Supplemental Brief submitted by the High Representative concerning the request of the applicant in Case No. U-30/22

Introduction

1. On 08 November, my Office (OHR) received the letter signed by the Registrar of the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court) by which we were asked, as the author of the challenged acts, to provide written observations concerning the request No. U-30/22 within the period of 15 days following the receipt of this letter.The proceedings in the case No. U-30/22 relate to the request submitted by the Chairman of the Presidency of BiH, Mr. Šefik Džaferović (hereinafter: the Applicant) at the time of filing of his request, for the review of constitutionality of **Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/ 04, 71/05, 72/05, 32/07, 88/08, 79/22 and 80/22) enacted by my Decision No. 6/22 of 2 October 2022 and the **Law on Amendments to the Election Law of Bosnia and Herzegovina** (Official Gazette of Bosnia and Herzegovina, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04 , 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7114, 31/16 , 41/20, 38/22, 51/22 and 67/22), enacted by my Decision No. 07/22 of 2 October 2022. I was invited to submit a response to the allegations made in the said request.

2. The High Representative (HR) appears in this case neither in the position of a conventional party before the Court, nor as a respondent institution in the sense of the Court's Rules, but rather submits these written observations in the posture of *amicus curiae*.

3. In accordance with the Decision of the Constitutional Court in Case No. U 9/00 of 3 November 2000 and the theory of functional duality developed therein, the High Representatives have consistently endorsed the power of the Constitutional Court to review legal acts enacted in an exercise of their *substitution powers*. I therefore do not object to the review by the Constitutional Court of challenged Amendments to the Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 79/22 and 80/22) and of the Law on Amendments to the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 67/22). All observations are provided to the Court without prejudice to the above-mentioned theory of functional duality developed by the Court in its Decision U-09/00. Under that theory the Court can exercise review of constitutionality of the legislation enacted by the High Representative, but only as to its content. By contrast, the Court shall not examine whether the High Representative was justified in enacting legislation in place of domestic authorities.

4. As consistently stated in the case law of the Constitutional Court, the powers of the High Representative arise from Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the relevant resolutions of the UN Security Council and the Bonn Declaration. Neither the powers nor the exercise of those powers is subject to review by the Constitutional Court. The arguments put forward by the Applicant in respect to the timing and predictability of my Decisions of October 2, if followed by the Court, could seriously hamper the discretion of the High Representative to use these powers, by allowing a review of their use in a particular situation. The powers of the High Representative such as those exercised on 2 October, are by essence "last resort" crisis management powers which purport to solve serious problems arising in the implementation of the civilian aspects of the peace agreement. It is their nature as last resort tools that underlies the consistent jurisprudence of the Court that recognizes the inadmissibility of their review. Accordingly, it must belong to the High Representative's discretion to determine whether the condition for the use of these powers, including the exhaustion of the possibility of settlement by BiH authorities, are met.[1]

5. In sum, as norms incorporated into the legal order of BiH, the content of acts adopted by the High Representative are subject to judicial review in a similar way as acts adopted by the legislative bodies. However, the Constitutional Court cannot address the scope of the High Representative's international mandate, which represents the exercise of lawfully delegated UNSC Chapter VII powers, and cannot examine whether the High Representative properly or timely exercised his discretion in enacting "remedial" legislation on 2 October after closure of polling stations in place of domestic authorities.[2] As I have explained in my brief submitted to the Court on 4 November 2022 concerning the request No. U-27/22 submitted by Mr. Komšic, it was my prerogative to opt for the best moment to issue those Decisions. I have done so trying to strike an appropriate balance between

the need not to disturb the electoral campaign and the need to use my powers as a last resort tool to solve difficulties arising under the GFAP. As such, I sought to adjust my intervention and make it proportionate to the aim pursued, i.e. enabling the establishment of new indirectly elected authorities in the Federation, including the election of delegates to the House of Peoples of BiH, in order to promote democracy and advance the reform agenda needed for EU integration[3]. I had to consider ongoing discussions on BiH candidacy status and likelihood that this issue would be discussed and decided in December.

