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BOSNIA AND HERZEGOVINA

OPINION

ON

THE DRAFT LAW ON COURTS OF BOSNIA AND HERZEGOVINA

**Adopted by the Venice Commission
at its 134th Plenary Session
(Venice 10-11 March 2023)**

On the basis of comments by

**Mr Paolo CAROZZA (Member, United States of America)
Ms Marta CARTABIA (Member, Italy)
Mr Kaarlo TUORI (Honorary President, Expert, Finland)**

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Table of Contents

I.	Introduction	3
II.	Background.....	3
	A. Constitutional basis for the State level jurisdiction	3
	B. Previous attempts to reform the Court.....	4
	C. Outline of the Draft Law	5
III.	Analysis	6
	A. Scope.....	6
	B. The establishment and composition of two separate Statelevel courts	7
	C. Jurisdiction of the Courts.....	8
	1. Jurisdiction of the Court (first instance).....	9
	a. Jurisdiction in criminal matters	9
	b. Jurisdiction in civil and administrative matters	11
	2. Jurisdiction of the High Court (as an appellate instance and as a first-instance court)	11
	D. Immunity and the duty of neutrality of judges	12
	E. Internal organisation of the two courts.....	13
	F. Court administration	14
	G. Evaluations	15
IV.	Conclusion	16

I. Introduction

1. By letter of 7 September 2022, the former Minister of Justice of Bosnia and Herzegovina, Mr Josip Grubeša, requested an opinion of the Venice Commission on the Draft Law on Courts of Bosnia and Herzegovina ([CDL-REF\(2023\)017](#))¹, hereinafter the “Draft Law”). This opinion had been planned to be prepared for the 133rd Plenary of the Venice Commission in December 2022. However, in the light of the post-election situation in Bosnia and Herzegovina it was decided to postpone the preparation of this opinion until such time as the new Parliament would take up its functions and the new government would be appointed.

2. On 25 January 2023, the new Council of Ministers of Bosnia and Herzegovina was formed. The new Government expressed its intention to proceed with the Draft Law and to receive the Venice Commission’s opinion on it.

3. Mr Paolo Carozza (Member, United States of America), Ms Marta Cartabia (Member, Italy) and Mr Kaarlo Tuori (Honorary president, Finland, expert) acted as rapporteurs for this Opinion.

4. On 20 and 22 February 2023, the rapporteurs and members of the Secretariat (Mr Demirtshyan, Mr Gjoni and Mr Dikov) had online meetings with the Minister of Justice and the representatives of the Ministry of Justice,² the president of the High Judicial and Prosecutorial Council, the President of the Criminal Division of the Court of Bosnia and Herzegovina, representatives of the Parliamentary Assembly of Bosnia and Herzegovina, the legal advisor of the Office of the High Representative and representatives of the European Union delegation and OSCE office in Bosnia and Herzegovina, as well as with some non-governmental organisations. The Commission is grateful to the authorities of Bosnia and Herzegovina, as well as to the Council of Europe office in Bosnia and Herzegovina for the excellent organisation of the online meetings.

5. This opinion was prepared in reliance on the English translation of the Draft Law. The translation may not accurately reflect the original version on all points.

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 20 and 22 February 2023. Following an exchange of views with the representative of the Bosnian authorities, Ms Sanela Latić, it was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Background

A. Constitutional basis for the State level jurisdiction

7. The Constitution of Bosnia and Herzegovina is silent on the organisation of the judicial system. Each Entity (the Republika Srpska, the Federation of Bosnia and Herzegovina) and the Brčko District have their own courts systems. The State level court (the Court of Bosnia and Herzegovina) (hereinafter “the Court”) was established by law enacted by the High Representative in 2000 and later adopted by the Parliamentary Assembly of Bosnia and Herzegovina as the law on the State Court of Bosnia and Herzegovina and amended several times (hereinafter – the “Current Law”). Under the Current Law, the Court has a limited jurisdiction in criminal, civil and administrative matters and is divided into two chambers: first instance and appeal. Judges of the Court are assigned to each chamber by decision of the President.

8. The creation of the Court at the State level in 2000 was justified by the concept of the “implied powers” of the State. This concept can be summarised as follows. According to the division of

¹ This draft law replaces the draft law [CDL-REF\(2022\)045](#) sent by the authorities in September 2022.

² Ministry of Justice in this Opinion refers exclusively to the Ministry of Justice of Bosnia and Herzegovina.

competences between the State of Bosnia and Herzegovina and the two entities, enshrined in the Constitution, the former only possesses the competences explicitly conferred on it, whereas the residual powers fall to the entities. The Constitution does not expressly and in general terms regulate legislative powers regarding civil or criminal law issues. This entails that *as a rule* civil and criminal legislation fall under the legislative competence of the entities.

9. There are exceptions to this rule. Thus, the expressly enumerated responsibilities of Bosnia and Herzegovina include a reference to criminal-law-related issues at least in Article III (2f); the State of Bosnia and Herzegovina may possess legislative powers within civil or criminal legislation as part of its so called *implied powers*, *i.e.*, powers which are necessary for carrying out explicitly granted powers; and such powers may be based on an agreement by the Entities or be "necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina", as provided for in Art. III (5a).

10. Lacking provisions on courts of general jurisdiction, the Constitution of Bosnia and Herzegovina appears to imply that the application of both Entity and State level legislation falls to entity courts. However, in its Opinion on the need for a judicial institution at the level of the State of Bosnia and Herzegovina, the Venice Commission argued for the constitutionality of a judicial institution at the level of the state of Bosnia and Herzegovina, with a reference to the implied powers. The Venice Commission stated that "under the Constitution of Bosnia and Herzegovina the State of Bosnia and Herzegovina is vested with [its] own powers, in particular legislative ones, and must be capable of establishing the institutions necessary to guarantee the effectiveness of Bosnia and Herzegovina legislation. If the lack of a court at state level undermines that effectiveness, Bosnia and Herzegovina must have the authority to create one."³ Therefore, the "constitutional silence" does not imply that a State level court is banned by the constitutional system of Bosnia and Herzegovina.

