

**COURTING DISASTER:
THE MISRULE OF LAW
IN BOSNIA & HERZEGOVINA**

25 March 2002



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COURTING DISASTER:

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

The law does not yet rule in Bosnia & Herzegovina. What prevail instead are nationally defined politics, inconsistency in the application of law, corrupt and incompetent courts, a fragmented judicial space, half-baked or half-implemented reforms, and sheer negligence. Bosnia is, in short, a land where respect for and confidence in the law and its defenders is weak.

Bosnians are unequal before the law, and they know it. Exercise of the legal rights to repossess property or to reclaim a job too often depends on an individual's national identity – or that of the judge before whom she or he appears. Even when citizens do get justice in the courts, the chances of having decisions enforced can be slim, since the execution of court orders is often prolonged unlawfully or hedged in arbitrary conditions. Obtaining justice is also subject to geographical chance. War crimes in one entity or canton are still hailed as acts of heroism in another.

Ethnicity and geography are not the only brakes on justice. An individual's position in or relationship to one or another national-political elite also counts. Punishing the powerful and the well connected for milking public coffers or appropriating public goods – whether in the name of the 'national cause' or for private gain – remains virtually unknown. Although allegations of corruption in high places appear in the newspapers every day, and formal investigations are nearly as common, not a single past or present national party leader has yet been convicted and sent to prison.

Unlike for the majority of law-abiding Bosnians, national discrimination and 'ethnic justice' do not apply to smugglers, racketeers, tax evaders, gunrunners, drug dealers, white slavers, and their patrons. These groups rejoice in what remains of old Yugoslavia's "brotherhood and unity", doing business across internal

and external borders and national or confessional divides. Their community of interest – in getting rich and defying the law – contrasts with the disunity of those who want to uphold the law.

Not only is Bosnia divided juridically into three, four, fourteen, or sixteen territorial-hierarchical jurisdictions (depending on how the one state, two entities, one autonomous district, eight unitary cantons, and two mixed cantons are counted); it also has three separate sets of laws, two of which are replete with contradictory provisions. This fragmentation is a boon to criminals and a pitfall for would-be reformers and enforcers of the law.

The discontinuity of the territorial structure bequeathed by the Dayton Peace Accords is compounded by Bosnia's mixed legislative inheritance. The statute books contain a multitude of outdated, overlapping and inconsistent laws from the pre-war, wartime and post-war periods. They are applied (or not) by courts which are too numerous, too expensive, too inefficient, and too vulnerable to political influence.

The brain drain of legal talent that accompanied the war continues today. This, coupled with the 'politically correct' appointments that have prevailed throughout, means that the country's several executive authorities wield influence over judges' minds as well as their purses. The courts are simply in no position to resist either the power of the executive or the temptations of national solidarity.

The dysfunctional nature of Bosnia's legal and judicial system has been long apparent to both domestic legal experts and international officials. The Office of the High Representative (OHR), the United Nations Mission in Bosnia & Herzegovina (UNMIBH), the

Organisation for Security and Cooperation in Europe (OSCE), the Independent Judicial Commission (IJC), and various NGOs have regularly reiterated both their keen appreciation of the centrality of the rule of law and their commitment to establishing it.

But this recognition of the problem and an appreciation of its dire consequences have not led to the adoption and implementation of adequate remedies. There has been no coherent, coordinated and thoroughgoing program of judicial and legal reform. Rather, international efforts have typically been timorous, incremental, piecemeal and disjointed, leading to long delays, the loss of institutional memory and periodic re-launches of reform schemes. In particular, international agencies have sought quick fixes for systemic problems. The saga of the now abandoned program of “comprehensive” judicial review is the most depressing case in point.

As a consequence, millions of dollars have been spent since 1996 by an assortment of international agencies to promote the rule of law in Bosnia, including hefty salaries for over 200 foreign legal experts who have worked to improve the performance of Bosnia’s 1,200 judges and prosecutors. In comparison to the sums expended, the results achieved have been pitiful. Brcko District, in northern Bosnia, is the positive exception to the general sorry record, and proves that successful reform is possible.

Parroting at least part of the international community’s charge sheet, Bosnia’s governments and politicians never fail to take an opportunity to castigate their country’s politicised and ineffectual judiciary, blaming it for all manner of societal ills. Yet they have refused to free judges and prosecutors of political manipulation and make the judiciary an independent pillar of a lawful state. Rather, the political parties keep the judiciary obedient by seeking always to appoint their own ‘good’ judges in place of other parties’ ‘bad’ ones, railing against the continuing indignity of foreign judges on Bosnian benches, and ensuring their own discretionary powers in the distribution of justice remain intact.

Now, belatedly, the international community is giving the establishment of the rule of law the priority it deserves. The High Representative is expected to create a new, state-wide High Judicial Council in the first week of April. This step will likely be followed by the swift passage or imposition of a package of some 52 laws on legal and judicial reform. This new initiative probably represents the last chance for fundamental reform. A new, serious and long-term commitment by Bosnians and foreigners alike is required if the complex

judicial and legal measures essential to the rule of law are to be implemented while the international community is still on hand to help.

The increasing complexity and ubiquity of cross-cantonal, cross-entity and cross-border criminal networks; the legal challenges posed by a transition economy; the need to try thousands of war crimes cases in the country; the faltering interest of the international community in Bosnia; and the increased pressure to uphold legal standards and human rights posed by Bosnia’s imminent membership of the Council of Europe and other European bodies – all point to the unsustainability of the current legal and judicial disorder. But they also testify to the inadequacy of past and present international approaches to reform.

If Bosnia is to be ruled by laws and not by wilful men, let alone to progress towards European Union membership, then the responsible international agencies (above all OHR and the IJC) and Bosnian jurists and politicians should consider the following recommendations and undertake reforms in a coordinated, coherent and consistent manner, applying the lessons drawn from Brcko. The recent decision of the Peace Implementation Council (PIC) to scrap peer review of judges and the priority now being accorded to rule of law issues by the High Representative, his designated successor and at least some Bosnian leaders are encouraging signs that the challenge may finally be confronted.

RECOMMENDATIONS

1. Bosnia requires uniform, comprehensive reform of its various judicial and legal systems, simultaneously in both entities and at the state level. This reform should:
 - (a) embrace the judiciary and, in particular, the judicial appointment mechanism;
 - (b) harmonise legislation;
 - (c) include the adoption of new civil and criminal legislation;
 - (d) remove the grip of the executive on the financing of courts, and the grip of the legislature on the hiring and firing of judges;
 - (e) streamline the bloated and very expensive court structures, improve court management;
 - (f) professionalise the legal profession, modernise legal education; and,
 - (g) pursue a cultural revolution in the attitudes and practices of court personnel.

CONSTITUTIONAL AND LEGAL REFORM

2. Legislation to regulate and institutionalise obligatory and automatic cooperation in criminal and other legal matters among the courts, prosecutors and police of the state, the entities and Brcko District should be enacted by the state, entity and district assemblies by June 2002.
3. Bosnia's parliamentary assemblies, advised by OHR, should amend the state and entity constitutions and laws by June 2002 to:
 - (a) Provide for the establishment of a state-level Judicial Commission; and
 - (b) Reform the court structure in the Federation and Republika Srpska to reduce the number of municipal and cantonal courts and prosecutors' offices, switching from a system based on administrative-territorial units to one based on court-to-population ratios.
4. By September 2002, the state and entity parliaments should pass criminal and civil legislation – uniform throughout the country and in conformity with European standards – to establish effective legal procedures for the delivery of thorough and expeditious criminal investigations, civil litigation and fair judicial processes.
5. The state and entities should enact legislation by the end of 2002 that provides for the financial independence of the judiciary and the reform of court administration, as recommended in the IJC strategy document.
6. The High Representative should brook no further delay in ensuring the adoption of the draft law on inter-entity judicial cooperation, and the draft state-level law that would require all lawyers to be certified by and registered with the BiH Bar Association.

THE JUDICIARY

7. The Constitutional Court's decision on the equality of the "constituent peoples" must be fully applied to the judicial system. Furthermore, as the decision is implemented, the judiciary must be empowered to take responsibility for upholding the integrity of the process and the permanence of its results.
8. Pending the completion of a comprehensive reform process, the international community should not yield to Bosnian arguments against the participation

of foreign judges in the work of Bosnian courts. The removal of such judges would not increase Bosnian sovereignty but rather diminish the independence of the BiH Constitutional Court and the rights of Bosnians.

REAPPOINTMENT PROCESS

9. The failed comprehensive peer review of judges and prosecutors should be replaced with a general reappointment process (GRP) on the model successfully applied in both the former German Democratic Republic and Brcko District.
 - (a) Incumbent judges and prosecutors (as well as other qualified candidates at home and abroad) should be invited to reapply (or apply) for all available positions in a transparent and internationally supervised competition.
 - (b) Candidates should be required to demonstrate that they meet prescribed criteria of professional competence, moral integrity and commitment to the highest standards of human rights, precluding involvement in the administration of 'ethnic justice' during and since the war.
 - (c) General reappointment should be completed, within a calendar year, by spring 2003.
 - (d) General reappointment should be organised and administered by a state-level interim judicial commission, led by the IJC but also including foreign judges of the BiH constitutional court, distinguished Bosnian jurists and legal scholars, prominent lawyers from the Ombudsmen offices and private practice, and representatives of the executive.
 - (e) The IJC should retain the final say in approving initial appointments for a probationary period of one year, during which appointees would be trained to apply the new criminal and civil procedure codes.
 - (f) Upon expiry of the probationary period, the interim judicial commission should become a permanent commission, without further IJC participation but including judges of the entity's supreme and constitutional courts, as well as their chief prosecutors.
 - (g) The permanent, state-level judicial commission would confirm or deny life-time mandates for the probationers.

