

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Helen Keller, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević

Ms. Angelika Nussberger and

Mr. Ledi Bianku

Having deliberated on the request lodged by seven delegates of the Council of Peoples of the Republika Srpska, in case no. *U-15/21*, at its session held on 14 July 2022, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request lodged by seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (*Official Gazette of the RS*, 89/21),

it is hereby established that the Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (*Official Gazette of the Republika Srpska*, 89/21) is not compatible with Article I(2) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

Pursuant to Article 61(2) of the Rules of the Constitution of Bosnia and Herzegovina, the Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (*Official Gazette of the Republika Srpska*, 89/21) is hereby quashed.

Pursuant to Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the quashed Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (*Official Gazette of the Republika Srpska*, 89/21) shall be rendered ineffective on the next day following the date of the publication of the present decision in the *Official Gazette 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 24 November 2021, seven delegates of the Council of Peoples of the Republika Srpska, namely Mihnet Okić, Alija Tabaković, Džemaludin Šabanović, Faruk Dozić, Muris Ćirkić, Ahmet Ćirkić and Samir Baćevac (the “applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (the “Constitutional Court”) for review of the constitutionality of the Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (*Official Gazette of the RS*, 89/21, the “contested law”) with Article I(2) of the Constitution of Bosnia and Herzegovina and Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska (the “National Assembly”) was requested to submit a response to the request.

3. Having requested the extension of the time limit for submitting its response twice (which was accepted by the Constitutional Court), the National Assembly submitted its response on 24 February 2022.

III. Request

a) Allegations in the request

4. The applicant alleges that according to the explicit provisions of Article III(3)(b) of the Constitution of BiH, the Entities have positive constitutional obligation to harmonize the Constitutions of the Entities and laws with the Constitution of Bosnia and Herzegovina. There is no

exception to the supremacy of the Constitution of BiH. Having analysed the practice of the legislative authorities of the Entities regarding this obligation, one may conclude that they do not perceive it as a positive obligation nor do they take a proactive stance when it comes to the protection of constitutionality, compliance with the normative hierarchy and legal certainty. Despite the fact that the High Representative (substituting himself for the institutions of Bosnia and Herzegovina) enacted the Law on Amendment to the Criminal Code of Bosnia and Herzegovina, published in the *Official Gazette of Bosnia and Herzegovina*, 46/21 (the “Law on Amendment to the Criminal Code of BiH”) and despite clear obligations of the Entities to comply with the Constitution of BiH, the National Assembly of the Republika Srpska enacted the Law on Non-Applicability of the Decision of the High Representative Enacting the Law on Amendment to the Criminal Code of BiH. The applicant alleges that the provisions of the contested law are unconstitutional for several reasons, and notably:

- As they have been in violation of Article I(2) of the Constitution of BiH. The mentioned provisions imply the rule of law meaning a political power system based on the respect for the constitution, laws and other regulations by the citizens and holders of governmental power. The principle of the rule of law requires that all constitutions, laws and regulations be harmonized with the constitutional principles. According to Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in BiH (the “Dayton Agreement”), the High Representative is the final authority in theatre regarding interpretation of this Agreement and “*facilitates, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation*”. In accordance with his powers and Conclusions of the Peace Implementation Conference held in Bonn (9 and 10 December 1997), the High Representative rendered the Decision Enacting the Law on Amendment to the Criminal Code of BiH. Having acted so, the High Representative, as noted in the views the Constitutional Court of BiH took at an earlier point, substituted himself for the national authorities and acted as an authority of Bosnia and Herzegovina, and the law enacted by him should be regarded as a law of Bosnia and Herzegovina. The National Assembly of the Republika Srpska disregarded the constitutional principle of the rule of law by adopting the contested law and refused to comply with the Constitution and laws in force, which renders the law at issue unconstitutional.

