

Brief by the High Representative Concerning the Request for the Review of Constitutionality in Case No. U 15/20

Summary: The applicant has challenged provisions of three articles of the Law on Court of Bosnia and Herzegovina. The challenged provisions of the law are ones that establish the appellate jurisdiction of the Court of Bosnia and Herzegovina and that govern the assignment of judges to the appellate division. The applicant alleges that the challenged provisions violate the principles of judicial independence and impartiality that are protected by the Constitution of Bosnia and Herzegovina.

The High Representative agrees with the previous decision of the Constitutional Court of Bosnia and Herzegovina that upheld the Law on Court of Bosnia and Herzegovina. He also supports the conclusions of the Venice Commission that specifically recognized the legitimacy of the appellate structure of the BiH Court.

The High Representative submits that the regulation of two instances in one court does not violate international human rights instruments or the BiH Constitution and that the current legislation protects the judicial independence and impartiality of the Appellate Division of the Court of Bosnia and Herzegovina.

I. Introduction on Procedural Status

1. On 17 December 2020 the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) received the request of Ms. Borjana Krišto, at the time Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for the review of constitutionality of Articles 9(1), Article 10(4) and Article 11(1)b) of the Law on Court of Bosnia and Herzegovina – Consolidated Version (Official Gazette of Bosnia and Herzegovina 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07, 74/09, 97/09; hereinafter: Law on BiH Court).

2. The challenged provisions of current Articles 9(1), Article 10(4) and Article 11(1)b) of the Law on BiH Court were initially enacted within *the Law Establishing the Court of Bosnia and Herzegovina* that formed integral part of *the High Representative's Decision No. 50/00 of November 12, 2000 on Law Establishing the State Court of Bosnia and Herzegovina* (Official Gazette of Bosnia and Herzegovina, 29/00) in order to ensure the effective exercise of the competencies of the state of BiH and the respect for human rights and the rule of law. The law was subsequently adopted by the BiH Parliamentary Assembly, without changes as specified by the High Representative's decision, and was re-published in the Official Gazette of Bosnia and Herzegovina. The provisions were subsequently updated, both by the High Representative and the BiH Parliamentary Assembly.

3. On 22 June 2022 the High Representative, as the authority that initially enacted the challenged provisions, asked the Constitutional Court for leave to submit a brief in *amicus curiae* capacity. On 24 June 2022, the Constitutional Court invited the High Representative to submit his opinion within 60 days, and this brief is submitted on 19 August 2022 pursuant to that invitation.

4. The High Representative notes that, following the Decision of the Constitutional Court in Case No. U-9/00 of 3 November 2000, the High Representative has consistently endorsed the power of the Court to review a law enacted through exercise of his substitution powers. The High Representative therefore does not object to the review by the Constitutional Court of the provisions challenged in this case.

II. The Request for Review

5. The applicant argues that the challenged articles of the Law on BiH Court are inconsistent with Bosnia and Herzegovina's legal responsibility to guarantee the independence and impartiality of the judiciary. The applicant, in particular, challenges the organizational aspect of the right to a legal remedy insofar as the appellate authority is a division within the BiH Court itself and not a separate legal entity. The applicant also challenges the authority of the president of the BiH Court to assign judges to the appellate division.

6. The applicant argues that under such organizational solution the principle of two instances is only "partially met" because parties before the BiH Court, although having a right to appeal, "do not have the right to have their appeals decided by a higher court but only one division of the same court". The applicant further submits that such

a structure is contrary to Bosnia and Herzegovina's legal tradition and legal system in which "a higher court is understood to be a court that has the legally prescribed jurisdiction, structure and internal organization". The applicant concludes that this conflicts with **the principle of individual independence of judges**. The applicant further submits that the role of the BiH Court president in assigning judges to the appellate division "without clearly prescribed and defined criteria" is also contrary to **the legal principle of two instances, the right to a fair trial and violates individual independence of judges and their impartiality**.

7. The applicant requests that the specified provisions of the Law on BiH Court be declared inconsistent with the Constitution of Bosnia and Herzegovina (the BiH Constitution) and with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) and that the Constitutional Court order the Parliamentary Assembly of Bosnia and Herzegovina to harmonize the challenged provisions with the BiH Constitution within a deadline determined by the Court.