11. In its 2012 Opinion on legal certainty and the Independence of the Judiciary in Bosnia and Herzegovina, the Venice Commission further elaborated on the concept of implied powers. The Commission referred to the Constitutional Court's decision U 25/00 of 23 March 2001, where the Court stated that "the issues not explicitly listed in Article III. 1 of the Constitution of Bosnia and Herzegovina, referring to the competencies of the institutions of Bosnia and Herzegovina, do not necessarily fall within the exclusive competence of the Entities".⁴ According to the Venice Commission, a number of "implied powers" exist which are not necessarily "residual powers" within the meaning of Article III.3 (a) and thus do not necessarily belong to the Entities but to either the State or the Entity which has the relevant primary powers. Implied powers are "incidental powers which have not been attributed by the Constitution explicitly but follow and find their legitimacy in the primary powers".⁵

B. Previous attempts to reform the Court

12. While the Court of Bosnia and Herzegovina became a part of the legal order of the country, its internal structure, and the co-existence of two instances within the same Court, has been debated. In the Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, the Venice Commission, while recognising that the current model is not contrary to the Constitution or international standards, supported the establishment of a separate court of appeal.⁶

³ Venice Commission, [CDL-INF \(98\) 17](#), Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina, chapter 2.

⁴ Venice Commission, [CDL-AD\(2012\)014](#), Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, para. 16.

⁵ Venice Commission, [CDL-AD\(2012\)014](#), Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, paras. 17-18.

⁶ Venice Commission, [CDL-AD\(2012\)014](#), paras. 62-63.

13. In 2013 the Ministry of Justice of Bosnia and Herzegovina made the first attempt to reform the Court and create two separate jurisdictions at the State level – the Court and the High Court. The authorities of Bosnia and Herzegovina considered that the current system was constitutional and was not contrary to the international standards but argued that the Draft Law would better guarantee the rights and interests of the parties to the proceedings and better ensure judicial independence.

14. In June 2013 the Venice Commission examined this draft law and approved of it in general, while making some recommendations on further improvements.⁷

15. This first draft law has never been adopted, but the reform of the State level judiciary remained on the agenda of the authorities of Bosnia and Herzegovina, in particular, in relation with the [EU accession path](#). In the opinion on Bosnia and Herzegovina's EU membership application, which was adopted by the European Commission on 29 May 2019, it was recommended that a Law on the Courts of Bosnia and Herzegovina should be adopted to prevent conflicts of jurisdiction and ensure the required legal certainty in criminal matters. The adoption of the new Law on Courts of Bosnia and Herzegovina in line with European standards is the sixth key priority determined by the European Commission for accession of Bosnia and Herzegovina to the European Union.⁸

16. In parallel, steps were taken within the Court to regulate the procedure for assigning judges to the Appellate Division and cases to the judges, in order to avoid any questions about their independence. Thus, in July 2022 the President of the Court issued regulations determining this procedure where criteria for assigning judges to the Appellate Division were defined, and the procedure of consultation of the President of the Court with the presidents of the departments of the Court and the Registrar was introduced.

17. On 17 December 2020 the then Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina Ms Borjana Krišto introduced an appeal before the Constitutional Court of Bosnia and Herzegovina claiming that the institutional structure of the Court undermines its independence and therefore is unconstitutional. On 19 September 2022 the Constitutional Court of Bosnia and Herzegovina requested an opinion of the Venice Commission on this matter, which on 10 March 2023 adopted the *amicus curiae* Brief on the appellate review in the Court of Bosnia and Herzegovina.⁹

C. Outline of the Draft Law

18. The main proposal of the Draft Law can be summarised as follows. The Draft Law will regulate the continued existence of the Court of Bosnia and Herzegovina, the establishment of the High Court of Bosnia and Herzegovina as a second instance court (hereinafter, the "High Court"), the organisation of the two courts, jurisdiction, internal organisation, transparency of work, financing, and other matters relevant to the organisation and functioning of the two courts. In other words, the new law will deal with the courts of Bosnia and Herzegovina at the State level, except for the Constitutional Court, in a single law. The establishment of a separate High Court is the most important innovation introduced by the Draft Law.

19. Apart from serving as a second instance court at the State level and receiving cases on appeal from the Court, the High Court will also adjudicate on other matters. In particular, it will decide on extraordinary legal remedies against the final and binding decisions of the Court,

⁷ Venice Commission, [CDL-AD\(2013\)015](#), Opinion on the draft law on Court of Bosnia and Herzegovina, paras. 84- 88.

⁸ [COM\(2019\) 261 final](#), Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, page 8.

⁹ Venice Commission, [CDL-AD\(2023\)002](#), Amicus curiae Brief on the question of the appellate review in the Courts of BiH

decide on appeals against decisions of the Central Election Commission and in conflict-of-interest proceedings, as well as solve the conflicts of jurisdiction between courts of the entities/district of Bosnia and Herzegovina, and courts of the entities/district and the Court itself.¹⁰

20. The Draft Law also regulates the basic principles that govern the work of the courts, as well as the jurisdiction and internal organisation of the courts. The issues of confidential data protection and, the powers of the Ministry of Justice, as well as issues related to financing of the courts are also regulated by the Draft Law under separate chapters.

III. Analysis

A. Scope

21. This Opinion should be read together with the previous Opinion on the draft law on the Courts of Bosnia and Herzegovina issued by the Venice Commission in 2013¹¹ and the 2012 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina¹² as far as the recommendations of the mentioned Opinions are relevant also for the present Draft Law. In the present Opinion the Venice Commission will limit itself to addressing some key issues. If this Opinion remains silent on other elements of the Draft Law, this is not to say that the Venice Commission agrees with them nor that it will not raise them at a later stage. Similarly, this Opinion will not extensively comment on the parts of the Draft Law which do not raise any issues, or which reflect the earlier recommendations by the Commission.

22. The conclusions of the present Opinion on the proposed model of organisation of the State level jurisdictions should also be read in the light of the position expressed by the Venice Commission in the context of the currently existing system in its *amicus curiae* brief for the Constitutional Court of Bosnia and Herzegovina on the appellate review in the Court of Bosnia and Herzegovina.¹³ Critical remarks concerning the current system should not be interpreted as casting doubts about its constitutionality, which is for the Constitutional Court to assess.

