

Decision amending the Law on Judicial and Prosecutorial Service in the Federation

In the exercise of the powers vested in me by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement; and considering in particular Article II.1. (d) of the last said Agreement, according to the terms of which the High Representative shall “Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation”;

Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative’s intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of any difficulties as aforesaid “by making binding decisions, as he judges necessary” on certain issues including (under sub-paragraph (c) thereof) “measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities”;

Recalling further paragraph I.2.a. of the Conclusions of the said Bonn Conference which recognized “that an impartial and independent judiciary” was “essential to the rule of law and reconciliation within Bosnia and Herzegovina”, that the judicial appointment process must be based on merit, that a

judicial training facility must be established, and that the monitoring of the judicial system was an essential element of the aforesaid process;

Mindful of paragraph II.2 of the Annex to the Declaration of the Peace Implementation Council (Madrid, 16 December 1998) which “emphasize[d] the importance of intensified judicial reform efforts, co-ordinated by the High Representative, to support the efforts of the authorities in BiH [Bosnia and Herzegovina]” and “urge[d] the High Representative to further develop a comprehensive judicial reform strategic plan, identifying short and longer-term priorities, in consultation with the authorities, the Council of Europe, OSCE, UNMIBH and other organizations”;

Guided by paragraph 2 and paragraph 3 of my Decision on the Establishment of the Independent Judicial Commission of March 14th, 2001 (Official Gazette of Bosnia and Herzegovina No 10/01, Official Gazette of the Federation of Bosnia and Herzegovina No 14/01, Official Gazette of the Republika Srpska No 17/01) which provides that “The mandate of the Independent Judicial Commission shall embrace matters regarding promotion of the rule of law and judicial reform. The responsibilities of the Independent Judicial Commission shall be in line with this mandate and include: (Š) – to guide and coordinate reforms affecting the judiciary, the prosecutor’s office, professional associations, and related structures, procedures or institutions, including assisting in or facilitating the development of new legislation” Further, “In carrying out of its mandate and responsibilities, the Independent Judicial Commission shall have the following authorities: (Š) – to propose to the High Representative the exercise of his power under the Dayton Peace Agreement or the terms of its implementation”;

Noting that a truly independent and impartial judicial and prosecutorial system is essential to ensure the Rule of Law in all criminal, civil and commercial matters and guarantee the

advancement of human rights and freedoms and reconciliation within Bosnia and Herzegovina;

Considering the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina of May 17th, 2000 (Official Gazette of the Federation of Bosnia and Herzegovina No 22/00 and No 20/01)

Recognizing that certain executive authorities in the Federation of Bosnia and Herzegovina refuse to act within the established legal framework and fail to fulfill their legal obligations pursuant to the aforementioned Law thereby frustrating comprehensive judicial reform efforts and the effective administration of justice;

Observing that the Judicial and Prosecutorial appointment, disciplinary and dismissal process must be conducted according to objective criteria based on proper professional qualifications and transparent procedures to ensure a Judiciary that is the legitimate guardian of the Rule of Law in the Federation of Bosnia and Herzegovina;

Bearing in mind that the mass simultaneous expiration of Judicial and Prosecutorial mandates causes significant disruption to the efficient, fair and proper delivery of justice;

With the object of guaranteeing a professional, efficient and impartial selection, appointment, disciplinary and dismissal process of Judges and Prosecutors in the Federation of Bosnia and Herzegovina;

Having considered and borne in mind all the aforesaid matters, I hereby issue the following

DECISION

The Law on Amendments to the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina, which is

hereby attached as an integral part of this Decision, shall enter into force as a law of the Federation of Bosnia and Herzegovina on 3rd August 2001.

Article 1

In Article 4, after the first sentence of paragraph 2 of the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina Nos 22/00 and 20/01) (hereinafter the 'Law'): the following sentence shall be inserted "Exceptionally, professors of the Faculties of Law in Bosnia and Herzegovina in the fields of constitutional law, criminal law or criminal procedure law, civil law or civil procedure law, administrative law, commercial law or family law may be appointed as judges of the Federation Constitutional Court without having passed the bar examination."

Article 2

In Article 5, paragraph 4 after the words "Cantonal Commission shall then make the recommendation to" the words "the competent Cantonal Ministry of Justice" shall be deleted and the following words shall be inserted: "the appropriate body as identified pursuant to this law."

Article 3

In Article 9, after paragraph 2: the following new paragraph 3 shall be added:

"The Commissions and appointing authorities shall ensure that all vacancies on the Commissions are filled prior to the expiration of the mandate of any sitting Commission member in accordance with the procedures determined in the Book of Rules adopted by the relevant Commission."

Article 4

In Article 16, paragraph 4: after the words “needs of courts and prosecutors offices”, the following words shall be inserted: “Thereafter, all new vacancies must be announced at least 160 (one hundred and sixty) days prior to the date upon which the mandate of the judge or prosecutor then holding the position will expire. In the case of sudden or unexpected vacancies of judicial or prosecutorial positions, an announcement must be published within 30 (thirty) days from the date that the vacancy occurred.”

Article 5

In Article 17, paragraph 3: the words “30 days” shall be deleted and the following words shall be inserted: “60 days”.

Article 6

Article 20 shall be deleted and a new Article 20 shall be inserted:

“The Federal Commission (for the purposes of this Article 20, “the Commission”) will, for appointments at the level of the Federation, examine all of the applications received by it in accordance with the Book of Rules regulating the nomination of judges/prosecutors and the criteria set out in Articles 4 and 18 of this Law. Additionally, individual oral interviews of candidates shall be conducted in accordance with the procedures set forth in the Book of Rules regulating the nomination of judges/prosecutors.

When proposing candidates to the appointing authority, the Commission is obliged to forward to the appointing authority a complete description of each proposed candidate along with a copy of the relevant application materials.

The Commission shall propose candidates to the appointing authority in accordance with the following formula:

- If there is one vacant post for the same office, the

Commission shall propose 2 (two) candidates;

- If there are 2 (two) or 3 (three) vacant posts for the same office, the Commission shall propose a number of candidates equal to the number of vacant posts plus 1 (one) candidate;
- If there are 4 (four) or 5 (five) vacant posts for the same office, the Commission shall propose a number of candidates equal to the number of vacant posts plus 2 (two) candidates;
- If there are more than 5 (five) and less than or equal to 10 (ten) vacant posts for the same office, the Commission shall propose a number of candidates equal to the number of vacant posts plus 3 (three) candidates;
- If there are more than 10 (ten) and less than or equal to 20 (twenty) vacant posts for the same office, the Commission shall propose a number of candidates equal to the number of vacant posts plus 4 (four) candidates;
- If there are more than 20 (twenty) vacant posts for the same office, the Commission shall propose a number of candidates equal to the number of vacant posts plus 6 (six) candidates.

The Commission is not bound by Article 20, paragraph 3 only in the circumstances where either:

(i) there are an insufficient number of applicants to fulfil the requirements of Article 20, paragraph 3 or

(ii) where the Commission, having considered all of the applicants for the post, determines that an insufficient number of applicants exists who meet the requirements set forth in Articles 4 and 18 of this Law.

(iii) Application of paragraph (i) or (ii) of this subsection by the Commission shall not be a reason for the appointing authority to delay or cease appointment proceedings.

If the Commission does not propose the number of candidates as

required by paragraph 3 of this Article, it shall fully explain in writing to the appointing authority the reasons therefor.

Candidates shall be proposed to the appointing authority in order of preference, so that the first choice of the Commission is proposed as the first candidate, the second choice of the Commission as the second candidate and so on throughout the list.

For judicial and prosecutorial appointments at the Cantonal and Municipal levels, the relevant Cantonal Commission shall apply the same procedure as set out above, however the choice of proposed candidates and their ranking shall be made together with the relevant Federal Commission.

The Commission shall forward the list of proposed candidates to the relevant appointing authority by registered post.”

Article 7

A new Article 20a shall be inserted:

“In cases concerning the proposal and appointment of prosecutors, the following procedure shall apply. The appointing authorities shall be:

- For Federation level appointments: the President of the Federation with the consent of the Vice-President of the Federation.
- For Cantons with a Special Regime (Central Bosnia and Herzegovina Neretva) Cantonal and Municipal appointments, as well as the territory of the City of Mostar: the President of the Canton with the consent of the Vice-President of the Canton.
- For all other Cantonal and Municipal appointments: the President of the relevant Canton.

Upon receipt of the list of proposed candidates from the Commission, the appointing authority has a period of 20 (twenty) days to appoint candidates from that list.

The appointing authority should appoint the candidates in the order in which they are ranked on the list of proposed candidates. In the event that it does not follow the Commission's ranking, the appointing authority is required to explain fully in writing its precise reasoning for this, in respect of each individual candidate, to the relevant Commission.

In the event that the appointing authority fails to appoint any of the proposed candidates from the list provided to it by the relevant Commission within 20 (twenty) days from the date of receipt of the list, a number of proposed candidates from that list equal to the number of vacant posts shall be deemed to be appointed to office by the lawful appointing authority, in the order of their ranking on the list.

In the event that the appointing authority appoints a lesser number of proposed candidates than the number of vacant posts within 20 (twenty) days from the date of receipt of the list, the number of proposed candidates equal to the remaining number of vacant posts shall be deemed to be appointed by the lawful appointing authority from the list of proposed candidates, taking the highest ranked remaining candidate from the list first, and so on until all the vacant posts are filled.

All appointments under this Article 20a, whether made by an appointing authority, or deemed under this Law to have been made by an appointing authority, shall take effect immediately and the Commission shall as soon as possible thereafter ensure publication of the appointments in the relevant Official Gazette.

The appointing authority may reject a candidate from the list

of proposed candidates only on the ground that the candidate does not meet the minimum statutory criteria, as set out in Article 4 of this Law, for the post for which he or she was proposed. In this event, the appointing authority shall so inform the relevant Commission no later than 10 (ten) days after the date of receipt by it of the list of proposed candidates setting forth the specific criteria that the candidate fails to meet.

The Commission shall then have a period of 10 (ten) days in which to propose another candidate to the appointing authority or demonstrate that the candidate does in fact meet the minimum statutory criteria or to inform the appointing authority in writing that no other candidate is suitable for proposal, giving reasons. The appointing authority shall then have a period of 20 (twenty) days from the date of receipt of the reply from the Commission in which to appoint candidates to fill the vacant posts, in accordance with the procedure set out in Article 20a paragraphs 3 to paragraph 7.

The provisions of Article 20a shall apply to all proposals outstanding on the date of the entry into force of this Law. In cases where the relevant Commission has already sent a list of proposed candidates to the relevant appointing authority, the deadline specified in Article 20a paragraph 3 shall commence from the date of the entry into force of this Law.”

Article 8

A new Article 20b shall be inserted:

“In cases concerning the proposal and appointment of judges, the following procedure shall apply.

The list of proposed candidates shall be sent by the Commission to the appointing authority of judges as defined in The Constitution of the Federation of Bosnia and Herzegovina. The appointing authority should appoint the candidates in the order in which they are ranked on that list. In the event that

it does not follow the Commission's ranking, the appointing authority is required to explain fully in writing its precise reasoning for this, in respect of each individual candidate, to the Commission.

The appointing authority may reject a candidate from the list of proposed candidates only on the ground that the candidate does not meet the minimum statutory criteria, as set out in Article 4 of this Law, for the post for which he or she was proposed. In this event, the appointing authority shall so inform the relevant Commission no later than 10 (ten) days after the date of receipt by it of the list of proposed candidates setting forth the specific criteria that the candidate fails to meet.

The Commission shall then have a period of 10 (ten) days in which to propose another candidate to the appointing authority, or demonstrate that the candidate does in fact meet the minimum statutory criteria or to inform the appointing authority in writing that no other candidate is suitable for proposal, giving reasons.

The provisions of Article 20b shall apply to all proposals outstanding on the date of the entry into force of this Law."

Article 9

A new Article 20c shall be inserted:

"A candidate cannot be appointed to the position of judge or prosecutor if he or she has not been proposed for such position by the Commission.

A candidate will be informed whether the Commission proposed him/her for appointment."

Article 10

Article 21 shall be deleted and a new Article 21 shall be inserted:

“Within 90 (ninety) days after the coming into effect of this Law, all Federal and Cantonal Commissions must issue individual certificates to all serving judges or prosecutors within their jurisdiction setting forth the date upon which the mandate of each judge or prosecutor expires and stating in clear and unambiguous terms that the carrying out of any judicial, prosecutorial or, if applicable, Commission functions after the expiration of their mandate is a violation of the law.

Thereafter, at the time of the appointment of any prosecutor pursuant to this Law, the relevant Federal or Cantonal Commission involved in the appointment process must deliver to the appointee an individual certificate setting forth the date upon which the mandate expires.”

Article 11

A new Article 21a shall be inserted: “No less than 180 (one hundred and eighty) days prior to the expiration of the mandate of any judge, prosecutor or Commission member, the relevant Federal or Cantonal Commission shall issue a notification to that judge, prosecutor or Commission member informing him/her of the impending expiration of his/her mandate and stating in clear and unambiguous terms that the carrying out of any judicial, prosecutorial or, if applicable, Commission functions after the expiration of their mandate is a violation of the law.

At the same time as issuing the notification described in the previous paragraph, the Federal or Cantonal Commission must also deliver a copy of the notification of expiration of mandate referred to in the previous paragraph to the relevant Ministry of Justice, either Federal or Cantonal as appropriate, the relevant Court or prosecutor’s office and any other relevant appointing authority pursuant to this Law so that they may properly carry out their duties as set forth in Articles 6, 7, 8, 9 and 16 of this Law.

In the event that any judge, prosecutor, or Commission member's mandate will expire within 180 (one hundred and eighty) days or less from the time of the review conducted under paragraph 1 of Article 21, the relevant Federal or Cantonal Commission must also deliver a "notice of expiration of mandate within 180 (one hundred and eighty) days" to the relevant Federal or Cantonal Ministry of Justice, the relevant Court or prosecutor's office and any other relevant appointing authority pursuant to this Law so that they may immediately carry out their duties as set forth in Articles 6, 7, 8, 9 and 16 of this Law. "

Article 12

Article 22 shall be deleted and a new Article 22 shall be inserted:

"The authority authorised by the relevant law to initiate dismissal proceedings against a judge or prosecutor shall request an opinion from the Federal Commission prior to initiating such proceeding against a judge or prosecutor.

The authority requesting an opinion pursuant to this article shall forward to the Federal Commission the allegation(s) forming the basis of a dismissal proceeding and attach all evidence, including documents and witness statements, in support of the allegation(s).

The relevant Cantonal Commission shall deliberate and vote with the Federal Commission in cases concerning dismissal proceedings against judges and prosecutors at the Municipal and Cantonal levels.

No dismissal proceedings shall be initiated against a judge or prosecutor unless the Federal Commission first delivers an opinion stating that there is a sufficient factual and legal basis to warrant the initiation of a dismissal proceeding against a judge or prosecutor, which shall then be conducted in accordance with the relevant law.

The opinion of the Federal Commission shall not be subject to any administrative procedure or judicial review.”

Article 13

Article 27 shall be deleted and a new Article 27 shall be inserted:

“The authority empowered by the relevant law to suspend a judge or prosecutor from official duty shall request an opinion from the Federal Commission as to whether there is a sufficient factual and legal basis to warrant the suspension within five (5) days after suspending any judge or prosecutor from official duty.

The authority requesting an opinion pursuant to this article shall forward to the Federal Commission the allegation(s) forming the basis of the suspension and attach all evidence, including documents and witness statements, in support of the allegation(s).

Failure to request an opinion and submit the documents as required by paragraphs 1 and 2 of this Article shall have the effect that the suspension is automatically revoked and the judge or prosecutor who was the subject of the decision on suspension shall be immediately reinstated to perform official duties.

If the Federal Commission concludes that there is not a sufficient factual and legal basis to warrant the suspension of a judge or prosecutor, the judge or prosecutor shall immediately be re-instated by order of the Federal Commission to perform official duty.

The opinion of the Federal Commission shall not be subject to any administrative procedure or judicial review.

A judge or prosecutor shall not be suspended for a period exceeding 180 (one hundred and eighty) days from the date of

suspension without proceedings for dismissal having been initiated during that time period. Should a suspension exceed 180 (one hundred and eighty) days and no proceedings for dismissal be instituted, the suspension shall be null and void by order of the Federal Commission.

The relevant Cantonal Commission shall deliberate and vote with the Federal Commission in cases concerning suspension proceedings against judges and prosecutors at the Municipal and Cantonal levels.

In the case of any judges or prosecutors who are currently under suspension from their official duties, the suspending authority must follow the procedures set forth in paragraphs 1 to paragraph 7 of this Article with respect to the suspension of that judge or prosecutor. The deadline set forth in paragraph 1 of this Article shall begin to run five (5) days after the entry into force of this Law.”

Article 14

In Article 74, after the words “relevant Cantonal Commission in performing” the words “Preliminary Review, Subsequent Review, and Final Review” shall be deleted and the following words shall be inserted “Final Review Proceedings.”

Article 15

This Law shall enter into force on the day of its signature and shall be published without delay in the Official Gazette of the Federation of Bosnia and Herzegovina.

Sarajevo, 3 August 2001

Wolfgang Petritsch

High Representative