

Brief submitted on behalf of the High Representative concerning the request of the applicant in Case No. U 9/2000

TO THE JUDGES OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

In response to the letter of 10 April 2000 from Prof. Dr. Kasim Begić, President of the Constitutional Court, to His Excellency Wolfgang Petritsch, High Representative, with regard to case number U 9/2000, I have the honor to address the Court on behalf of the High Representative in connection with this matter.

Preliminary Observations

The High Representative welcomes and is pleased to respond to the invitation of the Court to offer suggestions concerning this case. The President's letter of 10 April does not specify the basis under the Court's Rules of Procedure upon which the invitation was issued; therefore, as a preliminary matter, the High Representative presumes it to have been issued under Article 71.[1] Accordingly, the High Representative does not appear in this case in the position of a conventional party before the Court, nor as a respondent institution in the sense of Article 16 of the Court's Rules,[2] but rather proffers these suggestions in the more detached posture of *amicus curiae*.

The essence of the suggestions which follow is that, as matters both of law and policy, the Dayton treaty, of which the Constitution is a part, establishes different spheres of activity as between the Court and the High Representative, such that each should respect the authority and independence of the other. The High Representative has frequently and strongly affirmed the overriding importance of the Court as the supreme judicial body under the Constitution of Bosnia and Herzegovina competent to decide issues arising under the Constitution, and has consistently given the highest policy priority to strengthening the Court and to advancement of its judicial independence.

Statement of the Case

On 7 February 2000, eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina lodged with the Court a petition challenging the legality of an act of the High Representative. The challenged act was the imposition by the High Representative, by means of a written decision on 13 January 2000, of a measure entitled "Law on State Border Service". The decision was published in due course in the Official Gazette of Bosnia and Herzegovina, O.G. 2/2000 (26 January 2000). Petitioners allege, first, that the High Representative does not possess the competence to adopt legal regulations, and, second, that the imposed measure, which establishes a State Border Service, would itself not be within the legislative competence of the State.

Issues Presented

- I. *Whether the Court has jurisdiction to decide this case under Article VI.3.(a) of the Constitution of Bosnia and Herzegovina.*
- II. *Whether the Court has jurisdiction on any basis to decide whether an act of the High Representative is or is not in conformance with his mandate.*
- III. *Whether the substance of a measure imposed by the High Representative can be reviewed by the Court as though it had been adopted by the institutions of the State or the Entities.*
- IV. *Whether the State is competent under the Constitution to regulate the control of its own international borders.*

Discussion

- I. *The Court's jurisdiction has been improperly invoked by the Petitioners under Article VI.3.(a) of the BiH Constitution.*

The petition was lodged under Article VI.3.(a), a provision conferring exclusive jurisdiction upon the Court with respect to disputes arising under the Constitution among the State, the Entities, or the institutions of the State. An

act of the High Representative is not an act of the State or any of its institutions, nor is it the act of an Entity. Indeed, because the High Representative is established by Annex 10 of the Dayton treaty, whose provisions are entirely outside the Constitution, the act challenged by Petitioners does not arise under the Constitution at all, and is therefore not within the jurisdiction of the Court under any Constitutional provision.[3]

II. The Court has no jurisdiction to determine whether an act of the High Representative is or is not in conformance with his mandate.

Under the Dayton structure, the mandate of the High Representative arises not from the Constitution, but rather from Annex 10, and, as more fully explained below, is to be interpreted by the High Representative himself, subject only to review and elaboration from time to time by international bodies outside the Constitutional order of Bosnia and Herzegovina and not subject to the Court's jurisdiction.

