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D R A F T

**LAW ON THE SUPREME COURT OF
THE FEDERATION OF BOSNIA AND
HERZEGOVINA**

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OF THE FEDERATION OF BOSNIA AND HERZEGOVINA**

I GENERAL PROVISIONS

Article 1

Supreme Court of the Federation of Bosnia and Herzegovina (hereinafter "Supreme Court") is the highest appellate court of the Federation of Bosnia and Herzegovina (hereinafter "Federation") and performs its duties in accordance with the Constitution of the Federation of Bosnia and Herzegovina (hereinafter "Federation Constitution"), this Law and other federal legislation.

Article 2

Supreme Court is an independent and autonomous body and adjudicates based on the Federation Constitution, legislation and other regulations of the Federation.

Article 3

Supreme Court has a right and a duty to inform, on its own initiative or at the request, Federation Parliament and Government on implementation of the laws and other regulations of the Federation, on the need to enact, amend or supplement those regulations, as well as on other matters that concern implementation of the laws and other Federation regulations.

Article 4

Supreme Court monitors and studies case law problems which pertain to the implementation of laws and other regulations of the Federation. In order to enable this, Supreme Court may request necessary information from the cantonal courts.

Article 5

Adjudicating at the Supreme Court is performed by judges.

Article 6

Judges adjudicate in panels, the size of which is determined by the federal legislation.

Unless provided otherwise by the federal legislation, Supreme Court adjudicates in a panel consisting of five judges. Supreme Court sits en banc in cases where it decides whether a

decision of its own panel in a criminal case or a decision of a cantonal court violate the law.

Article 7

A judge may not be held criminally or civilly liable for any act committed within the scope of his/her authority.

Article 8

The proceedings of the Supreme Court are open to the public.

Public access is ensured through announcing composition of the panels, allowing public to attend the proceedings before the Court, public announcement of the Supreme Court judgments, informing the public through the media on the Supreme Court activity and publishing of significant court decisions.

In accordance with the federal legislation, Supreme Court may exclude public from its proceedings in order to preserve confidentiality, protect public morality, interests of the minors and also when other state interests so require.

Article 9

Bosnian and Croatian languages are the official languages in use in the Supreme Court.

Supreme Court ensures equal use of the official languages of the Federation in its proceedings, and may use other languages as a means of communication.

When the Supreme Court decides in first instance, certified transcript of its decision is delivered to the entity whose decision was reviewed in an official language in which that decision was issued, and also to the party, either in that same language or in another language which the party used in its complaint or response to the complaint.

When the Supreme Court decides on appeal, certified transcript of its decision is delivered to the court or another entity whose decision was reviewed in an official language in which that decision was issued. A transcript of the Supreme Court decision is delivered to the party or another participant in the proceeding in that same language or in another language that was used during the procedure.

Official alphabet in use in the Supreme Court is the latinic alphabet.

Provisions stated in paragraphs 3 and 4 of this Article will be applied to the service of process and delivery of other court documents to the parties and other participants in the proceeding.

Article 10

Judgments of the Supreme Court are final and binding.

Judgments of the Supreme Court rendered with respect to appeals referred to in Article 13, par. 1 of this Law are binding not only with respect to the parties in the proceeding, but also a court, whose decision was appealed to the Supreme Court.

Article 11

Federal regulations on employment rights of executive branch employees shall apply to the employees of the Supreme Court, unless specified otherwise by this Law.

Federal regulations on executive branch which pertain to the authorities and responsibilities of the head of administrative agency and his/her deputy shall apply to the president¹ of the Supreme Court, unless provided otherwise by this Law.

Article 12

Supreme Court has a seal in accordance with the Law on the Seal of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of B&H", No. 2/94).

The name of the Supreme Court and the Federation coat of arms are displayed on the building in which the Supreme Court is housed.

Supreme Court is located in Sarajevo.

II JURISDICTION OF THE SUPREME COURT

Article 13

Supreme Court:

1. decides, under the terms and in a manner specified in the federal legislation, on appeals from cantonal courts decisions dealing with the Constitution, legislation and other Federation regulations, except for those appeals which are in the jurisdiction of the Constitutional Court of the Federation of Bosnia and Herzegovina (hereinafter

¹ President of court is equal to chief justice of the court in the U.S. legal system. (translator's remark).

"Constitutional Court") and Human Rights Court of the Federation of Bosnia and Herzegovina;

2. decides on regular and extraordinary appeals² if the federal legislation provides so;
3. reviews final decisions of the Federation administrative agencies to determine whether they are in accordance with the legislation, unless provided otherwise by the federal legislation;
4. resolves conflicts of jurisdiction between cantonal courts, unless provided otherwise by the federal legislation;
5. makes a decision to transfer territorial jurisdiction from one cantonal court to another cantonal court;
6. performs other duties within its jurisdiction as specified by the federal legislation.

Article 14

Supreme Court judges decide by consensus on removing judges of the cantonal court.

Article 15

Supreme Court gives proposals to the Constitutional Court for reviewing constitutionality of the legislation and other Federation regulations, as well as resolving other constitutional issues which arise in the course of a proceeding currently pending before the Supreme Court.

If in the course of the proceeding currently pending before the Supreme Court, it is determined that federal legislation is not in accord with the Federation Constitution, Supreme Court shall halt its proceeding and propose that the Constitutional Court review constitutionality of the legislation.

