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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Draft Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service

Opinion

by Mr Said Pullicino (Member, Malta)

Introduction.

The Draft Law provides for the establishment of a Service for Intelligence and Security of the Federation of Bosnia and Herzegovina. In executing its functions, the Service has access to information collected by clandestine means and therefore is not normally available from conventional sources. To obtain information that others would deny or keep secret, governments must rely on intelligence agencies that need capabilities and authorities not available to other departments. Intelligence agencies must at times resort to intrusive techniques, such as intercepting communications, and therefore require the legal power to resort to such measures. Furthermore, most of the collection of information and its analysis must be done in secret. Secrecy is an invaluable resource, since if their sources and methods become revealed, the targets of their investigation will react to protect their secrets and access to intelligence will be lost. Secrecy is also vital in protecting individuals, both staff members and sources, who are involved in the collection of information. This need for secrecy means that the activities and performance of intelligence agencies cannot be as transparent as those of other government bodies, or be subject to the same degree of public scrutiny and debate. Publishing information on the allocation of resources or the successes of intelligence agencies would risk revealing their capabilities and targets. Such publicity could seriously compromise their effectiveness.

Whilst confirming that internal security services perform a valuable service to democratic societies by keeping the Government informed on security threats, they should be answerable to the law. In this respect Article 4 of the draft law provides that, *"the service shall perform its activities in accordance with the BiH and Federation Constitutions and other relevant laws and shall ensure protection of internationally recognised human rights"*. Security and intelligence agencies are to be under the law, and not above it. Recommendation 1402 (1999) issued by the Council of Europe confirms that *"internal security services are often inadequately controlled, there is a high risk of abuse of power and violations of human rights, unless legislative and constitutional safeguards are provided"*. By their nature, internal security services conduct highly intrusive activity, affecting the privacy of the individual. Whilst recognising the right to privacy, there are circumstances in a democratic society where it is necessary for the State to interfere with this right, but only in accordance with the law and for certain clearly defined purposes. Therefore, to obtain the benefits and avoid the risks, control and accountability must balance, the need to protect and promote national interests with the need to safeguard individual rights and freedoms. This opinion is aimed at addressing certain constitutional matters.

Interpretation Section.

The draft law should preferably include an Article with definitions of the various terms. This could be entitled as the Interpretation Section, defining such terms as Constitutional Structure, Service, Director, Deputy Director, Employee, Inspector General, Judge, Parliamentary Working Body and so on.

An Apolitical Agency

Article 38 of the draft law provides that *"no employee of the Service may be a member of a legislative, judicial or executive body within the Federation or in Bosnia and Herzegovina,*

nor may they belong to any governing or other board of a political party". Such a provision is a means to safeguard the independence of the Service from undue influence by political parties and is in line with Recommendation 1402 (1999) which provides that, *"internal security services should not be used as a political tool to oppress political parties, national minorities, religious groups or other particular groups of the population"*. It is also evident that the Service performs its duties throughout Bosnia Herzegovina. I believe that the draft law should also provide for adequate safeguards in the activities of the Service in order to ensure the protection of minorities and to guarantee that no one ethnic group is favoured over the other.

Violence and Use of Force.

The Service should gather intelligence by non-violent means. It should have no mandate to use violence or the threat of violence in the conduct of its activities. Furthermore, it must not plan for or undertake para-military activities or activities involving violence against the person or use of weapons. Otherwise, it would run the risk of becoming a tool of oppression. I propose the introduction of an *ad hoc* provision in this respect. Article 46 of the draft law provides for the use of weapons only for purposes of self-defence.

Distinct from Police Force.

Article 2 of the draft law provides that *"the Service shall have no police powers, including no power of arrest"* and the Service is defined as *"an independent Federation Institution"*. It is evident that the Service is not a "secret police force". It is an undisputed fact that there exists a clear distinction in their respective objectives, mode of action, regulations and culture. The objective of the Service is to contrast threats to national security by apprehending that which is not normally known to others, since it is enshrined in secrecy and because it is done in a concealed manner. Furthermore, the condition imposed in Article 25 that the Director and Deputy Director of the Service *"may not be appointed from among active duty military persons"*, ensures the independence of the Service from military power and establishes it as a civil authority answerable to various organs of the State.

