

Written observations made by the OHR concerning the request of the applicant in Case No. U-16/08

I. Introduction

1. On 24th October 2008 the Constitutional Court of Bosnia and Herzegovina (Constitutional Court) received a request of Mr. Milorad Živković, Deputy Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for review of constitutionality of Article 13 of the Law on Court of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", Nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07; the Law on Court). The application is numbered as U-16/08.

Concluding from the contents of the request itself – second page, sixth paragraph, the request is in fact limited to review of constitutionality of paragraph (2) of Article 13 of the Law on Court only, and not the entire Article 13.

2. The request of the applicant could be summarized as follows:

- First, that "[u]nder Article III of the Constitution of Bosnia and Herzegovina, in the area of judiciary there is no responsibility of the institutions of Bosnia and Herzegovina for enactment of criminal law legislation".
- Second, that "the responsibility of the institutions of Bosnia and Herzegovina in criminal law matters is restricted to the responsibility prescribed in Article III/1.g) of the Constitution of Bosnia and Herzegovina".
- Third, that one is unable "to establish the existence of the constitutional ground for enactment of such legislation" and that it is about "a transfer of responsibility from entities to Bosnia and Herzegovina".
- Fourth, that "by following the provision of Article III of the Constitution of Bosnia and Herzegovina, Article IV/4.a) defines in the area of legislative power the mandate for the Parliamentary Assembly".
- Finally, that the provision is unconstitutional "from the point of view of the rule of law principle guaranteed and reaffirmed by Article I/2. of the Constitution of Bosnia and Herzegovina".

3. The applicant thus requests that the Constitutional Court "*should establish a violation of the Constitution of Bosnia and Herzegovina caused as a result of enactment of the contested provision and it should therefore repeal the challenged provision.*"

4. On the 2nd of February 2009, the Constitutional Court invited the Office of the High Representative to submit its opinion in writing with regard to the allegations contained in the request, having in mind that the law in question was initially enacted by the High Representative for Bosnia and Herzegovina.

5. The Office of the High Representative (OHR) is submitting these written observations in order to assist the Constitutional Court in deciding in the case at hand. The allegations of the applicant are addressed in turn.

II. Facts

6. The statutory provision that is subject to the present challenge is paragraph (2) of Article 13 of the Law on Court. The provisions of paragraph (2) of Article 13 were initially enacted by the Decision of the High Representative **Enacting the Law re-amending the Law on Court of Bosnia and Herzegovina** of 24th January 2003 (Official Gazette of Bosnia and Herzegovina, No. 3/03). The Law **re-amending the Law on Court of Bosnia and Herzegovina** was subsequently adopted by the Parliamentary Assembly of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 42/03).

7. The aforementioned Law was enacted as a part of the reinvigorated strategy for judicial reform to strengthen the Rule of Law in Bosnia and Herzegovina, which was endorsed by the Steering Board of the Peace Implementation Council on 28 February 2002. This strategy was devised in response to calls by the authorities in

Bosnia and Herzegovina for firmer International Community actions to tackle economic crime, corruption and problems inherent in the judicial system, while bearing in mind that criminal activities continued to infringe on the economic, fiscal, commercial and other social rights and interests of the citizens of Bosnia and Herzegovina and that the establishment of a Special Panel for Organised Crime, Economic Crime and Corruption within the Court of BiH would advance the fight against crime.

Six years have elapsed and it remains of vital importance for Bosnia and Herzegovina to ensure that the rule of law is strengthened and adhered to.

III. As to Contentions of the Request for Review of Constitutionality

A. General Claim

8. The Constitution of Bosnia and Herzegovina (the Constitution) assigns certain areas of competence to the institutions of Bosnia and Herzegovina. The competence of the Entities in criminal law, as in other areas, is thus not disputed, but is limited by the competences of the State, as provided for in the Constitution.