- As they have been in violation of Article III(3)(b). The Entities as any other level of power in BiH enjoy constitutional autonomy. However, according to the provision of Article III(3)(b) of the Constitution, that autonomy is subject to the Entities’ obligation and other administrative units to comply with the Constitution of BiH and “decisions of the institutions of BiH”. By substituting

himself for the institutions of BiH, thus acting as an authority of BiH, the High Representative rendered the Decision Enacting the Law on Amendment to the Criminal Code of BiH, which is a national law in its nature, and, thus, should be regarded as a law of Bosnia and Herzegovina. The authorities of the Republika Srpska, by enacting the contested law, decided not to apply that Decision in the territory of the Republika Srpska, including the Law on Amendment to the Criminal Code of BiH. Such a view of the Entity's legislator is contrary to the Entities' obligation to comply with the "decisions of the institutions of BiH", and thus, contrary to the provisions of Article III(3) (b) of the Constitution of BiH.

5. The applicant further refers to Articles II and V of Annex 10 of the Dayton Agreement, Conclusions of the Peace Implementation Council with regard to the High Representative, Opinion of the Venice Commission and decisions of the Constitutional Court, wherein it examined the position and decisions of the High Representative (*U-9/00*, *U-16/00*, *U-25/00*, and *U-26/01*). In compliance with his powers, the High Representative intervened and took the Decision Enacting the Law on Amendment to the Criminal Code of BiH. The High Representative was forced to do so as "(...) *all legislative initiatives brought before the Parliamentary Assembly of Bosnia and Herzegovina to address this issue have been blocked*". Furthermore, in his Decision, the High Representative decided that the Law on Amendment to the Criminal Code of BiH was of temporary character and that the Parliamentary Assembly was free to adopt this Law in due form, without amendment and with no conditions attached. The applicant alleges (by referring to the decision of the Constitutional Court no. *U-9/00*) that the party not satisfied with this Law had several legal means at its disposal in accordance with the Constitution and laws of BiH to express its dissatisfaction or to challenge or amend the Criminal Code of BiH, but it decided to act in an unconstitutional manner by adopting the contested law.

6. The applicant proposes that the Constitutional Court should adopt a decision to grant the request and establish that the contested law was incompatible with the provisions of the Constitution of Bosnia and Herzegovina. The applicant also requests that the Constitutional Court should adopt an interim measure "to forbid the application of the [contested law] pending a final decision of the Constitutional Court upon this request". As alleged, the interim measure is necessary to prevent detrimental consequences that the application of the contested provisions could cause to BiH, notably as the rule of law could be jeopardized in that way and the application of the contested law could cause a conflict of the institutions responsible for enforcement of laws of BiH and RS Entity.

b) Reply to the request

7. The National Assembly contests the standing of the applicant by alleging that seven delegates of the National Assembly of the Republika Srpska do not have procedural standing under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The National Assembly alleges that the applicant erroneously refers to the Constitution of Bosnia and Herzegovina, as the Council of Peoples is neither a legislature nor a special chamber of the National Assembly. The Constitutional Court should therefore reject the request (unlike the hitherto case-law of the Constitutional Court of Bosnia and Herzegovina in cases *U- 7/10*, *U-8/19*, *U-9/19*, *U-4/20* and others).

8. The contested law was adopted in accordance with the Constitution of the Reublika Srpska. The constitutional grounds for enacting that law are, as alleged by the National Assembly, the provisions of Amendment XXXII to Article 68, paragraph 1, subparagraphs 1, 4, 5, and 18 of the Constitution of the Republika Srpska. Furthermore, the constitutional grounds are defined in Article 70, paragraph 1, subparagraph 2 of the Constitution of the Republika Srpska, which stipulates that the Republika Srpska shall pass laws, other regulations and general enactments.

9. The fact that the applicant attempts to define the High Representative as “an acting authority of BiH” and “substituting himself for the Parliamentary Assembly” by invoking the rule of law as a justification is “a top unprecedented incident in jurisprudence of the legal system accepted by civilized peoples cherishing special values”.

10. One gets the impression by reading the text of the request that the ultimate intention of the applicant is to undermine the legislative and representative institutions of Bosnia and Herzegovina, first of all the Parliamentary Assembly of Bosnia and Herzegovina and, consequently, the National Assembly as a legislative and representative authority of the Entity and to usurp its responsibilities guaranteed under the Constitution.