² There are several significant differences between the extraordinary and regular appeals. Mainly, extraordinary appeals may be filed after the time-limit for regular appeals has expired. Extraordinary appeals may be filed not only by the parties to the original proceedings, but also by the state prosecutor. The grounds and requirements for extraordinary appeals are much narrower and stricter. (translator's remark)

III INTERNAL ORGANIZATION OF THE SUPREME COURT

Article 16

Internal organization of the Supreme Court is set forth in a regulation on internal organization of the Supreme Court.

Regulation referred to in paragraph 1 of this Article is issued by the president of the Supreme Court upon approval of the minister of justice.

1. Court Divisions

Article 17

Supreme Court has a court division for regular appeals (appellate division) and a division for extraordinary appeals (cassation division) for criminal cases and also for civil cases; division for monitoring and studying case law, as well as other organizational units for conducting legal, technical and administrative tasks.

Civil division encompasses both civil and administrative cases.

Article 18

Each division has a chairman who is appointed by the president of the Supreme Court in an annual operating program after obtaining opinions from judges of that division.

Judges are appointed to the divisions in an annual operating program.

Article 19

In a court division conference judges discuss issues of interest to the division, and in particular: internal organization of the division, operation of the division, contentious legal issues, uniformity in the court decisions, improvement of work methods and continuing legal education of judges and legal advisers of the court division.

Issues of common interest for some or all courts in the Federation may be discussed during a court division conference.

Article 20

Chairman of the court division or president of the Supreme Court schedule a conference of a court division and manage its course.

A majority vote of court division judges is required for passing decisions at a court division conference.

When the president of the Supreme Court is present at a court division conference, he/she chairs the conference and participates in the decision-making.

Article 21

A court division conference shall be scheduled when it is determined that there are different approaches among the court panels with respect to implementation of the legislation or when one court panel departs from a previously accepted legal opinion.

When a court panel renders a decision which differs from a legal opinion of another court panel, chairman of the court division or president of the Supreme Court may request that the decision not be disseminated and that differences in the legal opinion be discussed at the court division conference. If during the conference a court division accepts an opinion opposite from the legal opinion on which the decision of a court panel was based, court panel that rendered the decision will have to rule on the matter again.

Legal opinion accepted at the court division conference is binding for all court panels within that court division.

2. General Conference

Article 22

Supreme Court holds general conferences when it decides on cases specified by the federal legislation, gives opinion on the need to enact, amend or supplement federal legislation or other federal regulations and decides on bringing an action for review of constitutionality before the Constitutional Court.

Supreme Court analyzes annual operating program and reviews annual reports of the Court in a general conference.

Article 23

General conference may be called in order to determine a legal opinion on a certain legal issue which is currently being decided by one of the Supreme Court panels.

Legal opinion accepted at a general conference is binding for all Supreme Court panels and may be amended only at the general conference.

Article 24

President of the Supreme Court and all judges of the Supreme Court constitute a general conference.

President of the Supreme Court schedules a general conference and manages its course. General conference must be scheduled if it is requested by one of the Supreme Court divisions or by one fourth of all judges of the Supreme Court.

Two thirds of the judges must be present at a general conference in order to achieve a quorum. Decisions are passed by a majority vote of all judges of the Supreme Court.

3. Expanded General Conference

Article 25

Supreme Court may hold an expanded general conference. At the expanded general conference judges establish general principles on issues relevant for implementation of federal legislation.

Expanded general conference is called in particular when it is determined that there is no uniformity among the courts within the Federation on issues which concern uniform implementation of the federal legislation.

Article 26

Expanded general conference shall be held when it is so decided by the general conference, and may be held at the proposal of one of cantonal courts.

President of the Supreme Court schedules and prepares an expanded general conference and manages its course.

When one of the cantonal courts gives a proposal for holding an expanded general conference and president of the Supreme Court does not accept this proposal, the court giving such proposal shall be informed on the reasons for declining its proposal. If the court giving a proposal persists in its request, president of the Supreme Court shall schedule an expanded general conference.

If the expanded general conference is held at the request of one of the cantonal courts, the court requesting an expanded general conference must present an issue to be reviewed at the conference and state its opinion on that issue.

Article 27

President of the Supreme Court, judges of the Supreme Court and a certain number of judges representing cantonal courts constitute an expanded general conference.

At least two thirds of the judges constituting an expanded general conference must be present in order to hold an expanded general conference.

Number of judges representing cantonal courts and rules for conducting an expanded general conference are determined by the Rules of the Supreme Court enacted at the expanded general conference.

Until the regulation referred to in paragraph 3 of this Article is enacted, three judges from each cantonal court shall be present at the expanded general conference.

Article 28

Rules of the Supreme Court and internal regulation of the Supreme Court regulate in detail internal organization and operation of the Supreme Court units.

Rules of the Supreme Court are enacted by a majority vote at the expanded general conference.

4. Court Administration

Article 29

Court Administration ensures that all requirements for proper functioning and operation of the Supreme Court are met, in particular: organization of internal operation, accurate and timely completion of tasks; notice to appear for jury duty and assigning members of the jury; dealing with court interpreters and experts; employment rights of the employees; continuing legal education of the judges, legal advisers and other staff members; keeping statistics; financial and accounting tasks as well as other tasks specified by the federal legislation and internal regulation on the Supreme Court operation.

