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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

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

**adopted by the Venice Commission
at its 34th Plenary meeting
(Venice, 6-7 March 1998)**

**on the basis of the opinion by
Mr Jean-Claude SCHOLSEM
(Belgium)**

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 European Commission for Democracy through Law (the Venice Commission) as regards the competence of the Federation in criminal law matters. The request should be seen in the context of the criminal code being drawn up by the Federal Ministry of Justice, with the Council of Europe's assistance.

2. The Commission considered this matter at its 32nd plenary meeting (Venice, 12-13 December 1997), on the basis of the preliminary opinion of Mr Scholsem, Rapporteur, and in the presence of Mr Van Lamoen, Deputy to the High Representative of the international community in Bosnia and Herzegovina. The Commission decided to resume its examination at its next plenary meeting and invited Mr Scholsem to present a draft report on the subject.

3. This opinion takes account of the views expressed at the 32nd plenary meeting, together with the explanations and clarifications supplied to the Rapporteur by the Office of the High Representative and the Council of Europe's Secretary General on the subject of the draft criminal code prepared by the Federation authorities and Council of Europe experts. It was adopted by the Commission at its 34th Plenary meeting (Venice, 6-7 March 1998).

Purpose of this opinion

4. The question is being interpreted in a broad sense to include the Federation's competence to legislate in the fields of substantive criminal law and criminal procedure, areas that are, to an extent, interlinked. The reply necessarily entails an examination of the division of competence between the State of Bosnia and Herzegovina (BH hereafter) and the two *entities*: the Federation of Bosnia and Herzegovina (FBH hereafter) and the Republika Srpska (RS hereafter). It also requires an examination of the division of powers in this area between the Federation and its cantons.

The competence of the FBH regarding criminal law vis-à-vis the State of BH

5. The fundamental rule for interpreting the constitutions of BH (Appendix IV of the Dayton Agreements), the FBH and the RS is that the two entities enjoy residual powers. The Constitution of BH assigns only certain specific areas of competence to the State, while the remainder lie with the federated entities (article III-3-a of the Constitution of BH). The entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competences of the State of BH in this area, as provided for in the Constitution of BH.

6. Of the areas of competence assigned to BH, only one directly concerns criminal law matters in the broad sense of the term: this is article III-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. Our task is to establish the scope of that competence as accurately as possible.

7. To assist in interpreting this provision, a comparison may be made between article III-3-a of the Constitution of BH and the equivalent provision of the Constitution of FBH (article III-

1, as modified by amendment VIII: *"It is an exclusive competence of the Federation ... stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime"*. The first version of the FBH Constitution granted the Federation powers in the field of international criminal law, which patently clashed with the Constitution of BH. Although the new version has rectified this situation, it has still left a certain ambiguity. The Venice Commission had stressed the need to avoid any overlap with the powers granted to the State of BH and proposed the setting up of joint institutions to guarantee co-operation between BH and the Federation in the enforcement of criminal law in international cases and cases involving more than one entity (Commission opinion on the compatibility of the Constitutions of the Federation of BH and the RS with the Dayton Constitution, CDL (96) 56 revised 2, 4 September 1996, p. 7; Venice Commission, Annual Report 1996). The Commission does not appear to have identified in the wording of the two constitutions a risk of conflict with regard to the exercise of legislative power, but rather in the implementation of crime policy. The wording of article III-3-a of the Constitution of BH seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of BH, which expressly refers to relations with Interpol, is indicative in this respect.

8. Article III-1-g of the Constitution of BH does not therefore appear to undermine the competence in principle of the FBH in the field of substantive criminal law, that is the power to determine offences and penalties.

9. However, that does not mean 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 it needs to use the machinery of criminal law to implement its powers and responsibilities. Although such competence is not explicitly provided for in any text, this is a logical consequence of the statehood of BH and the tasks entrusted to it. Customs policy, for example, is a prerogative of BH (article III-1-c of the Constitution of BH) and manifestly requires the existence and application of a range of criminal measures for which BH has competence and indeed sole competence. The same applies to criminal law relating to the currency and monetary policy, immigration and international transport and communication.

10. Similarly, it is clear that when the criminal law is intended to protect certain values that fall within the state's area of competence, BH must be responsible for enacting it. This will apply, for example, to the protection of the international frontiers of Bosnia and Herzegovina and its territorial integrity, the symbols of the state, such as its flags and emblems, and its constitutional system. The competences of the two entities in criminal law do not therefore cover this field.

11. The above-mentioned competence of BH is admittedly implicit, but this does not make it any less certain or exclusive. It is bound up with the nature of the state and cannot be exercised by, or even delegated to, the entities. If the two entities were to start legislating in place of the state, the same subject matter would be governed by different rules (leading, for example, to a conflict of rules for protecting the frontiers), which could result in absurd, or even dangerous, situations.

12. One suggestion is that the entities could legislate provisionally in this area to avoid any possibility of a legal vacuum created by the failure of the BH legislature to take action. For the reasons set out above, the Commission cannot support this interpretation. The Constitution of BH makes no provision for the entities to perform the functions of the state on a substitute basis and such an initiative on the part of the entities would appear to be in breach of the constitutional order of BH. It would in any case have little justification since there appears to be no danger of such a legal vacuum. Thus, article 2 of Annex 2 of the Constitution of BH ("Transitional Arrangements") clearly states that "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".