9. The function of criminal law in a given legal order is to protect certain values that are, at a particular moment of time and at a particular stage of development of the society, considered important enough to warrant the most severe action the state may take against individual freedoms, as the protection of those values could not be realised without criminal justice compulsion.

Criminal justice compulsion is thus an additional and auxiliary mean to protect these core values. In a democratic state based on the rule of law, this protection is not so much an expression of the powers of the state as it is indeed a duty of the state.

Whenever certain responsibilities are assigned to the institutions of Bosnia and Herzegovina, those institutions are obliged to use available mechanisms to ensure that those responsibilities are carried out, and carried out in a proper manner. If the institutions of Bosnia and Herzegovina fail to establish those mechanisms in respect to certain rules of behaviour, they fail in the exercise of their responsibilities.

As a result, Bosnia and Herzegovina must meet its obligation to protect the core values protected by the Constitution and thus provide effective protection to its citizens and all persons on its territory.

We respectfully submit in that respect that the Constitutional Court has been continuously pointing to Article I/2 of the Constitution that defines Bosnia and Herzegovina as a democratic state, which shall operate under the rule of law.

B. "Under Article III of the Constitution of Bosnia and Herzegovina, in the area of judiciary there is no responsibility of the institutions of Bosnia and Herzegovina for enactment of criminal law legislation"

10. We note that the Constitutional Court has already answered the first argument made by the applicant in its prior Decision proclaiming the Law on Court of Bosnia and Herzegovina to be in accordance with the Constitution.^[1]

C. "There is no constitutional responsibility of the institutions of Bosnia and Herzegovina for enactment of legislation in the field of criminal law"

11. Under the Constitution, the responsibilities of the institutions of Bosnia and Herzegovina are provided for in, *inter alia*, Article III/1 (*Responsibilities of the Institutions of Bosnia and Herzegovina*) and III/5. (*Additional Responsibilities*).

The competence of the institutions of Bosnia and Herzegovina under III/1.(g) is one of the grounds for jurisdiction of the institutions of Bosnia and Herzegovina in the field of criminal law. It is not the only ground.

When the institutions of Bosnia and Herzegovina have the competence in a particular field, this also includes the competence to regulate in this field and to apply sanctions for violations of such regulation (subsidiarity of criminal law).

However, as the present request for review of constitutionality is limited to Article 13(2) of the Law on Court, these

written observations shall focus on the responsibilities of the institutions of Bosnia and Herzegovina under Article III/1.(g) and III/5. of the Constitution.

12. Article 13(2) of the Law on Court of BiH provides:

“2. The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brcko District of Bosnia and Herzegovina when such criminal offences:

- a. endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;
- b. may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brcko District of Bosnia and Herzegovina.”

This provision forms part of an organisational law further defining the jurisdiction of the institutions of Bosnia and Herzegovina over criminal matters that are essential for the very existence of the Bosnia and Herzegovina as a state and/or have consequences beyond the territory of an Entity or the Brcko District of Bosnia and Herzegovina (hereinafter: the District) and/or could have such detrimental consequences for the Bosnia and Herzegovina as a state that the institutions of Bosnia and Herzegovina must ensure the enforcement of those criminal matters.

13. Article III/5.(a) of the Constitution prescribes:

“(a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.”

Under this provision, Bosnia and Herzegovina is obliged to assume responsibility over matters that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. As a result, the institutions of Bosnia and Herzegovina have to take all necessary measures to cope with such matters including by enacting legislation in certain areas in the field of criminal law.

14. We therefore respectfully submit that the criminal jurisdiction of the Court of Bosnia and Herzegovina under Article 13(2)a) is not based on a tacit “transfer of responsibility from entities to Bosnia and Herzegovina” pursuant to the agreement of the Entities, this being just one of the basis listed under Article III/5.(a) of the Constitution, but rather on the necessity to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. We further endorse the Constitutional Court interpretation of Article III.5.(a) by which the Constitutional Court established that such provisions recognises “three independent hypothesis”[2].