Article 30

President of the Supreme Court organizes the work of the Court Administration.

In the case of disability or absence of the president of the Supreme Court, a judge designated in an annual operation program shall conduct tasks relating to organization of Court Administration and other tasks delegated by the president of the Supreme Court.

Chairmen of the court divisions assist president of the Supreme Court in administrative tasks.

Article 31

President of the Supreme Court represents Supreme Court and has other rights and duties specified in this and other federal laws.

President of the Supreme Court enacts annual operating program upon obtaining opinion of judges at the general conference.

IV ADMINISTRATION OF COURTS BY JUSTICE

Article 32

Administration of courts by justice is conducted by the Ministry of Justice.

Ministry of Justice performs tasks concerning the operation of the Supreme Court and in particular: ensures implementation of this Law and other legislation, regulations and measures concerning organization and operation of the Supreme Court; monitors organization, methods of work and operation of the Supreme Court and undertakes measures for improving organization and operation of the Supreme Court; ensures that funding and other requirements for operation of the Supreme Court are met; gives instructions to the Supreme Court on efficient conducting of court administration tasks; undertakes measures in order to ensure efficient and timely operation of the Supreme Court in accordance with the federal legislation and other regulations; investigates complaints concerning the Supreme Court administration, undue delay in the disposition of cases and treatment of the parties; gives instructions for recording statistical and other data on the Supreme Court operation and introduces information systems for the Supreme Court.

Ministry of Justice may request from the Supreme Court reports and information which are necessary in order for the Ministry of Justice to complete the tasks referred to in paragraphs 1 and 2 of this Article.

Article 33

Regulation on the Supreme Court operation specifies: principles of organization and operation of the Supreme Court, especially principles of internal organization, rules on keeping registry and other books, administrative forms, handling of documents from the moment of filing until they are placed in the archives, rules on informing the public on the Supreme Court proceedings, rules on issuing notice to appear for jury duty and assigning members of the jury, court panels activity, court division conferences and general conferences, use of other languages as a means of communication, as well as other issues relevant for internal operation of the Supreme Court.

Regulation on the Supreme Court operation is issued by the minister of justice.

Article 34

Judges wear special robes during the proceedings.

Minister of justice shall specify in a regulation the type of a robe and the manner of its use.

Article 35

Judges of the Supreme Court are issued a special identification document.

A form and method of issue of the special identification document are specified in a regulation referred to in Article 34, paragraph 2 of this Law.

V JUDGES AND MEMBERS OF JURY OF THE SUPREME COURT

1. Appointment of Judges

Article 36

Seventeen judges are appointed to the Supreme Court.

Equal number of Bosniak and Croat judges are appointed to the Supreme Court, and others will be represented appropriately.

Based on the proposal from a president of the Supreme Court, House of Peoples determines the number of the Supreme Court jury members.

Article 37

Judges of the Supreme Court are nominated by the Federation President with concurrence of the Federation Vice-President and require confirmation by the majority of the House of Peoples.

Article 38

A citizen of the Federation of Bosnia and Herzegovina, with a law school degree, bar exam, at least 10 years experience in the judiciary or in private practice, having a reputation of a distinguished jurist and possessing highest moral qualities shall be appointed for a judge of the Supreme Court.

In exceptional cases, a assistant professor (with a PhD degree) or a professor of a law school who teaches criminal law or criminal procedure or civil law or civil procedure or administrative, corporate or family law may be appointed for a judge of the Supreme Court.

Article 39

Proposal for nominating Supreme Court judges is submitted by the minister of justice upon obtaining an opinion of the judges at the general conference.

Article 40

Before taking the office, a judge shall give a statement.

The text of the statement is as follows:

" I state that, in performing duties of a judge of the Supreme Court of the Federation of Bosnia and Herzegovina, I will abide by the Constitution and laws of the Federation and perform my duties impartially and to the best of my ability".

A judge shall give the statement before the Federation President.

Article 41

A judge of the Supreme Court shall serve until the age 70, unless he/she resigns or is removed from the office.

Article 42

President of the Supreme Court is elected among the judges of the Court. President of the Supreme Court is elected and removed by the judges of the Supreme Court at the general conference.

President of the Supreme Court is elected for a four year term. After the expiration of a four year term a member of a different constituent nation shall be elected for a president of the Supreme Court.

2. Termination of Position

Article 43

A judge may be removed from office or resign from office.

Article 44

A judge may be removed from office if he/she is convicted of a crime which makes him/her unworthy to serve; if it is determined that he/she gravely violated an oath of office or diminished the reputation of the office; if it is determined that he/she is not professionally capable or that

he/she inadequately performed duties of a judge for a lengthy period of time or is not achieving satisfactory results in the work; if it is determined that he/she has an executive position or is a member of an executive organ within a political organization, or if relevant medical institution determines that he/she has become permanently disabled.

Article 45

A proposal for removal of a judge from the office may be submitted by the minister of justice.

Article 46

Decision on removing a judge from the office is made by consensus of the judges of the Supreme Court.

A judge, whose removal from the office is being decided upon, does not participate in making a decision referred to in paragraph 1 of this Article.

Article 47

During the removal procedure a judge will be allowed to comment on reasons for his/her removal.