III. The Law

8. The request for the review of constitutionality relates to the following provisions of the *Law on BiH Court – Consolidated Version*:

- **Article 9(1)**: *The Court shall decide the following:*

- a) appeals against a judgement or decision delivered by the Criminal Division of this Court;*
- b) appeals against a judgement or decision delivered by the Administrative Division of this Court;*
- c) extraordinary legal remedies against final judgments reached by the divisions of the Court, not including those that constitute the request for reopening of proceedings.*

- **Article 10(4)**: *The President of the Court in accordance with its Rules of procedure shall be competent to make general and special assignment of judges to any Division, Panel or case except when otherwise defined by law.*

- **Article 11(1)b)**: *The President of the Court is responsible for: [...] b) the appointment of judges to the different divisions and panels unless otherwise defined by this Law; [...].*

9. The Constitutional Court is requested to review their consistency with the following provisions of the *BiH Constitution, the ECHR, and the ICCPR*:

- **Article I.2.** of the BiH Constitution, on Democratic Principles: *Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.*

- **Article II.2.** of the BiH Constitution, on International Standards: *The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.*

- **Article II.3.e)** of the BiH Constitution, on Enumeration of Rights: *All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: [...] e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

- **Article 6.1.** of the ECHR, on the Right to a fair trial: *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

- **Article 14.5.** of the ICCPR: *5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

IV. Background on the BiH Court

10. The establishment of the BiH Court was part of a broader and far-reaching judicial reform, including the

restructuring of the courts and prosecutors' offices networks, a reappointment process of judicial office holders as well as changes in procedural and substantive laws. These reforms required a deep involvement by the international community in particular in the organizational, expert and financial aspects. The BiH Court was conceived as a national institution but with the presence of international judges and prosecutors for a transitional period.

11. In part, the judicial reform was needed to implement the broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as the best way for the International Criminal Tribunal for Former Yugoslavia (ICTY) to achieve the objective of completing all trial activities at first instance by 2008. This strategy was endorsed by the UN Security Council on 23 July 2002 who took note of the recommendations of the ICTY with regard to the creation, as proposed by the High Representative, of a specific Chamber, within the BiH Court, to deal with serious violations of international humanitarian law. The jurisdiction of the BiH Court was *inter alia* intended to allow for the transfer of cases that were, at the time, registered internationally. The structure of the BiH Court itself mirrored that of the ICTY. The ICTY also comprised both a trial chamber and an appeal chamber under the management of the same president.

12. In addition, while designing a judiciary at state level, it was important to consider the demands of flexibility and efficiency to ensure the efficient management of cases and the delivery of decisions within a reasonable time, considering the financial limitations, the backlog of cases and the increased number of judges. The BiH Court therefore followed a centralized model. This model allowed it to self-manage and administer and to keep it relatively insulated from the systemic problems of the domestic legal system.

13. The structure of the BiH Court and the role of its president are not unique or unprecedented. Apart from the ICTY, a similar structure was also used in other international or hybrid tribunals such as the International Criminal Court, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Special Court for Sierra Leone and the Kosovo Specialist Chambers and Specialist Prosecutor's Office. All have structures that, in some way, locate the trial and appeals chambers within the same court and the presidents of such tribunals have a key role in the administration and management of courts, including assigning judges to different chambers within a court. Same solution is also known in national legislation of Council of Europe member states.

14. Notwithstanding the practical and financial benefits of having all judicial institutions at the same location and both instances in the same institution, the question arose on how to continue to better the BiH judicial structure, especially improving the public perception on the independence of these institutions. As a result, the BiH Ministry of Justice prepared the Draft Law on Courts of BiH which indeed *inter alia* envisaged the establishment of an Appellate Court of BiH, primarily to serve as a second instance court receiving cases on appeal from the BiH Court. Since it requires establishment of a new institution at the state level with its finances and a seat, it is subject to long discussions yet to be resolved.