Considering that it is not envisaged under the Constitution that the Entities may assume responsibilities explicitly assigned to the institutions of Bosnia and Herzegovina, including the responsibility to protect the national security of Bosnia and Herzegovina, and that the institutions of Bosnia and Herzegovina have no exclusive competence over criminal law enforcement, the institutions of Bosnia and Herzegovina have, by enacting Article 13(2) of the Law on Court, chosen to rely in part on criminal offences prescribed by the Entities (and the District) while establishing specific rules of jurisdiction that enable an institution established at State level to enforce such criminal offence whenever it falls within the responsibilities of the State as foreseen under Article III/5.(a) of the Constitution.

15. We further note that certain criminal offences that primarily protect other values, such as the economic criminal offences, may by their repercussions have influence on national security, i.e. the sovereignty, territorial integrity, political independence, and international personality and therefore require the institutions of Bosnia and Herzegovina to regulate them[3].

16. Article III/1.(g) of the Constitution reads:

“(g) International and inter-Entity criminal law enforcement, including relations with Interpol.”

The words “law enforcement” are not exclusively associated with the police, but also include the tasks of the prosecutor’s office and of the courts in the field of criminal law[4].

Under this provision the institutions of Bosnia and Herzegovina are also responsible to ensure the enforcement of criminal law when it has an international or inter-Entity character.

Entity legislation applies within the boundaries of that Entity. The legislation of Bosnia and Herzegovina applies to the entire territory of Bosnia and Herzegovina, including both Entities and the District. Were it not for the jurisdiction of the Court of Bosnia and Herzegovina in international and inter-Entity criminal law enforcement, there would be a legal gap, as the Constitution does not envisage that the responsibilities of the institutions of Bosnia and Herzegovina may be assumed by the Entities.

We submit that the responsibility of the institutions of Bosnia and Herzegovina over international and inter-entity criminal law enforcement is two-fold: on the one hand, Bosnia and Herzegovina must ensure enforcement of criminal compulsion regarding certain criminal offences that are, by their very nature, international or inter-entity. This would certainly apply to the offence of smuggling of goods. On the other hand, any offence that is provided by law of the Entities or the District could, whenever it produces consequences beyond the territory of an Entity or Bosnia and Herzegovina, fall within the responsibilities of the institutions of Bosnia and Herzegovina. As such, Article III/1.(g) creates a jurisdiction for the institutions of Bosnia and Herzegovina over certain criminal offences that co-exists with the jurisdiction of the Entities and the District over those offences.

Therefore, by enacting the challenged provision, the institutions of Bosnia and Herzegovina further defined their jurisdiction over inter-entity law enforcement matters by providing for the type of consequence criminal offences prescribed by an Entity or a law of the District must produce for this offence to fall within the jurisdiction of the Court of Bosnia and Herzegovina: the Court of Bosnia and Herzegovina has jurisdiction whenever serious repercussions or detrimental consequences, economic or otherwise, are either caused to Bosnia and Herzegovina or go beyond the territory of one Entity (or the District).

17. The existence of those particular consequences (serious repercussions or detrimental consequences) is a factual question and may only be established by the Court of Bosnia and Herzegovina itself on a case-by-case basis. Therefore we argue that no violation of the Constitution of Bosnia and Herzegovina stem from the enactment of the provision, even though such violation could occur in a particular case.

We observe that the application that is made of this provision in a certain case may be subject to review by the Constitutional Court, acting under, *inter alia*, Article VI/3.(c) of the Constitution. Whether the Court of Bosnia and Herzegovina has overstepped its jurisdiction so as to interpret Article 13(2) of the Law on Court in a way that place this provision at variance with the Constitution may therefore be established by the Constitutional Court after the Court of Bosnia and Herzegovina has finally decided on its jurisdiction by rendering a final and binding verdict in a particular case.

