

# **Comments and preliminary observations the OHR concerning Case number CH/O314958, Nikola Grabovac v. BiH and FBiH**

## **HUMAN RIGHTS COMMISSION WITHIN THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**

*Case number CH/O314958, Nikola Grabovac v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*

### **Comments and preliminary observations made by the Office of the High Representative**

#### **I. Background**

1. On 6 October 2002, the High Representative enacted a package of immunity legislation in Bosnia and Herzegovina, including the Law on Immunity of the Federation of Bosnia and Herzegovina, ("the Law on Immunity"), consequently adopted by the Parliament of the Federation of Bosnia and Herzegovina (Official Gazette of F BiH 19/03). The enactment of this Law on Immunity followed the amendments to the Constitution of the Federation of Bosnia and Herzegovina by which the provision (IV.B.4.10) for criminal non-liability of the executive officials was deleted.

2. The Law on Immunity abolishes "inviolability immunity" (i.e., the suspension of prosecution or suit for the duration of a public mandate), also referred to herein as "procedural bars to the institution of proceedings", for both parliamentarians and executive office-holders but provides for "non-liability immunity" from civil and criminal liability only to delegates and members of the Parliament of the Federation and members of the Cantonal legislatures. The Law on Immunity also provides for "non-liability immunity" from civil liability to certain executive office-holders.

3. Such solutions were based heavily on the findings and recommendations of the Round Table of experts from Bosnia and Herzegovina ("BiH"), convened in the fall of 2002 by the Office of the High Representative ("OHR") in order to develop strategies for the reform of immunity legislation in BiH. This Round Table included lawyers, academics, prosecutors and judges.

4. The impetus for the formation of this Round Table was the then widespread interpretation of the constitutional provisions providing for the parliamentary and governmental immunity and its use to shield office-holders from responsibility for crimes and tortious acts that bore no relationship to their official duties. Under the previous system, the immunity granted to parliamentarians and many executive office-holders was extremely broad, and was often interpreted so as to cover acts such as fraud.

5. The aim of the Round Table was to strike a balance between the need to protect the integrity of legislative and executive institutions in BiH and the need to prevent abuse of authority by individuals in such institutions. Toward this end, members of the Round Table reviewed immunity legislation in other European countries and examined the feasibility of such models for the BiH context.

6. On 12 April 2004, the Registrar of the Human Rights Commission within the Constitutional Court of BiH invited OHR to participate as *amicus curiae* to the case No: CH/O314958 by providing a written submission with regard to the High Representative's interpretation of Article 8 of the Law on Immunity of the Federation of BiH in connection with Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the Convention").

7. The OHR has previously submitted to the Constitutional Court of BiH an opinion in relation to the interpretation of the Law on Immunity in case No: U-24/02, a copy of which is attached herewith. The present document further develops the question of retroactive application of Article 8 of the Law on Immunity.

#### **II. Compliance of Article 8 of the Law on Immunity of the Federation with Article 7(1) of the Convention**

##### ***(a) Retroactive application of criminal law***

8. In the case at stake, the applicant challenges the Ruling of the Constitutional Court of the Federation of BiH of 8 July 2003 by which his appeal against the Ruling of the Cantonal Court in Sarajevo No; Kv-61/03 of 20 March 2003 was rejected. The Constitutional Court of the Federation of BiH confirmed the position of the Cantonal Court in Sarajevo pursuant to which all procedural bars to the prosecution against those otherwise entitled to immunity were removed by virtue of Article 8 of the Law on Immunity.

9. The applicant claims that the contested Ruling of the Constitutional Court of the Federation of BiH violates Article 7 (1) of the Convention as it applies the Law on Immunity in a retroactive manner.

10. Article 7(1) of the Convention, provides that *"No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under the national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed."*

11. Article 8 of the Law on Immunity provides that *"As of the date of entry into force of this Law, previous procedural bars to prosecution of or civil proceedings against those otherwise entitled to immunity are hereby repealed. Such repeal shall be without prejudice to substantive defenses in criminal and civil proceedings previously provided for by law."*

12. Article 7 (1) of the Convention sets forth guarantees that relate to the applicability of substantive criminal law while Article 8 of the Law on Immunity seeks to address procedural matters related to immunity. According to D. Gommien, D. Harris and L. Zwaak (*"Law and Practice of the European Convention on Human Rights and the European Social Charter"*, Council of Europe Publishing, 1996), the *"...Convention as applied in practice deals with criminal procedure in much detail while the substantive law is less affected"*. Pursuant to the position of these authors, that influence of the Convention on the substantive law is in fact reflected in Article 7 of the Convention *"...which express the well-known principles **nullum crimen sine lege**"*.

13. It is evident that Article 8 of the Law on Immunity neither prescribes new criminal offences nor imposes a heavier penalty for pre-existing offences. As such, the conditions under which the Convention and its principle of non-retroactivity would apply are not met. As noted in the attached opinion of OHR submitted to the BiH Constitutional Court in case No: U 24/02, Article 8 of the *Law on Immunity* specifically stipulates that the new legislation is enacted *"without prejudice to substantive defenses in criminal and civil proceedings previously provided for by law"*. This stipulation was incorporated in the Law precisely in order to ensure that criminal law in BiH is sufficiently foreseeable and accessible and to ensure compliance with Article 7 (1) of the Convention.