23. Finally, the present Opinion will not examine the relationship between the Draft Law and the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (the HJPC) the procedural codes of Bosnia and Herzegovina, nor between the Draft Law and the procedural legislation of the entities/district. It appears that the Draft Law contains some provisions which overlap with the provisions of this other legislation (for example, the rules on the immunity of judges are defined both in the Draft Law and in the Law on the HJPC), or which are interconnected with them. Before adopting the current Draft Law, the legislator should examine such overlapping or interconnected provisions, and, if necessary, propose amendments to those other laws, for the sake of harmonisation. During the online meetings the rapporteurs were informed that the changes in the law on the HJPC are underway, so the Venice Commission expects that the draft law on the HJPC will address the interconnected issues.

¹⁰ There is now a two-instance rule set out in the Criminal Procedure Code of Bosnia and Herzegovina for the Court of Bosnia and Herzegovina. According to Article 24 (3) of the Code of Criminal Procedure, in the second instance, the Court's Appellate Division shall adjudicate by way of a Panel composed of three judges. Consequently, the adoption of the draft Law will also entail some amendments to the Code of Criminal Procedure of Bosnia and Herzegovina.

¹¹ Venice Commission, [CDL-AD\(2013\)015](#), Opinion on the draft law on Court of Bosnia and Herzegovina.

¹² Venice Commission, [CDL-AD\(2012\)014](#), Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina.

¹³ Venice Commission, [CDL-AD\(2023\)002](#), Amicus curiae Brief on the question of the appellate review in the Courts of BiH

B. The establishment and composition of two separate State level courts

24. As deduced from the 2013 Opinion,¹⁴ while the present organisation of the Court of Bosnia and Herzegovina does not contradict *per se* the principles of independence and impartiality of the judges or other constitutional values, the Venice Commission has already supported the establishment of a separate court of appeal. The authorities of Bosnia and Herzegovina seem to have heeded this recommendation with the suggestion of establishing the High Court of Bosnia and Herzegovina. Likewise, the Venice Commission welcomes that in line with its previous recommendations,¹⁵ instead of dealing with each of the two State level courts in separate laws, the national authorities have introduced one law on courts of Bosnia and Herzegovina.

25. The main rationale for establishing a separate court of appeal was that it would “seem as more independent than a division in an existing court” and hence create more trust in the judicial system.¹⁶ In addition, there is a theoretical risk (although the national interlocutor assured the rapporteurs that this had never happened in practice before) that the same judge would be assigned to the first instance and then to the Appellate Division dealing with the same case. Although Article 29 (e) of the Criminal Procedure Code of Bosnia and Herzegovina (Reasons for disqualification) addresses this concern, separating the two courts reduces such a risk more substantially.

26. In the 2013 Opinion the Venice Commission recommended maintaining a provision, according to which “a judge who has participated in the decision-making process pursuant to an appeal shall not participate in proceedings deciding in extraordinary legal remedies”. It turns out that this provision is not present in the Current Draft Law. It is possible that the judges for the newly established High Court may be chosen from among the current judges of the existing court. As a result, there is a risk of potential conflicts of interest not only in the proceedings involving extraordinary legal remedies, but also in ordinary proceedings, if a judge from the High Court had previously been involved in a case in the current State Court. The Venice Commission recommends foreseeing an appropriate safeguard in the Draft Law.

27. Another rationale for establishing two separate judicial institutions relates to the principle of the “natural judge” which is recognised in some legal orders and suggests that the jurisdiction and the composition of each court be established in advance by the law, in the abstract, by a general objective act, and not on a basis of an *ad hoc* decision before the case is brought before the court. Moreover, it is related to the concept of “tribunal established by law” contained in Article 6 of the European Convention of Human Rights, even though the case-law of the ECtHR is not conclusive on this point.¹⁷ Therefore, from the rule of law perspective, the creation of a separate court of appeal, with specially selected and permanently appointed judges, will make the system more predictable for the users of the court system and reduce the risk of arbitrary assignment of cases compared to a system where such matters are regulated not by the law but in the internal rules of the Court adopted and applied by the Court President.

28. That being said, the legislator should not lose sight of another imperative – namely the efficiency of justice and the overall cost of the reform. Article 3 (1) of the Draft Law foresees that the seat of the Court shall be in Sarajevo, while the seat of the High Court shall be in Mostar. As mentioned also in the 2013 Opinion, there are no international standards relating to the seats of

¹⁴ Cf. [CDL-AD\(2013\)015](#), para. 11.

¹⁵ [CDL-AD\(2012\)014](#), para. 63.

¹⁶ See the explanatory note to the Draft Law, [CDL-REF\(2023\)017](#).

¹⁷ Venice Commission, [CDL-AD\(2017\)031](#), Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, para 87.

the highest judicial institutions and this matter falls within the discretion of the authorities of Bosnia and Herzegovina to decide.¹⁸ Some interlocutors noted the fact that the physical presence of the courts in the same building may be seen as impairing the independence of the individual judges. The Venice Commission does not necessarily subscribe to this view. The choice of the seat of the High Court should be made after a careful consideration of the implications of establishing the court outside of Sarajevo, in particular for the quality and efficiency of justice. The Venice Commission recommends that the seat of the High Court be established on the basis of an evidence-based analysis of the impact of the seat location on the prosecution services, detention facilities and penitentiary institutions, legal aid services as well as the security issues related to parties and archives based on the criteria outlined in the CEPEJ Guidelines on the Creation of Judicial Maps to Support Access to Justice within a Quality Judicial System,¹⁹ provided that this does not lead to further delays in the adoption of the Law.

