

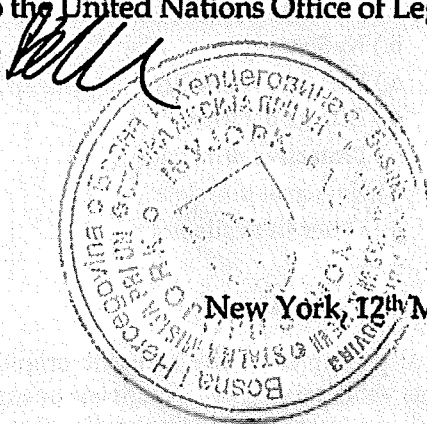


BOSNIA AND HERZEGOVINA
Permanent Mission to the United Nations
New York

No. 201-22-05-1-216-1/18

The Permanent Mission of Bosnia and Herzegovina to the United Nations presents its compliments to the United Nations Office of Legal Affairs and, in reference to document Ref. LA/COD/50/1 dated 13 December 2017, has the honour to submit herewith comments of Bosnia and Herzegovina, provided by the Ministry Justice of Bosnia and Herzegovina.

The Permanent Mission of Bosnia and Herzegovina to the United Nations avails itself of this opportunity to renew to the United Nations Office of Legal Affairs the assurances of its highest consideration.



New York, 12th March 2018

Office of Legal Affairs
United Nations
New York

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Number: 06-07-14-11892/17
Sarajevo, 1 February 2018

SUBJECT: General Assembly, UN-Resolution on Criminal accountability of United Nations officials and experts on mission

Regarding the referenced letter number and date requesting from the Ministry of Justice of Bosnia and Herzegovina, in accordance with the request of Permanent Mission of Bosnia and Herzegovina to the UN in New York, number: 201-22-05-4-1244-1/17 from 19 January 2018, to adjust its response on the UN-Resolution on Criminal accountability of United Nations officials and experts on mission, given in the letter number: 06-07-14-11892/17 from 5 January 2018, in the form of questionnaire response, we hereby deliver:

Question number 1 which reads as follows:

1. Please indicate available forms of jurisdiction and a list of relevant provisions in domestic criminal legislation applicable to nationals during their service as UN officials or experts on mission. Also, please specify whether specific legislation applies to the UN official or the expert on mission on the basis of:

- a.) Territorial principle
- b.) Nationality
- c.) Passive personality
- d.) Effects doctrine
- e.) Protective principle
- f.) Universal principle
- g.) Other (if available)

Response:

General principles of the domestic criminal legislation are also applicable to BiH citizens while serving as UN officials or experts on mission.

Spatial and temporal validity implies that the criminal legislation of BiH applies to anyone who commits a criminal offence in its territory at the time of validity of that legislation, and also, under certain conditions, when a criminal offence is committed outside its territory.

For the personal validity, unlike this spatial and temporal principle, not the circle of persons to whom it applies, but rather the circle of persons to whom it does not apply shall be determined, i.e., those who are excluded from the implementation of the criminal law due to certain properties.

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Some cases are provided for in other regulations of internal or international character. Thus, there are very specific situations when certain categories of persons are not subject to criminal legislation at all or are subject to it quite conditionally to ensure an unimpeded performance of their public law functions, such as Members of Parliament, judges of ordinary and constitutional courts, or due to a certain international legal status of some persons, e.g. diplomatic and consular representatives, as well as some other international officials (*immunity law as a basis for exclusion or limitation of the criminal legislation implementation*).

International law represents the basis of exclusion of the implementation of our criminal legislation and the jurisdiction of our courts in relation to some persons, because of, as underlined before, their international legal status, including: heads of foreign states and their attendants when they are in our country, heads of diplomatic missions and their close family members; members of diplomatic staff and their family members, of course, if they are not our citizens (see Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relations of 1963).

