Comments and preliminary observations made by the OHR concerning Case number U-24/02

Constitutional Court of Bosnia and Herzegovina

Case number U-24/02

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

I. **Background**

In the fall of 2002, the Office of the High Representative ("OHR") convened a Round Table of experts from Bosnia and Herzegovina ("BiH"), including lawyers, academics, prosecutors and judges, in order to develop strategies for the reform of immunity legislation in Bosnia and Herzegovina.

The impetus for the formation of this Round Table was the then widespread use of parliamentary and governmental immunity 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.

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.

On 6 October 2002, the High Representative enacted a package of immunity legislation at the levels of BiH, the Federation and Republika Srpska, which was based heavily on the findings and recommendations of the Round Table. This package of legislation sets forth the procedure by which parliamentarians may invoke immunity from criminal and civil liability, and certain executive office-holders may invoke immunity from civil liability.

This legislation 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 "non-liability immunity" from civil and criminal liability to delegates and members of the Parliamentary Assembly of BiH, delegates and members of the Parliament of the Federation, members of the Cantonal legislatures and deputies and members of the Republika Srpska National Assembly and Council of Peoples. The legislation also provides "non-liability immunity" from civil liability to certain executive office-holders.

Non-liability immunity, which is the type of immunity provided for in Article IV.3(j) of the BiH Constitution, provides absolute protection from liability for acts committed within the scope of a public office-holder's official duties. It may include, *inter alia*, immunity for actions based on votes cast or opinions expressed during parliamentary sessions, as a means to provide for independence and freedom of expression.

The determination as to whether an act falls within the scope of a public office-holder's duties is to be made by a competent court with the possibility of appeal, rather than, as previously, by political bodies.

It is OHR's view that this approach to immunity provides for

the public accountability of officials and persons holding elected office, while ensuring that such persons enjoy such immunities as are appropriate for the proper carrying out of their functions and duties. In particular, the introduction of judicial review regarding the question of whether an act falls within the scope of a public office-holder's duties is a step forward in reducing the politicization of immunity.

II. **Compliance of the *Law on Immunity of the Federation* and the *Law on Immunity of Bosnia and Herzegovina* with Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina and with Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms***

The applicants contend that Article 6(3) and Article 7(2) of the *Law on Immunity of the Federation* are in violation of Article II.1 of the Constitution of BiH, which provides that: "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms…", as well as Article II.2 of the Constitution of BiH, which provides that the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto (hereinafter: "Convention") is directly applicable in Bosnia and Herzegovina and has priority over all other law. The applicants therefore contend that the provisions are also in violation of Article III.3(b) of the BiH Constitution, according to which each Entity "shall comply fully with this Constitution which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitution and law of the Entities…"

For the reasons described in the preceding paragraph, the applicants also claim that Article 6(2) and Article 7(2) of the *Law on Immunity of BiH* are in violation of Articles II.1 and II.2 of the Constitution of BiH.

These arguments appear to be based on the view that the above-

mentioned Articles are in violation of Article 13 of the Convention, which provides that: "Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity,"

The implementation of Article 13 of the Convention is, of course, vital to ensuring effective protection of human rights in BiH.

It is well-established that a violation of Article 13 requires an arguable complaint that a right guaranteed by the Convention has been violated.[1] According to Harris, O'Boyle and Warbrick, in their Law of the European Convention on Human Rights, "…Article 13 does not guarantee a remedy against all kinds of illegality in the national legal order, but only illegal acts related to the enjoyment of Convention rights."[2] This position is supported by van Dijk and van Hoof in Theory and Practice of the European Convention on Human Rights, which states that Article 13 "cannot…constitute the object of a separate complaint"[3] but can only be put forward in conjunction with another right in the Convention.

Based on the information provided by the applicants in relation to this allegation, it is unclear which additional right in the Convention they believe to be implicated. It appears that the applicants may have confused Article 13 of the Convention with a right to exhaustion of "regular and extraordinary remedies in criminal and civil proceedings." As a result, we are not in a position to answer definitively the allegations of the applicant, and we would welcome the opportunity to provide further comments on this matter, should the applicant provide further clarification.

However, even if a Convention right connected with the exhaustion of remedies were at issue in the instant case, we are satisfied that there would be no violation of Article 13.

In the Case of *Vilvajarah and Others v. the United Kingdom*[4], the Court provided an overview of the requirements of Article 13. When the applicant has an arguable claim regarding violation of a right enshrined in the Convention, Article 13 must provide for a domestic remedy to enforce the substance of such right. Following on the Court's reasoning, Van Dijk and van Hoof have noted that "…Article 13 does not go so far as to require any particular form of remedy, Contracting States are afforded a margin of discretion in conforming to their obligations under this provision."[5]

Under both the *Law on Immunity of the Federation* and the *Law on Immunity of BiH*, criminal charges or civil actions brought against a public office-holder are dealt with through the regular court process, which includes the possibility of appeal in accordance with relevant codes of civil and criminal procedure. In addition, both Laws provide that individuals who wish to invoke immunity pursuant to existing legislation may do so before the competent court. Finally, first instance decisions on immunity may be appealed, as applicable, to the Constitutional Court of the Federation in accordance with Article 6(3) and Article 7(2) of the Federation Law, or to the Constitutional Court of BiH in accordance with Article 6(2) and Article 7(2) of the BiH Law.

In light of the above, the OHR believes the challenged Articles to be consistent with Article 13 of the Convention and, therefore, with Article II.1 and II.2 of the Constitution of BiH. Accordingly, we do not believe the *Law on Immunity of the Federation* to be in violation of Article III.3(b) of the Constitution of BiH.