29. Article 5 (2) of the Draft Law envisages that the composition of the Courts should reflect proportional national representation according to the 1991 census. In this regard, the Venice Commission recalls its previous findings that while the ethnic representation quotas may be legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. The judiciary is not a representative institution. Here, the principle of the independence and impartiality of individual judges should prevail over other considerations.²⁰ Moreover, organising courts along ethnic lines would be damaging to the credibility of the judicial institutions. Such an approach may also counter Protocol no. 12 to the European Convention on Human Rights (the ECHR) on the prohibition of discrimination and should therefore be approached with extreme caution.²¹ Hence the Venice Commission would recommend to revise the mentioned provision – for example by providing that the composition of the State judicial institution should reflect the diversity of the society of Bosnia and Herzegovina in terms of ethnic, gender composition and otherwise and the judiciary, as required by the Constitution, shall be generally representative of the peoples of Bosnia and Herzegovina.²²

30. Finally, the Venice Commission notes that, under Article 2 (3) of the Draft Law, both courts are “established and abolished by law”. The Parliamentary Assembly of Bosnia and Herzegovina enjoys considerable discretion in shaping State level courts, but this discretion is not unlimited. “Abolishment” of the State level courts without replacing them with equivalent institutions is not advised since it may impede the State to exercise its implied powers. Eventually, it would be necessary to consider adding provisions on the State level judiciary to the Constitution of Bosnia and Herzegovina, so as to put clear constitutional limits to the discretion of the legislator. The Opinion of the European Commission on the EU membership application of the country, in key priority 4, also calls upon Bosnia and Herzegovina to “Guarantee the independence of the judiciary, including its self-governance institution (HJPC)”. Such a reform would ensure a constitutional entrenchment of the organisation of the State level judiciary.

C. Jurisdiction of the Courts

31. The jurisdiction of the Courts in criminal, civil and administrative matters is defined in Articles 16-19 of the Draft Law. If compared to the Law currently in force, the jurisdiction of the State level courts is re-defined and, in general, extended (with one notable exception which will be analysed below). The Venice Commission reiterates, as a starting point, that any possible extension of the jurisdiction of the State level courts should remain within the limits set by the implied powers derived from the Constitution. It belongs, in the final instance, to the

¹⁸ [CDL-AD\(2013\)015](#), para. 19.

¹⁹ [CEPEJ\(2013\)7Rev1](#), Revised Guidelines on the Creation of Judicial Maps to Support Access to Justice within a Quality Judicial System.

²⁰ [CDL-AD\(2013\)015](#), para. 21.

²¹ [CDL-AD\(2013\)015](#), para. 23.

²² According to Article IX(3) of the Constitution of Bosnia and Herzegovina, officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

Constitutional Court of Bosnia and Herzegovina to decide whether a particular competency of the future Court or the High Court goes beyond the limits, in particular by applying the doctrine of implied powers of the State.

32. The State level courts are created in response to a constitutional need (in the sense that the constitutional system is weak until such courts come into existence).²³ Therefore, the legislator must define, first, which *substantive* issues fall within the competency of the State level courts (which should be based on the constitutional distribution of competencies between the State and the entities/district, also taking into account the implied powers of the State), and, second, who is to decide on the potential conflict of jurisdictions which would inevitably arise in a system where several court systems and several legal orders co-exist (the *procedural* jurisdiction).

1. Jurisdiction of the Court (first instance)

a. Jurisdiction in criminal matters

33. Article 16 of the Draft Law regulates the jurisdiction of the Court in criminal matters. First of all, the Court will be competent to examine criminal offences defined under the Criminal Code of Bosnia and Herzegovina “and other laws adopted by the Parliamentary Assembly of Bosnia and Herzegovina”. The Venice Commission notes that the Criminal Code of Bosnia and Herzegovina regulates a relatively narrow list of crimes (such as criminal offences of corruption or crimes against humanity). Other criminal offences within the jurisdiction of the Court may be defined by “other laws adopted by the Parliamentary Assembly”.

34. In this respect the proposed Draft Law defines the jurisdiction of the Court more narrowly than the Current Law which refers just to “other laws” of Bosnia and Herzegovina. The new wording suggest that the offences provided by the laws enacted by the High Representative (and not the Parliamentary Assembly) will not be examined by the Court. The question remains which jurisdiction may be competent to hear cases based on such legislation. In the opinion of the Venice Commission, it would be natural to keep those cases within the jurisdiction of the Court, and therefore the new wording of Article 16 (1) should be aligned with the existing wording.

35. The second group of cases adjudicated by the Court are those crimes which are provided by the entity-level criminal laws provided that “*those criminal acts threaten the sovereignty, territorial integrity, political independence, state security and international subjectivity of Bosnia and Herzegovina*”.

36. Finally, the third group of criminal cases within the jurisdiction of the Court is specifically listed in Draft Article 16 (3) (for example, terrorism, human trafficking, money laundering corruption etc.). These are crimes provided by the entity-level criminal laws but they can fall within the jurisdiction of the Court if certain criteria specified in the Draft Law are met: they were committed across the Entity borders, or outside the territory of Bosnia and Herzegovina, resulted in a large-scale damage to the institutions of Bosnia and Herzegovina, or if those crimes “are in contravention of the international obligations of Bosnia and Herzegovina”.

37. The Commission notes that in defining the scope of the jurisdiction of the Court the authorities opted to follow the proposal of the EU experts (mentioned in the explanatory note) and to refer to “areas/fields” of criminal offenses, like the Treaty on the Functioning of the European Union, instead of listing criminal offenses exhaustively.

38. One may argue that this drafting technique leaves too much room for interpretation, which would lead to the conflicts of jurisdiction, and therefore undermine the principle of legal certainty. For example, the definition of inter-entity/district and cross-border crimes largely depends on an

²³ [CDL-INF \(98\) 17](#), page 4.

assessment of the specific facts of each case. The term "large-scale damage" is not very precise either.

39. The Venice Commission is mindful of the risks associated with the use of such vague definitions. However, in the circumstances the Venice Commission is ready to accept this legislative technique, for the following reasons.