6. This brief must be read in conjunction with my brief concerning the request No. U-27/22 and in particular Section 4, part I and IV thereof which addresses questions directly linked to the present request submitted by the Presiding Member of the Presidency of BiH, Mr. Džaferović (hereinafter: the Applicant). For this reason, it is not necessary to restate the rationale behind my decisions which is equally relevant in clarifying certain issues addressed in the request of the second Applicant. I refer to Section II of my brief of 4 November in that respect.

7. The Applicant argues that the above-mentioned amendments enacted by my Decisions Nos. 6/22 and 7/22 violate the principle enunciated in Article I(2) of the Constitution of BiH by encroaching on the principles of legal certainty in the election process in BiH and, in particular, the principle of legitimate expectations. In this brief I will develop the following counter-arguments:

> a) The amendments enacted by virtue of Decisions of the High Representative on October 2 neither modify the system of elections nor relate to direct elections. Indirect elections must be clearly distinguished from direct elections. As such, the Decisions do not affect the principle of legal certainty in the election process;
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> b) Changes to the rules regulating the indirect elections that were made shortly before or even after the holding of elections have been common practice. This illustrates further that indirect elections must be considered as being essentially different from direct elections.

8. These arguments will be addressed in turn.

Additional Arguments

I. Legitimate expectations, political party lists and change to the electoral system

9. As explained in my brief submitted to the Court on 4 November[4], the allegation that the electoral system was affected by my Decisions lacks any basis in fact and law. The Decisions of October 2 do not affect the direct elections. They do not even change the principles governing the election of delegates to the Federation House of Peoples and the election of the President and Vice-President of the Federation. I acted with the sole purpose to ensure that those election procedures cannot be blocked and can therefore serve the orderly functioning of constitutional bodies, including the Upper Chamber of the Federation (and by extension of the State of BiH) and the Federation executive.

10. Insofar as this issue has been raised by both the Applicants in their requests No. U-27/22 and No. U-30/22, I can only emphasize and amplify the crucial aspects already addressed in my previous submission.

11. All the principles that have been consistently applied to the election of delegates to the House of Peoples of the Federation since the establishment of the House of Peoples of the Federation in 1994 remain fully applicable following my intervention. The brief that the OHR provided concerning the request No. U-4/18 lists these five principles (para 19):

> “Article IV.2.6 and IV.2.8 of the Constitution of the Federation regulate the composition and election to the Federation House of Peoples and establish five principles in that respect:
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> a) Members of the Federation House of Peoples are elected by the Cantonal Assemblies from among their members;
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> b) The Federation House of Peoples is composed on a parity basis;
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> c) The number of delegates to be elected by a canton is proportional to its population;
>
> d) The delegates elected by each constituent people in a canton reflects the ethnic structure in that canton;

e) At least one representative of each constituent people is elected from each canton having such representatives in its legislative body."[5]

12. These principles have not been affected by my Decisions which adopt corrective measures that respond to demands formulated by the Constitutional Court and make the following principles operational:

a) The first principle included under item a. to ensure that all seats in all caucuses or in the group of Others can be filled, thereby correcting an issue identified by the Constitutional Court of BiH in case No. U-17/16 of 19 January 2017. In that Decision the Court held:

"It is therefore necessary for the legislative authority to finally find an adequate mechanism which would make it possible for the House of Peoples of the Parliament of the FBiH to be formed in full composition in order to prevent future situations in which a Caucus in the House of Peoples of the Parliament of the FBiH would not be formed in full composition following the elections, as prescribed by the Constitution of the Federation of Bosnia and Herzegovina."

b) The second principle included under item b. to ensure greater proportionality in the assignment of seats to cantons and constituent peoples as foreseen by the third and fourth principles (c. and d.) and correcting an issue identified by the Constitutional Court of BiH in case No. U-23/14. I recall, in that respect, that this decision specifically addressed the possibility to increase the number of delegates by stating:

"Whether a greater number of delegates would enable better, i.e. more credible representation of constituent peoples and Others is the issue falling within the scope of competence of certain legislative authorities who enjoy a "wide margin of appreciation", and, thus, is not the issue of constitutionality so that it does not fall within the scope of jurisdiction of the Constitutional Court."