III. Compliance of the *Law on Immunity of Bosnia and Herzegovina* with Article VI.3(b) of the Constitution of Bosnia and Herzegovina.

The applicants contend that Article 6(2) and Article 7(2) of the *Law on Immunity of BiH,* which concern the appeal of

certain judicial decisions to the Constitutional Court of BiH, are incompatible with the Constitution of BiH, which specifically sets forth the jurisdiction of the Court.

However, Article VI.3(b) of the Constitution of BiH vests the Court with "appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina."

It is our view that, based on this provision, the Constitutional Court may legitimately hear appeals from final and binding decisions issued by competent courts in BiH in cases concerning whether an act of a BiH parliamentarian or executive office-holder of BiH (i.e., members of the Presidency and the Council of Ministers of Bosnia and Herzegovina) was carried out within the scope of his or her duties, as is provided in the *Law on Immunity of BiH*.

Because the Constitution itself establishes the aforementioned positions, and outlines the core duties associated with such positions, we believe that the question as to whether an act was carried out within the scope of such duties may be considered as an issue arising "under this Constitution". Indeed, Article *4(2) of the Law on Immunity of BiH* provides that 'the phrase "acts carried out within the scope of their duties" shall refer to acts arising out of an individual's duties in the Parliamentary Assembly, Presidency, or the Council of Ministers of Bosnia and Herzegovina, as respectively applicable and *as defined in the Constitution of Bosnia and Herzegovina*.' *(Emphasis Added).*

The applicants also argue that the above-mentioned Articles in the *Law on Immunity of BiH* are in violation of the Constitution, given that one of the preconditions for access to the Constitutional Court is the exhaustion of all other remedies. Applicants assert that such exhaustion of remedies is not possible in the given case.

We believe this assertion to be ill-founded, given that the above-mentioned provisions make clear that the Constitutional Court may only hear appeals from "final and binding" judgments of competent courts.

IV. Compliance of the Laws on Immunity of the Federation and Bosnia and Herzegovina with Article 7.1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the general legal principle of non-retroactivity

The applicants argue that Article 8 of the Laws on Immunity of the Federation and BiH are in violation of the general legal principle: *"nullum crimen sine lege and nulla poena sine lege"*, incorporated into Article III.3(b) of the Constitution of BiH, as well as Article 7.1 of the Convention, which 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."

Presumably the applicants are concerned that the above-mentioned provisions have the effect of removing a substantive defense to criminal liability that was provided for under previously-existing legislation.

However, Article 8 of both the *Law on Immunity of the Federation* and the *Law on Immunity of BiH* specifically notes that the new legislation is enacted "without prejudice to substantive defenses in criminal and civil proceedings previously provided for by law." This protection was incorporated in the Laws precisely due to the need to ensure that criminal law in Bosnia and Herzegovina is sufficiently foreseeable and accessible, as well as the need to ensure that Article 7.1 would be respected.

In this context, it should be noted that, according to N. Jayawickrama in The Judicial Application of Human Rights Law, 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."[6]

Thus, to the extent that previously-existing immunity legislation prohibited individuals from being held liable for certain actions by virtue of their official positions, such prohibition on liability would continue to apply to actions performed while such legislation was in effect.

Instead, the new legislation would simply eliminate any procedural bars to the institution of proceedings against parliamentarians and executive office-holders which were in place under previously-existing legislation. In other words, from the date of entry into force of the immunity legislation, parliamentarians and executive office-holders will no longer be able to invoke a procedural shield to protect themselves from all legal proceedings simply because they hold public office.

In sum, while the new legislation 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. Moreover, the new legislation does not remove any substantive defenses to liability that were in place at the time when such actions were committed.

V. **Conclusion**

The immunity legislation challenged by the applicants 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 basis for applicants' assertion of a violation of Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* is unclear. A violation of Article 13 requires an arguable breach of a right guaranteed under the Convention, and it is unclear which Convention right the applicants believe to be at issue in the instant case.

Nevertheless, even if a Convention right were at issue in this case, the package of immunity legislation provides individuals who believe themselves to be entitled to immunity pursuant to existing legislation with an opportunity to assert such immunity before a competent court. Moreover, individuals may appeal such decisions to an appropriate Constitutional Court in BiH. Therefore, we believe the legislation to be consistent with Article 13 of the Convention. Accordingly, we believe that the applicants' arguments regarding Articles II.1, 11.2 and Article III.3(b) of the Constitution of BiH, which are based on the premise that Article 13 has been violated, are without foundation.

Further, it is our view that the Constitutional Court of BiH is competent under VI.3(b) of the Constitution of BiH to review appeals from competent courts in BiH concerning whether actions of parliamentarians or certain executive office-holders at the level of BiH fall within the scope of their official duties, given that these positions and the core duties associated with these positions are set forth in the Constitution of BiH itself.

Finally, it is our view that neither the *Law on Immunity of the Federation* nor the *Law on Immunity of BiH* is in violation of the general legal principle of non-retroactivity or Article 7.1 of the Convention, as these laws do not eliminate substantive defenses to criminal liability for actions committed under previously-existing legislation which provided

for such defenses.

Notes:

[1] Doran v. Ireland (31 July 2003, Appln. 50389/99) at para 55.

[2] DJ Harris, M O'Boyle, C Warbrick, Law of the European Convention on Human Rights (1995) at 445.

[3] P. van Dijk and G.J.H. van Hoof Theory and Practice of the European Convention on Human Rights (1998) at 695.

[4]Judgment of 30 October 1991, Series A No. 215.

[5] P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights (1998) at 706.

[6] N. Jayawickrama, The Judicial Application of Human Rights Law (2002) at 586.