

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2) line 2, Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 60/05 and 64/08), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Krstan Simić

Having deliberated on the request lodged by **the twelve Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, in Case No. **U 11/08**, at its session held on 30 January 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the **twelve Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, for review of the constitutionality of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 25/04, 93/05, 32/07 and 15/08) is hereby dismissed.

It is hereby established that the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 25/04, 93/05, 32/07 and 15/08) was enacted in compliance with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 4 June 2008, the twelve members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicants”), lodged a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the constitutionality of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 25/04, 93/05, 32/07 and 15/08; hereinafter referred to as “the challenged law”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 9 July 2008 to submit their replies to the request.

3. The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“Parliamentary Assembly”) failed to reply to the request.

4. Upon a proposal made by the Judge Rapporteur, the Constitutional Court, pursuant to Article 15(3) of the Rules of the Constitutional Court, addressed the Office of the High Representative (“the OHR”) and asked for its written observations in respect of the relevant request.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicants on 27 October 2008.

6. Pursuant to Article 93(1) line 2 and (3) of the Rules of the Constitutional Court, the Constitutional Court took a decision that Ms. Seada Palavrić, the President of the Constitutional Court and Judge Mirsad Ćeman would not participate in the work and the decision-making procedure relating to the request since they had participated as members of the Parliamentary Assembly in the enactment of the challenged law.

III. Request

a) Statements from the request

7. The applicants state that the Parliamentary Assembly enacted the challenged law, as imposed by the High Representative on an interim basis, and amendments thereto pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina (“the Constitution of BiH”), which embodies the Parliament’s universal responsibility in the field of legislative power. According to the applicants’ allegations, “the Parliamentary Assembly of Bosnia and Herzegovina did not specify the provision, i.e. the constitutional basis for giving it the mandate to regulate the matter in question”. In the view of the applicants, the Parliamentary Assembly has no mandate to regulate the matter in question through legislation given that these matters do not fall within the scope of its responsibilities under Article III(1) of the Constitution of BiH. Furthermore, the applicants assert

that Article III of the Constitution of BiH leaves no room for doubt that the field of judiciary falls under the exclusive responsibility of the Entities and that, by applying the accepted methods of interpretation of all Articles of the Constitution of BiH, and particularly of Article II, “which relates to the universal human rights and freedoms”, the applicants have been unable to recognize or establish the constitutional basis for enacting the challenged law. In addition, it is stated that, the legislator, on the other hand, failed to refer to the constitutional basis for enacting the said Law under Article III(5)(a), whereby it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly. In the view of the applicants, at present, the judiciary in BiH is bulky, disorganized, non-functioning and inefficient in which corruption and bias have not been eliminated or rooted out as well as petty politics and adjudication under national and other standards.

b) *Amicus curiae* – Written Observations by OHR

8. The OHR contends that the applicants’ request that the law be declared null and void on the basis of an omission to quote the appropriate constitutional provision in its preamble arises from a misunderstanding. In this context, it is stated that the necessity to indicate in the preamble of laws their constitutional basis is a formal requirement provided for under the Unified Rules for Legislative Drafting in the Institutions of Bosnia and Herzegovina adopted in January 2005, but the Rules of Procedures of the Houses of the Parliamentary Assembly in force at the time of the adoption of the challenged law did not contain such a requirement as they did not provide detailed rules related to the content of the preamble of laws enacted by the Parliamentary Assembly. The consistent practice of the Parliamentary Assembly before the adoption of the new Rules of Procedure illustrates that the Preamble of laws refers to Article IV(4)(a) of the Constitution of BiH as the constitutional basis for the Parliamentary Assembly to enact legislation rather than as a basis to exercise responsibility over a particular field of competencies. As stated in the Observations, the aforementioned is confirmed by the Laws adopted pursuant to III(5)(a) or III(5)(b) of the Constitution of BiH originating from transfer agreements concluded by the Entities. Both preambles of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 35/04) and the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 44/03, 52/04, 34/07 and 4/08) contain references to Article II(4)(a) of the BiH Constitution while no reference to Articles III(5)(a) and III(5)(b) respectively were included. In this regard, the OHR quoted the Decision of the Constitutional Court in the case related to the constitutionality of the

Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina. In the said decision, the Constitutional Court stated as follows: “it is indisputable that the provision of Article III(5)(b) of the Constitution of Bosnia and Herzegovina was respected when the relevant Law was adopted, considering the fact that the relevant law was adopted on the basis of the Agreement signed on 2 June 2003 by Prime Ministers from both Entities”. Thus, in the opinion of OHR, by doing so, the Constitutional Court took into account the actual constitutional basis for Bosnia and Herzegovina to regulate this field and did not only consider the fact that the Parliamentary Assembly, within the Preamble of the said Law, only indicated Article IV(4)(a) of the Constitution as a basis to enact legislation.