Article 48

Decision on suspending a judge from the office is made by a majority vote of all judges at the general conference. A judge, whose suspension from the office is being decided upon, does not participate in deciding on suspension.

Article 49

A judge submits his/her resignation to the Federation President and Federation Vice-President.

A judge shall leave the office on the day following the acceptance of his/her resignation.

3. Rights and Obligations of Judges

Article 50

A judge shall perform his/her duties to the best of his/her ability, in a responsible and legal manner, and protect his/her personal reputation and reputation of the Supreme Court.

A judge shall not hold an executive position or be a member of an executive organ within a political organization.

Judges' spouses, lineal kin and collateral kin up to a second degree shall not be appointed for a judge of the Supreme Court.

Article 51

A judge may not be employed elsewhere.

Article 52

A judge shall receive salary for his/her service, as well as other compensation specified by the federal legislation.

Salaries and other compensation of the judges may not be reduced during their service.

A judge has a right to pension, disability and health insurance and other related rights specified in the general regulations, a right to use vacation and leave granted to all employees of the Office of Federal Prosecution and an annual leave of 30 working days, a right to be reimbursed for expenses under the terms specified in the federal legislation and other regulations, as well as a right to further professional education within the means of the funds earmarked for that purpose.

Article 53

Federation shall be liable for damages inflicted upon an individual or a legal entity by the improper or illegal act of a judge committed within the scope of his/her responsibility.

Federation may request reimbursement for the paid damages from the judge only if the damage was inflicted on purpose or as a result of a gross negligence.

Statute of limitations for damages referred to in paragraph 2 of this Article is six months from the day the damages were paid.

VI EMPLOYEES OF THE SUPREME COURT

Article 54

Legal, administrative and technical tasks at the Supreme Court are performed by the secretary³ of the Court, legal advisers and other staff members.

³ Secretary of the court is equal to the clerk of the court in the U.S. legal system. (translator's remark).

1. Secretary of the Court

Article 55

Supreme Court shall have a secretary of the Court.

A person appointed for the secretary of the Supreme Court shall have a law school degree, a bar exam and at least three years of legal experience following the bar exam.

2. Legal Advisers of the Supreme Court

Article 56

Supreme Court shall have legal advisers.

Legal advisers assist the judge, prepare draft decisions, take depositions from the parties, and conduct, either independently or under supervision or directions of a judge, other legal tasks specified by the federal legislation or regulation on internal operation of the Supreme Court.

A person appointed for a legal adviser of the Supreme Court shall have a completed a law school degree, a bar exam, at least five years of legal experience and a reputation of a distinguished jurist.

President of the Supreme Court decides on hiring legal advisers upon obtaining opinion of the judges at the general conference.

Number of legal advisers is specified in the regulation on internal organization of the Supreme Court.

3. Other Staff Members

Article 57

Staff members of the Supreme Court perform legal, administrative and technical tasks. Regulation on internal organization of the Supreme Court specifies the number of staff members.

Requirements concerning education, experience, requirements for passing professional exams, scope of tested subjects and manner of taking the exam, as well as other relevant questions are specified in a regulation issued by the minister of justice.

VII JUDICIAL POLICE

Article 58

In accordance with the federal legislation, judicial police assist the Supreme Court in securing information, in ensuring the presence of witnesses and the transport of accused persons, in carrying out sanctions, maintaining order and security in the courtroom and in carrying out orders of the Supreme Court.

VIII MAINTAINING CONFIDENTIALITY

Article 59

Judges, members of the jury, secretary of the Court, legal advisers and other staff members of the Supreme Court must protect confidential information regardless of the way in which they learned of it.

The following is particularly considered to be confidential: information determined to be confidential by the federal legislation or other regulations; information determined to be a business secret in accordance with the governmental regulations or regulations issued by legal entities, institutions and other organizations and companies; data and documents specifically marked as confidential by government organs, institutions or other organizations, companies and other legal entities; data and documents determined to be confidential by the president or authorized officer of the Supreme Court.

Article 60

Duty to preserve confidentiality continues after the service at the Supreme Court has ended.

President of the Supreme Court may grant a permission to the Supreme Court judge or a staff member to reveal confidential information if there are valid reasons to do so. Judges in a general conference may grant a permission to the president of the Supreme Court to reveal confidential information.

Article 61

President of the Supreme Court or a judge authorized by the president release through media information on the status of a specific case or other proceedings of the Supreme Court.

Article 62

A judge or staff member of the Supreme Court shall not release to unauthorized persons information on personal, family or economic status of citizens.

A judge or another staff member designated in an annual operating program shall grant permission to review court files to the persons who are eligible to do so in accordance with the federal legislation or regulation on internal operation of the Supreme Court.

IX FUNDING OF THE SUPREME COURT

Article 63

Funding for the Supreme Court is provided through the Federation budget.

Budget of the Supreme Court consists of regular operating funds (funds for salaries of the judges and other employees, funds for office equipment and supplies, funds for amortization of equipment, supplies and building) and special funds.

Article 64

Resource management and financial accounting of the Office of Federal Prosecution is conducted in a manner prescribed for the federal executive branch. Minister of justice shall issue a regulation concerning payment of court costs and expenses by the parties.

X TRANSITIONAL AND FINAL PROVISIONS

Article 65

Supreme Court shall commence its work on March 1, 1995.

Judges of the Supreme Court shall be appointed prior to that date.