15. In its *Opinion on Bosnia and Herzegovina's application for membership of the European Union* of 2019 the European Commission lists the adoption of a new law on courts of BiH among the 14 key priorities for the opening of negotiations for accession to the European Union.^[1] At its 23-24 June 2022 meeting, the European Council adopted a set of conclusions concerning the membership applications of Ukraine, Moldova and Georgia as well as the EU membership perspective of the Western Balkans. Conclusion 21 expressed the Council's readiness to grant the status of candidate country to BiH and invited the European Commission to report without delay on implementation of 14 key priorities set out in its Opinion, with special attention to those constituting 'a substantial set of reforms'. Conclusion 20 welcomed the 12 June 2022 political agreement by the leaders of BiH and called on them to swiftly implement the commitments set out therein. In the political agreement the signatories specifically committed to "urgently and no later than within 6 months from the formation of all authorities adopt (among others) the Law on Courts of BiH."^[2] Thus, while the initiative in the Draft Law on Courts of BiH to establish two separate courts for first instance and second instance decision-making is not driven by doubts regarding the constitutionality of the current structural arrangement but rather about the outcome of public discussions on how to improve public perception, it is planned that *de lege ferenda* Bosnia and Herzegovina at the state level will have two separate courts of ordinary jurisdiction, separating institutionally basic and appellate jurisdiction.

16. *De lege lata* the Appellate Division of the BiH Court is established by the Law on BiH Court as a separate division within the BiH Court (Article 10) and consists of at least ten judges (Article 13). It is composed of three Sections (Article 16): Section I to hear appeals against judgments of Section I of the Criminal Division, Section II to hear appeals against judgements of Section II of the Criminal Division, Section III to hear appeals against

judgements of Section III of the Criminal Division, and against judgements of the Administrative Division. Section III also hears complaints in electoral matters and is chaired by its president who is elected by all judges of Section, and serves for a term of five years.

17. The Appellate Division has jurisdiction to decide: on appeals against a judgement or decision delivered by the Criminal Division of the Court, against a judgement or decision delivered by the Administrative Division of the Court, extraordinary legal remedies against final judgments reached by the divisions of the Court, not including those that constitute the request for reopening of proceedings (Article 9), and electoral appeals before its Section III against a decision of any authority in Bosnia and Herzegovina, its entities, and against of courts of last resort in the District of Brčko, which is not subject to another ordinary appeal (Article 23 of the Law on BiH Court).

18. The appointment of judges to the BiH Court is the exclusive responsibility of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) as provided for in Article 17 of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Law on HJPC)[3]. The HJPC is also responsible for conducting disciplinary proceedings, determining disciplinary liability, and imposing disciplinary measures (which can include removal from office); deciding upon appeals in disciplinary proceedings; deciding upon suspensions of judges; deciding upon the temporary assignment or transfer of judges to another court; and setting criteria for the performance evaluations of judges. The appointment procedure is regulated in detail in Chapter V of the Law on HJPC while the disciplinary liability of judges is regulated in detail in Chapter VI of the same law.

19. The criteria to be appointed as a judge to the BiH Court are established by Article 23 of the Law on HJPC providing that: "Judges of the Court of Bosnia and Herzegovina shall have a minimum of eight (8) years of practical experience as a judge, prosecutor, attorney, or other relevant legal experience after having passed the bar examination and shall be appointed for life, subject to resignation, mandatory retirement age or removal from office for cause."

20. The termination of mandate to hold office is regulated in Article 88 of the Law on HJPC and applies in the following cases: upon reaching the mandatory retirement age, upon resignation from office; upon removal by the Council as a consequence of disciplinary proceedings; if it has been proven by the medical documentation that he or she has permanently lost the working capacity to perform his judicial function.

21. Once appointed by the HJPC to the BiH Court, the president of the Court in accordance with its Rules of Procedure is competent to make general and special assignment of judges to any Division or Panel [Article 10(4) and 11.b) of the Law on BiH Court].

V. Arguments

V.1. The principles of independence and impartiality

22. The principle of independence of the judiciary has two components: institutional and individual independence^[4]. The applicant in her submission questions both components, in particular whether the current institutional arrangements under these challenged provisions of the Law on BiH Court provide sufficient safeguards against arbitrary interferences, namely, whether the current structure and role of the president of the Court represent such interference or could be perceived as such.

