the

conclusion of such an agreement without the need for such consent.

However, OHR is of the view that the legal basis for the *Agreement* is not to be found in this Article. Rather, it is located in Article III.2.a, which states

The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.

OHR has previously indicated, in its *Response to the Request from the Commission for Constitutional Issues of the Republika Srpska* (attached) that, whereas an agreement to be concluded under Article III.2.d explicitly requires the consent of the BiH Parliamentary Assembly, the conclusion of special parallel relationship agreements do not require such consent. The wording in Article III.2.a regarding special parallel relationships clearly spells out that the entities have a *right* to conclude such agreements, consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina. In order to ensure that such agreements do not deviate from the BiH Constitution, Article VI.3.a of the Constitution provides as follows:

The Constitutional Court shall have exclusive jurisdiction to decide... whether an Entity's decision to establish a special parallel relationship with a neighboring State is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

In support for his argument that the *Agreement* should have been concluded in accordance with Article III.2.d of the Constitution and not on the basis of a "special parallel relations agreement", Mr. Belkic indicates that "(t)he RS Constitution does not contain a single specific provision on ratification of the agreement on special parallel relations of the entities with neighboring countries." However, it would appear that this issue is not a matter falling under the Court's jurisdiction, as it does not arise under the BiH Constitution.

Mr. Belkic also makes the non-textual argument that successful, functioning relations between BiH and Federal Republic of Yugoslavia (FRY) are required for the conclusion of special parallel relations agreements and that, as of the conclusion of the *Agreement* and even as of the submission of his request, such relations did not yet exist. As evidence, he cites the fact that "not a single inter-state Agreement regulating relations between Bosnia and Herzegovina and the Federal Republic of Yugoslavia has been concluded" and that "the two countries have not exchanged ambassadors."

It is not proposed in this paper to comment on the current situation as to the relationship between the FRY and BiH. However, as a Party to the *General Framework Agreement for Peace*, the FRY has committed itself to fully respecting the BiH Constitution. In addition, there is nothing in the BiH Constitution suggesting a requirement that the conclusion of special parallel relations agreements is predicated on the establishment of a successfully functioning relationship between the State of BiH and neighboring countries. Indeed, such a requirement would be difficult to implement in practice since it is unclear who would be competent to decide whether such a relationship exists and upon what criteria such a decision would be taken.

Finally, Mr. Belkic states that the "preparations for conclusion of the Agreement" lacked transparency and "only Serb representatives participated in these preparations". OHR would only note that neither the BiH Constitution nor Decisions of the Court regarding equality of constituent peoples throughout BiH would appear to require that agreements otherwise concluded in a lawful manner may nonetheless be invalid based on the ethnic identity of the individuals who participated in their preparation. In addition, it is important to note in this context that the Agreement does not in any way discriminate as to those intended to derive benefit under it.

II. Conformity of Agreement with BiH Constitution

Article 2 of the *Agreement* provides that the Parties shall, in particular, establish co-operation in certain specified areas, including the following areas, which have been challenged by Mr. Belkic as being inconsistent with the BiH Constitution:

- prevention of crime
- defence in a fully transparent manner
- economy and use of natural resources
- privatization and denationalization
- planning

Mr. Belkic cites various provisions of the BiH Constitution that provide for a role for BiH Institutions in the above areas, in an attempt to demonstrate that they are not appropriate areas for co-operation through an SPR between FRY and the RS.

However, the *Agreement* itself repeatedly emphasizes that co-operation between the Parties must be in accordance with the BiH Constitution. The Preamble to the Agreement states, *inter alia*, that “the Federal Republic of Yugoslavia and Republika Srpska (hereinafter the Parties) shall establish special parallel relations on the basis of...the conviction that consistent, comprehensive and accelerated implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina and its Annexes (hereinafter the Peace Agreements) is the basis for creating conditions for permanent coexistence of citizens in Republika Srpska...and respect for the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina.”

Moreover, Article 1 of the *Agreement* entitled “Objectives” specifies that, in establishing special parallel relations, the Parties wish to secure “the development of transparent cooperation between executive, legislative and other institutions to the levels that are in conformity with the Peace Agreement.”