Article 66

Judges appointed initially under this Law shall serve for a term of five years unless they reach age 70 prior to that, and shall be eligible for reappointment.

Article 67

President of the Supreme Court shall issue a regulation on internal organization of the Supreme Court no later than 30 days after the Court commences its work.

Article 68

Until the regulation on internal organization of the Supreme Court is issued in accordance with this Law, existing regulations on internal operation of courts ("Official Gazette of the Socialist Republic of B&H" No. 3/76, 27/78 and 11/80) shall be applied, unless they are inconsistent with this Law.

Article 69

This Law enters into force eight days after being published in the "Official Gazette of the Federation of B&H", and shall be implemented as of March 1, 1995.

Mariofil Ljubić (Signed)
Speaker of the Constituent Assembly of the Federation of B&H

Analysis of the Draft Law on the Supreme Court for the Federation of Bosnia and Herzegovina

I. Introduction

The draft Law on the Supreme Court of the Federation of Bosnia and Herzegovina represents an important step in building an independent judiciary within the framework of a system of separation of powers in a democratic state governed by the rule of law. Overall, the draft law is quite thorough, and its provisions are well drafted.

A variety of suggestions for fine-tuning the draft law are offered, including the clarification of various provisions, changes to the structure of the draft law, the addition of provisions addressing court procedure and ethical concerns, and refinements of various aspects of court administration. The most serious concern, however, regards the independence of the Court from any undue influence of the other branches of government. In particular, the variety of powers wielded by the Ministry of Justice over the Court is quite troubling. The drafting committee is urged to reconsider these provisions in order to maintain judicial independence.

A second major concern is that the scope of the Court's powers may be too broad, which could lead to the Court taking on a quasi-legislative and administrative role. In order to maintain the appearance of an unbiased and independent judiciary, it may be wise to reconsider these powers, so as to avoid unnecessary entanglement of the Court in political disputes.

The drafting committee is to be commended for the effort that has obviously been expended in producing a comprehensive and well thought out draft law, which will provide a solid foundation for the establishment of the Federation's Supreme Court.

II. Drafting Issues

There are two general concerns regarding the drafting of the draft law. First, a number of provisions are vague and require clarification. Second, the overall structure of the draft law could be simplified yet, at the same time, made more comprehensive.

A. Vagueness

While the majority of the draft law is clearly written, various provisions require clarification. The use of precise definitional terms and phrases is essential to avoid confusion as to the application of the draft law. For example, Article 24 of the draft law requires that two-thirds of the judges must be present in order to establish a quorum for a general conference. However, since there are seventeen judges, a number not evenly divisible by three, it is unclear what number constitutes a quorum. Are eleven or twelve judges required? Further, Article 24 provides that decisions at a general conference are passed by a majority of all judges of the Supreme Court. It is unclear whether this provision requires a majority of all judges, even those not present at the general conference, or only a majority of those present.

Generally, the system of conferences causes some confusion. For example, if the competence of the three conferences is not explicitly laid out, a conflict of competence may arise between different conferences. Further, the interaction between a court division conference, a general conference, and an expanded general conference also requires clarification.

Another example of a concern raised due to vagueness regards Article 2, which specifies the law to be used as the basis for the decisions of the Supreme Court. If followed strictly, Article 2 would seem to preclude the use of precedent. While this may not be the intent of the drafting committee, it would be a pity if Article 2 were so used to limit and regulate the sources of applicable law.

In addition to vagueness, confusion as to various aspects of the draft law is also caused by apparent conflicts between provisions. For example, Article 7 seemingly provides judges with absolute immunity for judicial acts. However, Article 53 apparently opens the door for judicial liability in certain circumstances. These two provisions need to be redrafted to avoid any confusion as to the extent of judicial liability. The practical consequences as to whether judges enjoy limited or absolute immunity for their judicial acts are quite significant. The adoption of absolute immunity, which will encourage judicial independence, is strongly recommended.

The above examples underscore the importance of careful drafting, as well as the dangers of vague and possibly-conflicting provisions. Many future problems can be avoided through the use of clear and consistent definitional language. While there are other instances of vague or conflicting provisions, these instances shall be addressed as they relate to other topics in this assessment.

B. Structure

A number of revisions to the overall structure of the draft law are possible. One possibility is to remove the provisions concerning the internal organization of the Court, and, instead, include such provisions in the regulation referred to in Article 16. In addition, the draft law could be organized into three chapters concerning:

1. The jurisdiction of the Court;
2. The appointment of judges; and
3. The administration of the Court.

The draft law could be further simplified by combining provisions that concern the same issue. For example, both Article 32 and Article 63 address the issue of funding for the Court, while Articles 3 and 4 and Articles 13 through 15 are concerned with the functions of the Court. One issue should be dealt with in one article, or in a number of articles in succession, and not in various chapters of the draft law. Further, Articles 43 through 49 concern the process for removing a judge from office, but so does Article 14, which is contained in Chapter II, regarding the jurisdiction of the Court. Combining related provisions will greatly facilitate the comprehension of the draft law.

Another possibility, however, is to increase the scope of the draft law to include the extensive procedural rules that will be required for practice before the Court, if such rules are not already provided for in other regulations. For example, rules on written and oral procedure, the rights and duties of legal representatives of the parties, whether the Court accepts new evidence, the form of judgments, and so forth must all be promulgated. Further, such procedural rules should set out rules on access to the Court, such as the limitations on how a case is referred to the Court. Finally, a separate chapter could be added to expand upon the confidentiality provisions in Chapter VII, prescribing a comprehensive code of ethics for all judges and non-judicial court employees.