13. It should be noted, finally, that in another area the Constitution of BH itself establishes a rule of criminal law by providing for parliamentary immunity (article IV-3-j).

14. Subject to these reservations, it can be concluded that the entities' competence in substantive criminal law is clearly established in the constitutional system of Bosnia and Herzegovina.

15. Regarding criminal procedure, the conclusion that BH is not competent is strengthened by the fact that BH has no powers to establish courts, other than the Constitutional Court. It difficult to envisage BH establishing a system of criminal procedure before courts that do not come within its jurisdiction. Moreover, the Constitution of the FBH contains numerous provisions concerning criminal procedure, which have never attracted any criticism (articles II-2-1 (b) and (e) relating to *habeas corpus* and fair criminal proceedings; article IV-C-3 empowers the Federation to prescribe such rules of procedure as may be necessary to ensure uniformity with regard to due process¹). Article IV-C-8 establishes a criminal police service responsible directly to the federal courts. Article V-11 institutes cantonal courts and article VI-7-1 establishes municipal courts with general jurisdiction in all civil and criminal matters.

16. It is clear from these provisions that criminal procedure lies within the competence of the entities.

17. It has been asked whether, in the areas of criminal law for which BH has exclusive competence, it should not also have the power to establish rules of procedure concerning their implementation, including the establishment of special courts. The Commission believes this would not be compatible with the Constitution of BH, which, as already noted, only provides for one court at state level: the Constitutional Court. Besides, there is nothing to prevent the entities' courts from enforcing the laws enacted by the BH legislature. Admittedly, in the absence of a court of ordinary instance at the state level, these laws might not always be uniformly interpreted. However, any divergences in the interpretation of state laws that might occur need not create significant or insurmountable problems. In any event, if variations in the interpretation of state laws by the entities' judicial institutions does raise serious problems, these could be seen as a threat to the constitutional order of BH and could thus be set aside by the

¹ 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).

Constitutional Court of BH.

18. Briefly, the FBH is competent in the criminal field in all the areas where BH has no specific competence. BH has competence regarding criminal law and criminal procedure;

- a. under article III-1-g of its Constitution, for the implementation of a co-ordinated crime policy, both internationally and between the entities;
- b. whenever the use of the criminal law is necessary for the exercise of one of its constitutional powers or to protect the values of the state.

In the absence of any other explicit granting of competences in this area, BH has no authority to lay down the general principles or basic rules of criminal law or procedure. The drawing up of a criminal code containing the above principles and rules is certainly outside its competence. It is thus an entity responsibility.

The competence of the FBH vis-à-vis the cantons

19. While the FBH is undoubtedly competent to draw up a criminal code and a code of criminal procedure, it still has to be decided whether this is the responsibility of the Federation itself or the cantons. According to the Constitution of the FBH, the cantons have residual powers (article III-4: "*The cantons shall have all responsibility not expressly granted to the Federation Government. They shall have, in particular, responsibility for: ...*"). *Prima facie*, therefore, the cantons have competence in criminal matters. However, a close examination of the FBH Constitution reveals that the FBH has broad competence in this area and that the constitutional logic points to a shared competence between the cantons and the Federation.

- *The Federation's competence regarding specific areas of criminal law*

20. Article III-1 of the Constitution lists the exclusive competences of the Federation and article III-2 those that are shared between the FBH and its cantons. These provisions, as modified by amendments VIII and IX of 5 June 1996, contain no specific references to the criminal law, apart from the aforementioned article III-1-f: ("*stamping out terrorism, inter-cantonal crime, unauthorised drug dealing and organised crime*"). This article appears to give the FBH a certain measure of competence in the criminal field. Like the similar provision of the Constitution of BH, it gives the FBH special competence regarding situations exceeding the jurisdiction of cantons (inter-cantonal crime) or certain particularly serious offences (terrorism, organised crime and drug dealing). However, the competences of the FBH, unlike those of BH, are not confined to the problems of co-ordinating crime policy – the term *criminal law enforcement* does not appear in the FBH Constitution. The FBH has the right to draw up the relevant substantive criminal law provisions (see article IV-20-d of the FBH Constitution). This is clearly a broad competence since it covers all the types of criminal offence likely to have inter-cantonal implications, which given the size of the cantons will not be the exception.

21. Moreover, just as is the case with BH, the Federation's competence is not simply based on article III-1-f of its Constitution but extends, implicitly but unambiguously, to defining and punishing any act established by it as an offence within the exercise of its exclusive powers and responsibilities (for example with regard to the economy, land use or energy policy) or shared

powers and responsibilities (for example with regard to guaranteeing and enforcing human rights, article III-2-a).

22. It also has exclusive competence to enact criminal legislation to protect values – for example, symbols or territory - which, by their nature, it alone is capable of protecting (see also para 27 below).