13. In the same manner, the provisions of the Election Law of BiH that are operationalising these five principles by enabling proportional distribution of mandates to cantons and constituent peoples have not been affected by my Decisions. In particular, the part of Article 10.12 of the Law that provides for the application of the Ste Lagüe/Webster proportional representation formula to the division of seats between cantons and constituent peoples is the same as the one included in the Law on Amendments to the Election Law by the Parliamentary Assembly of BiH in July 2002 (Official Gazette of Bosnia and Herzegovina, No. 20/02). The same holds true for Article 10.16 which regulates the possible redistribution of mandates that could not be filled from the cantonal assembly in one or more cantons.

14. The Applicant alleges, quoting an article published on the klix.ba portal which in turn quotes the President of the Central Election Commission of BiH (hereinafter: CEC), that the lists of candidates submitted by political parties on the 4 July 2022 would have been different if the rules would have been known on that date. However, the possibility to include on political parties' lists candidates from different constituent peoples or from the group of Others – and the political incentive to do so – already existed under the rules in place in July 2022. These rules were favouring those parties or group of parties that could gain control over a fraction of the seats in each constituent people's caucus.

15. The system of indirect elections developed since the Washington Agreement gives a substantial advantage to political parties that are able to either influence the composition of the respective constituent people's caucuses in the Federation House of Peoples or to conclude agreements between parties that control those respective caucuses. This fact has remained unaffected by the changes introduced in 2002 or 2022. The number of delegates to be appointed in each constituent people's caucus, be it 30 delegates, 17 delegates or 23 delegates is of little relevance. The underlying principle is that representation in each constituent people's caucus by one political party or an alliance between political parties represented in each caucus in the Federation House of Peoples is a crucial element of the nomination of candidates for the positions of President and Vice-Presidents whereas their election requires confirmation of the requisite majority in the Federation House of Representatives whose members are elected by citizens of the Federation through direct elections.

16. This approach is fully in line with the conclusions of the Constitutional Court which has repeatedly called political parties to abide by the principles of the Decision on Constituent Peoples No. U-5/98.[6] In that respect, the very fact that the party of the Applicant has in the past only seriously competed for representation in one of the caucuses of constituent peoples and relied on post-election alliances to form a government must be underscored.

17. The application wrongly claims that the composition of election lists for the elections to the cantonal assemblies would have changed the outcome of the elections to the Federation House of Peoples or even the election of the President and Vice-President of the Federation. This affirmation grossly distorts the reality of the system in place under the Election Law.

18. As mentioned in my submission to the Court in respect to request No. U-27/22, the rules in the Constitution of the Federation and in the Election Law of BiH distinguish between elections for Cantonal Legislatures and elections for the Federation House of Peoples. The ethnic declaration of the candidates annexed to the candidacy lists certified for the elections to the cantonal legislatures is not mentioned on the printed ballots and is therefore not formally known to the voters. When the voters cast their vote, they are doing so with a view to have their candidate elected to the cantonal assembly. It is only when the elections to the cantonal assemblies are certified that caucuses of constituent peoples are formed on the basis of those declarations and that parties establish their lists to compete in the vote that takes place in each caucus of each assembly. When casting their votes for a candidate for a cantonal assembly, the voter is unaware of the way the caucus will be composed, how parties will seek alliances or how other members of the constituent people caucus will vote. In fact, the candidates that fare best in the direct vote could very well be set aside by a political party and not be candidates for election to the House of Peoples of the Federation, which shows that the number of votes received by candidates in direct elections has no impact on the outcome of the elections of delegates to the Federation House of Peoples. It is difficult to see how the High Representative's Decision could have confused the voters as to the predictability of these elections.

19. At the time this brief is being written, political parties continue their consultations to seek the best possible outcome in the election of the delegates to the Federation House of Peoples. The outcome of such process cannot be predicted as the political parties present in the constituent people's caucuses of the cantonal assemblies adapt their strategy to the alliances they can conclude and to their relative strength in these caucuses. Political parties can even decide to split their votes between different lists if they see an advantage in this strategy. All these options are inherent in the system of indirect election and reflect a practice which has been observed in the process of implementation of election ever since 1996.