C. “By following the provision of Article III of the Constitution of Bosnia and Herzegovina, Article IV/4.a) defines in the area of legislative power the mandate for the Parliamentary Assembly”

18. The Applicant is correct when he contends that Article IV/4.(a) of the Constitution defines the Parliamentary Assembly as the legislative body of Bosnia and Herzegovina. As such, all issues falling within the responsibility of the State that require regulation by a law, as opposed to by-laws or decrees, may be regulated by the Parliamentary Assembly only.

However, Article IV/4.(a) does not “follow the provision of Article III of the Constitution of BiH”, but applies to all the provisions of the Constitution that constitute a basis for the State to enact legislation.

We note that the Constitutional Court has already decided on this question, amongst others in its Decision on the Law on Court.[5]

19. As shown above, Article 13(2) of the Law on Court is not based on transfer of responsibility from the Entities to the institutions of Bosnia and Herzegovina, but is enacted within the State constitutional competency under *inter alia* Article III/5. and Article III/1.(g) of the Constitution.

D. “The provision is unconstitutional from the point of view of the rule of law principle guaranteed and reaffirmed

by Article I/2. of the Constitution of Bosnia and Herzegovina”

20. As to the submission of the applicant that the contested provision is unconstitutional under the rule of law principle guaranteed and reaffirmed by Article I/2. of the Constitution, we note that it is precisely due to the fact that Bosnia and Herzegovina, according to its Constitution, operates under the rule of law that impunity for endangering the highest social values of the State needs to be avoided. Were it not for the jurisdiction of the Court of Bosnia and Herzegovina under Article 13(2) of the Law on Court, the State would not have any venue to guarantee the enforcement of criminal law in the situations envisaged under Articles III/1.(g) and III/5.(a) of the Constitution.

The main element underlying the notion of rule of law, and indeed one of the most important, is the need to ensure that nobody is above the law.

It is doubtful whether this principle could even in theory be met by entrusting bodies of the Entities with the prosecution of offences that meet the conditions provided for under Article 13(2) of the Law on Court.

It belongs to the institutions of Bosnia and Herzegovina to ensure that cases with have the consequences referred to in Article 13(2) reach a court and are processed before a court in accordance with the law.

It is precisely because they affect the State that the offences that meet the conditions provided for in Article 13(2) need to be prosecuted at the level of Bosnia and Herzegovina. By failing to entrust an institution at State level with the prosecution of offences that are detrimental to the Bosnia and Herzegovina as a state, the institutions of Bosnia and Herzegovina would essentially fail their responsibilities and would leave to institutions that represent only a portion of the territory and population of the State to appreciate what is and what is not detrimental to the overall domestic and international interests of the State. The rule of law is about assurances that the State has adequate mechanisms and applies them in order to ensure compliance with its norms, either by prevention or by employing its criminal justice system to ensure the sanction.

IV. Conclusion

21. For the reasons described above, the Office of the High Representative believes that Article 13(2) of the Law on Court is in conformity with the Constitution and that the enactment of such provision corresponds to a constitutional obligation for the institutions of Bosnia and Herzegovina to exercise their responsibilities under, *inter alia*, Articles III/1.(g) and III/5.(a) of the Constitution.

Notes:

[1] Case U-26/01, “Official Gazette of Bosnia and Herzegovina”, No. 4/02.

[2] Case U-9/00, “Official Gazette of Bosnia and Herzegovina”, No. 1/01 and case U-26/01, “Official Gazette of Bosnia and Herzegovina”, No. 4/02. In the Case U-26/01 the Constitutional Court stated:

“21. According to Article III.5 (a) of the Constitution of Bosnia and Herzegovina (“Additional Responsibilities”), the Constitutional Court refers to the decision in the Case No. *U 9/00* (published in the Official Gazette of Bosnia and Herzegovina No. 1/01 of 19 January 2001). In this decision the Constitutional Court expressed its opinion that the aforementioned Article distinguishes three independent hypothesis: Bosnia and Herzegovina shall assume responsibility for (1) such other matters as are agreed by the Entities; (2) matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) matters that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to Articles III.3 and III.5 of the Constitution of Bosnia and Herzegovina. The Constitutional Court also expressed its opinion that, in this context, only Article IV.4 (a) which provides that the Parliamentary Assembly shall enact legislations as necessary to implement decisions of the Presidency (or for the implementing of the responsibilities of the Assembly as per this Constitution) needs to be considered. In addition, the Constitutional Court stated that this Article does not require the consent of the Entities.”