One provision that should be removed from the draft law, however, is Article 64. Federal prosecution is not a subject of the draft law; hence, a provision concerning funding for the Office of Federal Prosecution is inappropriate and unnecessary.

III. Separation of Powers

Perhaps the most serious concerns raised by the law regard the issue of the separation of powers, which contains two distinct topics. The first, and most pressing, issue is whether judicial independence can be maintained in light of the considerable influence delegated to the Ministry of Justice. The second issue is whether the powers of the Court are too broad, running the risk of potential entanglement in divisive political issues.

A. Judicial Independence

Assuming that one goal of the Supreme Court is to render the judiciary independent of the executive and legislative branches, there is much concern as to the scope of powers granted the Ministry of Justice vis-à-vis the Court. Article 16 requires the Minister of Justice's approval of the internal organization of the Court. Article 32 speaks in comprehensive terms of the "administration" of the Court being conducted by the Ministry of Justice. The tasks outlined in that article appear to give the Ministry a great deal of control over the Court's operations, including organization and "methods of working"; giving "instruction" to the Court; investigating complaints about the Court's administration, including delay and, quite problematically, "treatment of the parties"; the way statistics are compiled; and the kind of information systems the Court will use. Article 33 continues this trend by giving control to the ministry over the filing and docketing systems, public information functions, jury notices and assignments, "court panel activity," "court division conferences," and so forth.

While many of these terms are too vague to determine exactly what is included or excluded in the above powers, one can not avoid the impression that the Ministry of Justice will have a heavy hand in how the Court operates. The operational control of judicial functions by the judiciary is an essential part of its independence, and judges learn by experience what kind of administration works best. The drafting committee is strongly urged to retain administrative control in the judiciary itself. The notion that the justices and the president of the Court must bow to the executive in such choices is not appealing. While it is feasible for ministry control of the judicial administration to coexist with judicial independence, it is a relationship that must be closely watched for any signs of political leverage on the way courts and judges operate if they are

truly to guard independent liberties from the intrusions of the other political branches. For the Court to be perceived as both powerful and independent, it must be seen to have control over the way it runs its own operations as much as possible.

Positive reference is made, however, to Article 11 as potentially contributing to the maintenance of judicial independence. While the article is not quite clear, having the remuneration of all judges fixed in a specific law is another important aspect of judicial independence. This will deprive the executive and legislative branches from using judges' compensation as a weapon in any conflict with the judiciary.

B. The Legislative Function of the Court

A number of provisions, such as Articles 3, 4, 22, and 23, seem to contemplate a quasi-legislative role for the Supreme Court. It may be questioned whether such a role is advisable for a body that is not elected and whose members have life tenure.

Particular attention should be paid to Articles 3 and 4, which give the Court an advisory function that is quite comprehensive. In some federations, such as the United States, the court of last resort is not expressly given the authority to provide advisory opinions and has declined to do so. It is not unheard of in the United States for judicial bodies such as the United States Judicial Conference, or the Chief Justice of the United States Supreme Court in his or her State of the Judiciary annual message, to allude to laws or proposed laws that have resulted in clogging the courts with litigation or extending too far the jurisdiction of the federal courts into that of the state courts. However, generally, the nexus has been the effect of these laws on the federal courts, not just their general effectiveness or the public policy underlying them. Indeed, the Founding Fathers of the United States debated whether there should be a Council of Revision to pass upon proposed laws for their constitutionality, but the idea was rejected as having too much potential for judicial intervention in the other branches.

Other courts, such as in Canada and some European countries, have a mandate to provide such opinions on the formal request of the executive or legislative branches. Article 3 goes further by stating that the Supreme Court has not only the right but also the duty to inform, and not only at the request of the legislative or executive branches but also on its own initiative, on the matters specified in Article 3. In sum, it seems as though the Court will be an advisory arm of the Parliament or the Government in a team effort to improve the laws, considerably blurring the line that separates the judicial from the legislative function. This is not entirely novel outside the United States, but careful thought must be given to the potential consequences of a Supreme Court that is an active participant in the legislative process. Acting as a political player runs the risk of the Court impugning its appearance as independent of the political branches. If these provisions are not redrafted to restrict the Court's authority and responsibilities, the Court must exercise great restraint, or the Court's actions may affect the Court's credibility in handling traditional legal problems for which judges are uniquely well qualified. In order to avoid this problem, at the very least the Court should develop separate guidelines on the circumstances in which it considers it appropriate to provide advice on its own initiative.

On a related point, Chapter III seems to contemplate the Court adopting general legal conclusions in anticipation of cases that may come before it. For example, it appears that the general conference can adopt legal decisions binding on a panel adjudicating a particular case, although most of the judges involved will not have heard the case. Again, these provisions seem to lay out a kind of legislative role for the Court. This is quite different from the task of rendering decisions in particular cases involving particular parties. It may be questioned whether the two roles are compatible. For example, could not the judicial conference's adoption of certain legal conclusions in the abstract appear to be prejudging cases that may be working their way through the lower levels of the judicial system? Furthermore, are the judges really equipped to make decisions in this abstract kind of way without the fact-finding procedures available to the legislature? Again, the precise role of the Court must be carefully considered lest the perception of the Court as an unbiased and objective arbiter be compromised.