Scope of the Service

Article 3 of the draft law defines the scope and outlines the functions of the Service. Although Guideline A.ii. of Recommendation 1402 (1999) demands that the sole task of the internal security services must be to protect national security, this does not imply that investigation concerning narcotics, trafficking and production fall outside the jurisdiction of the Service. It is a fact that certain criminal activity constitutes a threat to national security on both weak states and states that are stronger and more advanced. Thus, for example criminal syndicates can affect the economic security of advanced industrialised states in that their basic activities of corruption, extortion, fraud, money laundering, tax evasion, price fixing, and other criminal undertakings can seriously undermine the free market economy and have a negative effect on the impact of the various government institutions.

I am of the opinion that the Recommendation should not be interpreted as imposing a limitation on internal security services. Article 3(2) of the draft law should be retained. The Service provides valuable information that can only be acquired through its set up of data collecting methods, even though sometimes unorthodox, to other government agencies entrusted with the enforcement of law in areas of serious crimes above-mentioned. Though

not forming part of the intelligence community, such other government agencies may be significant users of the community's product in support of their specific mandates. The special powers attributed by the draft law to the Service in achieving its scope should ideally not be exercised by other government agencies. If extraordinary investigative powers were extended to other government agencies entrusted with law enforcement, the scope of establishing a separate and independent service would be prejudiced. Moreover, such a situation could potentially lead to abuse of power. On the other hand, one has to ensure that law enforcement agencies in investigating serious crime that could destabilise the economic and social texture of the country, can rely on the support of the Service for the gathering of information without involving the Service in the enforcement. Article 7 of the draft law adopts such a line of thought in providing that *"Whenever the Service obtains information about unconstitutional and illegal activities, it shall report such information to the appropriate prosecutorial and police bodies or other appropriate bodies"*.

Since the Service has the duty to effect intelligence work on matters concerning the protection of the constitutional structure, it should also be empowered to collect information or intelligence relating to the capabilities, intentions or activities of any foreign state or group of states, or any person not being a citizen of Bosnia Herzegovina. This should be a method of assistance afforded to the Ministry of National Defence, and should be exercised only upon written authorisation by the Minister of National Defence or the Minister of Foreign Affairs. Article 3 might possibly call for clarification in this respect.

Grounds for surveillance.

The draft law should include a provision which explicitly prohibits the Service from investigating acts of advocacy, protest or dissent that are conducted in a lawful manner. They should be investigated solely where they are carried on in conjunction with any of the activities referred to in Article 3 of the draft law. The draft law should also incorporate the principle that such Agencies should be apolitical, in the sense that they are not to be concerned in furthering, protecting or undermining the interests of authority, section of the population or any political party or organisation.

Director.

In terms of Article 19 of the draft law, the Service is headed by a Director. He has the control and management of the Service. The Director is in terms of Article 22 appointed or dismissed by the President and the Vice President, with the prior approval of the House of Representatives. The fact that prior approval of the Federation House of Representatives is to be sought, is positive in that it does not restrict the organisation solely to the tight control of the Executive. It is also positive that the Director and Deputy Director are not to be from the same constituent people. I believe that termination of the Director's office should be for specified purposes, for example misbehaviour, physical or mental incapacity, bankruptcy, unauthorised absence, thereby ensuring a measure of security of tenure and stability and freedom from undue influence in the exercise of his functions.

Article 19 of the draft law provides for the sharing of responsibility between the Director and the Deputy Director. While such a provision would seem necessary and inevitable considering the particular Federal set up of Bosnia and Herzegovina, it could give rise to

serious problems in the management of the Service in case of conflict between the Director and his Deputy. The law should provide a mechanism how conflicts, that could arise on fundamental issues relating for example to the enforcement of the law and determination of policy, have to be resolved. Unless this is seen to, the result could very well be either a complete stalemate or a weakening of the Service rendering it completely ineffectual.

The office of director should be occupied for a determinate period of time that may be subject to renewal with the same method of appointment. However, no person should hold office as Director and Deputy Director for terms exceeding in the aggregate an established number of years.

With respect to the duties of the director (Article 23), his responsibilities should include the duty to ensure that the Service does not take any action that could give rise to suspicion that it is concerned in furthering, protecting or undermining the interests of any section of the population or any political party or organisation.

I also propose the introduction of a provision whereby the Director and the Deputy Director are obliged to give written notice to the Government of all interests, pecuniary or otherwise, that they have or acquire and that could conflict with the proper performance of his duties.

Electronic Surveillance.

Article 9 and 10 of the draft law deal with the collection of information via electronic surveillance. It is positive that the use of such devices requires the approval of an investigative judge of the Supreme Court and are not left in the hands of the executive. Case-law of the European Court of Human Rights has emphasised that prior judicial sanction is the preferable safeguard for the citizen's Article 8 rights in the investigative context.

Ideally such means of surveillance should be resorted to where normal investigative procedures have already been attempted but have failed or appear unlikely to succeed or be too dangerous. Imposing such a condition in the law would reflect a proportionate approach. It would be appropriate if warrants last for a determined period, subject to renewal on the personal authority of the investigative judge who must be persuaded that the criteria for authorisation are still valid. Furthermore, in reaching a decision the investigative judge should aim at establishing that there is a probable cause for belief that particular communications concerning an offence will be obtained through such a means of surveillance. In this respect, the material likely to be obtained by interception must be of direct use in compiling the information that is necessary to the Service in carrying out the tasks laid upon it by the State.

I believe that judicial authorisation should be sought in obtaining any information, record, document or thing in the performance of the duties and functions of the Service under Article 3 of the draft law. Therefore, I propose that entry of any premises or handling of any property, article, document or any other material in or on or relating to such premises, shall be done on the authority of such authorisation. Furthermore, the draft law should clearly stipulate what details are to be specified in the warrant, such as:

- The type of communication authorised to be intercepted, the type of information, records, documents or things authorised to be obtained;

- The identity of the person, where known, whose communication is to be intercepted or who has possession of information;
- A general description of the place where the warrant is to be executed;
- The period for which the warrant is to remain in force;
- Providing brief reasons for granting or refusing the issue of a warrant;
- Such other terms and conditions as the judge considers advisable in the public interest such as for example that the surveillance stops as soon as it has ceased to provide information of the kind sought.

It is noted that the draft law uses the term approval. One understands the need for a speedy and effective procedure to obtain such authorisation. The procedure could therefore be informal and reduced to a minimum so long as it is ensured that it can be positively identified and documented. The procedure should be set down by regulation, due emphasis being made on the need to satisfy the judge that there is a *"reasonable suspiscion"* (Article 3 of the draft law).

It is sensible for there to be administrative authority to make certain technical variations to the warrant. However, this should be provided for expressly in the warrant. In default, a further application would be essential.

Use of intercepted material in evidence.

The draft law does not contain any provision which regulates this issue. Since electronic surveillance must be approved by a judge rather than by an administrative order, than one could conclude that information collected through such a source should be admissible in evidence as long as adequate safeguards are introduced aimed at protecting and guaranteeing an individual's fundamental human rights. Therefore, the draft law could provide for the admissibility as evidence of material obtained through duly authorised interventions, subject to proper safeguards necessary to ensure due process in criminal proceedings. The material should be subject of ordinary disclosure rules in criminal proceedings. It is also advisable to introduce a provision stipulating that intercepted material obtained in breach of the legislation is inadmissible as evidence. Possibly, as the investigation progresses and prior to trial, the judge issuing the approval could also have a role in weighing the balances of sensitivity and relevance of the information being collected. The judge may decide on which information is secret but not relevant and therefore not exposed in criminal proceedings, and which information is relevant for court proceedings. Such a system, while ensuring that vital secrets are not exposed, should also serve as an ongoing oversight of the intelligence operations rather than post action oversight. A means which should in practice continue to limit to a minimum the possibility of abuse in operations which result in judicial proceedings.

Accountability.

An accountability framework is essential in any legislation which regulates internal security services. One might distinguish between informal means of control (for example, ethics, values and leadership) and formal means (for example, policies and procedures, funding, audit, review, and authorisations). Its aim is to create a sensible balance between openness and secrecy. In the draft law it is evident that great emphasis is placed on control exercised by the Executive, although this is normally considered as being the least rigorous type of control. Thus, for example the Permanent Federation Working Body (Article 13), has the duty to report to the Prime Minister of the Federation, is responsible for approving the

financial plan of the Service, approving regulations submitted by the Director, review quarterly reports referring to the operation of the Service, complaints against the Service, and approving decisions on the termination of employment in terms of Article 44 of the draft law.

The Technical Working Group on Intelligence Matters (Article 14) and Parliamentary Working Body established by Parliament (Article 16) are amongst the means whereby oversight and control of the Service is to be effected. The draft law does not contain any limits on how long a member is to serve on such bodies. The members of the former are appointed by the Permanent Federation Working Body, which is composed of the Minister of Interior, Minister of Defence, Minister of Finance and Minister of Justice (Article 13). In terms of Article 14 of the draft law, the Technical Working Group on Intelligence Matters shall report to the Permanent Federation Working Body. A primary function of this body is to review complaints regarding the operations of the Service and forward them to the Inspector General. The draft law does not regulate the manner in which complaints are filed and it does not appear that this body has the right to grant redress to an aggrieved party. It is apparent that this body is appointed by the Executive, and under such circumstances it would not appear to be the appropriate means to review complaints. Whether the present set up is retained or in any case, it is strongly recommended that aggrieved parties should be given direct access to file a complaint to the Inspector General. This remedy could be included in Article 29 paragraph 3 of the draft law.

The Parliamentary Working Body is composed of Members of Parliament (Article 16). The draft law provides that the members shall consist of three representatives from the House of Representatives and three representatives from the House of Peoples of the Federation Parliament. However, it does not provide for the method of selection. I propose that the Opposition should have a say in the appointment of some of the members. Notwithstanding the fact that Article 16 of the draft law provides that the Parliamentary Working Body is established *"for the oversight and supervision of the Service"*, its functions (Article 17) are limited in scope and extent. This body should be empowered to request the Director to appear before it. The introduction of a provision which stipulates that the Director is to consult on a regular basis with leaders of the major opposition parties represented in the House of Representatives, would be advisable to keep them informed on matters relating to security. Such a provision aims at strengthening the role of Parliament in the chain of accountability. In theory Parliament has another potential window on the intelligence community through the scrutiny of Estimates and voting of funds. Article 47 of the draft law stipulates that *"Financial means for work of the Service will be determined within the Federation budget"*. However, it is a fact that much of the information about the activities, expenditures and performance of the Service and units carrying out intelligence function is normally classified, and cannot be included in public documents.

The draft law also provides for the establishment of the office of Inspector General, who is appointed by the Government with the approval of the President and Vice President (Article 26). This office appears to be a means to provide independent assurance to the government, Parliament and the people of Bosnia and Herzegovina that the Service conducts activities within the law having regard to human rights. The Inspector General is responsible for monitoring the Service's compliance with its operational policies, reviewing the operational activities of the Service and investigates complaints. The Inspector General appears to be a public watchdog enjoying authority, power and prestige. Consideration should be given to the advisability of developing this office into a quasi-judicial authority that would perform the above mentioned functions. Unfortunately, in terms of the draft law complaints may be