20. The same line of reasoning applies to the election of the President and Vice-Presidents of the Federation. Here again, the constitutional principles that govern these elections remain untouched: nomination within the caucuses of the House of Peoples, election by the Parliament of the Federation, first by the House of Representative and then by the House of Peoples, and election of the Federation government by the sole House of Representative. On that issue, I refer to the arguments provided in my brief sent to the Court in response to arguments made in the request No. U-27/22 at paragraphs 86 to 90.

21. The Applicant further alleges that, beyond their unpredictability, the rules enacted by my decisions of 2 October were vague and imprecise, determining that the method of distribution is not clearly prescribed. The Court will observe that after the Applicant submitted his request to the Court, the CEC adopted a new instruction which implements legal regulations in respect to elections of delegates to the House of Peoples of the Federation. They did so by applying the same method as the one applied in 2018 with two exceptions:

a) Instead of distributing 17 mandates for constituent peoples, they distributed 23; and instead of distributing 7 mandates for members of Others, they distributed 11.

b) When distributing these seats in accordance with a clear formula[7], the legal uncertainty that was caused by the need to reconcile conflicting provisions in the Federation Constitution and the Election Law in respect to the census to be applied and the minimum representation of constituent peoples in each canton has been removed.

II. Legal predictability: past practice concerning election to the House of Peoples and to the positions of President and Vice Presidents.

22. For the reasons set out above, my enactments of 2 October fully respect the principle of stability of the law or the principle of legitimate expectation. The system underlying the indirect election of the delegates to the House of Peoples of the Federation and of the President and Vice-President of the Federation have not been altered by his Decisions. In addition, the Court will be aware that other adjustments to the rules concerning these indirect elections, which are more substantial and far-reaching than my Decisions, have been made by different bodies – national and international. Those adjustments were made shortly before or after the holding of elections,

sometimes even after the announcement of the results, but always long after the certification of candidates lists by the election commission. This past practice inevitably corroborates the view that indirect elections, even if they are the extension of direct election, must be considered as a different process regulated by its own specific principles and rules.

23. In 2018, following the general elections, the CEC had to respond to certain inconsistencies in the legal framework related to elections to the Federation House of Peoples. It did so by adopting an instruction which applied Article 10.12 of the Election Law of BiH[8] which distributed mandates to cantons and constituent peoples and seeks to overcome the legal discrepancies between the Federation Constitution and the Election Law of BiH on the issues of applicable census and minimum cantonal representation of constituent peoples. This instruction was adopted in December 2018[9], i.e. more than one and a half month after the final certification of the results. In practice, this means that political parties could not have anticipated what rule would apply when submitting their candidates lists. Said instruction of the CEC was subject to a number of challenges, including before the Constitutional Court. In both Decisions[10], the Court held that

> "(…) taking into account the content of the request in the case at hand and Article 31 of the Rules of the Constitutional Court, the Constitutional Court does not find any reason why the impugned implementing act of the CEC would raise an issue of violation of human rights and fundamental freedoms."

24. In 2002, amendments to the Election Law of BiH were adopted by the Parliamentary Assembly of BiH to implement the provisions of the FBiH Constitution as set forth in Amendment XXXIII and XXXIV to the FBiH Constitution. Such amendments to the Election Law introduced new rules concerning the election of delegates to the House of Peoples of the Federation and were adopted by the Parliamentary Assembly of BiH in July 2002 (Official Gazette of Bosnia and Herzegovina, No. 20/02) and published on 3 August Both the adoption by the Parliamentary Assembly of BiH and the entry into force of these amendments occurred long after the list of candidates were certified by the CEC.

25. The same holds true for the practice of the Provisional Election Commission (PEC) that organized elections under the aegis of the Organization for the Security and Cooperation in Europe (OSCE BiH). In 2000, one month before the holding of the general elections in November, but well after the certification of the candidates lists, the Provisional Election Commission adopted new rules concerning the election of delegates to the House of Peoples of the Federation that were unsuccessfully challenged before the Constitutional Court.[11] I note that the PEC was bound, under Annex 3 to the GFAP, to comply fully with paragraphs 7 and 8 of the OSCE Copenhagen Document.[12]

26. There are two other examples of changes made to rules regulating indirect elections immediately after the elections took place. One can be found in Decision 41/02 that was enacted on 6 October 2002 and provided changes to rules on appointment of executive authorities at cantonal level. The other example was the amendments made to the Sarajevo Statute following Decision of the Constitutional Court in case No. U-4/05 in which the Court established that Article 21 of the Statute of the City of Sarajevo violated Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination and ordered the City Council of the City of Sarajevo to amend its Statute and municipal bodies to repeat elections of councillors in accordance with the Constitution of BiH.