By the entirely separate provisions of Annexes 4 and 10, Dayton established respectively both the State Constitution, which in turn created this Court and limited its jurisdiction to Constitutional matters, and also the Office of the High Representative. According to Annex 10, all of the tasks of the High Representative are to be carried out "as entrusted by a U.N. Security Council resolution[.]"[4]

Annex 10 thus calls for the appointment of the High Representative,[5] broadly defines his mandate and operational parameters,[6] makes him the final authority in theatre to interpret his own mandate,[7] and places his ultimate supervision in the hands of the U.N. Security Council.[8]

On the one hand, it can easily be seen from the plain meaning of the language of Annex 10, Article V, that the High Representative is the "final authority in theatre" regarding interpretation of Annex 10 itself, that the provision means to exclude from all domestic institutions in Bosnia and Herzegovina, including the courts, any competence to interpret the mandate of the High Representative. It is not necessary in this case to consider the exact boundaries of the "theatre", except to note that it includes all of the territory of Bosnia and Herzegovina.

On the other hand, the Court may take cognizance that elaborate international mechanisms are provided through Annex 10 to supervise and direct civilian implementation of the peace settlement. The U.N. Security Council has, in a long series of resolutions,[9] fully and consistently exercised the responsibility contemplated for it in Annex 10. On the very next day following the signing of the Treaty in Paris, The Security Council adopted a comprehensive resolution which, among its many other provisions, recognized the establishment of the Peace Implementation Council (hereinafter PIC) and the Steering Board,[10] appointed Mr. Carl Bildt as the first High Representative,[11] confirmed that the High Representative is the final authority in theatre regarding the interpretation of Annex 10,[12] and invited periodic reports from the High Representative in accord with Annex 10.[13]

In the ensuing period, the PIC and Steering Board have been very active, elaborating from time to time in written declarations their views and priorities for peace implementation, including commentary on the work of, and guidance to, the High Representative.[14]

The Security Council, through its ongoing series of resolutions, has been correspondingly active, consistently welcoming and endorsing the conclusions of the PIC and Steering Board,[15] requesting further reports from the High Representative,[16] twice appointing successor High Representatives,[17] and repeatedly reaffirming the final authority of the High Representative in theatre regarding the interpretation of Annex 10.[18]

Petitioners in this case, by incomplete references to the Bonn Declaration of the PIC, have invited the Court in section 1 of the Petition to consider whether the High Representative has acted within his mandate in imposing a measure establishing a State-level border service. In light of the foregoing review of Annex 10 and the international mechanisms it entails, the High Representative suggests to the Court that the Dayton treaty has allocated supervision of the High Representative and the elaboration of his mandate not to the courts, nor to any institution of Bosnia and Herzegovina or the Entities, but instead to international authorities, including the U.N. Security Council, the PIC, the Steering Board, and the High Representative himself. As a result, no court in Bosnia and Herzegovina should undertake any analysis of the nature or extent of the High Representative's mandate or his compliance with it; instead, the Court should declare Petitioners' first claim inadmissible.

III. The Court lacks jurisdiction to review the substance of a measure imposed by the High Representative as though it had been adopted by the institutions of the State or the Entities.

In their second claim, Petitioners seek the Court's review of the substance of a measure imposed by the High Representative, as though that measure had been duly adopted by the Parliamentary Assembly. To review the substance of such a measure would exceed the Court's jurisdiction under Article VI.3.(a).

The point of this observation is closely related to that of Section I, above. Article VI.3.(a) of the Constitution, under which this petition is lodged, gives the Court jurisdiction to review only disputes "between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina[.]" If a law were enacted by the Parliamentary Assembly and gave rise to such a dispute, it would be reviewable by the Court in a case properly brought and meeting other jurisdictional requirements, but here that is not the situation.^[19] In this case, an act of the High Representative, not being the act of any institution of the State or the Entities, cannot be a basis for any form of domestic judicial review. Accordingly, Petitioners' second claim is also inadmissible.

IV. Notwithstanding its inadmissibility, Petitioners' second claim is invalid on the merits because the State is competent under the Constitution to regulate the control of its international borders.

Because Petitioners' second claim is inadmissible, any opinion of the Court concerning its merits would amount to an advisory opinion, which courts normally decline to render. Due to the importance of the subject of the State's competence over international borders, however, and in the interest of promoting stability and understanding among the many competing authorities in Bosnia and Herzegovina, the Court may wish in some degree to address the merits of this claim.