Finally, the *Agreement* provides in Article 9 that OHR shall be consulted regarding the preparation of Annexes to the *Agreement* and will supervise its implementation. This provides yet another safeguard to ensure that co-operation is limited to that which is in conformity with the BiH Constitution.

Specifically with respect to co-operation in the area of “economy and natural resources”, Mr. Belkic notes that, pursuant to Article III.5.b of the Constitution of BiH, the entities were obliged to begin negotiations within six months of the entry into force of the Constitution with a view to “including in the responsibilities of the institutions of BiH other matters, including utilization of energy resources and cooperative projects.”

Although Article III.5.b. does not specify which projects are to be the subject of such negotiation, Mr. Belkic’s view is that co-operation between BiH and FRY under the *Agreement* would prejudice these negotiations and are thus contrary to this provision.

As noted in OHR’s *Response to the Request from the Commission for Constitutional Issues of the Republika Srpska*: “(i)t is true that under Article III.5.b of the BiH Constitution, the Entities should have entered into negotiations with a view *inter alia* to transferring the responsibility for utilization of energy resources to the State institutions six months after the signing of the GFAP, and that this has not occurred. It is therefore important when any subsequent annexes to the Special Parallel Relations Agreement dealing with this field are being drafted, that this particular issue is taken into account. Cooperation in this area between the RS and FRY does not however preempt the possibility of the State assuming responsibility for energy resources pursuant to an agreement between the Entities.”

Accordingly, co-operation between the Parties under the *Agreement* is circumscribed by the BiH Constitution (Annex 4 of the Peace Agreement). Although it must be sensitive to future developments that would grant additional responsibilities to State institutions, it is not on its face in violation of the BiH Constitution.

III. Consistency with Jurisprudence of the Court Regarding Use of Official Languages

Finally, Mr. Belkic argues that, because the *Agreement* was published in the Official Gazette in the Serbian language, ekavian dialect and Cyrillic script, it is not in accordance with the Decision of the Constitutional Court in Bosnia and Herzegovina which “guarantees constituent status of all three peoples even at the level of the entities including equality of Bosnian, Croatian and Serbian language and Cyrillic and Latin alphabets.

OHR is aware that the Court, in Case. No. U 5/98-IV, has ruled that the following language in the RS Constitution is not in conformity with the BiH Constitution: “The Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in *official use* in the Republic, while the Latin alphabet shall be used as specified by law. In regions inhabited by groups speaking other languages, their languages and alphabet shall also be in official use, as specified by law (*Emphasis Added*).” [1] In its Opinion, the Court stressed that the phrase “official use” has been interpreted very broadly, and “far exceeds the *per se* legitimate aim to regulate the use of languages”. In particular, the Court noted that the term “official use” reaches “well beyond relationships vis-à-vis governmental powers into the spheres of media and economics which are usually seen as “private affairs” in democratic societies.”

However, the Court explicitly stated that, in reaching this decision, it did not consider whether the BiH Constitution would require “full equality of languages and alphabets of the constituent peoples...” Indeed, one can imagine a variety of ways in which language rights might be regulated consistent with the BiH Constitution. In the view of OHR, failure to publish a document in an Official Gazette in each language and alphabet of the constituent peoples is not *per se* a violation of the BiH Constitution.

IV. Conclusion

The Agreement on Establishment of Special Parallel Relations Between the Federal Republic of Yugoslavia and Republika Srpska was concluded in accordance with Article III.2.a of the BiH Constitution. The provisions of the *Agreement* enumerating the bases for co-operation are to be construed in light of internal references stipulating that co-operation must take place in accordance with the Peace Agreement, which includes the BiH Constitution. None of these bases constitutes a *prima facie* violation of the BiH Constitution.

While the Court has ruled that a provision in the RS Constitution providing for official use of the Serbian language and the Cyrillic script is not in conformity with the BiH Constitution, it has not attempted to set forth detailed guidelines for the regulation of language rights and, indeed, has not determined whether the BiH Constitution requires full equality of the languages and alphabets of the constituent peoples. As a result, publication of the *Agreement* solely in the Serbian language and the Cyrillic script in the RS Official Gazette would not appear to be in violation of the BiH Constitution.

[1] Article 7, RS Constitution