22. The Venice Commission in its *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*^[5] elaborates on this as follows:

"75. The independence of the judiciary can be seen as having two forms: institutional and individual independence. Institutional independence refers to the separation of powers in the state and the ability of the judiciary to act free of any pressure from either the legislature or the executive. Individual independence pertains to the ability of individual judges to decide cases in the absence of any political or other pressure."

It further states that institutional independence can be assessed by four criteria: independence in administrative matters, in financial matters, in decision-making power without external interference and in determining jurisdiction.

With regard to individual judicial independence the Opinion states:

“80. Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. Judges must be independent and impartial. These requirements are an integral part of the fundamental democratic principle of the separation of powers: judges should not be subject to political influence and the judiciary should always be impartial.

81. This requirement has many aspects and the following four seem of particular importance in the context of BiH. The first one is the appointment and the promotion of judges. All decisions concerning the professional career of judges must be based on objective criteria and must avoid any bias and discrimination. The selection of judges and their promotion must be based on merit (professional qualifications, personal integrity). The second is the security of tenure and financial security. The term of office of judges must be adequately secured by law and, ideally, should end with the retirement of the judge. Adequate remuneration and decent working conditions must also be guaranteed. Any changes in the guarantees should occur only in exceptional situations. The third aspect is independence in the decision-making power. Individual judges must be free to decide cases without any external interference. The fourth refers to the rights of judges. As other individuals, judges enjoy an array of human rights, yet some of these rights (freedom of association, freedom of expression, etc.) are of special importance to them as these rights help in ensuring their individual independence. On the other hand, certain fundamental rights are somewhat limited for judges: for instance, freedom of expression is limited by the duty of confidentiality, which forms a part of the principle of impartiality.”

24. The notion of “impartiality” is closely linked to that of independence and refers to the fact that judges should act objectively when adjudicating without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties.

Principle 2 of the *United Nations Basic Principles on the Independence of the Judiciary* specifies that: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

In the case of *Arvo O. Karttunen*, the Human Rights Committee explained that the notion of impartiality “implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”^[6].

The European Court of Human Rights (ECtHR) has consistently ruled that the concept of impartiality has two requirements, one subjective and one objective requirement. In the first place, “the tribunal must be subjectively impartial”, in that “no member of the tribunal should hold any personal prejudice or bias”, and this personal “impartiality is presumed unless there is evidence to the contrary”^[7]. Secondly, “the tribunal must also be impartial from an objective viewpoint”, in that “it must offer guarantees to exclude any legitimate doubt in this respect”^[8].

25. The applicant contests the characterization of the Appellate Division as a “higher tribunal” because it is not a separate entity but a division within the BiH Court. However, the ECtHR clarified that a “tribunal” is characterized in the substantive sense of the term by its judicial function – determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner.^[9] In addition, Article 6 of the ECHR does not compel the Contracting States to set up (special) courts of appeal or of cassation^[10] but instead focuses on the issue of access to such bodies.^[11] As such, the mere fact that both instances are situated within the same court does not automatically raise an issue under Article 6 of the ECHR on this ground or on the grounds of independence and impartiality. Through its jurisprudence the ECtHR further clarified that for the purposes of Article 6(1) of the ECHR a “tribunal” need not be a formal court of law integrated within the standard judicial machinery of the country but that it is about whether the guarantees, both substantive and procedural, are in place. An authority not classified as one of the courts of a state may nonetheless, for the purposes of Article 6(1) come within the concept of a “tribunal” in the substantive sense of the term.^[12]

26. The Venice Commission of the Council of Europe stated in this regard, in its already mentioned *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, that:

“The possibility of appealing judgments made by different sections within the same Court to a different division of that Court, if it is in effect separate from the rest of the Court should in itself not be a problem.”^[13]

27. The Appellate Division of the BiH Court meets all the criteria, as it determines matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It has the power to give binding decision^[14] and has full jurisdiction as prescribed by the law to examine all questions of fact and law relevant to the disputes before it and to decide on several matters in second instance.^[15] It is a higher tribunal as it is a second instance, its decisions reviewing the decisions of the first instances.