9. Also, the OHR holds that the applicants’ allegation that there is no constitutional basis for adopting the challenged law, is unsubstantiated since it is indisputable that the challenged law was adopted pursuant to Article III(5)(b) of the Constitution of BiH as originating from the transfer agreement. In this context, the OHR underlines that the explanation attached to the Draft Law, forwarded by the Council of Ministers to the Parliamentary Assembly, expressly states that the constitutional basis for adopting the law is contained in Article III(5) of the Constitution of Bosnia and Herzegovina. In addition, evidence that the challenged law was adopted under such transfer can be found in Articles 92 and 93 of the challenged law, which stipulate that the Entities’ laws and the original Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina shall be repealed as of the entry into force of the challenged law.

10. Concerning the applicants’ assertion that judicial and prosecutorial matters fall under the exclusive jurisdiction of the Entities, the OHR refers to the Decision of the Constitutional Court No. *U 26/01* in the case related to the Law on Court of BiH, where the Constitutional Court of BiH declared the said Law to be in conformity with the Constitution of Bosnia and Herzegovina. Furthermore, in the view of OHR, the fact that «there is a role for Bosnia and Herzegovina in judicial and prosecutorial matters notwithstanding any transfer was further reflected in the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which was enacted on 23 May 2002.” Additionally, it is stated that the Transfer Agreement was concluded because certain matters covered by the challenged law were falling within the responsibilities of the Entities and that the effect of such agreement was to transfer to the institutions of Bosnia and Herzegovina matters concerning the “affairs and functions of judges and prosecutors” that were still falling within the responsibility of the Entities.

11. Finally, according to the OHR, the applicant's request is unfounded as it relies on the wrong assumptions that the obligation to denote the constitutional basis of the law in the Preamble relates to the constitutional basis for the Institutions of Bosnia and Herzegovina to exercise responsibility over specific matter rather than to the constitutional basis for the Parliamentary Assembly to enact legislation and that a breach of such obligation renders the law null and void. Moreover, the OHR holds that the constitutional basis for the adopting the challenged law exists and was made clear by the proponent of the Law and that such constitutional basis was accepted by the Parliamentary Assembly.

IV. Relevant Law

12. **Constitution of Bosnia and Herzegovina**, in the relevant part, reads:

Article III(1)

I. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

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

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

Article III(2)(b), in the relevant part, reads:

Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina [...]

Article III(3)(a)

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article III(5)

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.

b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

Article IV(4)

The Parliamentary Assembly shall have responsibility for:

a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

c) Approving a budget for the institutions of Bosnia and Herzegovina.

d) Deciding whether to consent to the ratification of treaties.

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

13. Pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina, at the session of the House of Representatives held on 11 May 2004 and at the session of the House of Representatives held on 21 May 2004, adopted the

Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 25/04)

CHAPTER I - GENERAL PROVISIONS

Article 1

Establishment

(1) This Law establishes the High Judicial and Prosecutorial Council, and regulates: its work, organization, competencies, powers and the conditions and mandate for the holding of judicial and prosecutorial power, the appointment of judges and prosecutors, the disciplinary responsibility of judges and prosecutors, the temporary suspension from office of judges and prosecutors, the incompatibility of judicial and prosecutorial service with other functions, the termination of mandates of judges and prosecutors and other questions related to the work of the High Judicial and Prosecutorial Council (hereinafter “the Council”).

(2) The Council is an independent organ of Bosnia and Herzegovina and has legal personality.

(3) The provisions of the Law on Ministries and Other Bodies of the Administration of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 5/03 and 42/03) and the Law on Administration of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 32/02) shall not apply to the Council.

14. Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina
(Official Gazette of the Federation of BiH, No. 16/04 of 27 March 2004)

Federation of Bosnia and Herzegovina and Republika Srpska

1. In the exercise of Article III(5)(b) of the Constitution of Bosnia and Herzegovina, the Entity of the Federation of Bosnia and Herzegovina ("the Federation") and the Entity of the Republika Srpska ("the Republika Srpska") hereby agree to transfer certain responsibilities for their respective judiciaries, including matters concerning the affairs and functions of judges and prosecutors, to an institution of Bosnia and Herzegovina to be known as the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("the Council") from the day of entering into the force of the new Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

2. The Council shall be responsible for autonomy, independence, impartiality, professionalism and efficiency, including also the prosecutorial function, in the Federation and the Republika Srpska, as well as at the level of Bosnia and Herzegovina.

3. The Federation and the Republika Srpska shall provide support to the Council in accordance with their obligations under Article VIII(3) of the Constitution of Bosnia and Herzegovina.

Bosnia and Herzegovina

4. Bosnia and Herzegovina shall assume the responsibilities transferred to it by the Entities, as defined in this Agreement.

5. In cooperation with the Independent Judicial Commission, the Council of Ministers of Bosnia and Herzegovina shall prepare the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The said Law shall be in line with the requirements set out in this Agreement and the relevant European and international standards.

6. The Council of Ministers of Bosnia and Herzegovina shall put forward a draft Law to the Parliamentary Assembly of Bosnia and Herzegovina.

7. Bosnia and Herzegovina shall provide suitable premises and sufficient funds for the work of the Secretariat so that the Council may commence its activities within one month as of the entry into force of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, for the purpose of facilitating the transformation into a single Council.

V. Admissibility

15. Pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to whether any provision of an Entity's constitution or law is consistent with this Constitution. Such disputes may be referred by one-fourth of the members of either chamber of the Parliamentary Assembly.

16. The relevant request for review of constitutionality was filed by the twelve members of the House of Representatives of the Parliamentary Assembly, who constitute one-fourth of the members of this chamber, which means that it was filed by authorized persons as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the request concerns the review of constitutionality of the challenged law, which was enacted by the Parliamentary Assembly, in which case the Constitutional Court is competent to take decisions, as referred to in the mentioned Article of the Constitution of Bosnia and Herzegovina.

17. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by authorized persons and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

18. In essence, the applicants hold that in view of the restrictions related to the responsibilities specified in Article III(1) of the Constitution of BiH, the Parliamentary Assembly had no constitutional basis to enact the challenged law. The applicants also argue that the legislator failed to refer to the constitutional basis for enacting the said Law under Article III(5)(a), whereby it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly.

19. Considering that the applicants challenge the constitutional basis for enacting the challenged law, the Constitutional Court shall examine the request within a wider constitutional context, but not limiting itself to the provisions of the Constitution of BiH referred to in the applicants' request.

20. In its observations, the OHR states the fact that the challenged law was enacted on the grounds and as the result of the Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("the Agreement") and that following the signing of the Agreement, the Draft Law was prepared and proposed to the Parliamentary Assembly by the Council of Ministers. In addition, it is mentioned in the Observations that the explanation of the Draft Law stated that the constitutional basis for the adoption was contained in Article III(5) of the Constitution of Bosnia and Herzegovina and that the Transfer Agreement was also appended to the Draft Law. In its Observations, the OHR takes the position that the relevant request is unfounded. In fact, the OHR contends that the applicants' request originates from a misunderstanding that the law should be declared null and void for a failure to quote the appropriate constitutional provision in the preambles of laws enacted by the Parliamentary Assembly, where Article IV(4)(a) of the Constitution of BiH is specified as the constitutional basis for the Parliamentary Assembly to enact legislation rather than as a basis to exercise responsibility over a particular field of competencies. In addition, it is mentioned in the Observations that there are other cases where the Laws were adopted at the state level based on transfer agreements concluded by the Entities. For example, both preambles of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina and of the Law on Indirect Taxation System in Bosnia and Herzegovina contain references to Article IV(4)(a) as the basis on which these laws were enacted. In assessing the constitutionality of the mentioned law, the Constitutional Court, in its Decision No. *U 17/05* (see, Constitutional Court, Decision on Admissibility and Merits of 26 May 2006, *Official Gazette of Bosnia and Herzegovina*, No. 87/06), took into account the actual constitutional basis for Bosnia and Herzegovina to regulate the field transferred to the State by the agreement concluded between the Entities in terms of Article III(5)(a) of the Constitution of BiH, and it was not relevant to quote Article IV(4)(a) of the Constitution of BiH within the Preamble of the Law as a basis to enact legislation.