TRAINING AND STANDARDS

10. Thoroughgoing reforms are required to entrench high professional standards in the judiciary. IJC,

OHR and other international agencies should organise training for newly appointed judges and prosecutors on the principles and application of the new legislation. Training on the new criminal procedure code should also include police officers, lawyers and academics.

11. The IJC and other international agencies should assist in the reform of the legal profession, in particular by creating a state-wide bar association capable of setting and maintaining ethical and professional standards across the country and serving as a 'doorkeeper' to the profession.
12. The international community should encourage the reform and modernisation of Bosnia's university law faculties and their curricula, bringing to bear the talents and experience of legal professionals to ensure that graduate lawyers can be effectively assimilated into the system.
13. Given that UNMiBH's mandate will expire at the end of 2002, the monitoring capacity of the UN Mission's Criminal Justice Advisory Unit (CJAU) must be utilised to the utmost – including oversight of the soon-to-be promulgated criminal procedure code – while it exists. Also, steps should be taken this year for the IJC to develop or acquire its own monitoring unit, for example by absorbing CJAU's staff and structures before its demise.

WAR CRIMES

14. OHR, the IJC and the Council of Ministers should ensure that, by spring 2003, the nascent state court is in a position to begin the trial of thousands of war crimes cases that will not fall within the purview of the Hague Tribunal.
15. The integrity of domestic war crimes trials should be assured both by the participation of foreign judges and by the previous elaboration of programs to build capacity among law enforcement agencies and to protect witnesses.
16. In order to educate the Bosnian public about the future role and responsibility of the state in prosecuting war crimes, Bosnia's Public Broadcast Service (PBS) should provide extensive coverage of all trials in The Hague related to Bosnia.

RESOURCES

17. The Peace Implementation Council (PIC) and international donors should provide the IJC with sufficient financial means, human resources and political support to complete a truly comprehensive program of judicial and legal reform.
18. International organisations and donors should continue to finance the Ombudsman offices and press for the enhancement of their powers and the implementation of their recommendations.

Sarajevo/Brussels, 25 March 2002

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I. INTRODUCTION

“The rule of law is better than that of any individual” – Aristotle

“There is no rule of law in Bosnia.” “Everything is wrong with the judiciary.” “The judiciary is the worst branch of government.” These are a few of many similar statements volunteered to ICG during recent interviews with domestic and international observers of legal affairs. They may seem harsh, but they represent assessments of Bosnia’s rule of law deficit that are as widely shared by government ministers, members of parliament and even judges as they are by representatives of the international community.¹

Public opinion polls carried out on behalf of the United Nations Development Program (UNDP) during 2001 show a marked decline in public confidence in the judiciary among Bosniaks and Serbs, but an increase among Croats. In the case of each nation, however, expressions of ‘no confidence’ in September 2001 were high: 48.5 per cent among Bosniaks, 48.1 per cent among Croats, and 56.2 per cent among Serbs. Even the police were rated more highly. Judges were also thought to be somewhat more likely than the police to

take bribes and abuse their offices.²

If the rule of law is defined as the condition according to which all persons, both individuals and government itself, are subject equally to its provisions, then the law cannot be said to rule in Bosnia. Moreover, if the main characteristics of the rule of law are that it should be based on established standards, operate through fair procedures and due process, be mediated by an independent judiciary, impose restrictions on the exercise of discretionary powers by individuals or governments, and provide for checks and balances among the legislative, executive and judicial branches,³ then the complaints and polling data cited above are fully warranted.

Although the rule of law does not require democratic government, democracy presupposes the rule of law.⁴ The law must rule if Bosnia is to become a functional democratic state, able to protect human rights, facilitate the emergence of a market economy, try war criminals, and successfully combat organised crime. For these

¹ ICG consulted the following sources in the preparation of this paper: the Independent Judicial Commission; Office of the High Representative; American Bar Association Central and Eastern European Law Initiative (ABA CEELI); UN Criminal Justice Advisory Unit; Organisation for Security and Cooperation in Europe; Council of Europe; Ministries of Justice; numerous judges and prosecutors in both entities and Brcko District; Ombudsmen of the Federation, RS, and BiH; members of the several parliaments; Human Rights Chamber; Bosnian lawyers; numerous other domestic and foreign legal professionals; students, professors, citizens, and many others, as well as the print and other media.

² UNDP Early Warning System in Bosnia & Herzegovina, *Quarterly Report, July-September 2001*, pp. 14-15. In addition to expressing their opinions in polls, Bosnian citizens employ other means to express their dissatisfaction with the judiciary. Demonstrating on 7 March 2002 their keen understanding of the decisions of the PIC in Brussels on 28 February, inmates in the Sarajevo Cantonal Prison (which is adjacent to the Cantonal Court) shouted out in unison “Sudije lopovi! Dohakace vam Petric!” (“Judges – crooks! Petrutsch will have your heads!”). ICG interview with a Sarajevo judge, 10 March 2002.

³ These are the attributes of the rule of law suggested by A.V. Dicey, as summarised by L.J.M. Cooray, “The Australian Achievement: From Bondage to Freedom”, www.users.bigpond.com.

⁴ Bosnians have some historical experience of the rule of law – whether under the Habsburgs, the Karadjordjevićs, or Tito – but little of democracy.

things to happen, the international community – and, in particular, the agencies working with Bosnia’s legislators and governments to implement judicial and legal reforms – must adopt a radically different strategy. The piecemeal approach prevailing at present in the Office of the High Representative (OHR) and the Independent Judicial Commission (IJC), which puts a premium on the incremental establishment of “ownership”, needs to be replaced by one that is comprehensive, systemic and tightly coordinated in its implementation.

Change is needed in four key spheres: in the judiciary, in the laws themselves, in the nexus between legislators and judges, and in the constitutional framework defining court structures. Thoroughgoing reforms will be required to entrench high professional standards in the judiciary. Modern civil and criminal legislation is needed if judicial procedures are to be made efficient and judges equipped to combat organised crime and endemic corruption. The grip of politicians on the financing of courts and the hiring and firing of judges must be removed if the judiciary is to be independent. And the number and structure of courts will have to be streamlined if the system is to be effective and sustainable.

Root and branch reform of Bosnia’s legal and judicial system has been on the agenda since the end of the war. It has not happened. There are now even more compelling reasons why it should, and why a different approach must be adopted to ensure that it does.

- The Constitutional Court’s decision on the equality of the “constituent peoples” across all of BiH⁵ needs to be reflected in the composition of the judiciaries of the two entities and of the state. Furthermore, as the decision is implemented, the judiciary must be empowered to take responsibility for upholding the integrity of the process and the permanence of its results.
- Transition from a party-state socialist economy to a free market economy puts the judicial system in a pivotal position in such key areas as the liquidation and bankruptcy of enterprises, the protection of private property rights, the attraction of foreign investors and the resolution of commercial disputes.

- Organised crime (e.g., trafficking of human beings, drugs, weapons, etc.), money laundering, corruption, customs and tax fraud, terrorism and other serious crimes are becoming ever more complex and costly to Bosnian society. Criminal networks spread beyond cantonal, entity and state borders, making a mockery both of the authorities’ fitful efforts to fight them and of the authorities themselves.
- Unbiased and efficient work by the judiciary in asserting and protecting basic human rights has become increasingly important as the tempo of refugee return picks up, property repossession cases proliferate, and international involvement in facilitating, financing and monitoring the process wanes.
- The ICTY’s admitted ability to try only major war crimes cases means that hundreds if not thousands of war crimes suspects will have to be tried in Bosnian courts if they are to be tried at all. Those courts must be made fit to handle this delicate assignment. The current practice of trying indicted war criminals in cantonal or entity courts has proved inadequate. Justice has neither been done nor been seen to be done. Trials have been regarded as occasions for dispensing ‘ethnic’ justice or exacting revenge. Moreover, such trials are politically explosive, especially as various past and present national leaders are among those indicted or likely to be indicted. All this highlights the failings of the current system.
- Since the presence and intrusiveness of the international community will diminish over the coming years, the days of the IJC, OHR and other agencies are numbered. However, their involvement, authority and financial support are needed to complete judicial and legal reform.

The international community has wasted time and resources on feeble and ill conceived attempts to reform the judiciary and the laws. The system of “comprehensive review” of judges is the most striking case in point. Meanwhile, the local political establishments have focused on maintaining their grip on the legal and judicial systems that served them so well during and since the war. The foreigners have won some battles, but local elites retain the high ground.

During the past two years the international community has strengthened the position of the Federation prosecutor, initiated a successful identity protection

⁵ The BiH Constitutional Court decision U5/98 issued in four parts in January, February, July and August 2000. Available at www.ustavisud.ba. For a discussion of its implications, see ICG Balkans Report No. 108, *After Milosevic: A Practical Agenda for Lasting Balkans Peace*, 26 April 2001, pp. 141-2.

program for vulnerable witnesses (also in the Federation), pushed through rudimentary reforms of the entities' criminal codes, established the IJC and, best of all, organised and effected a thorough reform of the judicial and legal system in Brcko District. But all these victories are being diminished or imperilled by inconsistencies in the IC approach to implementing an incoherent and uncoordinated strategy.

Since 1996, millions of dollars have been spent by an assortment of international agencies to promote the rule of law in Bosnia, including hefty salaries for over 200 foreign legal experts who have worked to improve the performance of Bosnia's 1,200 judges and prosecutors. In comparison to the sums expended, the results achieved have been pitiful.

Even where achievements are notable, the results have been slow to materialise. This is partly because some reforms take time to deliver (as in Brcko) and partly because others have been designed to fail. (Such is the mismatch between the IJC's broad mandate and its technical and financial incapacity.) The inadequacies of the current professional review of judges have recently been recognised in a report commissioned by OHR, in which author Charles Erdmann points out that the comprehensive peer review process could not deliver a professional judiciary, even were it to be implemented in full.⁶

As evidence mounts of the deeply flawed nature of judicial and police reforms in Bosnia, and reports like Erdmann's accumulate calling for substantial rethinks of policy, it should become increasingly difficult for either international or Bosnian leaders to pretend that all is well.⁷ And indeed, since the beginning of 2002, the Alliance for Change – the coalition that governs (nominally) at state level and (genuinely) in the Federation – has started both to decry the absence of thoroughgoing reforms and to call upon OHR and the

IJC to change course.⁸ In the RS, on the other hand, the only 'reform' for which the political and judicial establishments have called is the ouster of foreign judges from the BiH Constitutional Court.⁹

⁶ Charles Erdmann, "Assessment of the Current mandate of the Independent Judicial Commission and a Review of the Judicial Reform Follow-on Mission for Bosnia & Herzegovina", November 2001. Erdmann is a former member of OHR's Anti-Fraud Unit, Head of OHR's Rule of Law Department, judge on the BiH Provisional Election Commission, and sometime U.S. federal judge.

⁷ Signs that reality is kicking in accumulated in late February as this report was being written, with meetings of the PIC Steering Board in Sarajevo and of the PIC itself in Brussels considering how to salvage and revive legal and judicial reform. See "Raspravljat ce se i u Briselu o hitnim promjenama", *Dnevni avaz*, 28 February 2002.

⁸ Zlatko Lagumdžija, chairman of the BiH Council of Ministers, admonished the international community for its failure to push through urgently necessary judicial reforms – for which, he claimed, it alone was responsible, since the domestic executive power dare not interfere with the judiciary! See, "BiH i njeni gradjani ne mogu cekati", *Oslobodjenje*, 27 February 2002.

⁹ RS President Mirko Sarovic has argued that the BiH parliament should amend the Constitutional Court law to provide for six justices from the Federation and three from the RS, expecting, no doubt, that in the absence of the foreigners, the Serbs would often find themselves forming a majority with the Croats. See OHR, RS Press Review, 30 January 2002, as well as "Bosnjaci koriste strance" and "Za unitarizaciju BiH", *Glas Srpski*, 19-20 January 2002. For a comprehensive and revealing sample of RS expert opinion on the BiH Constitutional Court decision, see the series of interviews published in *Glas Srpski* on 29-30 December 2001.

II. THE LEGAL CONTEXT

Justice in Bosnia is delivered according to an inconsistent, mismatched and ill-fitting corpus of laws: those inherited from the Socialist Federative Republic of Yugoslavia (SFRJ); those enacted during the war to govern nationally exclusive territories; and post-war laws crafted locally or imposed by the High Representative. The existence of four levels of government with law-making powers (one state, two entities, ten cantons in the Federation, and Brcko District) adds to the confusion. In effect, the High Representative is another and superordinate level of government.

This plethora of laws and law-making, administered within four or more jurisdictions that are distinct from and jealous of one another, creates disorder, enhances disharmony, and makes justice slow when it is not unattainable. The existence of three separate legal, policing and penal systems (in the Federation, Republika Srpska and Brcko), which are both different from one another and run as if they were the creations of sovereign states, makes the investigation, prosecution and trial of serious crimes extending across Bosnia's internal frontiers all but impossible. As if this were not bad enough, more diversity is in store. ICTY procedures will govern war crimes trials and the new state court will have its own rules.

These inadequacies have been apparent to all and sundry for years, though the international community was slow to appreciate their magnitude, their interconnections or their intractability. From 1997, separate agencies and non-governmental organisations set about tackling separate facets of the problem: the multiplicity of outdated laws, the lack of judicial independence, the cumbersome and inefficient court structure, and the divided judicial space.

This meant that a piecemeal, incremental and uncoordinated approach was adopted by the numerous would-be reformers: the OHR and its Legal, Human Rights, and Anti-Fraud Departments; the United Nations' Judicial System Assessment Program (UNJSAP); the UN Mission's Criminal Justice Advisory Unit (CJAU); the Organisation for Security and Cooperation in Europe (OSCE); the American Bar Association's Central and East European Law Initiative (CEELI); the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ); and, latterly, the IJC.

These and other agencies have, of course, done valuable work. UNJSAP issued twelve thematic studies of the

shortcomings of Bosnia's legal and judicial systems during its life span.¹⁰ GTZ and ABA CEELI have drafted new laws. OSCE and CJAU have monitored trials. The OHR Anti-Fraud Department has fought corruption and worked on criminal codes. Unfortunately, their efforts have often overlapped or suffered from poor coordination, inconsistency and discontinuity. UNJSAP fell victim to UN budget cuts in late 2000. Its projected successor, the IJC, took ten months to get on its feet.¹¹ Reform efforts have also been undermined by the high turnover in international legal experts who tend to come to Bosnia with little background and to stay for only a few months.¹² All these factors have slowed down the reform process and limited its capacity to deliver.

For example, the transition from the UNJSAP to the IJC was supposed to be seamless. Equipped with an expanded mandate actually to implement the reforms for which the UNJSAP and other agencies had called, the IJC was also expected to absorb experienced UNJSAP personnel. Although the UNJSAP was abolished in November 2000, the IJC was not established until mid March 2001. It took another six months for the IJC to become operational, by which

¹⁰The reports are accessible at www.unmibh.org. "Report for the period November 1998-January 1999" (April 1999); Thematic Report I – "Court for Minor Offences" (July 1999); Thematic Report II – "Inspection of the Municipal Public Prosecutor's Office in Livno, Canton Ten, during 5-16 July 1999" (September 1999); Thematic Report III – "On Arrest Warrants, Amnesty and Trials in Absentia" (December 1999); "Interim Report on Delays and Detentions" (February 2000); Thematic Report IV – "A Case Study of Economic Reform – Inspection of the Registry for Companies and Public Institutions in Bihac, Una-Sana Canton, 6-13 December 1999" (May 2000); "Amnesty and Return – A Report on Implementation of Amnesty Legislation in the RS" (June 2000); Thematic Report V – "Enforcement: Execution of Court Judgments in Civil Cases" (September 2000); Thematic Report VI – "Expert Evidence: the Use and Misuse of Court Expert" (November 2000); Thematic Report VII – "JSAP and the Judicial Review Process in BiH" (November 2000); Thematic Report VIII – "Prosecuting Corruption: A Study of the Weaknesses of the Criminal Justice System in BiH" (November 2000); Thematic Report IX – "Political Influence: The Independence of the Judiciary in BiH" (November 2000).

¹¹ For an assessment of the baleful effects of this gap, see Erdmann (November 2001), p. 5.

¹² ICG pointed to the self-inflicted problem of international staff rotations in two recent reports. See ICG Balkans Report No. 115, *Bosnia's Precarious Economy: Still Not Open for Business*, 7 August 2001, and Report No. 121, *Bosnia: Reshaping the International Machinery*, 29 November 2001.

time most UNJSAP staff had dispersed, due both to the long hiatus and to financial disincentives to stay. On the other hand, a remnant of the UNJSAP endured. This is the CJAU, which works to improve liaison between local police and prosecutors, as well as to facilitate and monitor court cases related to human trafficking.

This badly executed transition resulted in the loss of institutional memory and momentum. Meanwhile, the contextual complexity increased as events proceeded and reforms were promulgated. Different laws were being introduced and applied in different parts of the country. The inherently flawed professional review process was being established. But central issues such as court restructuring and the creation of a single judicial space had yet to be addressed.

A. POST-WAR LEGAL AND JUDICIAL REFORM

The fact that Bosnia's legal and judicial systems were themselves principal obstacles to the rule of law had been recognised by both local jurists and an alphabet soup of international agencies by 1997. The latter began to develop and offer technical assistance projects.¹³ By 1998, the judiciary was swamped with invitations to seminars, workshops and training programs at home and abroad, and Bosnian legislators were receiving free secondments of foreign experts to help draft laws. The subjects of training and law-drafting embraced areas as diverse as human rights, anti-corruption, international legal instruments, judicial cooperation with the police and media, continuing education for judges and prosecutors, and legal procedures.

Yet as international agencies competed to do good and to improve Bosnia's judicial systems within their respective spheres, very little effort was made to come up with a comprehensive strategy. Eventually, and building upon the knowledge accumulated in the numerous assessments of the Bosnian judiciary since 1999,¹⁴ the IJC produced a strategy document in 2001.

¹³ For an account of the evolution of the Bonn, Luxembourg, and Madrid Peace Implementation Council (PIC) decisions since 1997, which tasked OHR with coordinating legal and judicial reforms, welcomed the establishment of the UNJSAP and called for specific actions such as strengthening the Federation Prosecutor's office, see Erdmann (November 2001), p. 4. The PIC documents can be accessed at www.ohr.int.

¹⁴ In addition to the series of UNJSAP reports noted above,

This had to take account, however, of the facts that opportunities had been lost, resources wasted and targets had shifted, in part because of the international community's own actions.

It was the Federation that first reformed both its criminal and criminal procedure codes in 1998, albeit to a very modest extent, which left substantial changes for later.¹⁵ Although criminal law reform started at the same time in the RS, that entity did not manage to complete a cursory reform of its criminal code until 2000. These efforts were more or less successfully obstructed by incompetence, the determination of local officials to preserve the status quo (which was professionally comfortable and provided tangible material and political benefits), and the plethora of international agencies that claimed a say in the process.

All these factors and diverse agendas militated against an efficient, uniform and thoroughgoing reform.

On the other hand, Brcko District's entire legal and judicial system was comprehensively overhauled by the Brcko Law Revision Commission (BLRC) in just two years. Today, Brcko has more than 40 new laws regulating its executive, legislative and judicial branches. Its judiciary is politically and financially independent. As this report shows, Brcko's newly minted criminal legislation and procedures make it the shining exception. Lessons should be drawn from this experience and applied in the rest of the country.

Realising that comparable progress was not being made elsewhere, OHR resolved to force a breakthrough by creating incentives for judges to raise their game and assert their independence. In June 2000, the High Representative imposed a law on the judicial and prosecution services in the Federation. Imposition proved unnecessary in the RS, where the National Assembly adopted such a law. These laws brought

OHR, OSCE, SFOR and other international and non-governmental organisations regularly addressed rule of law issues, as did the annual reports of the BiH Human Rights Chamber and Ombudsmen. For its part, ICG produced three reports in the period: Balkans Report No. 72, *Rule Over Law: Obstacles to the Development of an Independent Judiciary in Bosnia and Herzegovina*, 5 July 1999; Balkans Report No. 84, *Rule of Law in Public Administration: Confusion and Discrimination of a Post-Communist Bureaucracy*, 15 December 1999; and Balkans Report No. 86, *Denied Justice: Individuals Lost in Legal Maze*, 23 February 2000.

¹⁵ Among other changes, the revisions excised socialist terminology from the codes, abolished the death penalty and provided for a strict definition of detention. ICG interview with a Federation Ministry of Justice official, 12 September 2001.

three major changes: dramatic salary increases, a comprehensive peer review process, and new judicial appointments procedures.¹⁶

Although a welcome and necessary measure,¹⁷ salary rises alone could not assure the independence of judges and prosecutors.¹⁸ They naturally improved recipients' living standards, but did little if anything to improve their performances.¹⁹ They also incited envy on the part of judicial support staff, government officials and legislators.²⁰ Furthermore, the new laws treat judicial

pensions unequally between the entities. In the Federation, pensions rose along with salaries. But in the RS, pensions remained unchanged. This means that a senior judge or prosecutor will see his income slashed from some KM 3,000 per month to only a few hundred irregularly paid marks upon retirement. This humiliating prospect adds another incentive for the venal and fearful to regard bribes as justifiable hedges against a penurious retirement. Likely damage to the rule of law is all the greater because the temptation will be strongest for the most senior judges, who sit on the benches of the RS's highest courts.

¹⁶See OHR press releases "Amendments to the Republika Srpska Judicial Reform Laws", 12 June 2000 and "Federation Law on Judicial and Prosecutorial Service". 18 May 2000.

¹⁷ Many agencies pointed to low salaries as a cause of judicial dependence and an incentive to solicit or accept bribes. Pay rises were the recommended remedy. See ICG Balkans Report No. 72, *Rule Over Law: Obstacles to the Development of an Independent Judiciary in Bosnia and Herzegovina*, 5 July 1999 and UNJSAP's Thematic Report IX – "Political Influence: The Independence of the Judiciary in BiH", November 2000.

¹⁸ Salaries of judges and prosecutors went up from several hundred KM per month (paid irregularly) to KM 2500-3000 (but still paid irregularly). Judges and prosecutors in the RS, for example, received their May 2001 pay cheques in September. The situation in the Federation varies from canton to canton. In Hercegovacko-Neretvanski Canton, Bosniak judges received lower and more irregular salaries than their Croat colleagues. This anomaly was reportedly remedied by the end of 2001. ICG interview with members of RS judiciary and international legal experts, 11 October 2001; and broadcast interview with Nada Dalipagic, a judge of the Mostar Cantonal Court, "Pravosudje u BiH", Federation TV (FTV1), 7 February 2002.

¹⁹ ICG's interlocutors from various parts of BiH opined that the pay rises, far from dealing a deathblow to corruption, merely drove up the standard bribe from several hundred to several thousand KM. Although this state of affairs is common knowledge, proving a crime to which only two persons are normally party is particularly difficult. To prosecute, either party will usually have to incriminate himself. This is one reason why bribery is rarely prosecuted in Bosnia. See the interview with IJC official Stephanie McPhail, "Korumpiranost sudija nemoguće dokazati", *Nezavisne novine*, 15 November 2001.

²⁰ Recent strikes by lay judges in Tuzla and Bijeljina over the late payment (by up to a year) of their salaries also reflected their grievances with the vastly better-paid (and more regularly paid) professional judges. Lay judges in Tuzla earn just KM 10 per day of service, while those in Bijeljina receive only KM 7.5. "Sudije porotnici u Tuzli spremaju se na strajk", *Dnevni avaz*, 24 December 2001; "Nista od besplatnog sudjenja: Sudije porotnici iz Bijeljine nastavljaju strajk", *Nezavisne novine*, 8 October 2001; and "Poceo strajk porotnika: Paralisan rad Osnovnog suda u Bijeljini",

The salary hikes also put yet more strain on the already strapped budgets of the entities and cantons. Although justice never comes cheap, the near doubling in the number of courts in BiH since 1992 (from 69 to 104) means that Bosnians pay especially dearly for their bloated, inefficient and malign system. It is estimated that nearly 1,500 judges and prosecutors are employed across BiH.²¹

Despite the high international hopes, salary rises failed to make judges and prosecutors independent or to transform the administration of justice. In the continuing absence of reforms of court structures and management – and of civil and criminal procedures – the professional performance of judges and prosecutors

Nezavisne novine, 18 September 2001. Judges' salaries in the RS are ten times higher than the average wage. In Slovenia, by contrast, they are five times higher. On the other hand, within the profession there are inadequate incentives for promotion through merit, since there are no intermediate grades and no provision for incremental advancement. ICG interview with an RS legal expert, 11 September 2001.

²¹ The IJC has estimated that Bosnia has approximately 1,200 judges and prosecutors, plus another 285 judges who preside in minor offence courts: 200 in the Federation and 85 in the RS. Of the 104 separate courts, 35 are in the RS, 67 in the Federation and two are located in Brcko District. The Federation employs approximately 580 judges, spread among 56 municipal courts, ten cantonal courts and the Federation Supreme and Constitutional Courts. The 180 prosecutors are dispersed among the same number of municipal and cantonal courts, as well as in the Federation prosecutor's office. The RS has 300 judges and 80 prosecutors, working in 35 courts and 32 prosecutors' offices. Brcko employs seventeen judges, eleven of whom work in the basic court and six in the appellate court; while seven prosecutors work from a common office. (Strategy Paper of the Independent Judicial Commission, 2001-2002.) Before the war, Bosnia had 69 courts: 61 municipal courts, seven regional courts (Sarajevo, Mostar, Banja Luka, Zenica, Doboj, Tuzla and Bihac), and one supreme court. ICG interview with an official of the pre-war Ministry of Justice of the Republic of BiH, 21 December 2001.

showed little improvement. That, however, did not stop international agencies from coming up with another would-be panacea for the problem of inept and unfit judges. The new solution was comprehensive professional review. Since this peer review scheme was inaugurated in June 2000, it has accomplished almost nothing. There have been very few dismissals or instances of disciplinary action against either judges or prosecutors.²²

UNJASP and OHR designed comprehensive review with the aims of raising standards and instilling discipline by thoroughly vetting the judiciary. Those found unfit would be sacked or sanctioned. The review was to be carried out by local commissions composed of judges and prosecutors. Since its formation, the IJC has sought to supervise the process.

Unfortunately – and as both the Erdmann report and ICG’s own research confirm – the exercise has not only been fraught with difficulties, but was misconceived from the start. The review commissions have lacked the staff, technical skills and financial incentives to do a thorough job, while the IJC has lacked the capacity fully to carry out its supervisory role. The process has thus far been driven by citizens’ complaints against judges and prosecutors. Most of these, however, have been dismissed as frivolous and/or unsubstantiated, and only a handful of judges and prosecutors have been fired or disciplined.²³ If the process is to have any chance of weeding the judiciary, it must actively assess the professional record of each judge and prosecutor by looking into the cases they have tried, the decisions they have written and the appeals that have gone against them.

Erdmann proposed three options for salvaging international judicial reform efforts in November 2001. The first would allow the comprehensive review program to expire at the end of its projected, eighteen-month life span. This would have meant the end of 2001 in the Federation and early 2002 in the RS. Given

that the results achieved by then would have been nugatory, the international community was being invited, effectively, to consider writing off comprehensive review as a failed project from which it might walk away.

Erdmann’s second option was to extend the project and to give the IJC the financial and human resources it needed to supervise the process. Although this was the solution then adopted – and the IJC both sought to negotiate an extension to the end of 2002 with the entities and to win extra funding – Erdmann characterised this option as “a band aid for a system that needs a major surgery”.²⁴ His third and preferred option, therefore, was to discard peer review and replace it with a system of general reappointment similar to what was done in Georgia and the former German Democratic Republic.²⁵

In opting to extend and intensify comprehensive review, OHR and the IJC chose merely to postpone failure. The main problem with peer review is not that it has been haphazardly implemented or inadequately supervised (though such has been the case), but that it is *peer* review. In the Bosnian context of a highly politicised, war-inflated, post-socialist, nationally partisan, financially dependent, and institutionally deficient judiciary, peer review is a contradiction in terms. Such a judiciary will not and cannot transform itself into a competent, freedom-loving and disinterested bastion of democratic values, human rights and civil society. As one top international official put it, “Applying the concept of ‘local ownership’ in reforming Bosnia’s judiciary is a farce.”²⁶

Belatedly adapting to reality, the IJC proposed in February 2002 to abandon peer review and replace it – in all but name – with general reappointment, implemented by a state-level judicial body composed of both domestic and foreign members. Moreover, it argued, reappointment should be coordinated with simultaneous reform of the court structure and the introduction of new criminal and civil procedural codes.

The IJC aims to cut the number of judges and prosecutors (which it now recognises to be two to three times larger than a country of Bosnia’s size should require) and to reform the courts. But it stops short of

²² According to IJC data, after eighteen months of review, the total number of dismissals stood at three, while disciplinary action was pending against another eighteen judges. ICG correspondence with IJC, 7 February 2002.

²³ The IJC expected the review process to result in a meaningful reshaping of the judiciary and measurable improvements in the administration of justice through the removal of unfit judges and prosecutors. Because the review process has not produced such results, it is again searching for solutions and examining more radical approaches. Excerpt from IJC letter to heads of prosecutors’ and judicial commissions, 12 December 2001.

²⁴ Charles Erdmann, “Assessment of the Current Mandate of the Independent Judicial Commission and a Review of the Judicial Reform Follow-on Mission for Bosnia & Herzegovina”, November 2001, p. 12.

²⁵ Ibid, pp. 11-12.

²⁶ ICG interview with a senior international official, 11 October 2001.

questioning the need for cantonal courts.²⁷ The new IJC line was accepted within OHR and endorsed at the 28 February meeting of the PIC.

Although this represents a heartening and unusual about turn, the mechanisms, criteria and details of implementation have yet to be worked out. Given the history of international community operations in Bosnia, it is advisable still to be wary. For the devil – in the form of unprincipled compromises, appeasement of vested interests and watering down radical initiatives – is very much in the detail.

Meanwhile, the state level judicial system has started to take shape. The High Representative is expected to create a new High Judicial Council in the first week of April. This step will likely be followed by the swift passage or imposition of a package of some 52 laws on legal and judicial reform.²⁸ Since the BiH Constitutional Court ruled in September 2001 that the creation of a state court was constitutional,²⁹ the international community and the Council of Ministers have been working to establish such a court from scratch. At this writing, the state court still lacks everything from judges to laws, and premises to computers. It will not become operational before the middle of 2002 at the earliest. What it does have is a mission: to assert the supremacy of the state judicial system in Bosnia's legal hierarchy, to bridge the country's otherwise disconnected judicial space – both between the entities and with the outside world – and eventually to take on the challenge of trying war crimes at home.

B. INTERNATIONAL ORGANISATIONS

Internationally supported efforts to promote and inculcate the rule of law have been many and various since the war. That has been a large part of the problem. Some agencies have scored useful successes, but more could have been achieved had all involved been pushing reforms in the same direction. The 1997 Bonn PIC tasked OHR with coordinating judicial and legal projects within a coherent and focused strategy.³⁰ Yet it took almost four years for either a coordinating body or a strategy to emerge. Although another corner may have been turned at the 28 February 2002 PIC, there are signs that a good deal of inter-agency brokering lies in store before implementing mechanisms are agreed.³¹

1. Independent Judicial Commission (IJC)

High Representative Wolfgang Petritsch created the IJC on 14 March 2001. Its mandate is to assist and guide judicial and legal reform, working closely with relevant local institutions and coordinating the efforts of the other international agencies involved. The IJC answers directly to the High Representative. Several months after its formation, the IJC produced a strategic plan outlining objectives and timelines in several key areas, including reviews of judges and their appointment process, reform of court administration and financing, improvements to civil and criminal legislation, enforcement of court judgments, legal training and education, and inter-entity cooperation.³²

The IJC employs some 70 people, 33 of whom are international and national lawyers and judges. They work in six regional offices (Sarajevo, Banja Luka, Mostar, Tuzla, Brcko, and Bihac) and cover three areas: monitoring and implementation, which is concerned largely with the review and appointments' process;

²⁷ IJC, "The Reinforced Review of Judges and Prosecutors in BiH: Explanatory Paper", 13 February 2002.

²⁸ ICG Conversations with representatives of the OHR and IJC, Sarajevo, March 2002.

²⁹ On 12 November 2000, the High Representative imposed the Law on the State Court of BiH, acting on recommendations and a draft law proposed by the Council of Europe's Venice Commission. SDS members of the BiH parliament launched a constitutional challenge to this imposition, which the BiH Constitutional Court dismissed in September 2001. Decision imposing the Law on the State Court of BiH, 12 November 2000, (www.ohr.int) and presentation by Richard Barrett, legal adviser in OHR Legal Department, OHR Legal Seminar, Vogosca, 10 October 2001.

³⁰ See www.ohr.int

³¹ The Communiqué of the PIC Steering Board employs vague and unspecific language about a "reinvigorated strategy for judicial reform", and invokes the need to restructure the courts as the main argument for a change in the "selection process and termination of mandates" of judges and prosecutors. Effectively, this is a euphemism for general reappointment. On the other hand, it states the resolve of the international community to remove the influence of the executive over the judiciary by establishing a state-level High Judicial Council. See Communiqué of the Steering Board of the Peace Implementation Council, 28 February 2002, www.ohr.int

³² See *Strategy Paper of the Independent Judicial Commission 2001-2002*, Fall 2001.

plans and policy; and administration and support. The IJC's projected budget for 2001-02 totals €5.3 million, most of which will come from the EU and U.S. But since only €4.2 million has in fact been pledged, the IJC faces a funding gap of over € 1 million. (By comparison, the UN International Police Task Force (IPTF) employs 1,700 people and had a budget of U.S.\$ 145 million in 2001.) Given the vastly expanding scope of its mandate, the IJC will need hugely increased funding.³³

The IJC's own limited capacity means that it is particularly important that it should be able to utilise and tightly coordinate the work of other agencies engaged in legal reform. The IJC also needs to 'borrow' the monitoring and data-collection capacity it lacks if the day-to-day work of the judiciary and the implementation of new criminal and civil codes are to be assessed. According to ICG's sources, collaboration on law drafting projects is going well, but coordination of the monitoring efforts of several different agencies remains problematic.

Tight coordination is particularly important in criminal law reform, which, to succeed, must be developed and implemented as a coherent and comprehensive whole – including law enforcement agencies, the prosecution service, the courts, and the prison system. Among other things, the IJC will need the assistance of the agencies that are drafting the new civil and criminal procedures in order to plan and provide training on them for the judiciary, as well as later monitoring their implementation.

2. Office of the High Representative (OHR)

Three OHR departments cover different aspects of the rule of law. Among other matters, the Legal Department deals with state court issues, EU "Road

Map"³⁴ and eventual accession requirements, and questions relating to the drafting of criminal and civil legislation. The Rule of Law Department covers human rights issues such as cooperation with the ICTY, enforcement of Human Rights Chamber decisions, the coordination of international agencies monitoring civil liberties, and topics related to property and refugee return. The Anti-Fraud Department is in charge of legal and institutional efforts to combat corruption. It assists and monitors fraud and corruption investigations and court cases, facilitates judicial and law enforcement training in fighting corruption and fraud, and leads criminal law reform.³⁵ As such, it is probably in a better position than any other agency to view the criminal justice system as a whole. Yet even within OHR – not to mention outside it – disunity among would-be reformers has prevailed.

Thanks to these departments, the OHR can claim the credit for some signal achievements. It has helped to establish the state court (although this is not yet operational) and to draft laws for Bosnia's other state-level institutions. It has enhanced the role and credibility of the Human Rights Chamber. Most visibly, it has done much to expose politically connected corruption in the Federation. On the other hand, OHR's structure makes it vulnerable to inter-departmental turf wars, both in Sarajevo and among its under-utilised regional offices.³⁶ Nor has the OHR devoted as much attention to fighting corruption or pursuing legal reform in the RS as it has in the Federation.³⁷ And it has

³³ Some additional funding for specific projects had been won before the abandonment of peer review and the "reinvigoration" of the IJC mandate. See press release, "Administration and Management Reform of BiH Court System gets Underway", 10 January 2002, www.ohr.int. The Finnish and Norwegian governments had already provided financial support to hire additional staff to help the commissions investigate and assess the work of judges and prosecutors, as well as to improve court administration. Norway gave € 125,000 to hire six people to assess five courts and to suggest low-cost administrative improvements. Ibid. Finland offered €159,500 to hire twelve local lawyers as judicial commission investigators. ICG interview with IJC official, 31 October 2001.

³⁴ Issued in March 2000, the EU "Road Map" lists eighteen measures of reform that must be achieved in order for Bosnia to commence negotiations for a Stabilisation and Association Agreement.

³⁵ Further details on the departments' mandates can be accessed at www.ohr.int.

³⁶ For more on the causes and effects of dysfunctional structures in the international community in general, and in OHR in particular, see ICG Balkans Report No. 121, *Bosnia: Reshaping the International Machinery*, 29 November 2001.

³⁷ The RS is effectively two years behind the Federation in investigating and prosecuting corruption. Although verdicts have yet to be rendered in cases started as long ago as 1997 in the Federation, at least prosecutions have taken place. In the RS, the investigative agencies and the judiciary have received little support or stimulation from the OHR Anti-Fraud Department. Only recently has the AFD established a presence in the entity. Real results have yet to come. Thus far, however, RS prosecutors have filed 31 corruption charges against former government officials for abuse of office and peculation involving sums of only a few hundred thousand marks. Cases against tax evaders and fraudsters reputedly involved in robbing the exchequer of hundreds of millions of marks are nowhere in sight. See "Istraga o 31

adopted and held fast to the inherently flawed policy of comprehensive judicial review in the mistaken belief that this was a field in which “ownership” could flourish.

3. UN Mission in Bosnia & Herzegovina (UNMIBH)

UNMIBH acts in two areas: advising, supporting and vetting the local police and monitoring the relations of the police with the criminal justice system. The first is the sphere of the 1,700-strong International Policing Task Force (IPTF), which both deploys “co-located” international police officers throughout Bosnia and “authorises” (or “decertifies”) the fitness to serve of individual Bosnian policemen.³⁸

The monitoring of court cases is the work of the CJAU. Although merely a remnant of the much larger UN Judicial System Assessment Program (UNJSAP) that operated between 1998 and 2000, CJAU is almost the only international agency regularly monitoring criminal court proceedings. It pays special attention to cases resulting from IPTF’s Special Trafficking Operation Program (STOP). The latter involves raids on brothels masquerading as night clubs where trafficked women and girls are employed or enslaved. CJAU also monitors high profile cases such as the Jozo Leutar murder trial.³⁹

CJAU was able to keep some of UNJSAP’s national and foreign lawyers on its books and to maintain a string of regional offices. Fourteen legal officers are posted in Sarajevo, Mostar, Banja Luka, Tuzla, Doboj, and Bihac. Their long experience and regional presence are particularly important to the IJC, which is not only a new organisation but lacks eyes and ears in the provinces. CJAU staff meet weekly with IJC officials to share information relevant to the judicial review process and to other IJC projects.

Given that UNMiBH’s mandate will expire at the end of 2002, it is essential both that CJAU’s monitoring capacity should be utilised to the utmost while it exists – including oversight of the soon-to-be promulgated

slučaju korupcije”, *Dnevni avaz*, 13 October 2001; “Politika u krivičnoj prijavi”, *Nezavisne novine*, 15 November 2001; and “Zloupotrebe pod istragom”, *Glas Srpski*, 7 December 2001.

³⁸ ICG will discuss IPTF’s role and achievements – and the tasks which will need to be undertaken by its successor after 2002 – in a forthcoming report on policing in BiH.

³⁹ The suspected 1999 car bomb murderers of Federation Interior Minister Jozo Leutar are currently on trial in Sarajevo’s Cantonal Court.

criminal procedure code – and that steps should be taken this year for the IJC to develop or acquire its own monitoring unit. The simplest and most effective means of doing so would be for the IJC to absorb CJAU’s staff and structures before its demise. In any case, the IJC will certainly need to coordinate far more tightly in future with all other agencies involved in criminal justice reform, particularly with the AFD and the future EU Police Mission (EUPM).

4. Organisation for Security and Cooperation in Europe (OSCE)

OSCE’s human rights and democratisation projects, sustained by its field offices, have been important in promoting, monitoring and enforcing human rights. OSCE’s involvement in property law implementation and its support for the ombudsman offices have been crucial to their progress. Beginning in 1999, OSCE has also been active in training judges and prosecutors in such matters as handling human rights cases and managing their caseloads.

Like CJAU, OSCE’s engagement in rule of law issues benefits from having an extensive presence in the field, monitoring capacity and maintaining institutional memory. These will be even greater advantages once the UN mission decamps. Moreover, OSCE has been and will continue to be crucial in providing information on compliance with and implementation of the property laws by the judiciary. This has already proved indispensable during the comprehensive review process.

For example, during July and August 2001, six judges and prosecutors in Tuzla Canton moved out of properties they had been occupying illegally due to pressure applied by the IJC, but based on information provided by OSCE.⁴⁰

5. Council of Europe (CoE)

The Council of Europe and its offshoots, such as the Venice Commission, have been providing technical and other assistance to Bosnia since 1996. Its legal expertise on criminal justice standards in Europe and constitutional issues has proved useful in drafting new laws. The CoE has provided training courses and hosted visits by Bosnian judges to the European Court of Human Rights and the European Court of Justice.

⁴⁰ ICG interview with IJC, 4 September 2001, and inter-agency joint letter (OSCE, UNMiBH, OHR, UNHCR, and CRPC) to all court presidents and chief prosecutors requesting full compliance with and enforcement of the property laws, 4 September 2001.

Other notable CoE projects include the “Octopus” and “Paco” workshops on combating corruption, organised crime, and money laundering in south-eastern Europe. The Human Rights Three-Year Training Program (2001-03) aims to inform Bosnian jurists about the human rights standards set out in the European Convention on Human Rights and case practice in the European Court of Human Rights.⁴¹

However, the CoE’s brief extends beyond technical capacity building. It has taken an active part in helping Bosnia to prepare for accession to the Council. If, as expected, Bosnia gains full admission to the Council in May 2002, the legal environment in the country will be fundamentally changed. Not only will Bosnian citizens have access to both the European Court of Human Rights and the European Court of Justice, but their state will be obliged to sign and ratify several European conventions. These will serve to integrate BiH further within the international legal system and to reinforce international legal standards.⁴²

6. American Bar Association and Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

The ABA's Central and East European Law Initiative (ABA CEELI) program is fully funded by the United States Agency for International Development (USAID) and has been operating in Bosnia since March 1995.⁴³ Its major projects have included setting up judges’ and prosecutors’ associations, drafting a law on training institutes for judges and prosecutors, and providing technical support to Federation bar associations. Recent

projects involve collaboration with the IJC in drafting a civil procedure code, a law on the enforcement of court decisions, and a law on court financing. Legal education projects have focused on attorneys, law students and the judiciary of the Brcko District.

CEELI also drafted a Freedom of Information Act that is now in place on the state and entity levels. It obliges governments to disclose information on their operations and decisions. CEELI is now training journalists, NGOs, lawyers, and judges to use the Act, and has recently opened an office in Sarajevo to assist citizens seeking information from their governments, including help with litigation if officials fail to comply with requests.

The German Society for Technical Co-operation (GTZ) has worked on drafting key laws in the economic sphere. These have included a law on land registry, an obligations act, a condominium law, and a law on public notaries – most based on German legal practice and tradition. Unfortunately the bulk of these drafts still languish in parliamentary limbo.⁴⁴ GTZ’s support for the legal system also encompasses the development of resources for continuing legal education and the establishment in the Federation of an electronic library of entity and state laws. Cantonal laws, legal essays and court decisions are expected to be added to the on-line collection.

C. THE INTERNATIONAL COMMUNITY CAN DO BETTER

Despite notable achievements on the part of these and other foreign agencies and organisations, Bosnia would have been better served if their efforts had been coordinated within the framework of a coherent, comprehensive and credible strategy. Unlike local political leaderships, however, international agencies are not assessed at the polls by the objects of their policies. They are accountable instead to amorphous and increasingly disengaged bodies like the PIC and the UN Security Council, or to distant boards of directors and national government bureaucracies that have also grown bored with Bosnia.⁴⁵

⁴¹ ICG interview with a Council of Europe officer, 18 October 2001, and “Structure of a Three-year Programme (2000-03) for Training on the ECHR and other European Legal Standards for Judges, Prosecutors and Lawyers in BiH”, Council of Europe, March 2001.

⁴² Among other things, the 91 post-accession requirements will oblige Bosnia to sign, ratify and apply within two years the following conventions: The European Outline Convention on Transfrontier Cooperation and its Protocols and the CoE’s conventions on Extradition, Mutual Legal Assistance in Criminal Matters, Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and Transfer of Sentenced Persons. Bosnia will also need to adhere to European conventions on the Suppression of Terrorism, Transfer of Proceedings in Criminal Matters, Compensation of Victims of Violent Crimes and Cyber Crime within three years of accession. Bosnia & Herzegovina’s Application for Membership of the Council of Europe, October 2001.

⁴³ ICG interview with ABA CEELI official, 6 November 2001.

⁴⁴ For more information on the significance of these laws to modernising the Bosnian economy, see ICG Balkans Report No. 115, *Bosnia’s Precarious Economy: Still Not Open for Business*, 7 August 2001.

⁴⁵ Some of the deficiencies of the international community’s structure in Bosnia are discussed in ICG Balkans Report No. 121, *Bosnia: Reshaping the International Machinery*, 29 November 2001.

Dayton implementation has been going on so long that it has been 'routinised', with the local missions of international organisations sometimes appearing more interested in ticking boxes signifying that a given task or project has been completed than in actually making sure its objectives have been accomplished, or even that they were relevant in the first place. Moreover, to get anything done, international agencies occasionally make Faustian pacts with the powers that be, regardless that such compromises harm Bosnia's future, whether they involve a misguided privatisation policy or the non-apprehension of war criminals.⁴⁶

In the case of judicial and legal reform, similar compromises have been made. It is encouraging, however, that some – including the peer review process and the piecemeal approach to legal reform – have now been recognised as such. Both international and local jurists and politicians have acknowledged the shortcomings of present policies and the significance of getting them right while there is still an international presence in Bosnia to assist. The Erdmann report and numerous ICG interviews with relevant officials testify to this emerging consensus. Nevertheless, many international functionaries also argue that they need more time to reconsider their policies. They may have far less time than they imagine.

III. DISTRIBUTORS OF JUSTICE

Bosnia's court structure is inefficient, bloated and very expensive.⁴⁷ The number of courts and those that serve in them has almost doubled since before the war. Far from bringing greater efficiency and more justice, this proliferation has made matters worse. Bosnian courts are swamped on all levels with a backlog of cases reckoned in the tens of thousands.⁴⁸ This inefficiency is caused by procedures permitting endless judicial processes and by bad management. In addition, the courts inherited a large number of pre-war cases, most of which cannot be completed because of Bosnia's fractured judicial space. Locating and summoning witnesses who reside outside a court's narrow jurisdiction is almost impossible.

Before 1992, there were 69 courts, 61 of which were municipal, and seven of which were regional (based in Sarajevo, Mostar, Banja Luka, Zenica, Doboje, Tuzla, and Bihac). There was also a supreme court.⁴⁹ Today, Bosnia has 104 courts and, according to the IJC, approximately 1,200 judges and prosecutors to service them.⁵⁰ This latter figure does not include 285 minor offence court judges, of whom 200 serve in the Federation and 85 in the RS. The 1,200 mainline judges and prosecutors work in 35 RS courts, 67 Federation courts, and two Brcko District courts. The 580 Federation judges are split among 57 municipal courts, ten cantonal courts, and the entity's Supreme Court and Constitutional Court. There are some 180 prosecutors, divided among municipal, cantonal and Federation prosecutors' offices. The RS employs 300 judges and

⁴⁶ Recent ICG reports pointing, inter alia, to the perils of appeasement in both the economic and political spheres include Balkans Report No. 115, *Bosnia's Precarious Economy: Still Not Open for Business*, 7 August 2001 and Balkans Report No. 118, *The Wages of Sin: Confronting Bosnia's Republika Srpska*, 8 October 2001.

⁴⁷ This state of affairs has been acknowledged by most of ICG's interlocutors and is regularly discussed in the media. See, for example, "BiH ima previše sudova, sudija i tuzilaca", *Dnevni avaz*, 14 October 2001.

⁴⁸ For the number of minor cases going through the Sarajevo Canton courts, see "Opcinski sud riješio 54.776 predmeta, uglavnom tuzbi 'Toplana'", *Dnevni avaz*, 13 December 2001. In Tuzla Canton, the minister of justice requested that the president of the Tuzla Municipal Court be removed for failing to reduce the backlog. See "Postoji puno razloga za smjenu predsjednika i pojedinih sudija Opcinskog suda Tuzla", *Dnevni avaz*, 29 July 2001.

⁴⁹ ICG interview with an official of the pre-war Ministry of Justice of the Republic of BiH, 21 December 2001.

⁵⁰ This number does not include 124 minor offence courts. The judges of these courts have not received higher salaries, nor have they been included in the professional review process. ICG interviews with an IJC officer, 13 November 2001 and 12 March 2002, and "BiH ima previše sudova, sudija i tuzilaca", *Dnevni avaz*, 14 October 2001.

80 prosecutors, working in 35 courts and 32 prosecutors' offices. As noted above, Brcko District gets by with seventeen judges and seven prosecutors.⁵¹

Relative to their populations, Bosnia has almost twice as many judges as Germany, a country infamous for having the most extensive and expensive court structure in Europe. The German system comprises five pillars: civil and criminal law; administrative and public law; tax and customs law; social rights law; and labour law. Each of the pillars has three courts of instance, crowned by a supreme court. Germany employs some 16,000 judges and prosecutors to serve 82 million people.⁵² Bosnia's 1,200 judges and prosecutors serve just 3.7 million. This means that there is a German judge or prosecutor for every 5,125 people, while in Bosnia the ratio is 1:3,038. No one in his right mind would claim that Bosnians enjoy 40 per cent added value from their swollen judiciary.

Another difference between Bosnia and Germany is that courts in the former coincide strictly with the country's administrative units. This is a legacy of Austria-Hungary and of a time when travel was onerous and the courts had to be brought to the people. In Germany, by contrast, people are brought to the courts. Thus the system is organised according to density of population. A basic court in Germany serves 50-80,000 people, while a second-instance court covers between 800,000 and one million citizens. If the same ratios were applied to Bosnia, the Federation's 2 million residents would require only two second-instance courts, instead of the ten they have; and the RS, with only 1 million inhabitants, would have just one rather than five district courts.

The most striking difference between the German and Bosnian judiciaries, however, is in their productivity. On average, each German prosecutor completes 1,800 cases per year, and a judge hears 1,200 cases.⁵³ In Bosnia, judges are estimated to hear approximately 360 cases per year, or 30 per month. There are no figures or norms for prosecutors. German judges and prosecutors, however, are supported by a modern court administration staffed by competent people with a clear division of labour.

⁵¹ Strategy Paper of the Independent Judicial Commission, 2001-2002.

⁵² ICG interview with a judge of the German appellate court, 27 November 2001.

⁵³ *Ibid.*

A. THE ENTITIES

1. The Federation

The Federation court structure is the result of a political compromise in favour of decentralising – and replicating – power and jurisdiction in the cantons at the expense of a more centralised – and leaner – system. The Federation constitution decrees a strict division between the Federal and cantonal levels.⁵⁴ The Supreme Court, Constitutional Court and (non-operational) Human Rights Court belong to the Federation,⁵⁵ whereas the cantons have cantonal courts and as many municipal courts as they deem necessary. As has been confirmed by the decision of the BiH Constitutional Court on the equality of Bosnia's "constituent peoples", justice in the Federation is not blind. In fact, what is often dispensed (or claimed to be dispensed) is 'ethnic justice', advantaging one national group over another and discouraging recourse to higher courts assumed to be under 'alien' control. This has been particularly evident in the Croat-majority cantons, where the writ of the Federation Supreme Court and the Federation Prosecutor do not usually run.⁵⁶

In July 1999, OHR initiated a battle to disentangle the eleven jurisdictions in the Federation. Having recognised the problem, the High Representative imposed three important decisions to strengthen the Federation Supreme Court and Prosecutor. The decisions gave both Federation institutions jurisdiction over inter-cantonal and organised crime, drug trafficking, and terrorism – in line with the constitution – and made provision for the identity of witnesses

⁵⁴ Constitution of the Federation of Bosnia & Herzegovina: Chapter III, Article 1; Chapter IV, Section C; and Chapter V, Section 4. *FBiH Official Gazette 1/94 and 13/97.*

⁵⁵ Although provided for in the constitution, the Human Rights Court has never sat, despite the fact that three judges have been appointed and are paid high salaries, see "Za nepostojeći sud 300.000 KM", *Oslobodjenje*, 10 January 2002.

⁵⁶ Cantonal court jurisdiction over all serious crime cases is not conducive to trying organised and inter-cantonal crime because the judiciary has often either been co-opted by local political elites or is otherwise subject to political pressure. The Federation Supreme Court is only empowered to decide on extraordinary legal remedies, which do not defer the execution of cantonal court decisions often made in violation of provisions relating to due process and human rights. For details, see ICG Balkans Report No. 86, *Denied Justice: Individuals Lost in a Legal Maze*, 23 February 2000, and UNJSAP "Thematic Report II – Inspection of the Municipal Public Prosecutor's Office in Livno, Canton Ten, during 5-16 July 1999", September 1999.

testifying in these and other cases of serious crimes to be protected.⁵⁷ Another positive move – this time by the Federation Ministry of Justice – harmonised jurisdictional criteria in the Federation, thus applying the same principles in Croat and Bosniak majority cantons alike, while assuring equal access to the Supreme Court.⁵⁸

These reforms had a positive effect. In particular, the witness protection law helped to bring two major cases to trial. The first concerned Ismet Bajramovic-Celo, a Sarajevo underground figure and war hero, who was sentenced to 22 years' imprisonment for murder. The second case relates to the 1999 murder of Federation Minister of Interior Jozo Leutar, whose suspected killers are now on trial in the Sarajevo Canton Court.⁵⁹ The Federation Prosecutor, meanwhile, has been taking advantage of his new powers over cantonal prosecutors, issuing instructions on how to prosecute a given case and taking over its prosecution if he deems that to be necessary. The Federation Supreme Court, on the other hand, has yet to use its first instance jurisdiction to try cases of organised, inter-cantonal, or terrorist crimes.

Courts swamped. Along with the positive effects, came some negative ones. All the courts in the Federation are clogged by a backlog of cases, mostly administrative cases involving civil procedures related to property sales, privatisations and appeals against decisions by government agencies and ministries. Since 1996, when the Supreme Court had to deal with 600 appeals, its caseload has increased tenfold, most of all in the number of administrative cases. By the end of 2001, the Federation Supreme Court confronted a docket of over 8,500 cases: 702 civil cases, 380 criminal cases, and an astounding 7,353 administrative cases.⁶⁰

⁵⁷ High Representative's Decision amending the Law on the Supreme Court of the Federation, Decision imposing the Law on Special Witness Identity Protection in Criminal Proceedings in the Federation, and Decision amending the Law on the Federation Prosecutor's Office, 30 July 1999. Available at www.ohr.int.

⁵⁸ ICG interview with an official of the Federation Ministry of Justice, 12 September 2001. The amendments were published in the Federation Official Gazette No. 32-01, 27 July 2001.

⁵⁹ ICG interview with a member of the judiciary, 2 September 2001.

⁶⁰ Case overload and other problems of the Federation Supreme Court (including the non-appointment of seven justices) have been widely discussed at legal seminars and in the media since September 2001. ICG attended one such seminar on legal and judicial reform, organised by OHR in Vogosca on 10 October 2001. See "Nerijeseno vise od 8000 predmeta", *Dnevni avaz*, 12 December 2001, and "Na

According to a former judge and president of the Supreme Court, Vojislav Ilic, the explosion in administrative cases reflects Bosnia's intertwined social, political and economic crisis,⁶¹ while outdated legislation makes for delays and prolongs judicial processes. Yet as the number of cases before the Supreme Court and other courts skyrockets, the number of judges serving in the former is actually falling. In September 2001, the Federation House of Representatives ousted eight senior Supreme Court justices, claiming that they were too old for the job. The Human Rights Chamber swiftly found in favour of the aged eight, ruling that their dismissals were discriminatory, and that they must be reconsidered for reappointment along with the other judges being reviewed.⁶²

The lower courts face similar problems. Municipal courts are congested with property eviction cases, as well as with everyday matters relating to divorce, alimony settlements, inheritance, and property sales. Such cases originate and, mostly, stay in the municipal courts. In Sarajevo, for example, eviction orders make up 20 per cent of all court judgments. Even the simplest improvements of performance are often complicated. For example, these courts are also burdened with the manual registration of all property transfer data in land books. To use computers would require a change in the law.