28. It follows that the so-called principle of two instances does not necessarily mean two separate institutions as in two separate legal entities, but just as it is spelled out – two separate instances, as long as judges deciding in the second instance are not the ones that decided in the first instance. In this regard as pointed out by the Venice Commission in the referenced Opinion “a judge has never been appointed in the Appellate Division for a case he or she had tried at first instance.”

29. The Constitutional Court itself already decided on this issue in a concrete case, as pointed out in the Case No. AP 1785/06, categorized by the Constitutional Court itself as “unbiased two instance trial”, where it stated that:

“50. The Constitutional Court deems that the conclusion from above quoted decision can be applied to the specific case. All the more for the reason that this is a situation whereby two different panels of the same court are located in the same building and because an arbitrary allegation referred to in the appeal on “everyday contacts and joint work” in itself cannot constitute a violation of the impartiality of the court. In the same way one should consider the complaint referred to in the appeal, which refers to the fact that there is no hierarchical relationship between the Court of Bosnia and Herzegovina and other courts in Bosnia and Herzegovina, and that this court is competent for both, the first instance and second instance proceedings. Having considered all of the mentioned matters, the Constitutional Court concludes that the appeal allegations referring to the objective impartiality of the court are ill-founded, and, in conjunction with them, so are the allegations of a violation of the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.”

30. In the same case, the Constitutional Court decided whether the BiH Court, its first and second instances, can be considered independent, and for that determination assessed the statutory criteria [ECtHR, Mustafa Tunç and Fecire Tunç v. Turkey (GC), para 221], having regard to the following criteria: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures and whether the body presents an appearance of independence.^[16] This component of judicial independence relates to both the personal and the institutional or operational.^[17] It was satisfied with all the tests, not finding a violation of the Constitution (the Constitutional Court Decision in AP- 1785/06 of March 2007, paragraphs 38-40 and further). Thus the Constitutional Court was satisfied on all the concepts of Article 6(1) of the ECHR that are so-called institutional requirements: “tribunal established by law”, “independence” and “impartiality”.

31. Judges of the BiH Court, including the Appellate Division, are appointed by the HJPC pursuant to criteria prescribed by the law and those that the Council sets. The HJPC also monitors the activities of judges and prosecutors and, if need be, conducts disciplinary proceedings against them. Under BiH law judges have security of tenure, and the ECtHR sees the principle of the irremovability of judges during their term of office as a corollary of judges’ independence included in the guarantees of Article 6(1),^[18] but even that principle is not absolute and exceptions to this principle are acceptable in certain circumstances.^[19] The applicant in the present case though does not argue irremovability of judges during their term of office neither disputes the procedure of appointment by the HJPC nor the term of office of judges. The applicant instead disputes the role of the president of the BiH Court in assigning judges to different divisions including the Appellate Division as contrary to the individual independence of judges and their impartiality. It is therefore a question of internal independence, namely, that judges “be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court.”^[20]

32. The arguments advanced by the applicant to contest both the independence and impartiality of the Appellate Division are based therefore on the same consideration that it is the president of the BiH Court who assigns judges. In the context of internal independence requirements under Article 6 of the ECHR, this role of the Court president should be viewed in terms of how the president effectuates these assignments, namely, are the judges assigned initially and *in abstracto* to the divisions and panels of the Court, and once thus assigned, receive cases through an automatic distribution system in which the president could exert no influence. The mere possibility to assign judges within the divisions and panels of the same court does not rise to the level of a violation of either internal or individual independence.^[21] The applicant’s request does not provide evidence of specific misbehavior, coercion or

any other form of pressure from the president of the BiH Court towards the judges in the Appellate Division and although the president of the BiH Court is competent under the Law on BiH Court to make general and special assignment of judges to any division, panel or case, there is no record that once appointed to the Appellate Division judges have been reassigned to other divisions of the BiH Court.

33. The internal judicial independence requires that judges be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court^[22]. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the ECtHR to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.^[23] In any case, it would not be a situation particular to the Appellate Division of the BiH Court, but to all divisions of the BiH Court, as well as to the majority of courts throughout Bosnia and Herzegovina. Therefore, the question is whether the judges of the Appellate Division or any other division of the BiH Court are sufficiently independent of the court's president.

34. The Law on BiH Court does leave space for the president of the Court to reassign judges from the appellate to a first instance division, and vice-versa, and, with that, the possibility of the same judge being assigned to the same case in two instances. This said, the OHR has no record that this ever happened and while this potential may exist in theory, the procedural laws, like the Criminal Procedure Code of Bosnia and Herzegovina govern this issue, requiring the judge to be recused.^[24] Such a situation is not peculiar to the BiH Court, since it can arise with any assignment to appellate jurisdiction of judges that used to serve in first instances.

35. For objectiveness and transparency, based on the Law on BiH Court and the Rules of Procedure of the BiH Court^[25] the BiH Court president passed and published in the BiH Official Gazette *the Decision Establishing the Guiding Criteria for Assignment of Judges to the Appellate Division of the Court*^[26] with a view of including objective Criteria also in the Court's Rules of Procedure, which are to be adopted by the plenum of the Court, as soon as the possibility for the plenum to meet arises. Thus, the assignment to the Appellate Division is guided by objective criteria accessible publicly and done in a transparent manner.

36. In further assessing the internal independence it is important that the allocation of cases within the court follow "objective pre-established criteria".^[27] In this regard, the competencies of the court's president are regulated, the president does not give judges instructions how to decide on a particular case, and there is nothing in the appellant's submission to indicate this was ever the case. In addition, the president of the BiH Court has little power when it comes to the distribution of cases to judges in the divisions of the BiH Court, as the assignment of cases generally functions by automatism. Cases are registered in the so-called Central Management System (CMS) as they are received and are assigned a case number, thus in principle court presidents do not have a task of reviewing incoming cases and assigning them to individual judges, as the CMS does it automatically. Automatism was established precisely to prevent possible internal influences by court presidents or presidents of divisions of courts, and as a safeguard to secure the independence of judges vis-à-vis their judicial superiors.^[28]

V.2. The applicant's argument regarding the so-called "principle of two instances" in the legal tradition of Bosnia and Herzegovina

37. The applicant asserts that such structure of the BiH Court is contrary to Bosnia and Herzegovina's legal tradition and legal system where "a higher court is understood to be a court that has the legally prescribed jurisdiction, structure and internal organization". Prescription contrary to legal tradition does not amount to constitutionality, but even were it an argument in the present case, it cannot stand.

38. There are other examples in Bosnia and Herzegovina of two instances within the same court, even in same cases. Thus, the legislation regulating the Supreme Court of the Federation of Bosnia and Herzegovina envisaged that that highest ordinary court was deciding on legal remedies against its decisions when it had the first instance jurisdiction, including thus all three instances. Even to the present day, the Special Department for Organized Crime and Corruption of the Supreme Court of the Federation is an internal organizational unit of the Supreme Court [Article 23(1) of *the Law on Combating Corruption and Organized Crime in the Federation of Bosnia and Herzegovina*, OG FBiH 59/14] and has first instance jurisdiction for a number of offences, while the appeals are decided by a panel of the very same Supreme Court of the Federation [Article 26(1) of the same Law].

39. In different cases, it is the principle of court organization in Bosnia and Herzegovina that second instance courts, cantonal courts in the Federation and district courts in the Republika Srpska, apart from their second

instance jurisdiction, also have first instance jurisdiction in particular cases (Law on Courts of the Federation of Bosnia and Herzegovina and Law on Courts of the Republika Srpska)[29].

40. In principle, courts may have and in Bosnia and Herzegovina in majority of cases do have departments organized for particular fields of law, such as criminal, administrative or civil. Being departments of a court, they are manned by judges assigned to the departments by a court president, since assignment of judges is considered a task of a court management and administration (Rulebook on Internal Court Operation)[30]. Thus the manner in which individual judges are assigned to their tasks in the BiH Court does not differ from the court management in other courts in Bosnia and Herzegovina.

VI. Conclusion

41. The High Representative agrees that the current Law on BiH Court can be improved and he supports such efforts. There is a draft law in procedure that should establish a separate appeal body. However, a desire to improve the structure of the state court does not imply that the current structures are unconstitutional.