Therefore, the specific legislation does not apply on UN officials or experts on missions, that is, the following principles from Articles 8¹ and 9² of the Criminal Code of Bosnia and Herzegovina, shall be applied:

¹ Applicability of Criminal Legislation of Bosnia and Herzegovina to Those Perpetrating a Criminal offence within the Territory of Bosnia and Herzegovina

Article 8

- (1) *The criminal legislation of Bosnia and Herzegovina shall apply to anyone who perpetrates criminal offence within its territory.*
- (2) *The criminal legislation of Bosnia and Herzegovina shall apply to anyone who perpetrates a criminal offence aboard a domestic vessel, regardless of its location at the time of perpetration of the offence.*
- (3) *The criminal legislation of Bosnia and Herzegovina shall apply to anyone who perpetrates a criminal offence aboard a domestic civil aircraft while in flight, or aboard a domestic military aircraft, regardless of its location at the time of perpetration of the offence.*

² Applicability of the Criminal Legislation of Bosnia and Herzegovina to Offences Perpetrated outside the Territory of Bosnia and Herzegovina

Article 9

- (1) *The criminal legislation of Bosnia and Herzegovina shall apply to anyone who, outside of its territory, perpetrates:*
 - a) *Any criminal offence against the integrity of Bosnia and Herzegovina prescribed in Chapter XVI (Criminal Offences against The Integrity of Bosnia and Herzegovina) of this Code;*
 - b) *The criminal offence of counterfeiting of money or of counterfeiting of securities of Bosnia and Herzegovina, the criminal offence of counterfeiting of instruments of value or of forgery of trademarks, measures and weights issued on the basis of regulations made by the institutions of Bosnia and Herzegovina, as defined in Articles 205 through 208 of this Code;*
 - c) *A criminal offence which Bosnia and Herzegovina shall be bound to punish according to the provisions of international law and international treaties or intergovernmental agreements;*
 - d) *A criminal offence against an official or responsible person in the institutions of Bosnia and Herzegovina, related to his duty.*
- (2) *The criminal legislation of Bosnia and Herzegovina shall be applied to a citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates any criminal offence.*
- (3) *The criminal legislation of Bosnia and Herzegovina shall be applied to a non-citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates a criminal offence against Bosnia and Herzegovina or its citizen which is not specified in paragraph 1 of this Article.*
- (4) *The criminal legislation of Bosnia and Herzegovina shall be applied to a non-citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates against a foreign state*

The CC of BiH contains two sets of rules that regulate the spatial validity of our criminal legislation: one set of rules from the provisions of Article 8 of CC BiH and that include cases of the criminal offence perpetration in our territory, and the other, when a criminal offence has been committed outside these areas (Article 9 of CC BiH). Accordingly, the validity or implementation of the BiH criminal legislation in accordance with *the territorial principle* as the initial and basic principle of the territorial validity of criminal legislation is provided for in the provisions of this Article. According to that principle, this criminal legislation shall apply to anyone who perpetrates a criminal offence within the territory of BiH, regardless of the perpetrator's citizenship. Therefore, after it is established that the criminal offence has been committed in the territory of BiH, the implementation of our criminal legislation shall be compulsory, regardless of whether the perpetrator is a BiH citizen, a foreigner or a stateless person, whether an offence has been committed against our or some other country, to our citizen or a foreign citizen, our goods or goods of another country or international organization. Acceptance of this validity principle and the criminal legislation implementation shall be compliant with the prevailing understanding of legitimacy and sovereignty of each state to ensure the implementation of its laws in its territory, that is, to prosecute all offences committed in its territory. The territorial principle has been supplemented by two other principles: *the principle of ship's flag* and *the principle of aircraft registration* (paragraphs 2 and 3), which is compliant with the rules of the international law.

Article 9 of CC BiH contains another set of provisions on the spatial validity of the criminal legislation and rules of implementation of the BiH criminal legislation for cases when criminal offences were committed abroad, i.e., when its implementation through the territorial principle referred to in Article 8 of CC BiH is not possible. For the implementation of our criminal legislation in such cases, there are several principles established by law: real (*protective*), personal and universal principle.

Paragraph 1 of this Article provides for the implementation of our criminal legislation in accordance with the so-called *real or protective principle* for a given number of criminal offences committed abroad, i.e., outside the area covered by Article 8 of CC BiH, for which, due to their threat to BiH or the significance of goods at risk, it cannot be expected that the state in whose territory these offences were committed ensures protection of those values or interests successfully enough.

While the real principle is related to the extension of our criminal legislation validity to anyone who, outside the borders of BiH, commits only the offences listed in paragraph 1, in the principle referred to in paragraph 2 (*the principle of active personality or the national principle*), the repressive government of our country applies only to the criminal offences committed abroad by our citizens, excluding the criminal offences of the real principle referred to in paragraph 1. Certainly, the

or non-citizen of Bosnia and Herzegovina a criminal offence for which, under that legislation, a punishment of imprisonment for a term of five years or a more severe punishment may be imposed.

(5) In the cases referred to in paragraphs 2 and 3 of this Article, the criminal legislation of Bosnia and Herzegovina shall be applied only if the perpetrator of the criminal offence is found within the territory of Bosnia and Herzegovina, or has been extradited to it, while in the case referred to in paragraph 4 of this Article, only if the perpetrator is found within the territory of Bosnia and Herzegovina and is not extradited to another state.

condition for this is that our citizen is found within our territory or has been extradited to it, which is specified in the provision of par. 5 of this Article.

(3) Paragraph 3 of this Article provides for the possibility of applying our criminal legislation also to a foreigner who has committed a criminal offence (other than those referred to in par. 1 of this Article to which it applies) against BiH or its citizen abroad, we have seen the real principle including our citizens too in case they commit one of the offences specified in that provision (*subsidiary or limited real principle*) abroad. Accordingly, the protection of our legal goods abroad extends to other legal goods that have been compromised by a criminal offence committed by a foreigner, other than those listed in the primary real principle referred to in paragraph 1. Therefore, based on the protection of our legal goods against criminal offences committed abroad, several principles have been established on the basis of which our criminal legislation is being implemented. The first principle (par. 1) ensures its implementation with regards to the protection of significant legal goods, as a rule of political character, and these acts are listed specifically, whereas this provision actually contains two principles: one that ensures the implementation of our law when these are the offences committed outside of BiH and which compromise the legal goods that are not covered by the real principle referred to in par. 1. (*the subsidiary real principle*), and the second one relating to the implementation of our criminal law in the case of criminal offences against our citizens that were committed abroad. Therefore, this concerns the acts where our citizens are victims of a criminal offence, in the sense of criminal law - passive subjects, and accordingly this rule is also referred to as *the principle of passive personality*, which also belongs to the real principle.

(4) Par. 4 contains *the universal or cosmopolitan principle* according to which the criminal law of BiH shall also be applied to a foreigner who, outside the territory of BiH, commits a criminal offence against a foreign country or a foreigner for which, under that legislation, a sentence of five years imprisonment or a more severe punishment may be imposed. So, this is related to such situations in which a criminal offence, its perpetrator and compromised or violated legal goods bear no relation whatsoever with our legal order, which raises an issue of the implementation basis of our legislation in such situations. The true meaning of this principle stems from international solidarity and the need to prevent serious criminal offences against such values, which represent the common interests of all nations and all people, and whose violation irritates all civilized people. Such criminal offences are all offences against international humanitarian law, such as genocide, war crimes and other crimes against humanity, but also all criminal offences that are international in nature, such as, for example, human trafficking, illicit manufacturing and trafficking in narcotic drugs, dangerous weapons, terrorism and the support of terrorist activities, various forms of organized crime that knows no national boundaries, etc.

Beside the stated seriousness of the offence, the conditions for the implementation of our criminal legislation under this principle are that the foreigner-perpetrator is in the territory of BiH and not extradited to a foreign state, which means that, essentially, according to this principle, the implementation of our legislation is reduced only to a foreign citizen (the perpetrator of a criminal offence) who is not extradited. Other conditions for the implementation of our criminal legislation under this principle are

basically the same as for the personal and subsidiary real principle of par. 2 and 3 of this Article, which indicates that this principle is subsidiary in nature.

Question number 2 which reads as follows:

1. To what extent do domestic provisions establish the *ration personae* jurisdiction over offences committed by foreign nationals while serving as UN officials or experts on Mission (please specify for each of them whether they are being implemented, and also quote the relevant domestic provisions):
 - a.) General applicability to all persons
 - b.) Jurisdiction over nationals
 - c.) Jurisdiction over stateless persons
 - d.) Jurisdiction over foreign nationals (specify exceptions)
 - e.) Specific legislation in relation to certain categories of persons
 - f.) UN military officers and experts on Missions
 - g.) UN police officers and experts on missions
 - h.) UN civil servants and experts on missions
 - i.) Civil servants acting under foreign jurisdictions
 - j.) Other (if any)

Response:

a- General applicability to all persons

(1) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who, outside of its territory, perpetrates any criminal offence against the integrity of Bosnia and Herzegovina prescribed in Chapter XVI (Criminal Offences against The Integrity of Bosnia and Herzegovina) of this Code;

b) the criminal offence of counterfeiting of money or of counterfeiting of securities of Bosnia and Herzegovina, the criminal offence of counterfeiting of instruments of value or of forgery of trademarks, measures and weights issued on the basis of regulations made by the institutions of Bosnia and Herzegovina, as defined in Articles 205 through 208 of this Code;

c) a criminal offence which Bosnia and Herzegovina shall be bound to punish according to the provisions of international law and international treaties or intergovernmental agreements;

d) a criminal offence against an official or responsible person in the institutions of Bosnia and Herzegovina, related to his duty.

b) Jurisdiction over nationals

(2) The criminal legislation of Bosnia and Herzegovina shall be applied to a citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates any criminal offence.

In the cases referred to in paragraph 2 of this Article, the criminal legislation of Bosnia and Herzegovina shall be applied only if the perpetrator of the

criminal offence is found within the territory of Bosnia and Herzegovina, or has been extradited to it.

c) Jurisdiction over stateless persons and d) Jurisdiction over foreign nationals (specify exceptions)

(3) The criminal legislation of Bosnia and Herzegovina shall be applied to a non-citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates a criminal offence against Bosnia and Herzegovina or its citizen which is not specified in paragraph 1 of this Article.

(4) The criminal legislation of Bosnia and Herzegovina shall be applied to a non-citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates against a foreign state or non-citizen of Bosnia and Herzegovina a criminal offence for which, under that legislation, a punishment of imprisonment for a term of five years or a more severe punishment may be imposed.

(5) In the cases referred to in paragraph 3 of this Article, the criminal legislation of Bosnia and Herzegovina shall be applied only if the perpetrator of the criminal offence is found within the territory of Bosnia and Herzegovina, or has been extradited to it, while in the case referred to in paragraph 4 of this Article, only if the perpetrator is found within the territory of Bosnia and Herzegovina and is not extradited to another state.

e) Specific legislation in relation to certain categories of persons

There are certain categories of persons which are not subject to the criminal legislation or are subject to it only under certain conditions.

Some cases are provided by other regulations of internal or international character. Thus, very specific are those situations when certain categories of persons are either not subject to criminal legislation at all or are subject to it quite conditionally to ensure an unimpeded performance of their public law functions, such as for example, Members of Parliament, judges of ordinary and constitutional courts, or due to a certain international legal status of some persons, e.g. diplomatic and consular representatives, as well as some other international officials (*immunity law as a basis for exclusion or limitation of the criminal legislation implementation*).

International law represents the basis of exclusion of the implementation of our criminal legislation and the jurisdiction of our courts in relation to some persons, because of, as underlined before, their international legal status, including: heads of foreign states and their attendants when they are in our country, heads of diplomatic missions and their close family members, members of diplomatic staff and their family members, of course, if they are not our citizens (see Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relations of 1963).

Therefore, there is no specific legislation in Bosnia and Herzegovina for military officers, UN police officers, civil servants and experts on Missions.

Question number 3 which reads as follows:

To what extent do domestic provisions establish *the ration materiae* jurisdiction over offences committed by nationals while serving as UN officials or experts on Mission (please specify for each of them whether they are being implemented, and also quote the relevant domestic provisions):

- a.) General applicability of the Criminal Code
- b.) Applicability limited to obligations under international agreements
- c.) Applicability limited to „serious“ criminal offences
- d.) Applicability limited to "international criminal offences", including genocide, crime against humanity and war crimes
- e.) Applicability limited to offences punishable by a minimum prison sentence (e.g. 3/5 years)
- f.) Applicability limited to offences that compromise the "essential interests of the state"
- g.) Applicability limited to offences that pose a threat to public safety
- h.) Applicability limited to a specific list of criminal offences
- i.) Other restrictions relative to the applicability of the *ratione materiae* of domestic law (if any).

Response:

We emphasize that the criminal legislation of Bosnia and Herzegovina also applies to UN officials and experts on missions.

The CC of BiH provides rules governing the implementation of our criminal legislation in cases when nationals commit a criminal offence outside the territory of BiH (Article 9). These rules originate in the character and significance of the protected asset that has been attacked or compromised by the criminal offence that has been committed, also in the status of the perpetrator himself, and ultimately in criminal-political reasons, i.e., international obligation or solidarity in the suppression of serious criminal offences.

This is regulated by Article 9, paragraph (1) in a manner so as to make the provision valid for national and foreigners and it reads: "*(1) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who, outside of its territory, perpetrates:*

- a) any criminal offence against the integrity of Bosnia and Herzegovina prescribed in Chapter XVI (Criminal Offences against The Integrity of Bosnia and Herzegovina) of this Code;
- b) the criminal offence of counterfeiting of money or of counterfeiting of securities of Bosnia and Herzegovina, the criminal offence of counterfeiting of instruments of value or of forgery of trademarks, measures and weights issued on the basis of regulations made by the institutions of Bosnia and Herzegovina, as defined in Articles 205 through 208 of this Code;
- c) a criminal offence which Bosnia and Herzegovina shall be bound to punish according to the provisions of international law and international treaties or intergovernmental agreements;
- d) a criminal offence against an official or responsible person in the institutions of Bosnia and Herzegovina, related to his duty."

Furthermore, paragraph (2) of the same Article of the BiH CC prescribes that the criminal legislation of Bosnia and Herzegovina shall apply to a citizen of Bosnia and Herzegovina who commits any offence outside the territory of Bosnia and Herzegovina, provided that the perpetrator of the criminal offence is found within the territory of Bosnia and Herzegovina or has been extradited to it.

Question number 4 which reads as follows:

2. What are the prerequisites (if any) needed for the implementation of extra-territorial jurisdiction for UN officials or experts on Mission?
 - I.
 - a) Agreement (SOFA/SOMA) with the host state on the extra-territorial jurisdiction
 - b) Agreement (SOFA/SOMA) with the host state on UN officials or experts on Mission
 - c) Some other agreement
 - d) Domestic legislation
 - e) Criminal offences for which extradition is possible
 - f) Double criminality, with or without special limitations for its implementation
 - g) Presence of the perpetrator in the territory of the home state, with or without special limitations regarding the implementation of the above
 - h) Implementation of the principle *ne bis in idem*
 - i) The prosecution permit required by the public prosecutor/other government officials

Response:

We consider that it is important to mention that Bosnia and Herzegovina, in accordance with point b) of the answers provided, concluded an agreement with the North Atlantic Treaty Organization on the status of NATO and its staff in Bosnia and Herzegovina. This Agreement, Annex B to Annex I-A, is an integral part of the General Framework Agreement for Peace in Bosnia and Herzegovina, and it is stated under Point 2 of the Agreement that the provisions of the Convention on the Privileges and Immunities of the United Nations of February 13, 1946 that refer to experts on the task shall be applied *mutatis mutandis* to NATO personnel involved in the Operation, unless otherwise provided by this Agreement.

The Agreement on the legal status of NATO forces (abbreviated as PFP / NATO SOFA) regulates the legal status of members of NATO military and civilian forces in the states, and the obligations of the states towards them.

In 2008, the Presidency of Bosnia and Herzegovina ratified this Agreement for the purpose of its effective application and implementation, and in 2012 the Council of Ministers adopted Instructions on application and implementation of the PFP / NATO SOFA in Bosnia and Herzegovina.

Question number 5 which reads as follows:

3. What is the legal basis for the application of immunity of UN officials and experts on Mission?
 - a.) UN Convention on Privileges and Immunities, 1946 - ratified?
 - b.) Specific agreements with the UN (SOFA/SOMA/OTHERS)
 - c.) Other general privileges and applicable immunities, including those recognized by domestic law

Response:

We emphasize that, based on succession, in accordance with points a.) and b.) of the answers provided, Bosnia and Herzegovina is a member of the UN Convention on Privileges and Immunities of 1946 (text published in "Official Gazette of the F.P.R.Y" No. 20/1950), and that, as we have stated in the response number 4, it concluded the Agreement on the legal status of NATO forces (abbreviated as Pfp / NATO SOFA).

Question number 6 which reads as follows:

4. To what extent is military and/or civil law applicable to criminal offences committed by UN officials or experts on Mission?
 - a.) The exclusive implementation of military law in relation to military personnel deployed as UN officials or experts on Mission
 - b.) Exclusively use of military courts for deployed as UN officials or experts on Mission
 - c.) Potential application of civil law/courts for military personnel

Response:

There are no separate military courts in Bosnia and Herzegovina that could exercise military law on military personnel. Military personnel shall be subject to civil law to the same extent as other citizens. UN officials or experts on Mission shall exclusively be subject to civil law implemented by the courts of ordinary jurisdiction within the judicial system which is in Bosnia and Herzegovina organized at the level of Bosnia and Herzegovina, entities (Federation of BiH and Republika Srpska) and Brčko District.

Best regards,

MINISTER
Josip Grubeša

Delivered to: - the addressee,
- file.

I hereby certify that this translation fully corresponds to the original written in Croatian.
Date: 26 February 2018
Certified Court Interpreter for English and German – Marina Čotić