11. Article 1 of the contested law stipulates that the High Representative’s Decision Enacting the Law on Amendment to the Criminal Code of BiH shall not apply in the territory of the Republika Srpska. The reason for this legal solution is that the High Representative does not have constitutional grounds for taking that decision and that this constitutes a flagrant violation of international law, constitutional order of Bosnia and Herzegovina and Republika Srpska. That decision, which was taken out of the institutions of BiH and in contravention of the procedure prescribed in the Constitution, undermines directly the rule of law and legal certainty. The National Assembly further alleges that the High Representative is the final authority in theatre regarding interpretation of this Agreement but that, however, he is not so when it comes to the authority to

pass amendments to the Dayton Peace Agreement and its Annexes, and that the applicant refers “tendentiously” to the Conclusions of the Peace Implementation Council in Bonn.

12. While invoking the provisions of Articles II and V of Annex 10 of the Dayton Peace Agreement and item IX(2) of the Conclusions of the Peace Implementation Council, the National Assembly concludes in its response that the High Representative does not have responsibility to enact laws falling under the scope of responsibility of the State or Entity and that the imposed law is therefore passed without valid constitutional grounds.

13. While referring to a study of the Venice Commission and Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”), the National Assembly alleges that the decision of the High Representative is in contravention of Article 10 of the European Convention, Article II(3)(h) of the Constitution of Bosnia and Herzegovina, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights and international law and constitutional order of Bosnia and Herzegovina, which are the reasons why the National Assembly enacted that law.

14. In the opinion of the National Assembly, this is a unique opportunity for the Constitutional Court to finally express a correct view regarding the position of the High Representative in BiH and protect the provisions referred to in Articles II(1), II(3)(g), II(3)(h), III(1), III(2), III(3)(a), III(5)(a), IV(3)(c), and IV(3)(d) of the Constitution of Bosnia and Herzegovina. This would be the way to protect the integrity of the institutions of Bosnia and Herzegovina and provisions of the Dayton Peace Agreement as a whole. Otherwise, the confirmation of such responsibilities, *i.e.* powers of the High Representative, in the manner alleged in the request, would definitely amount to the derogation of constitutional order of Bosnia and Herzegovina as a whole and, partially, Dayton Peace Agreement.

15. Accepting the fact that an individual alone, including the High Representative, can pass laws is inadmissible in legal terms, incompatible with all acts under the Constitution of BiH and achieved democratic standards and general civilization standards. The enactment of legal acts by one person alone, including the High Representative, would imply full legal and political delegitimation of any State in the world, full elimination of its sovereignty, placing thus the whole country and its peoples and citizens in a situation of full political independence by that individual, which is completely incompatible with the Preamble and Article I(2) of the Constitution of Bosnia and Herzegovina.

16. The National Assembly alleges that Europe as the birthplace of democracy, since 1215 and *Magna carta libertatum*, has been fighting for restricting the power of individual and protection of individual rights and freedoms, whereas, in Bosnia and Herzegovina, in the 21st century, “we have a situation that an individual alone passes laws” outside the highest legislative authority. Therefore, the National Assembly concludes that the request is unfounded and proposes that the Constitutional Court should dismiss it, and contests the proposal for interim measure, which is not specified.

IV. Relevant Law

17. The **Constitution of Bosnia and Herzegovina**, as relevant, reads:

Article I

Bosnia and Herzegovina

Bosnia and Herzegovina

2. Democratic Principles Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article III(3)(b)

Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

3. Law and Responsibilities of the Entities

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.

18. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18 and 46/21)

For the purpose of this decision, an unofficial revised text compiled at the Constitutional Court of Bosnia and Herzegovina will be used, which reads as follows:

III – CHAPTER III - APPLICATION OF CRIMINAL JURISDICTION

OF BOSNIA AND HERZEGOVINA

Applicability of Criminal Legislation of Bosnia and Herzegovina to Those Perpetrating a Criminal Offence within the territory of Bosnia and Herzegovina

Article 8(1)

(1) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who perpetrates a criminal offence within its territory.