40. First, the Venice Commission notes that this law is of an organisational/procedural and not of a substantive legal nature. While precision is very important in the definition of criminal offences, the same level of precision is not necessarily required in respect of certain procedural rules, provided that they are interpreted reasonably and, in most cases, do not give rise to divergent interpretations, and that there is an efficient mechanism of resolving such conflicts. Such description of competencies between the centre and the regions/entities is not unusual in composite states (federal, regional, supranational). The role of the interpretation in defining the sphere of competence is very important. The Venice Commission understands that the relevant provisions of the Draft Law will be further interpreted by the case-law of the two Courts. Moreover, the Draft Law provides for the power of the High Court, outlined in Article 19 (2) b) e) to resolve jurisdictional conflicts between the entity/district courts and the Courts. This authority is intended to ensure the effective operation of courts at all levels and derives from the constitutional obligation of Bosnia and Herzegovina to safeguard the highest level of internationally recognised human rights and fundamental freedoms, including the right to a fair trial. As became clear during the online meetings, similarly vague provisions of the Current Law so far did not give rise to many legal controversies or open conflicts between the courts. In sum, the use in the Draft Law of some open-ended criteria for describing the jurisdiction of the Court of Bosnia and Herzegovina does not seem to be very problematic.

41. This does not mean that the definition of the Court's jurisdiction cannot be improved further. Several remarks are called for in this respect.

42. During the online consultations some of the interlocutors criticised the use of the term "large-scale damage to the institutions of Bosnia and Herzegovina". In particular, some proposed that this damage should not be limited "to the institutions of Bosnia and Herzegovina," which restricts the scope of the provision, but should extend instead to the "State of Bosnia and Herzegovina", which has a much wider scope. While accepting that such issues are mostly within the margin of appreciation of states to decide, the Commission underlines that for the State level court it would be more typical to regulate criminal issues which concern the whole State. So, in this case, conferring jurisdiction upon the Court to adjudicate criminal offenses that have caused extensive harm to the State of Bosnia and Herzegovina appears to be more appropriate.

43. As regards the reference to "*the contravention of the international obligations of Bosnia and Herzegovina*", for the sake of clarity, the Venice Commission recommends using the following wording "*if such criminal offences are provided for by international treaties ratified by Bosnia and Herzegovina*".

44. Draft Article 16 does not provide (at least not expressly) for the competency of the Court to deal with the environmental crimes which may have a nationwide character, and which could endanger the well-being and environmental security of whole nation. The Commission has underlined that states are obligated by national and sometimes international laws to protect the environment and to consider the responsibility of the current nation and people to its future generations. In recent times, environmental issues have evolved into a pressing global concern, which can no longer be disregarded or overlooked by states and policy-makers.²⁴ Thus, the

²⁴ Venice Commission, [CDL-AD\(2020\)020](#), Opinion on four draft constitutional bills on the protection of the environment¹, on natural resources, on referendums and on the President of Iceland, the government, functions of the executive and other institutional matters, para. 81.

Venice Commission recommends including major crimes against the environment in the scope of the jurisdiction of the Court (even if this competency may arguably be derived from Article 16 (3) (a) concerning cross-entity/district crimes provided by the respective Criminal Codes at the sub-State level).

b. Jurisdiction in civil and administrative matters

45. As regards the civil jurisdiction of the Court (Article 17 of the Draft Law)²⁵, it is worth noting that the primary law that governs the Court's jurisdiction will be the current Draft Law. Leaving discretion to the legislator to provide in other laws other types of cases falling within the Court's jurisdictions may create ambiguity. Consequently, the term "unless regulated otherwise by another law" in paragraphs (b) and (c) of Article 17 should be removed as it may add uncertainty regarding the jurisdiction of the Court. The Venice Commission recommends regulating the civil jurisdiction of the Court in the present draft without any references to other laws.

46. Furthermore, it is not clear why the Court has jurisdiction to conduct enforcement proceedings and proceedings for collection of claims (see Article 17 (c)). The wording of this provision suggests that the Court is responsible also for enforcement proceedings based on the judgments of the entity/district courts. That seems difficult to be fulfilled in practice and does not fit well with the (relative) independence of the State level and Entity-level judicial systems. The most relevant solution in this case would be that each court should be responsible for the enforcement of its own judgments. The Venice Commission recommends amending Article 17 accordingly.

47. As regards the administrative jurisdiction of the Court regulated in Article 18 of the Draft Law, it seems that most of the recommendations of the Venice Commission made in its 2013 Opinion²⁶ still remain pertinent, in particular those regarding the need for clarification of the provision to "*assess the legality of final administrative acts adopted (...) by the authorities of government of Bosnia and Herzegovina (...) for which judicial protections are not provided outside of an administrative dispute*".

48. It is also unclear what is the difference between the remedy provided by Article 18 (a), which deals with complaints against administrative acts, and Article 18 (c), which provides for the possibility to contest official acts violating human rights. The interrelation between three different types of administrative acts which may be contested before the Court (final administrative acts by an institution of Bosnia and Herzegovina, final administrative acts adopted in accordance with the laws of Bosnia and Herzegovina and final individual acts or actions by an official of an institution of Bosnia and Herzegovina) is also not entirely clear.

2. Jurisdiction of the High Court (as an appellate instance and as a first-instance court)

49. Article 19 regulates the jurisdiction of the High Court. The High Court will deal with the appeals against the decisions of the Court and, in some cases, will be the court of the first and only instance.

50. The Draft Law does not describe procedural rules on how the cases shall be adjudicated by the two Courts within their jurisdiction as defined in Articles 16-19. As understood by the Venice Commission, such provisions may be found in procedural codes which provide how, for example, a case should arrive to the High Court in the "conflict of jurisdiction" cases, who can initiate an appeal (the entity/district court, the parties, the prosecutor, etc), as well as other procedural issues. As explained during the meetings with the national interlocutors, insofar as the criminal cases are concerned, in practice it is essentially the prosecution service which decides where a case should

²⁵ In the Current Law on the Court of Bosnia and Herzegovina the civil jurisdiction is not provided explicitly, although similar cases involving public authorities may be treated under the heading of "administrative jurisdiction" (Article 8).

²⁶ [CDL-AD\(2013\)015](#), paras. 48-51.

go: to an Entity-level court or to the Court of Bosnia and Herzegovina. However, it is not entirely clear what happens if the parties disagree with the decision taken by the prosecution, whether there is a procedure for appealing such decision and withdrawing cases from the Entity courts and bringing them to the State level or transferring them to the judicial system of another entity. Admittedly, the procedural legislation of the entities/district should also be harmonised with the provisions of the Draft Law in this respect, since it may affect the process of initiation, termination, transfer and reopening of cases dealt with by the entity/district courts.

51. The Venice Commission also notes that the power of the High Court to decide on conflicts of jurisdiction between the courts of different entities/district and between the entity/district courts and the Court of Bosnia and Herzegovina is as such unproblematic. It may be derived from the need to ensure the harmonious co-existence of different legal orders and court systems, and the High Court would be the most natural institution to play the role of an arbiter in such cases. This is therefore an aspect of the implied powers derived from the Constitution in the judicial field; it would be advisable to make this clear in the explanatory note to the Draft Law.

52. The High Court will have the jurisdiction to decide on appeals in conflict-of-interest proceedings (Article 19 (2) a) of the Draft Law). According to the Draft Law on the prevention of conflict of interest in the institutions of Bosnia and Herzegovina which regulates the duty of the State officials to declare potential conflicts of interest and rules on how to avoid them,²⁷ the decisions of the Conflict of Interest Committee for Bosnia and Herzegovina institutions (the CIC) shall be final and no appeal shall be allowed against them. However, an administrative dispute may be initiated before the Court of Bosnia and Herzegovina (Article 29) against the decisions of the CIC. At the same time, according to Article 30 (4) of the same Draft Law on the conflict of interests, in order to impose a monetary fine, the CIC “shall initiate the minor offence procedure before the Court of Bosnia and Herzegovina”.

53. The Draft Law is not clear as to whether the conflict-of-interest proceedings initiated by the CIC are within the jurisdiction of the Court (see Article 18 which permits interested persons to contest administrative acts, which may arguably include acts issued by the CIC), or the High Court (see Article 19 which gives the High Court the power to decide “in the conflict-of-interest proceedings”). It is not clear if the High Court will decide on this matter as a first instance tribunal or as a second instance tribunal. Furthermore, the Draft Law does not mention the “minor offence procedures” as falling in the competence of either of the two Courts.

54. In sum, the Venice Commission recommends clarifying which court has jurisdiction in conflict-of-interest proceedings and that is first-instance or appellate I jurisdiction.

D. Immunity and the duty of neutrality of judges

55. According to Article 8 (2) of the Draft Law (Immunity), “*judges cannot be held accountable for the expressed opinion or vote when making a judicial decision, unless a judge violates the law which constitutes a criminal offence*”. First of all, the Draft Law should develop the idea of “immunity” further to specify whether it includes protection from the criminal, civil or disciplinary responsibility.

56. In this context, it should be mentioned that the immunity from prosecution for acts performed in the exercise of a judge’s function is an integral part of the wider concept of *judicial independence*.²⁸ However, this immunity is restricted to immunity from prosecution for acts performed in the exercise of the judges’ functions and may not extend also to intentional crimes

²⁷ [CDL-REF\(2021\)041](#).

²⁸ Venice Commission, [CDL-AD\(2017\)002](#), Republic of Moldova, *Amicus Curiae* Brief on the Criminal liability of judges, para 9.

(e.g. taking bribes).²⁹ Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence. Only failures performed intentionally, with deliberate abuse or, arguably, with repeated or gross negligence should give rise to disciplinary penalties, criminal responsibility, or civil liability.³⁰

57. Moreover, it seems that this issue is already regulated by the law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.³¹ It is obvious that both articles regulate the same issue although with different wording. In practice this may create ambiguity, so the Venice Commission recommends that the issue of immunity be regulated either in the law on the High Judicial and Prosecutorial Council or in the Current Law, considering the above-mentioned principles.

58. According to Article 14 (1) of the Draft Law, in the execution of their official and judicial duties, judges shall not display any signs or contents of religious, political, ethnic, or other affiliation and must not take any actions that include a prayer or religious gestures or expressions. The case-law of the European Court of Human Rights leaves a wide margin of appreciation to the Member States in deciding whether and to what extent a limitation on the right to manifest one's religion or beliefs is "necessary". The Venice Commission acknowledges that this Article may potentially interfere with freedom of religion and belief as guaranteed by the ECHR. While recognising the considerable margin of appreciation, the Commission stresses that Member States may only impose restrictions that serve a legitimate purpose and are necessary in a democratic society, even within that margin.³²

E. Internal organisation of the two courts

59. Article 28 of the Draft Law provides that "*courts shall sit in panels of judges, unless the law stipulates that a matter may be handled by an individual judge*". It also stipulates that "*unless prescribed otherwise by another law, regular and extraordinary legal remedies filed against decisions of the Court shall be decided by the High Court sitting in a panel of three judges*". The Draft Law does not define how those panels are formed. In this context the Venice Commission reiterates its previous recommendation that if the composition of the panels is to be regulated by a law in the formal sense (*i.e.* not by the Court's internal rules), then it would be reasonable for it to be regulated by this Draft Law, in order to avoid similar issues being dispersed across different laws. However, the Venice Commission finds it preferable to leave the composition of the panels to the rules of procedure.³³

60. Furthermore, this draft article does not regulate the issue of distribution of cases amongst the judges. This issue is tightly connected to the issue of internal independence of judges, notably in the context of independence of the judges of a court from its president. It is highly recommended that the order in which judges deal with the cases be determined on the basis of general pre-determined criteria. This can be done for example on the basis of the alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, for example in court regulations laid down by the presidium

²⁹ Venice Commission, [CDL-AD\(2010\)004](#), Report on the independence of judicial system, Part I: The Independence of judges, para 61.

³⁰ [CDL-AD\(2017\)002](#), para 27.

³¹ According to Article 87 of that law:

"(1) A judge or prosecutor shall not be prosecuted, arrested, or detained, nor be subject to civil liability for opinions expressed or decisions taken within the scope of official duties.

(2) The privilege of immunity shall not bar or delay the criminal or civil investigation, conducted in accordance with the law, of a matter concerning a judge or prosecutor."

³² ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, judgment of 5 March 2018, para.129.