The substantive arguments advanced by Petitioners in support of their second claim are, in essence, that the State lacks competence to regulate the control of its own international borders, except to the extent first agreed by the Entities. Petitioners' arguments are based on two Constitutional provisions, both of which they have severely misinterpreted.

The first of these is Article III.2.(c), which requires the Entities to provide a safe and secure environment for all persons in their respective jurisdictions by maintaining civilian law enforcement agencies. Petitioners argue that this provision establishes an exclusive Entity competence over international border control, but its obvious primary intent is related instead to the general safety and security of the domestic population, to be assured by means of traditional law enforcement in the interior of the Entities, and not by means of external border control.

A careful accommodation of Entity law enforcement responsibilities has been included in the Law on State Border Service. Article 2 provides, in part, that "[t]he police in the Entities possess full competency to conduct its duties within the border zone," while Articles 4 and 5 provide for mutual cooperation and assistance between the Border Service and Entity law enforcement agencies. Thus, the Entities' ability to fulfill all of their necessary law enforcement responsibilities throughout their respective territories is not only preserved in this measure, but more likely also enhanced.

The second Constitutional provision on which Petitioners have mistakenly relied^[20] is actually the one which most clearly and directly establishes the State's competence with regard to regulating its international borders. This is Article III.5.(a), which provides, in full:

- 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.

The above provision, which allocates to Bosnia and Herzegovina, and not to the Entities, those competences "necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina," directly invokes the principle of self-preservation of the State. This is one of the general principles of international law recognized by civilized nations,^[21] and which is itself incorporated within the legal system of Bosnia and Herzegovina by virtue of Article III.3.(b) of the Constitution.^[22]

The international borders of any state mark the legal and physical limits of its sovereignty by delimiting the

territory which is under the state's jurisdiction. A state is entitled to protect its territorial sovereignty against unpermitted intrusion, and states have traditionally done so by establishing border police forces to control international borders in peacetime, to prevent the illegal entry of aliens, and to inhibit criminal activity, including organised crime, smuggling and drug trafficking.

The protection of international borders is a key element of territorial integrity, statehood and international personality. The Constitution assigns responsibility for such matters to the State and not the Entities, by laying down this principle of international law in Article III.5.(a), set forth above. It is therefore clear that the State of Bosnia and Herzegovina can establish on its own a police force to control its borders, without the need for any delegation of power to do so from the Entities.

An additional source of State competence with regard to international borders is found in Article III.1.(f) of the Constitution, which provides that immigration, refugee and asylum policy and regulation are also within the competence of the State. Those who control the border have an important role to play concerning these matters, because it is they who first come into contact with aliens entering the country. State competence regarding immigration, refugee and asylum matters must therefore include the competence to establish a border service at the State level.

Conclusion

For all the reasons stated, the Court should find the petition inadmissible for lack of jurisdiction. The Court is not obliged in this case to render an advisory opinion on the competence of the State to regulate the control of its own international border, although in fact the State has such competence. The measure involved in this case, even though imposed by the High Representative, would have been within the legislative authority of the Parliamentary Assembly, had it been duly enacted by that body.

Respectfully submitted to the Constitutional Court of Bosnia and Herzegovina by hand delivery to the Court's chambers in Sarajevo, on 3 May, 2000.

Yours sincerely,

Alexander S. Nicholas

[1] Article 71 provides: "The Court shall decide in each individual case on any issue regarding the proceedings before the Court, which is not regulated by these Rules." Such a provision clearly allows the Court to invite suggestions in a particular case from any outside source, akin to the participation of an *amicus curiae*, a familiar form of proceeding not otherwise regulated by the Rules.

[2] Article 16 contemplates only a submission to be invited by "the adopter of the disputed act[.]" This Rule, read in context, should operate only in a normal case, wherein a disputed act has been adopted by an authority or institution of BiH or one of its political subdivisions. As more fully elaborated below, an act of the High Representative does not meet this criterion.