21. In examining the allegations stated in the request, the Constitutional Court has invoked Article III of the Constitution of BiH, which regulates the issue of responsibilities of and relations between the Institutions of Bosnia and Herzegovina and the Entities and, in paragraph 1 of this

Article, itemizes the responsibilities of the Institutions of Bosnia and Herzegovina. These are the exclusive responsibilities of the Institutions of Bosnia and Herzegovina and there is no constitutional basis upon which these responsibilities could be transferred to the Entities. Paragraph 2 of the aforementioned Article stipulates the responsibilities of the Entities and their obligation to provide all necessary assistance to the Government of Bosnia and Herzegovina to enable it to honor its international obligations, as well as to provide a safe and secure environment for all persons in their respective jurisdictions. This paragraph specifies no other exclusive responsibilities of the Entities, but paragraph 3 of this Article stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

22. Based on further analysis of the constitutional provision of Article III, the Constitutional Court notes that, although Article III(3) of the Constitution of BiH stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities, paragraph 5(a) confers the powers on Bosnia and Herzegovina to assume certain responsibilities of the Entities, defined in the Constitution of BiH by the notion of “additional responsibilities”. According to the Constitutional Court’s interpretation, 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 (see, Constitutional Court, Decision No. *U 26/01* of 28 September 2001, published in *the Official Gazette of BiH*, No. 4/02).

23. The Constitutional Court has concluded that the challenged law was enacted after the Entities had entered into the Agreement in accordance with Article III(5) of the Constitution of BiH, whereby they had given the approval on the establishment of the Institution of Bosnia and Herzegovina under the name “High Judicial and Prosecutorial Council” as of the entry into force of the new Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The Council of Ministers undertook to put forward a Draft Law to the Parliamentary Assembly. Hence, it is undisputed that Bosnia and Herzegovina, in terms of Article III(5)(a) of the Constitution of BiH, assumed the responsibility from the Entities in this field of judiciary, after the consent of the

Entities, whereby the constitutional basis for enacting the challenged law as well as amendments thereto was created. Namely, what the applicants find disputable is that Article IV(4)(a) of the Constitution of BiH, which embodies the universal responsibility in the field of legislative power, is stated in the Preamble of the challenged law as the constitutional basis to enact the said law and not Article III(5)(a) of the Constitution of BiH, whereby “it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly of Bosnia and Herzegovina.” In this context, the Constitutional Court highlights that the formal transfer of the responsibility from the Entities to the State was carried out by the Agreement, whereby the responsibility for the establishment of the High Judicial and Prosecutorial Council was transferred at the state level. The Parliamentary Assembly enacted the challenged law in the field transferred to the state level, thereby it acted within the scope of its competence under Article IV(4)(a) of the Constitution of BiH.

24. By construing the relevant provisions of the Constitution of BiH, referred to in the reasons of the present Decision, the Constitutional Court has concluded that the Parliamentary Assembly had the constitutional basis for enacting the challenged law since it enacted the Law in the field that had been transferred to the state level based on the Agreement between the Entities, pursuant to Article III(5) of the Constitution of BiH. The Constitutional Court holds that an omission to quote the appropriate constitutional provision in the preamble of the Law cannot be the reason to declare the challenged law unconstitutional, given the undisputed competence of the Parliamentary Assembly to enact the challenged law.

25. The Constitutional Court has concluded that the challenged law was consistent with the Constitution of Bosnia and Herzegovina.

VII. Conclusion

26. By construing the relevant provisions of the Constitution of BiH, referred to in the reasoning of the present Decision, the Constitutional Court has concluded that the Parliamentary Assembly had the constitutional grounds to enact the challenged law since it enacted the Law in the field that had been transferred to the state level based on the Agreement between the Entities, pursuant to Article III(5) of the Constitution of BiH. The Constitutional Court holds that a failure to refer to the appropriate constitutional provision in the preamble of the Law does not constitute the reason for declaring the challenged law as unconstitutional, given the undisputed competence of the Parliamentary Assembly to enact the challenged law.

27. Pursuant to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this Decision.

28. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of Constitutional Court shall be final and binding.

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina