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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW
ON THE COURTS
OF BOSNIA AND HERZEGOVINA
AND RATIONALE OF THE LAW

BOSNIA AND HERZEGOVINA

MINISTRY OF JUSTICE

Draft

LAW

ON THE COURTS OF BOSNIA AND HERZEGOVINA

Sarajevo, March 2013

On the basis of Article IV 4, item a) of the Constitution of Bosnia and Herzegovina the Parliamentary Assembly of Bosnia and Herzegovina, at a session of the House of Representatives, held on _____ 2013, adopted the

LAW

ON THE COURTS OF BOSNIA AND HERZEGOVINA

PART ONE – GENERAL PROVISIONS

Article 1 (Subject Matter)

The Law shall regulate the organisation of the courts, their competences, internal organisation, transparency of work, financing as well as other issues of significance for the organisation and functioning of the courts of Bosnia and Herzegovina.

Article 2 (Objective)

- (1) The judicial authority of Bosnia and Herzegovina shall consist of the Court of Bosnia and Herzegovina (hereinafter: the Court) and the High* Court of Bosnia and Herzegovina (hereinafter: the High Court), with the objective of ensuring efficient exercise of State competences, adherence to human rights and the rule of law in Bosnia and Herzegovina.
*{*the original draft in BCS says "Viši sud", to imply second instance competence, possible translation is "Higher Court" or "Superior Court"}*
- (2) The Court and the High Court (hereinafter: the Courts) shall be founded and terminated by law.

Article 3 (Seat and Seal)

- (1) The Seat of the Court shall be in Sarajevo, while the seat of the High Court shall be in.....
- (2) The Courts shall have their seals in accordance with the Law on Seals of the Institutions of Bosnia and Herzegovina ("Official Gazette of BiH", no. 12/98, 14/03 and 62/11).

Article 4 (Composition and Number of Judges)

- (1) The Court shall be comprised of at least eight (8) judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others.
- (2) The High Court shall have an equal number of judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others.
- (3) The total number of judges for each court shall be determined by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter: the High Judicial and Prosecutorial Council), on the elaborated proposal of the President of the Court and the

express consent of the Minister of Justice of Bosnia and Herzegovina (hereinafter: Minister of Justice).

**Article 5
(Independence)**

- (1) The Courts shall be autonomous and independent from the legislative and executive powers.
- (2) No one shall be allowed to influence the independence or the impartiality of the judges when deciding over cases that are assigned to them.
- (3) A judge shall not be held accountable for any opinion expressed or vote cast when rendering a court decision.

**Article 6
(Accountability)**

- (1) The Courts shall be required to perform impartially, promptly and efficiently.
- (2) A decision on the removal of a judge due misconduct or demeaning judicial office may only be rendered in a procedure prescribed by the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.
- (3) Bosnia and Herzegovina shall be accountable for any damages a judge may cause to a citizen or legal person due to the illegal or improper discharge of judicial duties.
- (4) In the event that Bosnia and Herzegovina pays out damages in accordance with paragraph (1) of the Article, the judge may be asked to compensate the amount paid in the event that damages were caused either intentionally or due to gross negligence. *{***the original draft says "paragraph (1)", though it probably should read "paragraph (3)" – translator note}*

**Article 7
(Protection of Rights)**

- (1) The Courts shall protect the rights and freedoms as guaranteed with the Constitution of Bosnia and Herzegovina and the laws of Bosnia and Herzegovina.
- (2) Everyone shall be entitled to a fair hearing within a reasonable time before an independent and impartial court established by law to decide on their rights and duties or on grounds of suspicion or charges for a punishable offence.

**Article 8
(Binding Nature of Court Decisions and Reexamination)**

- (1) Decisions of the Courts shall be binding on the territory of Bosnia and Herzegovina.
- (2) A decision of the Court may be reexamined only by the High Court in accordance with legal remedies and in a procedure prescribed by law.

**Article 9
(Transparency)**

- (1) The work of the Courts shall be open, unless determined otherwise through procedural or other law.
- (2) The transparency of the work of the Courts shall be ensured with public hearings before the Courts, the disclosure of the composition of the courts, by providing disclosures to the public during court proceedings under the conditions provided for with the law and through the disclosure of court decisions and other information of interest to the public.
- (3) The Courts may, in accordance with the law, close hearing before the court to the public for reasons of safeguarding secrets, preserving morality/integrity and the interests of minors as well as in order to protect other separate interests of an individual or the community.

**Article 10
(Official Languages)**

The official languages of Bosnia and Herzegovina shall be used in proceedings before the Courts and in Court addresses to parties – Bosnian, Serbian and Croatian, as well as both scripts – Latin and Cyrillic.

**Article 11
(Official ID Cards)**

- (1) The Ministry of Justice of Bosnia and Herzegovina shall issue official ID cards to the presidents of the Courts and the judges.
- (2) The High Judicial and Prosecutorial Council shall determine the design of the official ID cards in a separate book of rules.

**Article 12
(Judge Robes)**

- (1) Judges shall wear robes during the public part of a trial and when publicly disclosing decisions.
- (2) The High Judicial and Prosecutorial Council shall determine the design of judge robes in a separate book of rules.

**Article 13
(Signs of Affiliation)**

In the execution of official and judicial duties, a judge shall not show any signs of religious, political, ethnic or other affiliation nor shall such insignia be shown anywhere in the premises of the court.

**Article 14
(Cooperation and Legal Aid)**

- (1) The Courts shall be required to cooperate mutually as well as with other courts and authorities in Bosnia and Herzegovina and with foreign courts in accordance with the procedural laws.
- (2) In matters within their jurisdiction, the Courts shall offer legal aid to other courts in Bosnia and Herzegovina and abroad in accordance with the law and international agreements or in accordance with the principle of reciprocity.

- (3) The Courts shall have authorities to request that other bodies send them any information they require in order to conduct court proceedings, while the bodies shall be required to promptly deliver responses and act in accordance with the requests of the Courts.
- (4) The Courts shall be required to inform the Attorneys Office of Bosnia and Herzegovina in the event that during a proceedings they determine that measures must be undertaken in order to protect the rights and interests of Bosnia and Herzegovina or other entities that according to the law are represented by the Attorneys Office of Bosnia and Herzegovina.

PART TWO – JURISDICTION OF THE COURTS

CHAPTER I – Jurisdiction of the Court

Article 15 (Criminal Jurisdiction)

- (1) The Court shall have jurisdiction in the first instance for criminal offences as determined with the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina.
- (2) The Court shall have further jurisdiction for criminal offences as determined with the laws of the Federation of Bosnia and Herzegovina, Republika Srpska and the Brcko District of Bosnia and Herzegovina in the event that:
 - a) the criminal offences endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;
 - b) the forms of the criminal offences are the most grave forms and the damage has been incurred to social values that are guaranteed and protected under the Constitution of Bosnia and Herzegovina and international laws, or damage has been made outside of the territory of Bosnia and Herzegovina;
 - c) criminal offences are committed by an individual or organised group whose members are from the territory of the whole of Bosnia and Herzegovina, from the territory of two entities or from the territory of one entity and the Brcko District of Bosnia and Herzegovina or in the event that the offences were committed throughout the territory of the whole of Bosnia and Herzegovina, on the territory of the two entities or on the territory of one entity and the Brcko District of Bosnia and Herzegovina.
- (3) The Court shall have further jurisdiction to:
 - a) decide any issue relating to international and inter-entity criminal law enforcement, including relations with Interpol and other international police institutions, such as decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign States or International Courts or Tribunals;
 - b) decide on the reopening of criminal proceedings that have been concluded with a legally binding decision of the Court.

Article 16
(Civil Jurisdiction)

The Court shall have jurisdiction to:

- a) preside over property-related disputes between the State of Bosnia and Herzegovina and the entities, between the State and the Brcko District of Bosnia and Herzegovina (hereinafter: Brcko District), between the entities, between the entities and the Brcko District and between the institutions of Bosnia and Herzegovina that exercise public authorities;
- b) resolve property-related disputes stemming from damages that were created due to the performance of duties of administrative bodies of Bosnia and Herzegovina, other institutions of Bosnia and Herzegovina or officials of such bodies or institutions;
- c) conduct proceedings for the compulsory enforcement of claims on the basis of enforcement decisions of the Court, institutions and bodies of Bosnia and Herzegovina unless determined otherwise with a separate law;
- d) resolve other disputes in the event that jurisdiction of the Court is determined with the laws of Bosnia and Herzegovina or by international agreements.

Article 17
(Administrative Jurisdiction)

The Court shall have jurisdiction to:

- a) decide on complaints against final administrative acts or on administrative silence, by an institution of Bosnia and Herzegovina or one of its bodies, public agencies, public corporations, institutions of the Brcko District or any other organisation as determined with the laws of the State of Bosnia and Herzegovina, while exercising public authorities;
- b) assess the legality of final administrative acts adopted in accordance with the laws of Bosnia and Herzegovina, performed in the exercise of public duties by the authorities of government of Bosnia and Herzegovina listed in paragraph 1 of the Article, for which judicial protections are not provided outside of an administrative dispute;
- c) decide on requests for the protection of freedoms and rights as guaranteed with the Constitution of Bosnia and Herzegovina, in the event they are violated due to a final individual act or action by an official of an institution of Bosnia and Herzegovina or one of its bodies, an institution of the Brcko District or any other organisation as determined with the laws of Bosnia and Herzegovina, while exercising public authorities;
- d) decide on reopening proceedings;
- e) preside over other disputes in the event that jurisdiction of the Court has been determined with the laws of Bosnia and Herzegovina or with international agreements.

CHAPTER II – Jurisdiction of the High Court

Article 18 (Subject Matter Jurisdiction)

- (1) The High Court shall have jurisdiction to decide on:
 - a) regular legal remedies against decisions of the Court of Bosnia and Herzegovina;
 - b) legal remedies against decisions of its panels unless determined otherwise with the law;
 - c) extraordinary legal remedies against legally effective decisions of the Court of Bosnia and Herzegovina, when determined with the law.
- (2) A judge who has participated in the decision making process pursuant to an appeal shall not participate in proceedings deciding on extraordinary legal remedies.
- (3) The High Court shall also have jurisdiction to:
 - a) take legal positions and opinions regarding the implementation of the laws of Bosnia and Herzegovina and international treaties on request by any court of the entities or any court of the Brcko District of Bosnia and Herzegovina (hereinafter: Brcko District) entrusted to implement the laws of Bosnia and Herzegovina;
 - b) decide on appeals against decisions of the Central Election Commission of Bosnia and Herzegovina and in procedures on conflicts of interest, when provided for by the law;
 - c) preside over conflicts of jurisdiction between courts from different entities, between courts of the entities and the Brcko District, as well as between the Court and any other court, for decisions against which appeals are not permitted;
 - d) preside over motions for the transfer of jurisdiction from the Court to another court in an entity or in the Brcko District in the event that there are actual reasons or legal reasons preventing the Court from taking action;
 - e) preside over motions for the transfer of jurisdiction from the courts of the Brcko District to the entity courts with subject matter jurisdiction or in the event that there are actual reasons or legal reasons preventing the courts of the Brcko District from taking action;
 - f) preside over any other cases that are provided for by the laws of Bosnia and Herzegovina or by international agreements.

Article 19 (Initiating an Evaluation of the Constitutionality of a Law)

Courts may initiate procedures for the evaluation of the constitutionality of a law before the Constitutional Court of Bosnia and Herzegovina in accordance with the Constitution of Bosnia and Herzegovina and the appropriate regulations dealing with proceedings before the Constitutional Court of Bosnia and Herzegovina.

PART THREE – INTERNAL ORGANISATION OF THE COURTS

CHAPTER I – Organisation

Article 20 (Organisation)

- (1) The Courts shall have a general plenum and departments that are established in order to preside over matters within the same legal field.
- (2) The Criminal Departments of the Court and the High Court shall consist of two sections and each section shall have at least 6 judges.

Article 21 (Work Methodology)

- (1) The courts shall adjudicate in judge panels, unless the law stipulates that action be taken by a single judge.
- (2) The composition of the panels shall be determined with the laws.
- (3) Unless determined otherwise, regular and extraordinary legal remedies filed against decisions of the Court shall be decided on by the High Court by a panel consisting of 3 (three) judges.

Article 22 (General Sessions)

- (1) The general plenum of the Courts shall consist of all judges of the respective court and decisions shall be passed through a majority vote of all judges.
- (2) At the general plenum the Courts shall:
 - a) adopt the work plan of the respective court as proposed by the Court President;
 - b) adopt the proposal of budget of the respective court;
 - c) decide on other issues provided for by the law.

Article 23 (Collegiums)

The Courts may, through an internal document, prescribe that certain issues from within the jurisdiction of the court, except for those under the jurisdiction of the general session, are decided on by the Collegium, which shall be comprised of the President of the Court, the Secretary-General, the presidents of the departments and, as necessary, other staff as determined by the President of the Court.

CHAPTER II – Court Departments and Sections

Article 24 (Court Departments)

- (1) The court departments are:
 - a) Criminal Department;

- b) Civil Department;
 - c) Administrative Department;
- (2) A department shall be managed by the president of the department who shall be elected by the judges of the department for a period of three years.
- (3) The president of a department shall be elected by a majority vote of all judges of the department and may be removed from office in the same manner.

Article 25
(Court Department Sessions)

- (1) The president of the department shall convene and manage the session of the court department.
- (2) At the sessions of the court departments, consideration shall be given to issues of interest regarding the performance and the improvement of work methodology of the department, especially the organisation of internal operations and monitoring the state of affairs of the department, as well as harmonising practices regarding legal issues and other department issues.

Article 26
(Sections of the Criminal Department of the Court)

- (1) The Criminal Department of the Court shall consist of:
- a) Section I for war crimes;
 - b) Section II for organised crime, economic crimes, corruption and general crime;
- (2) In the Criminal Department single judges may, within their section, also perform the duties of preliminary procedure judge or preliminary hearing judge.

Article 27
(Sections of the Criminal Department of the High Court)

The Criminal Department of the High Court shall consist of:

- a) Section I, decides on appeals filed against decisions in war crime cases;
- b) Section II, decides on appeals filed against decisions in cases of organised crime, economic crimes, corruption and general crime.

CHAPTER III – Presidents of the Courts and Judges

Article 28
(Implementation of Court Function)

Tasks within the jurisdiction of each of the courts shall be performed by the president, the judges, the professional staff and the other officers of the court.

**Article 29
(Court President)**

- (1) The President of the Court and the President of the High Court (hereinafter: the President) shall be responsible for the management of the comprehensive performance of the court and the court administration.
- (2) The President shall represent the court before other bodies and organisations.
- (3) The President of the court may delegate certain competences to judges or officers of the court.
- (4) The President of the court shall decide which judge shall perform the duties of President of the court in his/her absence.
- (5) The President of the court shall perform court administration duties in accordance with the law and the Book of Rules on Internal Court Operations.

**Article 30
(Appointment)**

- (1) The Presidents of the Courts shall be appointed and removed by the High Judicial and Prosecutorial Council in the manner and under the procedure as prescribed with the Law on the High Judicial and Prosecutorial Council.
- (2) The Presidents of the Courts shall be appointed from amongst the different constituent Peoples or from the ranks of other citizens of Bosnia and Herzegovina.
- (3) The Presidents of the Courts are appointed from among the judges of that court, who have proven managerial and organizational skills relevant for the operations of that court.
- (4) The President of the High Courts shall be appointed to a mandate of five (5) years and may not be reappointed as president prior to the expiration of a period of five (5) years from the end of the previous mandate.
- (5) After the elapsing of the deadline pursuant to paragraph (4) of the Article, presidents may be reappointed to one more mandate of five (5) years.

**Article 31
(Terms for Appointment to High Court)**

- (1) Candidates for judge positions with the High Court shall have at least eight (8) years of experience as a judge, of which at least five (5) years as a judge of the Court or another second instance or third instance court, or prosecutors, attorneys, general attorneys, agents for representation before the European Court of Human Rights in Strasbourg or other relevant post Bar exam legal experience.

**Article 32
(Evaluation)**

- (1) The performance results of the judges and of the Presidents of the Courts shall be evaluated in accordance with the criteria as determined by the High Judicial and Prosecutorial Council.

- (2) The performance evaluation of the judges shall be carried out by the president of the respective court together with the express opinion of the president of the department, the performance results of the President of the Court shall be evaluated by the President of the High Court while the performance results of the President of the High Court shall be evaluated by the High Judicial and Prosecutorial Council.

CHAPTER IV – Judicial Administration

Article 33 (Secretariat)

The Courts shall have separate secretariats which shall be managed by the court secretary, under the supervision of the president of the respective court and in accordance with the regulations on internal court operations.

Article 34 (Regulations on Court Operations)

- (1) The High Judicial and Prosecutorial Council shall, in cooperation with the Ministry of Justice, render the regulations on court operations that regulate the internal operations of the respective court and its organisational units.
- (2) The regulations pursuant to paragraph (1) of the Article shall be published in the “Official Gazette of BiH”.

Article 35 (Legal Associates and Legal Advisors)

- (1) A graduated lawyer with a passed Bar exam may be appointed as a legal associate to the Court.
- (2) A graduated lawyer with a passed Bar exam and three years of legal experience may be appointed as a senior legal associate to the Court.
- (3) A graduated lawyer with a passed Bar exam and five years of legal experience may be appointed as a legal advisor to the High Court.
- (4) Legal associates, senior legal associates and legal advisors shall be appointed by the High Judicial and Prosecutorial Council.
- (5) Legal associates and legal advisors shall assist a judge in their work, analyse legal issues, prepare cases for trial, as well as either independently or under the supervision and instruction of a judge perform other tasks as provided for with the law.
- (6) The provisions of the Law on the High Judicial and Prosecutorial Council that refer to competences of the Council for judges shall also be applied for legal associates, senior legal associates and legal advisors.

Article 36 (Court Trainees)

- (1) A graduated lawyer may be employed as a court trainee – volunteer for practical training for a period of, at most, two years.

- (2) The selection of court trainees shall be carried out based on a public competition which shall be announced by the president of the respective court.
- (3) Trainees – volunteers shall not receive compensation for work for the duration of practical training or any other rights, except for the right to medical insurance and insurance against accidents in the workplace.

CHAPTER V – Court Employees

Article 37 (Administrative Tasks)

- (1) Tasks that do not have to be performed by judges may be entrusted to employees of the respective court who perform administrative tasks.
- (2) The Presidents of the Courts shall establish the criteria for determining the required number of employees for the prompt and efficient performance of judicial duties.
- (3) The number of employees, the terms of reference for each employee, authorities and responsibilities, qualifications and other requirements for employment to each respective court shall be separately established with the Book of Rules on Internal Organisation and the Systematisation of Posts in accordance with the approximate assessment of the required number of judges.
- (4) The Presidents of the Courts shall send the documents pursuant to paragraphs (2) and (3) of the Article, together with the express opinion of the Ministry of Justice of Bosnia and Herzegovina, for confirmation to the High Judicial and Prosecutorial Council.

Article 38 (Personal Records)

- (1) Personal records shall be maintained for the employees of the Courts which shall contain personal information, information on qualifications as well as any other information in accordance with the law.
- (2) A person with a kept personal record shall have the right to review his/her file and the right to seek corrections if the said information is incorrect.

Article 39 (Employee Performance Evaluations)

- (1) The performance of the employees of the courts shall be evaluated annually.
- (2) The Presidents of the Courts shall evaluate the performance of the respective court secretary.
- (3) On the proposal of the senior official who is the immediate supervisor of the employee being evaluated, the president of the respective court shall evaluate the performance of the legal associates and trainees, while the secretary of the respective court shall evaluate the performance of the other employees.

**Article 40
(Accountability)**

Employees of the Courts shall be accountable for any violation of official duty in accordance with the regulations that are applied for civil servants and employees of institutions in Bosnia and Herzegovina.

PART FOUR – PROSECUTORS, DEFENCE COUNSELS AND DUTIES TO THE PUBLIC

CHAPTER I – Prosecutors and Defence Counsels

**Article 41
(Prosecutors)**

Prosecutors of the Prosecutors Office of Bosnia and Herzegovina shall take action in criminal proceedings before the Courts.

**Article 42
(Authorised Representatives)**

- (1) In order for an authorised representative to come forward and take action before the Courts, he/she must be entered in the Attorney Directory of the Bar Association in Bosnia and Herzegovina.
- (2) The Courts may, on a case by case basis, allow actions before the respective court for an authorised representative who does not fulfill the terms of paragraph (1) of the Article.
- (3) The General Session of the High Court shall, with the consent of the Ministry of Justice of Bosnia and Herzegovina, determine the procedure for specific actions of an authorised representative, as well as for acknowledging bodies that issue attorney licences, determine the terms and method for the work of all authorised representatives in proceedings before the respective court, including at its own discretion the right to pronounce sanctions against an authorised representative in proceedings before the court.

CHAPTER II – Duties toward the Public

**Article 43
(Confidentiality)**

In their work, the judges, officials and employees of the Courts shall be required to keep secret anything of which they acquire knowledge regarding participants to proceedings or the legal and factual circumstances of their cases and shall be required to keep the information as though it were confidential information not available to the public.