- ***The Federation's competence regarding criminal procedure and the criminal justice system***

23. It should also be borne in mind that the Federation has a constitutional responsibility for ensuring respect for human rights (article III-2-a) and for certain fundamental rules of criminal procedure. It can easily be inferred from several constitutional provisions that the FBH has numerous competences in the fields of criminal procedure and the criminal justice system. For example, there are several provisions of the FBH Constitution relating to criminal procedure (articles II-2-1 (b) and (e) are concerned with safeguarding *habeas corpus* and the right to a fair trial). It establishes courts with general – and thus criminal – jurisdiction, at both the federal and cantonal levels; it contains rules that are applicable to all federal and cantonal courts (articles IV-C 1 to 4) and makes fairly detailed provision for the election of judges (articles V-11 and VI-7). Finally, and above all, article IV-C-3 grants the Federation the – particularly wide - power to determine "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". On the other hand, the FBH Constitution makes cantonal legislatures responsible for laying down *supplementary* rules governing cantonal and municipal courts (ibid) and determining the jurisdiction of cantonal and municipal courts (article V-6-d, see also para 30 below).

24. It is clear from the foregoing that, as a matter of principle, competence to determine rules of criminal procedure in the FBH lies with the Federation itself, with the cantons' responsibility being confined to laying down supplementary rules.

- ***The Federation's competence regarding general criminal law***

25. It has been shown that the FBH has a fairly considerable competence in the fields of special criminal law and criminal procedure. It remains to be considered whether the Federation or the cantons are competent to determine the general principles of criminal law (imputability, complicity, aggravating or mitigating circumstances, reoffending). This issue seems to be not covered at all in the FBH Constitution. A literal reading of the Constitution would suggest that this competence must lie with the cantons, since it is not referred to in either the exclusive competences of the Federation or those it shares with the cantons. However, this interpretation should be approached with caution, in that it would lead to a fragmentation of legislation which appears completely at odds with traditional practice (the matter was previously dealt with at the federal level in the former Yugoslavia). A reading of the Constitutions of the FBH and the RS gives the impression that competence for the basic principles of criminal law has been in some ways "forgotten". 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 expressly listed in Articles III-1 and III-2. Were this situation to be regarded as a source of ambiguity or

controversy, it will be desirable to revise the Constitution of FBH as regards this point.

26. It is clear from the foregoing (paras. 20-25) that competence in criminal law is in fact shared between the Federation and its cantons, despite the fact that it is not included in the list of shared competences in article III-2. This incompatibility with the exhaustive list in article III-2-a is more apparent than real. In practice, this provision grants the FBH and the cantons shared responsibilities regarding human rights and it can be validly maintained that a large part of criminal law and criminal procedure comes within the scope of "guaranteeing and enforcing human rights", in the broad sense of the term².

27. There can be no doubt that the FBH Constitution provides for substantive criminal legislation at the federal as well as the cantonal level. For example, article IV-B-7(a), subparagraph vii, on the power of pardon of the Federation's President, makes a clear reference to "pardons for offences against *Federal* law"; similarly, article V-9-d, on cantonal responsibilities, refers explicitly to the "prosecution of crimes against *cantonal* law".

28. Turning to the laws governing criminal procedure and the criminal justice system, the FBH Constitution grants the Federation responsibility for determining the rules of procedure (IV-C-3) while cantons are given the task of adopting supplementary rules and determining the extent of the jurisdiction of cantonal and municipal courts.

29. Finally, competence in this field is already shared between the Federation and the cantons for a completely factual reason, since it appears that many cantons have delegated their criminal law powers to the Federation, in accordance with article V-2 of the Constitution.

30. Article III-3 of the FBH Constitution establishes the rule that, in areas where competence is shared between the Federation and the cantons, it may be exercised separately. Under the powers granted to it by the Constitution, the FBH can enact its own criminal code and code of criminal procedure or legislation governing the criminal justice system. However, article III-3 of the FBH Constitution also requires it to respect cantonal prerogatives and the need for a certain flexibility in enforcing federal legislation. For their part, the cantons can also legislate in this field, but only to supplement federal legislation. With particular regard to the criminal justice system, the cantons must establish the rules governing the jurisdiction of cantonal and municipal courts (article V-6-(d)). In view of the Federation's responsibility for ensuring uniformity with regard to procedural safeguards – including access to the courts (article IV-C-3) – cantonal legislation must take into account the federally established rules governing the competence *ratione materiae* of the various cantonal courts; on the other hand, cantonal legislatures are free to determine the number and territorial jurisdiction of the courts operating within their canton.

31. Finally, it must be emphasised that, while recognising the shared competence that the FBH and the cantons have in this field, federal legislation is based directly on the Constitution itself and not on a delegation of powers from the cantons. Federal law is thus applicable in all

² Article III-2-a differs from the provision in the Constitution of Bosnia and Herzegovina (article II-3), where human rights are guaranteed as general principles. Article III-2-a of the FBH Constitution, as opposed to the above provision of the Constitution of BH and article II-2 of the FBH Constitution, attributes specific competence for implementation ("guaranteeing and enforcing") of human rights.

the cantons, including those that have not delegated their competences to the Federation or that have revoked that delegation.