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OPINION

**ON THE COMPETENCE
OF THE FEDERATION OF
BOSNIA AND HERZEGOVINA
IN CRIMINAL LAW MATTERS**

by
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(Belgium)

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1. In a letter of 25 September 1997, Mr Mato Tadic, Minister of Justice of the Federation of Bosnia and Herzegovina, requested the opinion of the Venice Commission as regards the competence of the Federation in criminal law matters. This is a controversial issue within the group of experts responsible for drafting a criminal code at the level of the Federation.

2. The question is interpreted in a broad sense here, as problems of criminal law and criminal procedure are, to an extent, inextricably linked. The reply necessarily entails a brief reminder of the division of competence between Bosnia and Herzegovina (BH hereafter) on the one hand and the Federation of Bosnia and Herzegovina (FBH hereafter) and the Republika Srpska (RS hereafter) on the other hand.

The Constitution of BH assigns only certain specific areas of competence to the State, while the others lie with to the federated entities (Art. III-3-a of the Constitution of BH).

Of the areas of competence assigned to BH, only one directly concerns criminal law matters in the broad sense of the term: this is Art. I-1-g, which gives BH responsibility for "international and inter-Entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon BH in the area of criminal law and criminal procedure. It is the scope of that competence which it is our task to establish as accurately as possible.

3. The fundamental rule for interpreting the constitutions of BH, the FBH and the RS is that the latter two Entities dispose of residual powers, in which case the Entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the provision of Art. I-1-g of the Constitution of BH, referred to above.

As far as criminal procedure is concerned, this conclusion can be but borne out by the fact that BH has no power to establish courts, other than the Constitutional Court. It would be difficult to imagine that BH would organise a system of criminal procedure before courts which did not come under its jurisdiction.

Moreover, the Constitutions of the FBH and the RS contain numerous provisions concerning criminal procedure, which have never attracted any criticism before.

Article II-2-1 (b) (e) (f) of the Constitution of FBH, for example, clearly refers to problems of criminal procedure (*habeas corpus*, fair criminal proceedings, prohibition of torture and cruel and inhuman treatment or punishment). The Constitution institutes courts with

general jurisdiction, and therefore jurisdiction in criminal cases, at the level of the Federation and the Cantons. Article IV-C-3 empowers the Federation to prescribe "such rules of procedure as may be necessary to ensure uniformity with regard to due process and the basic principles of justice in the proceedings of all courts", a prerogative which is particularly important in criminal matters. Article IV-C-8 establishes a judicial police service depending directly on the federal courts. Article V-11 institutes cantonal courts and Article IV-7-1 establishes municipal courts with general jurisdiction in all civil and criminal matters.

The Constitution of the RS also refers to the basic rules of criminal procedure (*inter alia* in Articles 11, 12, 14, 15, 18, 19 and 20) and institutes courts with general jurisdiction as well as the state counsel (Art. 133).

From all these provisions, whose compatibility with the Constitution of BH has never been called into question, it may be deduced that criminal procedure falls within the competence of the federated entities.

4. As for competence in criminal law matters in the strict sense of the term, *viz* establishing offences and punishments, this also lies in principle with the federated entities, subject to the competence expressly assigned to BH by Article III-1-g ("international and inter-Entity criminal law enforcement including relations with Interpol").

The Constitution of the Federation of BH may be of help in interpreting the latter text. The first version of the Constitution gave the Federation responsibility for "combating international and inter-cantonal crimes, in particular terrorism, drug trafficking, and organised crime and co-operating with Interpol" (Art. III-1-g). This provision patently clashed with the Constitution of BH and was modified by amendment VIII adopted on 6 June 1996 to read "stamping out terrorism, inter-canton crime, unauthorised drug dealing and organised crime". When commenting on this text, the Venice Commission insisted, despite its changed wording, on the necessity of avoiding any clashes with the responsibilities conferred upon BH by Article III-1-g of the Constitution of BH. The Commission also stressed the desirability of establishing joint institutions guaranteeing co-operation between BH and the Federation in the enforcement of criminal law in international cases and cases involving several entities ("in the field of international and inter-Entity criminal law enforcement" (Opinion on the compatibility of the Constitutions of the Federation of BH and the RS with the Constitution of BH, Doc. CDL (96) 56 revised 2, 4 September 1996, p. 7).

5. This prompts two questions. Firstly, what is the competence of BH as regards criminal law and criminal procedure? Secondly, which authority is competent for these matters within the Federation itself? The latter is itself a federal State, and this raises a problem of the division of competence in the second instance, between the Federation and the Cantons.