³³ [CDL-AD\(2013\)015](#), paras. 58-59.

or the president.³⁴ Exceptions from the pre-determined principles of distribution of cases should be justified.³⁵ Many interlocutors met by the rapporteurs mentioned the electronic Case Management System, which is considered as integral to the independence and impartiality of the judiciary in Bosnia and Herzegovina. It would be useful to mention this system in the law.

61. Under Article 19 (1) (b) the High Court would decide on legal remedies against decisions of its own panels. First of all, it is not entirely clear what this provision entails, whether it introduces a system of appeal against the decisions of the panels of the High Court which examined a case in the first instance, or a “second appeal” against the decisions of the High Court which examined an appeal against a decision of the Court.

62. In this context, the Venice Commission recalls its previous finding that “*the High Court of Bosnia and Herzegovina would be introduced to replace the appellate jurisdiction at the State Court and form a separate court of appeal. It is therefore unfortunate that the same structure that currently exists in the State Court is being copied in this new Court*”.³⁶ The Venice Commission reiterates its recommendations not to establish an additional appeal instance and to provide that the High Court acts as a single last instance tribunal at the level of Bosnia and Herzegovina (with the exception of the appeals to the Constitutional Court of Bosnia and Herzegovina).

63. That being said, the Venice Commission reiterates, once again, that, in principle, a system whereby appeals are heard in the same court but by a differently composed panel can be found in some national and international legal orders (for example, the procedure of *en banc* rehearing in an American Federal Court of Appeals, or a Grand Chamber review at the European Court of Human Rights).

64. Article 21 of the Draft Law envisages the functions of the Court Presidents. Draft Article 21 (2) (c), provides that the Court President appoints a replacement for the judge in case of recusal, as decided at the court’s general session. This may allow for a possible workaround of the impartiality of the electronic Case Management System because it empowers the President of the Court to assign judges to cases where recusals occur. The Venice Commission recommends revising Article 21 by providing for stricter and more predictable rules of replacement for the judge in cases of recusal.

F. Court administration

65. Article 45 of the Draft Law envisages a quite broad jurisdiction of the Ministry of Justice in the court administration which provides in particular for the power to “monitor the implementation of this Law and other regulations”.³⁷ This catch-all formula may be used by the Ministry for intervening in the matters which pertain to the competency of the courts’ presidents or the HJPC. Moreover, according to Article 46 of the Draft Law, the inspectors of the Ministry of Justice shall exercise supervision over proper performance of the court administration. In the 2013 Opinion

³⁴ Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System, Part I: The Independence of Judges, para. 80.

³⁵ [CDL-AD\(2010\)004](#), para 81.

³⁶ [CDL-AD\(2013\)015](#), para. 52.

³⁷ In particular, it involves the following: “a) *preparation of draft laws and other regulations;*
b) *to monitor the implementation of this Law and other regulations relating to organisation and work of the Courts;*
d) *to collect statistics and other information about the work of the Courts;*
e) *to monitor the performance of tasks of court administration;*
f) *other activities provided by this Law.*
(2) *The Courts shall be required to submit to the Ministry of Justice all the information they require for the exercise of jurisdiction under paragraph (1) of this Article.*
(3) *The Courts shall submit annual reports on their activities for the previous year to the Ministry of Justice, by 31 March of the current year.*
(4) *The Ministry of Justice shall perform its duties in a way that ensures the independence of the Courts and must not in any way influence the work of the Courts in connection with individual cases.”*

the Commission criticised the active role of the Ministry of Justice in the administration of courts, and notably the broad role of the latter in the approval of the number of employees, the terms of reference for each employee, authorities and responsibilities, qualifications, and other requirements for employment to each court.³⁸

66. Usually, in such situations the competences of the Ministry of Justice related to the maintenance of buildings, equipment and IT systems, security of the courts, etc. are not problematic, whereas when such competencies go beyond the pure administrative and technical issues and acquire some supervisory features, this may be dangerous for the independence of the judiciary. Moreover, the right to decide the use of those resources should in principle also be left to the judiciary itself, either through the HJPC or through the court presidents.³⁹

67. In this context, the right of the Ministry of Justice to monitor the implementation of this Law and other regulations relating to the organisation and the operation of the Courts, to monitor the performance of the tasks of the court administration, the obligation of Courts to submit annual reports to the Ministry of Justice, and the existence of the inspectors of the Ministry of Justice is a source of concern. It is positive that under Article 45 (4) of the Draft Law, the Ministry of Justice shall perform its duties in a way that ensures the independence of the Courts and must not in any way influence the work of the Courts in connection with individual cases. However, this provision remains declarative, and does not sufficiently offset the risk associated with giving the Ministry broadly defined powers of “court administration”.

68. Consequently, the Venice Commission recommends revising the Draft Law in order to provide a proper division of administrative functions between the HJPC and the Ministry of Justice in the sphere of court management, in particular by replacing the reference to the general monitoring power of the Ministry with a list of more specific powers of the court administration.

G. Evaluations

69. Article 55 of the Draft Law regulates the evaluation of judges and presidents of the courts. First, it seems that this article is not in its correct place, since it is not transitional in its nature. Moreover, the issues related to the evaluation of judges should be the competence of the HJPC and should be regulated in the law on the HJPC.

70. As regards the content, and in particular the evaluation criteria and procedure, which under the Draft Law should be established by the HJPC, in its previous opinions the Venice Commission stressed that while it may be necessary to keep certain rules flexible, the main principles governing the evaluation process should be described in the law.⁴⁰ These criteria may be stipulated in the law on the HJPC. Moreover, by the time this Draft Law enters into force, the law on the HJPC shall regulate issues related to the High Court, such as, for example, the eligibility criteria for the High Court judges.

71. Moreover, in the context of the evaluation of prosecutors, the Venice Commission has already underlined the importance of having rules as precise as possible. In particular:

“The more the rules are precise and detailed, the less is the risk of arbitrariness, even if not every rule may be formulated with a mathematic precision, and sometimes the legislature has to defer to the wisdom of institutions or individuals who may be entrusted with interpreting such terms as

³⁸ Venice Commission, [CDL-AD\(2013\)015](#), Opinion on the draft law on Court of Bosnia and Herzegovina, paras. 79-80.