[3] This is not the Court's first occasion to compare carefully its own jurisdiction with that of other Dayton institutions. In Case Number U 9/98 (26 February 1999), a much closer and more difficult case than this one, the Court refused to review a decision of the Human Rights Chamber, even though, as observed by all judges of the Court, the Chamber, unlike the High Representative, is established under the Constitution itself. Case U 9/98 was brought under Art. VI.3.(b) of the Constitution, which specifies the Court's appellate jurisdiction over constitutional issues "arising out of a judgment of any other court in Bosnia and Herzegovina." The issue upon which the Court was divided was whether the Chamber, even though established under the Constitution, is a "court" within the meaning of Art. VI.3.(b).

[4] GFAP Annex 10, Art. I.2

[5] *Id.*

[6] *Id.* at Arts. II, III and IV.

[7] *Id.* at Art. V.

[8] *Id.* at Art. I.2.

[9] For the Court's convenience, copies of Security Council Resolutions cited herein are included as an Appendix to this submission.

[10] UNSC Resolution 1031 (15 December 1995), preamble, welcoming the conclusions of the London Peace Implementation Conference of 8 and 9 December 1995, in particular its decision to establish the PIC and Steering Board, the latter to provide political guidance to the High Representative on peace implementation. The full text of the London conclusions is available at <https://www.ohr.int>.

[11] *Id.* at para. 26.

[12] *Id.* at para. 27.

[13] *Id.* at para. 32.

[14] See, e.g., PIC Declarations following sessions in Florence, London, Bonn and Madrid; Steering Board conclusions from Paris, Istanbul and Sintra, all available, among others, at <https://www.ohr.int>.

[15] See, e.g., UNSC Resolutions 1088 (12 December 1996) para. 2 (Paris and London); 1112 (12 June 1997) para. 1 (Sintra); 1144 (19 December 1997) para. 2 (Bonn); 1174 (15 June 1998) para. 5 (Luxembourg).

[16] See, e.g., UNSC Resolutions 1031 (15 December 1995) para. 32; 1088 (12 December 1996) para. 34; 1174 (15 June 1998) para. 25.

[17] UNSC Resolutions 1112 (12 June 1997) para. 1 (appointing Mr. Carlos Westendorp); 1256 (3 August 1999) para. 1 (appointing Mr. Wolfgang Petritsch).

[18] UNSC Resolutions 1031 (15 December 1995) para. 27; 1088 (12 December 1996) para. 14; 1112 (12 June 1997) para. 3; 1174 (15 June 1993) para. 4; 1247 (18 June 1999) para. 4; 1256 (3 August 1999) para. 4.

[19] It is worthy of note in this case that Petitioners are themselves eleven members of the House of Representatives of the Parliamentary Assembly, whose votes in that body presumably caused the measure not to be passed, as alleged in the second numbered paragraph of the petition. It would thus be doubly inappropriate for the Court to entertain their request for an advisory opinion on the very measure they refused as Parliamentarians to adopt.

[20] Petitioners argue that any State competence in regard to Annexes 5 through 8 or with regard to the preservation of its own sovereignty must first be agreed to by the Entities. This idea is based on an erroneous logical interpretation of Art. III.5.(a), as though the three categories of State competence provided there in the same sentence were in part listed conjunctively, when in fact they are listed disjunctively. These competences are (1) matters agreed by the Entities, (2) matters provided for in Annexes 5 through 8, and (3) those necessary to preserve sovereignty, etc. Petitioners urge a logical interpretation giving the State only those competences meeting conditions [(1) and (2)] OR [(1) and (3)], when the plain language of the text confers any competence which is [(1) OR (2) OR (3)].

[21] See generally, Statute of the International Court of Justice, Art. 38.1.c; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Cambridge University Press (1994).

[22] In its full text, Art.III.3.(b) establishes the supremacy of the Constitution and laws of the State over those of the Entities, as well as the applicability of international law:

"(b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."