**Article 44
(Freedom of Access to Court Files)**

- (1) The public and the parties to proceedings shall have the right of access to court files and registers, in accordance with the law, unless determined otherwise with the law regarding any specific information from the court register.

- (2) Data entered in the court register shall be public and anyone may transcribe it or request to be issued a certified excerpt from the court register.

Article 45
(Work-Related Complaints)

- (1) A complaint against the work of a judge shall have the character of a disciplinary complaint for which a procedure shall be carried out in accordance with the Law on the High Judicial and Prosecutorial Council.
- (2) A procedure pursuant to a complaint against the work of an employee shall be carried out in accordance with the procedure prescribed with the Law on Civil Service in Institutions of Bosnia and Herzegovina and the Law on Working in Institutions of Bosnia and Herzegovina.

Article 46
(Court Police)

The Court Police of Bosnia and Herzegovina shall, in accordance with the regulations on Court Police, ensure the safety of judges, officials and employees as well as of the citizens who are in the Courts, as well as the safety of the court buildings and premises, order in the courtrooms and the enforcement of court orders.

PART FIVE – FINANCING THE WORK OF THE COURTS

Article 47
(Funds for Work)

- (1) Bosnia and Herzegovina shall be required to secure funding and any other support in order to ensure the unobstructed and efficient operations of the Courts.
- (2) The Courts shall have a clearly separate budget, which shall be a component part of the budget of the institutions of Bosnia and Herzegovina and the International Obligations of Bosnia and Herzegovina.

Article 48
(Budget)

- (1) Before the beginning of each budget year, the Presidents of the Courts shall submit budget proposals to the High Judicial and Prosecutorial Council for consideration and further procedure.
- (2) After consideration and adjustments to the budget proposal of the Courts, the High Judicial and Prosecutorial Council shall deliver the budget proposal to the Ministry of Justice.
- (3) The Presidents of the Courts shall have the right to attend and represent the proposal of the High Judicial and Prosecutorial Council at the sessions of the Parliamentary Assembly of Bosnia and Herzegovina and the relevant committees of the Parliamentary Assembly of Bosnia and Herzegovina whenever discussion is held or decisions made on issues regarding the budget of the respective court.
- (4) The Presidents of the Courts shall, with the assistance of the relevant court secretary, be tasked with the preparation and execution of the budget of the respective court.

- (5) At the end of each budget year, the Presidents of the Courts shall inform the Parliamentary Assembly of Bosnia and Herzegovina on the execution of the budget of the respective court.

Article 49
(Salaries and Compensation for Judges)

- (1) The salaries, compensation and certain material rights of the judges and of certain categories of professional staff of the Courts shall be determined with the Law on Salaries and Compensation in Judicial and Prosecutorial Institutions on the Level of Bosnia and Herzegovina ("Official Gazette of BiH", no. 90/05), while for the other employees the provisions of the Law on Salaries and Compensation in Institutions of Bosnia and Herzegovina ("Official Gazette of BiH", no. 50/08, 35/09 & 75/09) shall be applied.
- (2) In order to establish the salaries, compensation and other income for judges and the professional staff of the High Court, in accordance with paragraph (1) of the Article, the Ministry of Justice of Bosnia and Herzegovina shall be required to, within a period of 60 days of the day of coming into effect of the Law, deliver to the Council of Ministers of Bosnia and Herzegovina a draft Law on Amendments to the Law on Salaries and Compensation in Judicial and Prosecutorial Institutions on the Level of Bosnia and Herzegovina.

PART SIX – TRANSITIONAL AND FINAL PROVISIONS

Article 50
(Resolution of Cases received by the Court of Bosnia and Herzegovina)

Cases from within the jurisdiction of the High Court of Bosnia and Herzegovina that have been received by the Court of Bosnia and Herzegovina up to the time of the application of the Law, shall be taken over by the High Court of Bosnia and Herzegovina.

Article 51
(Ensuring the Conditions for the Start of Operations)

- (1) The Ministry of Justice of Bosnia and Herzegovina and the Ministry of Finance and the Treasury of Bosnia and Herzegovina shall ensure the necessary material/financial requirements for the start of operations of the High Court.
- (2) The High Judicial and Prosecutorial Council of Bosnia and Herzegovina shall be required to, within a period of three months from the coming into effect of the Law, carry out the procedure for the election of judges to the High Court.
- (3) The Court shall secure the required number of staff for the work of the High Court until the adoption of the Book of Rules on Internal Organisation and the Systematisation of Posts and the employment of certain posts that are required for independent functioning".
- (4) The President of the High Court shall, within thirty (30) days of taking up office, be required to pass a book of rules on internal organisation and the systematisation of posts.

- (5) The President of the High Court may in agreement with the President of the Court and the agreement of the employees, take on employees of same or similar positions who are employed with the Court.

**Article 52
(Other Regulations)**

The Presidents of the Courts shall pass other regulations that are required for the application of the Law or harmonise existing regulations with this Law within a period of 6 (six) months from the day of coming into effect of the Law, while until then the current regulations shall be applied unless they are contrary to this Law.

**Article 53
(Termination of Specific Provisions)**

Provisions under this law pertaining to mandates and requirements for appointing the president and judges of the High Court shall cease to be valid upon the beginning of application of provisions under the Law on HJPC regulating this issue.

**Article 54
(Termination of Other Laws)**

The provisions of the Law on the Court of Bosnia and Herzegovina – consolidated text (“Official Gazette of BiH”, no. 49/09, 74/09 and 97/09) shall cease to be valid with the beginning of the application of this Law.

**Article 55
(Coming into Effect)**

This Law shall come into effect on the eighth day from its publication in the “Official Gazette of Bosnia and Herzegovina” and shall be applied **as of, 2013.**

PSBiH, no. _____/13

_____ 2013

Sarajevo

SPEAKER
*of the House of Representatives
of the Parliamentary Assembly of BiH*

SPEAKER
*of the House of Peoples of the
Parliamentary Assembly of BiH*

RATIONALE OF THE LAW ON COURTS OF BOSNIA AND HERZEGOVINA

I – CONSTITUTIONAL BASIS FOR ADOPTION OF THE LAW

Constitutional basis for adoption of this Law is Article III 1. g) of the Constitution of Bosnia and Herzegovina, according to which the institutions of Bosnia and Herzegovina are responsible for international and inter-entity criminal law enforcement, including relations with Interpol, as well as Article IV. 4. a) of the Constitution of Bosnia and Herzegovina, whereby the Parliamentary Assembly of Bosnia and Herzegovina is responsible for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina.

II – REASONS FOR ADOPTION OF THE LAW

The State of Bosnia and Herzegovina is obligated to ensure legal security and certainty as the integral elements of the rule of law principle in a democratic society. Recognizing the need for judicial protection at the level of the State of Bosnia and Herzegovina compliant with the guarantees defined in the European Convention on Human Rights, the High Representative passed a Law on Court of Bosnia and Herzegovina, which was drafted by the CoE Venice Commission. Subsequently, the Parliamentary Assembly of Bosnia and Herzegovina adopted the bill in the proposed text, which later has been changed and amended.

Thus, establishment of the Court of Bosnia and Herzegovina allowed for judicial protection in the matters falling within the jurisdiction of the State of Bosnia and Herzegovina, which, under the Constitution of Bosnia and Herzegovina, is a precondition for establishing the rule of law in Bosnia and Herzegovina. The Court has *ratione materiae* jurisdiction in criminal matters based on Article III, paragraph 1, sub-paragraph g. of the BiH Constitution, which stipulates that the institutions of Bosnia and Herzegovina are responsible for international and inter-entity criminal law enforcement, including relations with Interpol. The *ratione materiae* jurisdiction and the composition of the Court are regulated by provisions of the Law. The *ratione materiae* jurisdiction implies the powers of the Court to decide certain types of cases or to undertake certain types of procedural actions or perform other tasks stipulated by law. Accordingly, the Court as jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. In addition to aforementioned responsibilities defined in the provisions of the Law on Court of Bosnia and Herzegovina, it is stipulated that the Court shall have jurisdiction to **hear appeals against first-instance decisions.**

When it comes to appeals, the Criminal Procedure Code of Bosnia and Herzegovina entails the right to appeal, according to which an appeal filed against a decision shall be reviewed by the **Appellate Panel of the Court and adjudicated in a session of the Panel or on the basis of a hearing** (Article 305). Thus, the appeal filed against the judgment of the Court of Bosnia and Herzegovina shall be reviewed and adjudicated by the same Court (Appellate Panel), which is contrary to the accepted definition of the appeal: “As the most important legal remedy, an appeal against first instance judgment is defined as an **ordinary, devolutive, suspensive and complete legal remedy of the parties to proceedings and other authorized persons, whereby the High Court is requested to alter or repeal, in part or in whole, the first instance judgment due to certain shortcomings, and to replace it with the judgment of the High Court.**”

Thus, in criminal proceedings the right to appeal is a legal, constitutional, convention-guaranteed right, and one of the fundamental human rights. The whole procedure involving legal remedies, including the trial before the second instance court, is principally an appellate proceeding, examining the merits thereof and adjudicating on the appeal. Therefore, the right to appeal in

criminal proceedings is guaranteed by both the national and international criminal law and it is a central right to rebut all irregular and unlawful judgments delivered in the first instance.

Undisputedly, the right to appeal is a legal right at the state level, since the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC) in Article 292 expressly stipulates the right to appeal and deadlines for filing an appeal against the judgment rendered in the first instance. However, Article 2, paragraph 3, sub-paragraph a. of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to an effective appeal, whereas Article 14, paragraph 5 thereof provides that any person convicted of a crime shall have the right to his **conviction and sentence being reviewed by a higher tribunal according to law. Article 13 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides for the right for an effective remedy before national authorities for violations of rights under the Convention**, and that efficiency must be institutional, real, corrective and material, whereas Article 2 of Protocol no. 7 to the ECHR guarantees the right to appeal in criminal matters, in a way that it provides that any person convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence **reviewed by a higher tribunal in accordance with law**. Article 47 of the EU Charter on Fundamental rights stipulates the right to an efficient legal remedy and fair trial.

In accordance with the Codes of Criminal Procedure of the entities and Brčko District of Bosnia and Herzegovina, the primary purpose and procedural objective of an appeal is to prevent the finality of first instance decision, and following the removal of all the deficiencies from the contested judgment the appellants pointed to in the appeal to have the second-instance court pass a decision more favorable to them. **Therefore, the second instance court shall decide on all factual or legal matters subject to challenge by on one or more grounds of appeal.**

Thus, both domestic and international legal documents justify the right of a person to have his appeal heard before a higher court, i.e. another independent and impartial tribunal.

Legal remedies available to the appellants must be sufficiently certain, not only in theory but also in practice, otherwise they would be lacking necessary availability and efficiency. Examining of one matter in two court instances, by two independent courts provides not only more guarantees of a proper and lawful proceedings but also full protection of the right and interests of the parties to the proceedings. On October 31, 2007 the Minister of Justice had passed a decision whereby he formed a Working Group to examine the justification of this point of view, i.e. the establishment of a special court for appellate procedure. In its *Report on examining the justification of an Appellate Court of Bosnia and Herzegovina*, the Working Group pointed out that current review of court decisions by an appellate division of the BiH Court was not contrary to either Article 2 of Protocol no. 7 of the Convention or Article 14, paragraph 5 of ICCPR. However, as the judges of the BiH Court are appointed by the High Judicial and Prosecutorial Council to the Court of Bosnia and Herzegovina, and not to any of the divisions of that Court, and since, in accordance with the legal authorities, the President of the Court is one who assigns judges to divisions, including the Appellate Division, whereas neither the Law on the HJPC nor the Law on Court of Bosnia and Herzegovina sets any additional criteria for assigning the judges to the appellate division, nor there is any provision in the laws that guarantees the continuity of the appointment of judges to the Appellate Division of the BiH Court, the Working Group concluded that this method of appointment of judges to the Appellate Division of the BiH Court provides no sufficient guarantees in terms of their internal independence, i.e. independence of each judge in the decision making process in relation to the other judges and the president of the court. The current way of assigning of judges to the Appellate Division of the BiH Court could also jeopardize the perception of the public about the actual internal independence of judges of the Division. In the course of discussion the Working Group also pointed out that the internal independence of judges of the appellate division of the BiH Court could also be brought into

questions by the current provision of the Law on BiH Court, which stipulates that the Court Rules, which apply to all three divisions of the BiH Court, shall be adopted at the general plenum of the Court of Bosnia and Herzegovina, in which the appellate division judges are in the minority. Furthermore, members of the Working Group had divided opinions as to how the listed grounds for possible complaints relating to internal independence of judges of Appellate division of the BiH Court could be removed. Majority of WG members preferred the establishing of a separate Appellate Court of BiH, which would be organizationally and functionally separate from the Court of Bosnia and Herzegovina, as the first instance court, and which would hear the appeals against all decisions delivered in the first instance by the Criminal and Administrative divisions of the BiH Court.

The second meeting on the "Structural Dialogue on Justice between the EU and BiH" held on November 10-11, 2011 in the section titled "Preliminary draft recommendations of the European Commission," said (quote) "In terms of institutional reform of the appellate system of the Court of BiH, the European Commission:

- notes with concern that the Ministry of Justice of Bosnia and Herzegovina has not made progress in implementing the conclusions of the working group on the establishment of the Appellate Court of Bosnia and Herzegovina;
- expects that proposals adopted in 2008, which the HJPC reiterated at its meeting held on 9 November this year, be referred to the parliamentary procedure before the next meeting of the Structural Dialogue."

Also, as part of a structural dialogue about *"coordination issues between the Court of BiH and other judicial instances in BiH, the European Commission: requires from the HJPC to coordinate the efforts in searching the ways to enhance the objectivity of the parameters identified in Article 7.2 of the Law on the Court of Bosnia and Herzegovina, in order to eliminate the possibility of abuse or inappropriate use of this Article"*.

To this end, the BiH Ministry of Justice has prepared a draft law on the Appellate Court of Bosnia and Herzegovina, *as well as amendments to Article 7.2 of the Law on the Court of Bosnia and Herzegovina*, but the ***Third meeting of the "Structural Dialogue on Justice between the EU and BiH" took place on June 05-06, 2012 and the "Recommendations of the European Commission" were as follows (quote):***

„ In terms of institutional reform of the appellate system of the Court of BiH, the European Commission:

- reiterated that the BiH Ministry of Justice must complete the legal framework necessary for the establishment of a separate Appellate Court of BiH, taking into account relevant conclusions from the opinions of the Venice Commission.

When it comes to cooperation of competences among the different court instances at all levels in BiH, European Commission:

- welcomes the efforts in finding a consensus within the professional community concerning the need to further objectify the parameters governing the jurisdiction of the BiH Court in the case of criminal offenses prescribed in the entity criminal codes and the Criminal Code of Brčko District,
- expects that the Ministry of Justice should propose legislative solutions taking into account the conclusions made in the process of consideration of Article 7.2 of the Law on Court of BiH led by the HJPC.“

Taking into account the relevant conclusions from the opinions of the Venice Commission and all of the abovementioned points, it all suggests that there are legitimate reasons for solving the courts' organization issues in a single law.

Also, this solution takes into account the recommendations of the European Commission delivered in the coordination process led by the HJPC concerning Article 7.2 of the Law on the Court of BiH, and, as required by the European Commission "*eliminates the possibility of abuse or inappropriate use*" of Article 7.2 of the Law on the Court of Bosnia and Herzegovina.

Analyzing the "DISCUSSIONS SUMMARY AND PROPOSED CONCLUSIONS IN RELATION TO ARTICLE 7 OF THE LAW ON THE COURT OF BIH", the offered solutions has been assessed as the most acceptable and most appropriate.

Thus, „the too wide discretion of the court to jeopardize the legal certainty, the rule of law and fundamental values of a democratic society (judgment of ECHR, Strelac v. Germany)“ has been eliminated.

III – COMPLIANCE WITH EUROPEAN LEGISLATION

European standards require for every person to have the right to a fair and public trial within a reasonable time before an independent and impartial court established by law, in deciding on their civil right or obligations, as well as the right to a legal remedy. All international documents, as well as legislations of other countries indicate that every person must have the right to appeal, i.e. the first instance decision should be reviewed by an independent court in accordance with the law. The practice of most countries is for the second instance court to adopt decisions on all factual or legal matters that are challenged on one or more grounds of appeal, while the judicial organization is to be regulated by national legislation.

Therefore, the „right to effective legal remedy before the national tribunal“ stemming from international legal documents obligates all member states to individually regulate this area in such a manner that is adequate to its constitutional system, state structure and similar. Thus, the matter regulated by this Draft Law is not regulated by the legally binding acts of the EU.

IV – IMPLEMENTING MECHANISMS AND ADHERENCE TO REGULATION

The implementation of this Law is ensured by the existence of the Court of Bosnia and Herzegovina, i.e. „Appellate Division of the Court of BiH“, the Prosecutor's Office of Bosnia and Herzegovina, and the High Court of Bosnia and Herzegovina established by this Law. Therefore, this law shall establish a court with primary jurisdiction to hear the appeals submitted against the judgments of the Court of Bosnia and Herzegovina.

V - CONSULTATIONS

This Law has been prepared based on the laws of Brčko District of Bosnia and Herzegovina, of Republika Srpska and of the Federation of Bosnia and Herzegovina, and primarily based on the Law on Court of Bosnia and Herzegovina. Consulted were also international regulations in this domain and case-law of the neighboring and other countries.

Major contribution in considering and agreeing on the most favorable legal solutions was provided by *the Report on examining the justification of an Appellate Court of Bosnia and Herzegovina*, prepared by the Working Group composed of representatives of the HJPC, The Court of Bi Hand the Prosecutor's Office of BiH, Supreme Court of RS and Supreme Court of the Federation of BiH, Prosecutor's Office of RS and Prosecutor's Office of FBiH, the Appellate Court and Prosecutor's Office of Brčko District and the BiH Ministry of Justice.

Also, the consultations were carried out in the framework of Structural Dialogue on Justice between the EU and BiH.

The Directorate for Human Rights, the Directorate General for human right and rule of law also provided comments to this draft law, (quote):

„In this Opinion we examined the compliance of the provisions of the draft Law on the Courts of Bosnia and Herzegovina (the" Draft Law "), whose adoption is currently considered by the authorities of Bosnia and Herzegovina, with the European standards, in particular the Convention on Human Rights and Fundamental Freedoms of the Council of Europe ("European Convention ") and its Protocols. This Opinion was prepared by Prof. Dr. Lorena Bachmaier Winter, after the draft law was delivered to the Council of Europe for expert comments.

In preparing this expert opinion, in addition to the European Convention and its Protocols and jurisprudence of the European Court of Human Rights ("ECHR"), the experts took into account the previous expert opinions of the Council of Europe, in particular the recent Opinion of the Venice Commission "on the legal certainty and independence of the judiciary in Bosnia and Herzegovina."

Suggestions proposed in the Opinion are largely built into the draft law.

High Judicial and Prosecutorial Council of Bosnia and Herzegovina, in a document dated 27.01.2012, delivered its opinion on the draft law, and its remarks were mostly accepted and incorporated into the Law.

The Bill will be submitted to the Legislative Office, the Directorate for European Integrations, and to the Ministry of Finance and Treasury of Bosnia and Herzegovina for comments.

VI – REVIEW OF EXISTING REGULATIONS

Adoption and application of this law requires that the Law on Court of Bosnia and Herzegovina – Consolidated text («Official Gazette of BiH» nos. 49/09, 74/09 and 97/09) first be repealed and the judges to the High Court to be integrated in the Law on salaries and other compensations in Judicial and Prosecutorial institutions at the level of Bosnia and Herzegovina

VII – FUNDS FOR IMPLEMENTATION OF REGULATIONS

This Law stipulates that Bosnia and Herzegovina shall provide the necessary financial and any other support in order to ensure a smooth and proper functioning of the Courts. Thus, the funds for organization and operation of the Courts shall be provided for in the budget of Bosnia and Herzegovina. However, funds for financing the Court of Bosnia and Herzegovina have already been secured. By repealing this Law, the Appellate Division of the Court of Bosnia and Herzegovina will be repealed as well, thereby securing, to a significant extent, funds required for the operation of the High Court.

In order to make a realistic and as accurate as possible financial framework required for implementation of the Law, the following needs to be calculated or otherwise estimated:

- current number of judges and other staff in the Court of Bosnia and Herzegovina
- number of judges and other staff in the Court of Bosnia and Herzegovina required in the future
- number of judges and other staff in the High Court required in the future
- required number of newly recruited judges and other staff
- accommodation and equipment

.....

Finally, in the first year of implementation of the Law, Bosnia and Herzegovina will be obligated to ensure the following:

Equipment approx. KM.
Office lease approx. KM.
Funding for running costs approx.KM.
Compensations approx. KM.
Gross salaries approx. KM.
Other expenses approx. KM.
.....
Total: KM

Of course, some savings can be achieved if other sources provide the resources (for example, equipment from donors, budget users of BiH or local communities, etc).