19. The **High Representative's Decision on Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina** (published in the *Official Gazette of BiH*, 46/21 of 27 July 2021)

DECISION OF THE HIGH REPRESENTATIVE

No. 26/21

(...)

Noting that all legislative initiatives brought before the parliamentary assembly of Bosnia and Herzegovina to address this issue have been blocked. For the reasons set forth above the High Representative hereby issues the following:

DECISION

ENACTING THE LAW ON AMENDMENT TO THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

(Official Gazette of BiH, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18)

1. *The Law which follows and which forms an integral part of this Decision shall enter into force as provided for in Article 2 thereof, on an interim basis until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendment and with no conditions attached.*

2. *This Decision shall come into effect immediately and shall be published on the official website of the Office of the High Representative, and in the “Official Gazette of Bosnia and Herzegovina” without delay.*

LAW

ON AMENDMENT TO THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

Article 1

(Amendment to Article 145a)

(1) In the Criminal Code of Bosnia and Herzegovina (Official Gazette of BiH, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18) in Article 145a, after paragraph (1) new paragraphs (2) to (6) shall be added to read:

“(2) Whoever publicly incites to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, when that behaviour does not constitute the criminal offence from paragraph (1) of this Article,

shall be punished by imprisonment for a term between three months and three years.

(3) Whoever publicly condones, denies, grossly trivializes or tries to justify a crime of genocide, crimes against humanity or a war crime established by a final adjudication pursuant to the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 or by the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court or a court in Bosnia and Herzegovina, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group,

shall be punished by imprisonment for a term between six months and five years.

(4) Whoever perpetrates the criminal offence referred to in paragraphs (1) to (3) of this Article by public dissemination or distribution of tracts, pictures or other material,

shall be punished by imprisonment for a term not less than one year.

(5) If the criminal offence referred to in paragraphs (1) to (3) of this Article is carried out in a manner likely to disturb public peace and order or which is threatening, abusive or insulting, the perpetrator

shall be punished by imprisonment for a term not less than three years.

(6) Whoever gives a recognition, award, memorial, any kind of memento, or any privilege or similar to a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or names a public object such as a street, square, park, bridge, an institution, building, municipality or a city or similar, or registers a brand, after or under a name of a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or whoever glorifies a person sentenced by a final judgement for genocide, crimes against humanity or a war crime in any way,

shall be punished by imprisonment for a term not less than three years.”

2. Paragraph (2), which shall become paragraph (7), shall be amended to read:

“(7) A perpetrator of the criminal offence referred to in paragraphs (1) to (4) of this Article who is an official or responsible person or employed in an institution of authority or any body financed through public budget,

shall be punished by imprisonment for a term not less than three years.”

Article 2

(Entry into Force)

This law shall enter into force eight days after the date of its publication on the official website of “Official Gazette of Bosnia and Herzegovina”, whichever comes first.

20. The Law on Non-Applicability of the Decision the High Representative Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina (Official Gazette of RS, 89/21 of 7 October 2021)

Article 1

The High Representative's Decision Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina, whereby in the Criminal Code of Bosnia and Herzegovina (Official Gazette of BiH, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18), in Article 145a, after paragraph (1), new paragraphs (2) to (6) shall be added, and paragraph (2), which shall become paragraph (7), shall be amended, shall not apply in the territory of the Republika Srpska.

Article 2

- (1) The relevant authorities of the Republika Srpska shall not cooperate with the relevant authorities of Bosnia and Herzegovina as to the application of the Decision of the High Representative referred to in Article 1 of this Law.*
- (2) Upon the entry into force of this Law, the Government of the Republika Srpska shall ensure the application of paragraph 1 of this Article with the aim of protecting the citizens of the Republika Srpska.*

Article 3

This Law shall enter into force on first day following its publication in the Official Gazette of the Republika Srpska.