IV. Internal Court Powers and Operational Issues

A. Jurisdiction

There is some confusion as to the jurisdiction of the Court, particularly as to the relationship between the Supreme Court and the Constitutional Court. For example, Article 13 suggests that the Supreme Court will decide constitutional cases, but Article 15 contemplates referral of constitutional issues to the Constitutional Court. When, then, does the Supreme Court decide a constitutional issue in a case appealed to it from the cantonal courts? Further, do cases referred to the Constitutional Court from the Supreme Court become the exclusive province of the Constitutional Court, or does the Constitutional Court merely decide the referred question and then remand the case back to the Supreme Court? The murky relationship between the Supreme Court and the Constitutional Court as to jurisdiction over constitutional issues must be clarified. However, a preliminary question is, perhaps, whether there is a need for a separate Constitutional Court at all.

A second aspect of jurisdiction that also requires clarification is whether the Court's jurisdiction is entirely appellate or whether some matters come before the Court for original decision. Although most of the provisions regarding jurisdiction, such as Article 13, suggest appellate jurisdiction, Article 58, regarding the duties of judicial police, suggests that the Court may have original jurisdiction in some cases. If there is indeed a mix of appellate and original jurisdiction, it is worth considering whether this is wise, as the roles of judges handling matters of original jurisdiction and appellate judges are quite different.

B. Appointment and Removal of Judges

1. Appointment

The provisions regarding both the appointment and removal of judges raise a number of concerns. The first problem with the appointment process is that it is unclear. Appointment appears to be a two-step process governed by Article 37 and Article 39. Under Article 39, the Minister of Justice submits a proposal for nomination only upon obtaining the opinion of the judges at a general conference. Then, the President of the Federation appoints a judge to the

Supreme Court under Article 37 so long as the judge is confirmed by a majority of the House of Peoples. However, the significance of the general conference under Article 39 is not clear. Is the Minister of Justice required to withdraw a nomination if it is not endorsed by the general conference? If the approval of the general conference is required, what sort of vote is necessary—a simple majority or something more? Clarification of this step in the appointment process is extremely important.

If, however, the opinion of the general conference is non-binding, then the problem of judicial independence from the other political branches is revisited. Appointment of judges by the President of the Federation with confirmation by the House of Peoples involves the danger of excessive political influence over the appointment process. With this in mind, the drafting committee is strongly urged to provide judges with real influence in the appointment process by requiring approval from the general conference for all nominations.

Article 42 provides for election of the President of the Court by the other judges. The drafting committee may wish to consider having the presidency determined by seniority, but both systems offer advantages and disadvantages. The use of the seniority system discourages political factionalism on the Court, as a judge may seek to curry the favor of other judges in his or her bid for presidency of the Court. The disadvantage with such a system, however, is that the most senior judge might not necessarily be the most capable. Of course, under the election system, it is also entirely possible that the most popular judge will be elected president over a more capable judge. It is also suggested that the four-year term for President for the Court is too short for a president to have any impact on the Court. Instead, a seven-year term for the president may be preferable. Finally, the drafting committee may also wish to consider referring to the "President of the Court" as "Chief Justice" instead. The latter term might add a moral authority to the position and enhance judicial independence by reinforcing the Supreme Court as a distinct institution.

2. Removal

The system for the removal of judges is also problematic. Again, one problem is that the procedure for removal is unclear. Article 44 provides the grounds for removing a judge from office, most of which are broad and vague. For example, a judge may be removed if it is determined that the judge "is convicted of a crime which makes him/her unworthy to serve" or "gravely violated an oath of office or diminished the reputation of the office," or is "not achieving satisfactory results in the work." The purpose for giving judges life tenure under Article 41 is to increase judicial independence. However, that effort is undermined by the large number of extremely-vague reasons for which a judge can be removed from office. At the very least, a more narrow definition of the crimes for which a judge can be removed is called for. Also, is there a reason why a judge can be removed for taking an executive position but not a legislative position? The same discrepancy is also contained in Article 50, which forbids a judge from holding an executive position.

Another vague provision is the requirement for removal of a judge by "consensus."¹ Does this mean that each of the sixteen other judges on the Supreme Court must agree to remove the

¹ Article 46.

judge in question? If so, this standard seems extraordinarily high. The drafting committee is advised to set a slightly-less stringent standard for removal, stated as a specific number in the provision.

A further concern with the removal process is whether there are adequate protections for the judge being removed. For example, Article 47 should be revised to allow a judge to produce witnesses, and to confront witnesses presented against him or her, during the proceedings for removal.

An additional provision requiring clarification is Article 48, which provides for the possibility for suspension of a judge. The option of a less-stringent disciplinary action than removal from office is encouraged; it is hoped that suspension is not merely used to get a judge out of office until he or she can be removed but is instead a separate sanction. The requirements for suspension, however, must be addressed. If the grounds for suspension are the same as that for removal, it should be so stated.

Article 14, which for some reason is contained in the chapter concerning jurisdiction, provides for removal of cantonal judges by the Supreme Court. It might be preferable for the cantonal judges to be removed by their peers, or perhaps by a joint committee of both cantonal and Supreme Court judges, rather than by Supreme Court judges alone.