³⁹ Venice Commission, [CDL-AD\(2022\)030](#), Opinion on three draft laws implementing the Constitutional amendments on the Judiciary of Serbia, para 21.

⁴⁰ Venice Commission, [CDL-AD\(2022\)018](#), Opinion on draft amendments to law no 3/2016 on the Public Prosecution Service of Moldova, para. 22

*“efficiency”, “trust” etc. This is why the methodology of evaluations, and the composition of the Evaluation Commission is at least equally important as the substantive rules it will apply.”*⁴¹

72. Therefore, the Venice Commission recommends stipulating in the Law the criteria of evaluation of judges, including the procedure for evaluation, the body/ies vested with the power of evaluating, the grading of the performances and consequences of insufficient evaluations.

73. Furthermore, according to Article 55(4) of the Draft Law, the performance evaluation for judges shall be done by the President of that Court, while the performance evaluation of the President of the Court shall be done by the President of the High Court. In the 2013 Opinion the Venice Commission found this provision as to be problematic as it defines the President of the Court as a central figure in the process of the evaluation of judges. The Commission underlined that this may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges.⁴² The Commission has criticised the systems where court presidents are hierarchically subordinated to one another also in its other opinions, finding that such hierarchical structure may be potentially dangerous for internal judicial independence, if these supervisory powers are abused to influence decisions in individual cases.⁴³ In the context of Bosnia and Herzegovina it seems that the body best placed for the evaluation of judges is the HJPC while the Presidents of the Courts may provide some support in the evaluation process, the ultimate decision must be made by the HJPC. At the very least, in case of a negative assessment by the President, the possibility of giving the final say to the HJPC (or to a committee therein) should be considered, especially if a negative evaluation implies tangible negative effects on the status, career and salary of the judge. Similarly, it is more appropriate that the performance evaluation of the two Presidents of the courts is conducted by the HJPC.

74. During the online meetings, it was explained to the rapporteurs that the new Draft Law on the HJPC, which is currently being prepared, would confer the power to evaluate judges to the HJPC. As a result, the power of court presidents to conduct such evaluations would be temporary in nature. Nevertheless, even as a temporary solution, this arrangement poses a risk of court presidents becoming too powerful and thereby compromising the individual independence of judges.

75. Consequently, even if the solution proposed by the Draft Law is temporary, the Venice Commission recommends reducing the possibility for the court presidents to evaluate the performance of the judges, by involving the HJPC in the evaluation process and regulating this issue by the law on the HJPC.

IV. Conclusion

76. On 7 September 2022, the former Minister of Justice of Bosnia and Herzegovina, Mr Josip Grubeša, requested an opinion of the Venice Commission on the Draft Law on Courts of Bosnia and Herzegovina, which shall regulate the continued existence of the Court of Bosnia and Herzegovina, the establishment of the High Court of Bosnia and Herzegovina, as well as other matters relevant to the organisation and functioning of the courts at the State level.

77. The Venice Commission welcomes the establishment of a separate court of appeal as well as regulating the issues of the two State level courts in one single law. The Venice Commission also notes a number of improvements and clarifications made in the Draft Law as compared to the previous drafts.

⁴¹ [CDL-AD\(2022\)018](#), para. 21.

⁴² [CDL-AD\(2013\)015](#), paras. 66-68.

⁴³ [CDL-AD\(2022\)030](#), para. 28.

78. The Venice Commission also notes with satisfaction that in their comments of 8 March 2023 the Ministry of Justice of Bosnia and Herzegovina accepted most of the recommendations of the draft Opinion and committed to implementing the necessary changes to the laws. The Venice Commission appreciates the authorities' willingness to follow the recommendations and emphasises that incorporating these changes will significantly enhance the draft Law's compliance with the principles of fair trial and independence of the judiciary.

79. As to the Draft Law as such, the Venice Commission makes the following recommendations:

- First and foremost, other legislation currently in force (in particular the law on the High Judicial and Prosecutorial Council, and the procedural codes) should be harmonised with the provisions of the Draft Law;
- The Venice Commission recommends refraining from organising courts strictly along ethnic lines but providing that the composition of the State level judiciary should reflect the diversity of the society of Bosnia and Herzegovina and the judiciary shall be generally representative of the peoples of Bosnia and Herzegovina, as required by the Constitution of Bosnia and Herzegovina;
- Provisions defining the jurisdiction of the Court might be clarified further, in particular, the criterion of large scale damage to "the institutions of Bosnia and Herzegovina" as well as the "international obligations" of Bosnia and Herzegovina could be re-formulated as proposed above (paras. 42 and 43), and a constitutional entrenchment of the basic features of the State court system might be considered;
- The composition of the panels in the Courts and the method of allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations based on the law (like the Courts' internal rules). It is commendable that the authorities of Bosnia and Herzegovina have committed to making the necessary changes to comply with this recommendation;
- The Draft Law should provide a proper division of administrative functions between the HJPC and the Ministry of Justice in the sphere of court management, in particular by replacing the reference to the general monitoring power of the Ministry with a list of more specific powers of court administration. The authorities in Bosnia and Herzegovina expressed willingness to implement this recommendation which is to be welcomed;
- The criteria of evaluation of judges should be defined in the law on the HJPC and the possibility for the court presidents to evaluate the performance of the judges/lower presidents should at least be circumscribed by involving the High Judicial and Prosecutorial Council in this process;
- The place of the seat of the courts should be defined on the basis of an evidence-based analysis of the impact of the seat location on the prosecution services, detention facilities and penitentiary institutions, legal aid services and the efficiency of justice in general, as well as the security issues related to parties.

80. The Venice Commission reiterates that despite these remarks, it supports the main purpose of the Draft Law – to create two levels of courts at the State level – and welcomes the readiness of the authorities of Bosnia and Herzegovina to reform the State level judiciary in order to bring it closer to the European standards. The Venice Commission is also hopeful that the authorities will implement the recommendations contained in its 2012 Opinion on Legal Certainty and the

Independence of the Judiciary in Bosnia and Herzegovina. It remains at the disposal of the authorities of Bosnia and Herzegovina for further assistance in this matter.