[3] See Horvatić, Željko (ur.), *Rječnik kaznenog prava, "nacionalna sigurnost"*, Masmedia, Zagreb, 2002.

[4] These observations are based on the Official text in English language of Article III/1.(g) of Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, as signed at Dayton. The Office of the High Representative regrets that the authorities of Bosnia and Herzegovina have never implemented the Agreement for the Establishment of the Bosnian, Croatian and Serbian Language Texts of the Annexes to the General Framework Agreement signed in Paris on 14 December 1995. The text of this Agreement can be found at http://www.usip.org/library/pa/bosnia/pa_bosnia.html. Translation of this provision has led to misunderstanding in the past: by way of illustration, see Preliminary Opinion of the Venice Commission on the Draft Amendments to the Constitution of Bosnia and Herzegovina of 7 April 2006, Paragraph 12, Item (b) available at [http://www.venice.coe.int/docs/2006/CDL\(2006\)027-e.asp](http://www.venice.coe.int/docs/2006/CDL(2006)027-e.asp): "The present sub-section (g) *"International and Inter-Entity criminal law enforcement, including relations with Interpol"* becomes sub-section (h) with a different text **"Implementation of international and inter-Entity criminal law enforcement regulations, including relations with Interpol"**. This new wording is much narrower and therefore seems at variance with the overall aim of the constitutional reform of granting more powers to the State level. It seems to take away from the State level the power to regulate, leaving to it only the power to implement. This is contrary to usual practice in federal states where often entities implement State law but not vice versa. It also risks undermining the current constitutional basis for existing State level legislation in the criminal law field and on the State Investigation and Protection Agency. The Commission therefore urges to reconsider this rephrasing."

[5] Case U-26/01:

"18. This question should be examined, first of all, in the context of Article I.2 of the Constitution of Bosnia and Herzegovina, which reads: "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections." Based on this fundamental principle of democracy, but also on its internal structure established pursuant to item 3 of the same Article, the Constitution of Bosnia and Herzegovina gives to Bosnia and Herzegovina responsibilities and jurisdiction in order to ensure its sovereignty, territorial integrity, political independence and international personality (see, *inter alia*, Articles I.1, II.7, III.1 (a), III.5 (a), V.3 (a)), the highest level of internationally recognized human rights and fundamental freedoms (see, *inter alia*, Article II.1 of the Constitution of Bosnia and Herzegovina, cf. Annexes 5-8 of the General Framework Agreement for Peace) and free and democratic elections (see Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina).

...

22. Furthermore, the Constitutional Court expressed the following opinion in the Second Partial Decision in the Case No. U 5/98: "The Constitution of Bosnia and Herzegovina creates powers not only within this general system of distribution of powers in Article III. In creating institutions of the State of Bosnia and Herzegovina, the Constitution also confers upon them more or less specific powers, as can be seen from Article IV.4 as regards the Parliamentary Assembly and Article V.3 as regards the Bosnia and Herzegovina Presidency, which are not necessarily repeated in the enumeration in Article III.1 The Presidency of Bosnia and Herzegovina, for instance, is vested with the power of civilian command over Armed Forces in Article V.5 (a), although Article III.1 does not explicitly refer to military affairs as being within the responsibility of the institutions of Bosnia and Herzegovina. It must then be concluded that matters which are not expressly enumerated in Article III.1 are not necessarily under exclusive competence of the Entities in the same way as the Entities might have residual powers with regard to the responsibilities of the institutions of Bosnia and Herzegovina."