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27. All the above-mentioned facts evidence that, for all intent and purpose, the rules applicable to indirect elections have been considered distinct from the rules regulating direct elections. Unlike regulations concerning the system applicable to the direct elections which fall within the scope of the principle of stability of law, these rules have been subject to changes shortly before or even after the holding of elections. I have explained in my brief concerning the request No. U-27/22 that the standards applicable to direct elections do not apply to the processes covered by my Decisions of 2 October.

28. To the extent that a certain level uncertainty is attached to the elections to the Federation House of Peoples and the election of the President and Vice-President of the Federation, this uncertainty is inherent to the system as it has been in place since 1994 and continues to operate. As explained in my brief concerning the request No. U-27/22, a more thorough reform of those processes will need to be undertaken within the domestic institutions which have the primary responsibility to assume this complex task.

29. Far from encroaching on the principle of legal certainty, my decisions have removed two levels of uncertainty that have been marring indirect elections in past decades:

(1) By removing many possibilities to block the process, they have significantly increased the chances that the Federation will have a government established following the 2022 general elections;

(2) By removing inconsistencies in legislation, in particular the contradictory provisions in the Federation Constitution and the Election Law of BiH that followed the decision of the Constitutional Court on non-compliance by which disputed provisions of the Election Law were repealed[13], they have enhanced legal certainty and removed the most serious source of unpredictability affecting indirect elections.

30. By removing the legal uncertainty attached to the impossibility to implement the pre-existing rules and by eliminating the obvious contradiction between legislation applying to indirect elections, the Decisions enacted on 2 October are fully in line with the principles of democracy embedded in Article I(2) of the Constitution of BiH. They also reinforce the democratic underpinnings of political system of BiH. These decisions protect "the election process in order to ensure free and democratic direct election in accordance with Article I(2) of the Constitution of Bosnia and Herzegovina".[14]

Notes:

[1] See, for instance, Constitutional Court Decisions No. U-9/09 of 26 November 2010, No. U-9/00 of 3 November 2000, No. U-16/00 of 2 February 2001, No. U 25/00 of 23 March 2001.

[2] See ECtHR, Decision as to the Admissibility of Application nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 by Dušan Berić and Others against Bosnia and Herzegovina.

[3] See Report on Bosnia and Herzegovina issued by the European Commission available at: https://neighbourhood-enlargement.ec.europa.eu/bosnia-and-herzegovina-report-2022_en

[4] See Paragraphs 81 and sq.

[5] See Amicus Brief provided by the Office of the High Representative in request No. U-4/18 at paragraph 21.

[6] Decisions in Case No. U-17/16 of 19 January 2017; Case No. U-5/05 of 27 January 2006; or Case No. U-4/05 of 22 April 2005.

[7] The same formula that is applied to the distribution of mandates to political parties competing in direct election and which can therefore not be considered as unclear to any professional.

[8] For a broad historical overview of this issue, see Section I of the High Representative submission in response to the request No. U-27/22 and in particular paragraphs 16-20.

[9] See paragraphs 18 and 19 of the Brief submitted by the High Representative concerning the request of the applicant in Case No. U 27/22.

[10] Decision in Case No. U-3/19 of 28 March 2019 and Decision in Case No. U 24/18 of 31 January 2019.

[11] PEC Rules and Regulations ("Official Gazette of BiH" nos 18/00, 20/00 and 21/00) were amended at its 284th session held on 11 October, when PEC adopted Article 119 and supplemented chapters 1100 and 1200 of its Rules and Regulations. Amendments to the PEC Rules and Regulations were published at the ("Official Gazette of BiH" No. 27/00) of 27 October 2000.

[12] https://www.osce.org/files/f/documents/9/c/14304.pdf

[13] See Paragraph 16 to 19 of the Brief submitted by the High Representative concerning the request of the applicant in Case No. U 27/22.

[14] Constitutional Court of BiH, Case U-1/19 at paragraph 11.