V. Admissibility

21. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.
22. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads:

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 an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*
- Whether any provision of an Entity's Constitution or law is consistent with this Constitution.*

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

23. The request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, consisting of a total of 28 delegates, which makes up $\frac{1}{4}$ of members of either chamber of a legislature of an Entity, which means (contrary to the assertions made in the response to the request) that the request was filed by an authorized subject, within the meaning of Article VI(3)(a) of the Constitution of BiH (see Constitutional Court, Decision on Admissibility, No. *U-7/10* of 26 November 2010, paragraph 21, available at www.ccbh.ba). As to the standing of the applicant, the Constitutional Court referred to the mentioned case-law in all subsequent cases wherein it dealt with the same claim, more specifically (Decision no. *U-4/21* of 26 September 2021, published in the *Official Gazette of Bosnia and Herzegovina*, 63/21, Decision No. *U-4/20* of 26 March 2021, published in the *Official Gazette of BiH*, 22/21 Decision no. *U-8/19* of 6 February 2020, published in the *Official Gazette of BiH*, 16/20, etc.)

24. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court concludes that the request is admissible as it has been filed by an authorized person and there is not any formal requirement under Article 19(1) of the Rules of the Constitutional Court which would render the request inadmissible.

VI. Merits

25. The applicant claims that the contested law is incompatible with Article I(2) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina, *i.e.* in violation of the principles referred to in the mentioned Articles and that the National Assembly has violated the principles referred to in the mentioned Articles by enacting the contested law.

26. The National Assembly contests the allegations in the request by alleging that the High Representative does not have powers to enact/impose laws and that his acts have been in violation of the provisions of the Constitution, European Convention and other international documents. On the other hand, the National Assembly contends that it acted in accordance with the provisions of the Constitution and responsibilities when it enacted the contested law.

27. The powers vested in the High Representative to enact laws and the legal nature of such laws were considered for the first time by the Constitutional Court in its decision *no. U-9/00* of 3 November 2000 when it examined the constitutionality of the Law on the State Border Service. It supported that case-law in all other decisions containing the same or similar claims as in the mentioned case (see Constitutional Court, Decision no. *U-9/00* of 3 November 2000, published in the *Official Gazette of BiH*, 1/01, Decision no. *U-16/00* of 2 November 2001, published in the *Official Gazette of BiH*, 13/01, Decision no. *U-25/00* of 23 March 2001, published in the *Official Gazette of BiH*, 17/01, and Decision no. *U-26/01* of 28 September 2001, published in the *Official Gazette of BiH*, 4/02). Therefore, with regard to the allegations in the response to the request that relate to the powers vested in the High Representative to enact laws and all other allegations related to that issue, the Constitutional Court refers to its case-law in decision no. *U- 9/00* (paragraphs 5 and 6):

5. *The Law on State Border Service was enacted by the High Representative on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.*

Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina

and the law that he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.

6. *Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 (O.G. 2/2000) - or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV(4) (a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed.*

28. Thus, it is beyond doubt that in the present case as well, the High Representative, by enacting the Law on Amendment to the Criminal Code of BiH and substituting himself for the national authorities, more specifically the Parliamentary Assembly of Bosnia and Herzegovina, enacted a national law in its nature, and is regarded the law of Bosnia and Herzegovina. Besides, the Constitutional Court will briefly examine the allegations in the response to the request, *i.e.* that the contested law was enacted on the basis of the responsibilities under the Constitution of the Republika Srpska. In this connection, it notes that it is beyond any doubt that the National Assembly has responsibilities to enact laws and other legal acts, but those laws must be compatible with the Constitution of Bosnia and Herzegovina.

29. Given the fact that the contested law forbids the application of a law of Bosnia and Herzegovina in the territory of the Republika Srpska, the Constitutional Court refers to its relevant case-law concerning the constitutional obligation of the Entities and other administration subdivisions of Bosnia and Herzegovina to comply with the State laws. In its decision *U-14/04* (see Constitutional Court, Decision on Admissibility and Merits no. *U-14/04* of 29 October 2010 published in the *Official Gazette of BiH*, 23/05), the Constitutional Court decided that the “enactment of the laws of the Entities in contravention of the procedure stipulated in the State laws raises the issue of constitutionality of such laws for the purposes of Article III(3)(b) of the Constitution of BiH, and that the obligations imposed by the State laws must be complied with.” The Constitutional Court reaffirmed that view in its decision no. *U-2/11* (see Constitutional Court, Decision on Admissibility and Merits, no. *U-2/11* of 27 May 2011, paragraph 52, published in the