investigated only on the request of the Technical Working Group on Intelligence Matters (Article 29(3)), a body which is appointed by the Executive. Preferably, his activities should include the self-initiation of inquiries and investigating complaints, as stated above, filed by members of the public. The Inspector General should not form part of any government department or agency, and should be appointed for a definite non-renewable term. He should enjoy certain powers in order to execute his duties in an efficient and effective manner, thus for example he should have the power to enter the premises of the Service, to require a person to answer questions or deliver documents, and to collect evidence on oath. In this respect Article 32 of the draft law provides that the *"Inspector General and the Deputy Inspector General shall have access to Service employees and data related to the subject being investigated"*. Proceedings should be regulated by appropriate regulations, aimed at safeguarding the interest of all parties concerned and ensuring the efficiency, confidentiality and security as essential requisites of the Service. It appears that in terms of Article 26 the Director and Deputy Director of the Service have a say in the appointment of the Inspector General. It is proposed to do away with this condition, as the office of Inspector General is another means of creating a system which offers accountability and review, thereby ensuring that the Service does not indulge in activities outside its lawful powers. Alternatively, the Director General may be consulted. Furthermore, Article 31 empowers the Director to prohibit the Inspector General from *"initiating or completing an investigation if s/he determines that this is necessary for the protection of the vital security interests of the Federation"*, subject to the approval of the Parliamentary Working Body. Once an investigation has been requested by the Technical Working Group on Intelligence, the Director or his Deputy should not be empowered to suspend such an investigation. As far as investigations are concerned, in my opinion it is not clear whether the Inspector General issues binding decisions or merely recommendations.

In my opinion the Inspector General should only be answerable to the Parliamentary Working Body. He should not be obliged to keep the Director or his Deputy informed about his work (Article 32). This should be left in his discretion. Where as a result of an investigation the Inspector General concludes that the Service was responsible for acting in excess of its functions and in violation of human rights, he should report to the Parliamentary Working Body. I also believe that the Inspector General should be responsible for reviewing the internal regulations and policies of the Service.

The establishment of institutions that are autonomous and act on their individual judgement and are not subject to direction or control of any other person or authority, thereby ensuring effective oversight and supervision, is of the essence. One should assess whether it is appropriate to introduce an independent and autonomous review agency which looks out against any infringement upon human rights and freedoms by the Service. The setting up of these type of agencies in other countries (example the Security Intelligence Review Committee in Canada), has been considered to be an innovative and unique response to the need to provide independent external review and a measure of public accountability to internal security services. Alternatively, the draft law could provide for a Tribunal with power, on application by an aggrieved party, to review complaints. Such specialised organs should be guaranteed the right to deliver enforceable decisions and not merely furnish recommendations to the Executive. Thus, for example where the Tribunal concludes that there has been a violation of the law, it should be empowered to issue an order which may quash the authority issued to effect electronic surveillance, require the destruction of intercepted material, and/or require the Government to pay compensation. The Tribunal must meet the requirements of independence and impartiality. Recommendation 1402 (1999)

issued by the Council of Europe on the Control of internal security services states that *"the overriding principle for ex post facto control should be that persons who feel that their rights have been violated by acts (or omissions) of security organs should in general be able to seek redress before courts of law or other judicial bodies"*. Unfortunately, the draft law does not contain any provision which aims at giving effect to this basic principle. Although the submission of reports is in itself a means of review, individuals should enjoy the right to seek redress from actions of the Service that might have encroached on their fundamental human rights and freedoms.

Conclusion.

I will conclude my opinion by enlisting the main elements of the draft law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service:

- It places the Service on a statutory footing;
- Outlines the levels of accountability under which the Service operates;
- Sets the limits on the Services functions. Aimed primarily in the interest of national security.
- Reinforces the view that intelligence agencies should not have police functions or any other responsibility for the enforcement of the law.
- Establishes a Parliamentary Working Body, with the responsibility to examine the expenditure and administration of the Service.
- Establishes the office of Inspector General as a means to provide independent external review and public accountability of the Service.

This opinion does not purport to be an exhaustive analysis of the intricate workings of the law that has to be verified in the light of the political scenario of Bosnia and Herzegovina.

Mr. Justice J. Said Pullicino.
September, 2001.