42. Judges of the BiH Court, including the Appellate Division, are appointed by the HJPC pursuant to criteria prescribed by the law. While the president of the court could legally reassign judges from the appellate to a first instance division, and vice-versa such authority is conditioned to the limits established by procedural laws and by internal acts of the Court establishing clear and objective criteria for assignment by the president. The president does not give judges instructions how to decide on a particular case, and there is nothing in the appellant's submission to indicate this was ever the case while the assignment of cases is automatic through the so-called Central Management System (CMS) where the Court president generally does not assign cases to individual judges.

43. The Constitutional Court and the Venice Commission have both previously decided that the structure of the BiH Court guarantees judicial independence and impartiality.

Notes:

[1] Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, Brussels, 29.5.2019., page 15.

[2] European Council meeting (23 and 24 June 2022) – Conclusions, Brussels, 24 June 2022, and Political agreement on principles for ensuring a functional Bosnia and Herzegovina that advances on the European path, 12 June 2022, at consilium.europa.eu.

[3] OG BiH 25/04, 93/05, 48/07 and 15/08.

[4] *GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND* ([coe.int](https://www.coe.int)), para. 234.

[5] Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)014.

[6] Communication No. 387/1989, Arvo O. Karttunen v. Finland (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 120, para. 7.2.

[7] *ECTHR Dakaras v. Lithuania*, para. 30.

[8] *Ibid.*

[9] For example, *ECTHR Belilos v. Switzerland*, para. 64; *Guðmundur Andri Ástráðsson v. Iceland* [GC], para. 219 et seq.

[10] *ZUBAC v. CROATIA* ([coe.int](https://www.coe.int)), para. 80.

[11] *ZUBAC v. CROATIA* ([coe.int](https://www.coe.int)), paras. 80, 81.

[12] *Sramek v. Austria*, para. 36

[13] Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91st Plenary Session, CDL-AD(2012)014, paragraph 62.

[14] Van de Hurk v. the Netherlands, para. 45

[15] Terra Woningen B.V. v. the Netherlands, Reports of Judgments and Decisions 1996-VI para. 52; Sigma Radio Television Ltd v. Cyprus, paras. 151-57.

[16] FINDLAY v. THE UNITED KINGDOM (coe.int), para. 73.

[17] GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND (coe.int), para. 234.

[18] The principles on the irremovability of judges emerging from the Court's case-law under Article 6(1) in Maktouf and Damjanović v. Bosnia and Herzegovina [GC], nos. 2312/08 and 34179/08, para 49, ECHR 2013; Fruni v. Slovakia, no. 8014/07, para 145, 21 June 2011; paragraph 20 of General Comment no. 32 of the UN Human Rights Committee concerning the right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32 published on 23 August 2007.

[19] ECtHR Grand Chamber judgement in Case of Guðmundur Andri Ástráðsson v. Iceland, at para. 239, referring to the case of Commission v. Poland (C-619/18) of the Court of Justice of the European Union (CJEU) by which an exception to that principle would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the impartiality of the court concerned to external factors and its neutrality with respect to the interests before it".

[20] PARLOV-TKALCIC v. CROATIA (coe.int), paras. 86.

[21] WARSICKA v. POLAND (coe.int), paras. 39 and 40.

[22] Dakaras v. Lithuania, ECHR 2000-X; Moiseyev v. Russia, para. 182.

[23] For example, Dakaras v. Lithuania, paras. 36 and 38; and Moiseyev, para 184, both referenced above.

[24] Criminal Procedure Code of BiH, Article 29: "*A judge cannot perform his duties as judge if: [...]e) if, in the same case, he participated in rendering a decision contested by a legal remedy[...].*"

[25] OG BiH 38/20.

[26] OG BiH 51/22.

[27] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), paras. 22-25.

[28] By converse implication ECtHR Moiseyev v. Russia, para 182.

[29] Law on Courts of the Federation of Bosnia and Herzegovina, OG FBiH 38/05, 22/06, 63/10, 7/13, 52/14 and 85/21; Law on Courts of the Republika Srpska, OG RS 37/12, 44/15 and 100/17.

[30] Rulebook on Internal Court Operation OG BiH 66/12, 40/14, 54/17, 60/17 and 30/18; OG RS 9/14, 71/17, 67/18 and 6/19.