Official Gazette of BiH, 99/11), wherein the Constitutional Court reiterated: “(...) the laws of Bosnia and Herzegovina passed by the Parliamentary Assembly of Bosnia and Herzegovina are being considered decisions of the institutions of Bosnia and Herzegovina” under Article III(3)(b) of the Constitution of Bosnia and Herzegovina, and the adoption of the laws by the Entities or any subdivisions thereof in Bosnia and Herzegovina contrary to the procedure prescribed by the State laws might challenge the issue of compliance with Article III(3)(b) of the Constitution of Bosnia and Herzegovina, pursuant to which the Entities and any subdivisions thereof are obliged to comply, *inter alia*, (and) with the decisions of the institutions of Bosnia and Herzegovina. If held otherwise, besides completely bringing to doubt the authority of the institutions of Bosnia and Herzegovina, it would also challenge the principle under Article I(2) of the Constitution of Bosnia and Herzegovina stipulating: 'Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law...' In that case the question might rightly be posed regarding the purpose of the State laws (*e.g.* the laws in the field of privatization, operations of the insurance companies, indirect taxation, *etc.*) if the entities or any subdivisions thereof in Bosnia and Herzegovina could pass laws violating or evading obligations imposed to those by the provisions of the State legislation, *i.e.* laws adopted at the level of the institutions of Bosnia and Herzegovina. Therefore, the Entities (and subdivisions thereof) must comply with the obligations imposed on them through the laws passed by the institutions of Bosnia and Herzegovina. The fact that such obligations have not been complied with might lead to the breach of the provisions of the Constitution of Bosnia and Herzegovina.”

30. Besides, the Constitutional Court refers to its recent decision no. *U 2/22*, wherein the Constitutional Court noted (see decision no. *U 2/22* of 26 May 2022, paragraph 91, available at www.ustavnisud.ba) that “the only way for the mentioned laws to cease to have an effect, as decisions adopted by the institutions of BiH, may be new decisions of the Bosnia and Herzegovina, which means that as long as the laws and the decisions of BiH are in legal force, the Entities have an obligation to comply with them and cannot have the responsibility for taking any legislative activities in these fields (...).”

31. In view of the undisputable content of the contested law forbidding the application of the Law on Amendment to the Criminal Code of BiH in the territory of the Republika Srpska and forbidding authorities of the Republika Srpska from cooperating with the authorities of Bosnia and Herzegovina in implementing the Law on Amendment to the Criminal Code of BiH, and the consistent case-law of the Constitutional Court referred to above, it is clear that the Constitution of Bosnia and Herzegovina does not contain any provision which would justify the constitutionality of

the contested law enacted by the National Assembly of the Republika Srpska. According to the principle of the rule of law under Article I(2), the Entities shall comply with the laws at the level of Bosnia and Herzegovina. As stated above, the Law on Amendment to the Criminal Code of BiH must be regarded a law of Bosnia and Herzegovina. Besides, according to Article III(3)(b) of the Constitution, the Entities are obligated to comply with the decisions of the institutions of Bosnia and Herzegovina. As stated above, the High Representative substituted himself for the institutions of Bosnia and Herzegovina by enacting the Law on Amendment to the Criminal Code of BiH. In the present case, the institution he substituted himself for is the Parliamentary Assembly of BiH. Thus, in addition to the fact that the mentioned law is considered a law of Bosnia and Herzegovina, it is also considered a decision of the institutions of Bosnia and Herzegovina. Given all the aforementioned expressed with regard to the Law on Amendment to the Criminal Code of BiH, Articles I(2) and III(3)(b) of the Constitution of Bosnia and Herzegovina have been violated.

32. Therefore, the Constitutional Court concludes that the contested law is incompatible with the Constitution of Bosnia and Herzegovina as being in contravention of Articles I(2) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

33. The Constitutional Court concludes that the contested law enacted by the National Assembly is incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina and Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

34. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

35. Given the decision of the Constitutional Court in the present case, it is not necessary to consider separately the applicant's request for an interim measure.

36. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