14. For these reasons the argument put forward in the applicant's appeal of 21 November 2001 filed with the Cantonal Court in Sarajevo that the retroactive application of Article 8 of the Law on Immunity contravenes Article 4 of the Criminal Code of the FBiH is also not grounded. The said Article of the Criminal Code (*principle of the legality*) pertains to the application of the substantive law while the issue whether a procedural bar to the institution of proceedings exists or not clearly falls within the procedural law.

#### **(b) Retroactive application of procedural law**

15. Considering the fact that Article 8 of the Law on Immunity provides for the revocation of the procedural bars to ongoing prosecutions, we need to elaborate on the possible applicability of the principle of non-retroactivity to the procedural laws. In this context, one should note that the prohibition of retroactive application of procedural laws is not contained in the Convention or any other international documents. Nor is it provided for under the BiH Constitution or other statutory provisions of BiH. To the contrary, many procedural laws are applied in a retrospective manner. By way of illustration, one could mention the application of a new law to ongoing proceedings which is, as a rule, regulated by transitional provisions of that law (see for instance Article 449 of the Criminal procedure Code of BiH and Article 442 of the Criminal Procedure Code of the FBiH).

16. Such principle has been broadly recognised. N. Jayawickrama, in *The Judicial Application of Human Rights Law* (2002), acknowledges that the general principle is that, while no new criminal laws or penalties may be imposed retroactively, *"a trial under a procedure different from what obtained at the time of the commission of the offense or by a court different from that which had competence at the time is not prohibited."* Another illustration of that principle can be found in the *Foster's Estate case* (N.W.2d at 114), in which the Supreme Court of North Dakota held: *"When an amendment to a procedural law becomes effective during the pendency of a proceeding unless a contrary legislative intent appears the validity of the procedural steps already taken therein is determined under*

*the old provisions but future procedure is governed by the amendment.”*

17. In the absence of any constitutional or statutory rule prohibiting the retroactive application of procedural laws, we believe that two factors should be taken into consideration in order to establish whether *Ex Post Facto* procedural law could be applicable to the case at stake: The extent to which the public interest is protected by that law and the nature of the right affected by the retroactive application of the law.

- a. As to the aspect of the public interest, we have already noted that the new immunity legislation was enacted due to the fact that the previous constitutional provisions were interpreted in such a broad manner that it amounted to shielding the officials from any responsibility for crimes and tortious acts that bore no relationship to their official duties.
- b. The individual right that has been affected by the retroactive application of Article 8 of the Law on Immunity pertains to the procedural bar to the institution of proceedings against parliamentarians and executive office-holders. As of the date of entry into force of the immunity legislation, parliamentarians and executive office-holders would no longer be able to invoke a procedural shield to protect themselves from all legal proceedings simply because they hold public office. Article 8 of the Law on Immunity eliminates solely the procedural right to have proceedings suspended until the end of the mandate of the office holder. According to the principles of criminal procedure law, the prosecution in each individual case would continue after the expiry of the mandate of a public official who enjoyed the immunity from criminal prosecution. (see *Commentaries to the Criminal procedure Code of F BiH*, 248, H. Sijercic-Colic, D. Vuleta and M. Hadziomeragic, OSCE, 1999).

18. Therefore, we are of the strong opinion that Article 8 of the Law on Immunity does not contravene Article 7(1) of the Convention.

### **(c) Additional question**

19. We would like to stress that the BiH Constitutional Court in its Decision No: 59/01 of 10 May 2002 expressly stated its position that Article 7(1) of the Convention could only be invoked if a contested decision establishes someone's guilt or imposes a sanction in relation to that guilt.

20. Furthermore, there should be no doubt that the regulations dealing with the immunity issues must be always restrictively interpreted due to the fact that such regulations represent an exception to general rules (see *Commentaries to the Criminal procedure Code of F BiH*, 248, H. Sijercic-Colic, D. Vuleta and M. Hadziomeragic, OSCE, 1999). According to the Draft Report of Venice Commission (*The Regime of Parliamentary Immunity*, CDL-IMM(1996)001e-rev-prov-restr, 1996) the “...immunity, with a different theoretical conception according to country, is designed to safeguard the “people’s representatives” against arbitrary power.” According to the same Report the immunity instituted **must not be such as to obstruct the course of justice**.

### **III. Other issues raised by the applicant**

21. In its application, the applicant also claims that Article 6 of the Convention has been violated by the contested Ruling of the Constitutional Court of the FBiH without giving any explanation for such a allegation. In our opinion, there has been no violation of Article 6 of the Convention during the proceedings before either the Constitutional Court of the FBiH or the Cantonal Court in Sarajevo.

22. Also OHR would like to take the opportunity to state that it fully concurs with the arguments, both on the issue of the admissibility and the merit of the application, provided in the written submission of the Respondent Party, the Federation of BiH, dated 20 April 2004.

### **IV. Conclusion**

23. While the Law on Immunity eliminates the requirement that proceedings be suspended while individuals are in office, in no way does it allow for an individual to be held liable for an action which did not constitute a criminal offence at the time when it was committed.

24. This Law is the result of an initiative by local experts and the international community aimed at achieving a balance between the need for accountability of public officials and the need to provide such officials with such immunities as are necessary to carry out their duties. The Law is fully in compliance with the Constitution of the FBiH in its amended form and certainly does not contravene any provision of the Constitution of BiH or the Convention. In particular, the Law does not violate Article 7(1) as it does not eliminate any substantive defenses to criminal liability for actions committed under pre-existing legislation which provided for such defenses.