Some further provisions requiring clarification are Articles 17 and 18, regarding divisional judges. While the draft law implies that divisional judges are Supreme Court judges, this should be stated explicitly.² Further, the process for divisional appointments is unclear. Do the judges rotate between divisions on an annual basis? If so, one year may be too brief a time period for a judge to achieve the requisite levels of thoroughness and efficiency in a division, and the drafting committee should consider extending the rotation period.

Finally, Article 36 is also vague. The article provides for an equal number of Bosniak and Croat judges to be appointed to the Court and that "others will be represented appropriately." This phrase is extremely vague and requires clarification.

C. Court Administration

As discussed above, Article 32 and Article 33 give the Ministry of Justice a great deal of authority over the administration and operation of the Court. For example, the Ministry of Justice is empowered to monitor the "organization, methods of work and operation of the Supreme Court" and to give "instructions to the Supreme Court on efficient conducting of court administration tasks." Such control of the Court's administrative functions by political officials gravely threatens the Court's independence. Again, the drafting committee is strongly urged to vest authority over the Court's administration in the Court itself.

In order for the Court to handle its own administration, provision must be made for some form of administrative office to handle the day-to-day tasks that are essential for the Court to

² Article 17.

operate. While Article 29 provides for a Court Administration, Article 30 currently requires the president of the Supreme Court to organize the work of the Court Administration. While it is advisable for the president to maintain an oversight role in the Court Administration, he or she will have insufficient time to be directly responsible for organizing the Court's work. Instead, such responsibility should be delegated to a chief administrative official who reports to the president. This will allow the president to monitor administrative issues while enabling him or her to devote more time to the actual business of the Court.

D. Court Procedure

While the draft law does not contain extensive procedural rules, the addition of which should be considered if not already provided for in some other law, a few procedural issues in the draft law were found confusing.

Perhaps most in need of clarification is Article 6, regarding the en banc review of decisions. The first question is how the procedure for such review is invoked. Further, while the provision implies that such decisions will be made by a majority vote, this should be stated specifically. There is room for confusion when one considers that Articles 14 and 46 call for a decision "by consensus." A second concern is why en banc review is limited to criminal or constitutional cases. Many civil cases raise critical questions of equal importance with criminal cases in which en banc treatment may be necessary to rectify panel error. Further, Article 6 should also specify how many judges sit en banc.

A number of concerns were also raised regarding public access to the Court. While Article 8 provides that Supreme Court proceedings are open to the public, the article also specifies that public access may be restricted "in order to preserve confidentiality, protect public morality, interests of minors and also when other state interests so require." Some of these terms are vague, particularly the reference to protecting public morality, which is a questionable basis for excluding the public and presumably the press from the Court's proceedings. It should be recognized, however, that there is a balance to be struck regarding public access. While public review of the Court's activities is a primary means for preventing arbitrary decisions, public review might not be necessary for less important decisions, as it may only delay the Court's proceedings.

Another means for facilitating knowledge about the Supreme Court is to provide for public review of all decisions made by the Court. Article 8 provides for the publishing of "significant court decisions," but the drafting committee is encouraged to provide for publication of all Court decisions. Further, it is recommended that a certified transcript of all decisions be made in both the Bosnian and Croatian languages. This will help to bridge cultural differences and will avoid the impression that a particular decision favors or only concerns one culture. This is a practice followed by the Supreme Court of Canada, which publishes its decisions in both French and English.

Article 13 might need revision to narrow the broad right to file extraordinary appeals. If parties can file extraordinary appeals on a large scale, this right might be abused by attorneys, resulting in an overload of the Court. One alternative is for the extraordinary reopening of a case to be done by the Supreme Court *ex officio*.

Finally, there should be more elaboration on the role of the jury in both civil and criminal matters.

E. Judges' Rights and Obligations

The provisions regarding the duration of a judge's appointment require clarification. Article 41 provides that a judge of the Supreme Court shall serve until the age of seventy, unless he or she resigns or is removed from office. Article 66, however, seems to provide for an initial term of service of five years, with the option of reappointment until age seventy. Not only does an initial term of five years seem too short but it also raises the danger of the judge being tempted to provide pleasing decisions in order to ensure reappointment. Further, if reappointment is to be used, Article 66 should specify the manner in which reappointment is to be made, such as whether it is the same process as for original appointment.

As discussed in Section II(A) of this assessment, there appears to be a conflict between Articles 7 and 53 over judicial immunity. Article 7 provides for judicial immunity for any act committed in the judge's judicial capacity, but Article 53 specifies that a judge may be personally liable to the government for damages it pays as a result of a judge's decision. It is extremely undesirable to have a judge worrying about possible liability for actions within the scope of a judge's authority, and the drafting committee is strongly encouraged to grant judges absolute immunity for such acts. Further, the indemnification of individuals who have been harmed by a judicial ruling is extremely generous, perhaps overly so. One concern is whether any assessment has been made of what the cost will be to the Federation for such a policy. The entire purpose of an appeals process is to correct wrong rulings. Is every person who brings a successful appeal entitled to remuneration? The drafting committee should reconsider whether this policy is both desirable and wise.

Finally, Article 51 prohibits a judge from holding employment elsewhere. A revision to this provision is recommended to permit judges to teach so long as teaching does not interfere with their judicial duties.