For the first question, it would appear from the very wording of Article III-1-g of the Constitution of BH (which must be compared to the corresponding text, *viz* Article III-1-f as amended of the Constitution of the Federation) that the responsibilities assigned are essentially those of enforcement and co-ordination. It seems to be more a matter of problems of crime policy as regards crime on an international scale or extending beyond the borders of the Entities (or beyond the borders of the cantons where the Federation is concerned) than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the

Constitution of BH, expressly referring to relations with Interpol, is indicative in this respect.

This limited competence of BH does not therefore undermine the entities' competence in principle for criminal law and criminal procedure. However, that does not mean, in our view, that Article III-1-g is the sole source of the competence of BH in criminal matters. BH may define certain acts as offences and provide for punishment insofar as the use of the machinery of criminal law is necessary to implement its powers and responsibilities. Although such competence is not explicitly provided for in any text, we see this as a logical consequence of the statehood of BH and the tasks entrusted to it. Customs policy, for example, is a prerogative of BH (Art. III-1-c) and manifestly requires the existence and application of a range of criminal measures for which BH has competence and indeed sole competence. In another sphere, the Constitution of BH itself establishes a rule of criminal law by providing for parliamentary immunity (Art. IV-3-j).

To sum up, BH is competent in the area of criminal law and criminal procedure: a) on the basis of Article III-1-g of the Constitution as regards the implementation of a co-ordinated crime policy at international and inter-Entity level; b) whenever the use of the machinery of criminal law is necessary to implement any of the powers and responsibilities assigned to it. It is not competent, unless competence is expressly assigned to it in this field, to define the general principles and basic rules of criminal law. Drafting a "criminal code" certainly does not lie within its competence and is a prerogative of the federated entities.

6. While the FBH is undoubtedly competent to draw up a criminal code, a specific question arises at the level of the Federation itself, which is not encountered in the RS, namely whether this is a matter for the Federation itself or the cantons.

According to the Constitution of the FBH, the cantons have residual powers (Art. III-4: "The cantons shall have all responsibility not expressly granted to the Federation Government. They shall have, in particular, responsibility for: ...). Article III-1 of the Constitution of the FBH sets out the areas of competence reserved exclusively for the Federation, and Article III-2 states where competence is shared between the Federation and its cantons. These texts, modified by amendments VIII and IX of 5 June 1996, contain no reference to criminal matters, with the exception of the aforementioned Article III-1-f ("stamping out terrorism, inter-canton crime, unauthorised drug dealing and organised crime"). We do not perceive this provision as granting the Federation sole competence for criminal matters. Like the corresponding provision in the Constitution of BH, it grants the Federation special competence for situations in which the competence of the cantons is inadequate (inter-canton crime) or for certain special and particularly serious sanctions (for terrorism, drug dealing and organised crime).

It may therefore be deduced that, in parallel with arrangements at the level of BH, the Federation is competent: a) on the basis of Article III-1-f of its Constitution; b) or for defining and punishing any act established by it as an offence within the exercise of its powers and responsibilities. As the Federation is competent for its finance and fiscal policy, for example (Article III-1-c), it has sole competence for the definition and punishment of offences in that area. The same line of reasoning may be applied to the cantons which, within the exercise of their powers and responsibilities, must use the machinery of criminal law and even to municipalities.

7. This still does not settle the question of whether competence for establishing the general principles of criminal law (imputability, complicity, aggravating or mitigating circumstances, reoffending etc) lies with the Federation or the cantons. If we are not mistaken, the Constitution of the FBH does not envisage this question at all. If the Constitution is to be taken literally, it would appear that competence in this area lies with the cantons, since it is listed neither as an area of competence reserved exclusively for the Federation nor as an area of competence shared between the Federation and the cantons.

However, this interpretation may be regarded with some caution, as it would result in a fragmentation of legislation which appears completely at odds with traditional practice. According to Mr Tadic, Minister of Justice, the matter was previously dealt with at the level of the Yugoslav Federation. The Minister's request considers only the issue of whether competence lies with BH or the Federation and at no time raises the possibility of competence lying with the cantons. When reading the Constitutions of BH and also the FBH and the RS, one has the impression that competence for the basic principles of criminal law has been "forgotten" in a manner of speaking. In this context, it may be considered that, by granting the Federation the right to establish courts with general jurisdiction and competence for criminal procedure, the Constitution of the FBH also makes the Federation competent for establishing the basic principles of criminal law. It is nevertheless true that this area of competence is not listed in Articles III-1 and III-2. Were this situation to be regarded as a source of ambiguity or controversy, it would be desirable to revise the Constitution of the FBH as regards this point.