The proliferation of cases is highlighted by Sarajevo's Number Two municipal court.⁶³ It is currently dealing with 108,849 cases, 77,422 of which were filed during 2001. A large proportion of these cases is the result of summonses for unpaid utility bills. In 2001, Sarajevo's municipal courts had to process over 50,000 payment orders averaging just KM 20 to 30 each.⁶⁴ Even worse, these orders often turn into civil procedures when citizens avail themselves of their right to appeal to the cantonal court, further clogging the system. The

vrhovnom sudu FBiH 8453 nerijesenih predmeta", *Dnevni avaz*, 21 October 2001.

⁶¹ The local media often report on the many cases of disputed enterprise privatisations that come before cantonal courts and which are eventually appealed to the Federation Supreme Court. See "Desetine tuzbi zbog sporova u privatizaciji", *Dnevni avaz*, 23 December 2001.

⁶² See Human Rights Chamber decision CH/01/7952. Also see "Odbijene sudije Vrhovnog suda FBiH vratiti u izbornu proceduru", *Dnevni avaz*, 12 January 2002.

⁶³ Sarajevo Number 2 municipal court covers the Novo Sarajevo, Novi Grad, Ilidza, Blazuj, and Hadzici municipalities. ICG interview with municipal court official, 15 January 2002.

⁶⁴ See "Opcinski sud rijesio 54.776 predmeta, uglavnom tuzbi 'Toplana'", *Dnevni avaz*, 13 December 2001.

Sarajevo experience is not exceptional.⁶⁵ The Tuzla Canton courts have a backlog of 45,905 cases, 25,979 of which are appeals of municipal court decisions.⁶⁶ Another factor contributing substantially to the piling up of cases is the high reversal rate of first instance verdicts by the second instance court, so sending cases back for retrial. The current system allows reversals because of minor technical errors, as well as for matters that could be rectified by the appellate court, without need for a retrial. In criminal cases alone, the reversal rate is said to run to approximately 50 per cent.⁶⁷

Once a seemingly simple case is accepted by a court, it can sit unattended for years. An average divorce case can take up to eighteen months to complete.⁶⁸ Illegal construction cases – which are rife – face similarly lengthy waits. Meanwhile, the offending building is completed. Some judges, nevertheless, manage to get through their caseloads with admirable efficiency, which is a tribute to their hard work rather than to the system.⁶⁹ For such judges have to do almost everything themselves, whether writing summonses or searching for witnesses' addresses. In most cases they have no support staff, and even when they do, the huge discrepancy between their pay and that of court officials provides no incentive for the latter actually to do their jobs. All this makes for delays in processing cases and reaching decisions. The execution of verdicts can take another several months. Meanwhile, the backlog of

new cases, pending trials and unexecuted verdicts continues to mount.

Clearing up the mess is a formidable undertaking because it requires action on several fronts. There must be new criminal and civil legislation, a leaner court structure, better court management, and a cultural revolution in the attitudes and practices of court personnel. Acknowledging the scope of the problems, the IJC has recently launched a project to improve court administration while it drafts a new civil procedure code in collaboration with ABA CEELI and local legal experts. To cope with the ever-mounting pile of cases, the IJC is considering the introduction of separate administrative and commercial courts.⁷⁰ Both Croatia and Slovenia have already adopted this solution. An alternative might be to banish small claims from the courts, and delegate collection agencies to deal with them on behalf of public utility companies. However, neither the Bosnian authorities nor the IJC has even begun to tackle the equally intractable problems of incompetent and/or unmotivated court staffs and a cumbersome court structure.

Costly and inefficient structures. There are yet more absurdities in the Federation's court system. The number of municipal courts and, therefore, their cost varies greatly from canton to canton. For example, Sarajevo has two municipal courts for nine municipalities. But Tuzla has twelve municipal courts and Hercegovacko-Neretvanski Canton boasts ten. The divided city of Mostar, which before the war had one municipal court, now has three, although one of them (in the supposedly shared Central Zone)⁷¹ does not function. But even two courts is one too many in a city the size of Mostar. Moreover, judges and prosecutors in the H-N Canton are paid irregularly, though Bosniaks were until recently paid less – and even less regularly – than their Croat counterparts.⁷²

⁶⁵ Sarajevo and Tuzla cantons are the two most economically developed and populous cantons in the Federation. The estimated population of Sarajevo Canton in 1998 was 369,000, while that of the far-flung Tuzla Canton was approximately 900,000. For information on Tuzla Canton, see www.vladatk.kim.ba

⁶⁶ The big backlog in Bosnia's most populous canton has been a subject of controversy. Last year the cantonal minister of justice requested the removal of the Tuzla municipal court president on grounds of weak leadership. The minister argued that the failure to execute 14,000 verdicts, the average of eleven months required to complete a case, and the 559 outstanding criminal investigations warranted his dismissal. "Ministrica Bakalovic zatrazila smjenu predsjednika Opcinskog suda Tuzla", *Dnevni avaz*, 28 July 2001. At the time of writing, the court president is still in office.

⁶⁷ ICG correspondence with a long-serving foreign legal expert, 11 March 2002.

⁶⁸ In some instances a divorce can be completed much more efficiently. ICG has learned that a judge in one of Sarajevo's municipal courts recently dissolved her own marriage with exemplary speed. ICG interview with a prominent Bosnian lawyer, 12 March 2002.

⁶⁹ ICG interview with a prominent Bosnian lawyer, 19 October 2001.

⁷⁰ For an account of the economic liability represented by Bosnia's courts, see ICG Balkans Report No. 115, *Bosnia's Precarious Economy: Still Not Open for Business*, 7 August 2001. The idea of introducing commercial and administrative courts has won favour among local authorities, who have claimed that such a solution would produce efficiency gains. See "Sudovi koce investicije", *Nezavisne novine*, 6 December 2001.

⁷¹ Although the international community considers the establishment of the Central Zone court a successful step towards the reintegration of the city, no premises have been occupied by the judges and prosecutors who have been appointed. By such means is a political victory rendered Pyrrhic – and turned into a financial burden.

⁷² ICG interview with a foreign court monitor, 11 October

Courts in Bosnia are financed through the entities' justice ministries. The ministries not only pay judges' and prosecutors' salaries, but also all court expenses (including the costs of detaining defendants, exhumations, expert witnesses, and the prison service).⁷³ In an environment of scarce resources, such an arrangement guarantees fierce competition among the courts themselves, while leaving the judicial system at the mercy of the executive.⁷⁴ Financial considerations are bound, therefore, to enter into decisions over whether to keep a given suspect in detention or to employ an expert witness. Would-be reformers have recognised that the financial dependency of the courts is an additional hazard to justice and, in 1999, ABA CEELI drafted a law on court financing. As of this writing, however, no such law has been enacted other than in Brcko District. The entity governments are naturally reluctant to let go of their hold on the system.⁷⁵

Case transfers. Despite years of long and painstaking effort by the international community to unify Mostar's courts as a contribution towards uniting the city,⁷⁶ the resulting structure has failed to win the trust of its own creators. The High Representative has regularly transferred high-profile cases to Sarajevo. His decisions to move the Leutar murder trial and the cases stemming from the Hercegovacka Banka raids in April 2001 represented additional votes of no confidence in Mostar's judiciary.⁷⁷ This means that the city's courts

are not only expensive and under-used, but also that they are deemed unfit to try serious or politically sensitive cases.

The application (or fear of application) of political or ethnically prejudicial pressure on the courts is not confined to Mostar. It happens (or risks happening) throughout the country.⁷⁸ This is why the transfer of cases from one jurisdiction to another within each entity is often justified. As one prominent Bosnian lawyer and former prosecutor noted, "Small towns – small courts – big pressure."⁷⁹ Changes of venue also take place because the home court lacks the expertise and capacity to deal with a case.

Although this practice is employed all over the world to ensure due process and fair trials, in Bosnia it is a double-edged sword. On the one hand, it enhances the prospects that justice will indeed be served. But, on the other, it risks discrediting the process in the eyes of the national constituency out of whose jurisdiction the case is being moved. When, for example, a case is shifted from a Croat-majority canton to a Bosniak-majority canton, both the decision and the eventual verdict will be decried as 'ethnic justice', whereby one group (or the international community) is accused of setting up a kangaroo court to prosecute and persecute the other.

www.ohr.int.

⁷⁸ The media and international agencies alike have often reported instances of meddling with and intimidation of the judiciary. A currently notorious case is that of Dr Dragomir Kerovic, convicted in 2001 of forcibly aborting his mistress's eight-month old foetus in 1997, but only after his first trial in Lopare was sabotaged by his mobilisation of *veze* ('connections') with the local judiciary. Thanks to intervention by the High Representative, the case was transferred to Bijeljina, and a retrial resulted in his conviction and sentencing to six and a half years in prison. In the meantime, however, Kerovic had acquired Yugoslav citizenship and fled to Serbia. Bosnia is now demanding his extradition. For the background, see UNJSAP Thematic Report IX – "Political Influence: The Independence of the Judiciary in BiH" (November 2000). Another illustrative example is that of Salem Miso, a Sarajevo Canton judge who, in July 2001, sentenced Ismet Bajramovic-Celo to 22 years in prison for murder and who is now presiding over the Leutar murder trial. He has been provided with 24-hour police protection because of the threats he has received. For details, see the interview with Miso ("Nije me strah") in *Dani*, 9 February 2001. See also the interviews with Vlado Adamovic, President of Federation Association of Judges and a Supreme Court judge ("Sudstvo u FBiH ima pojednice podlozne politickoj kontroli", *Dnevni avaz*, 23 December 2001) and with Suljo Babic, former Federation Prosecutor ("Kriminalu lojalni kadrovi", *Dani*, 1 October 1999).

⁷⁹ ICG interview with a prominent Bosnian lawyer, 19 October 2001.

2001.

⁷³ Last year Sarajevo Canton spent KM 1 million on detention expenses. ICG interview with President of the Sarajevo Canton Court, 13 September 2001.

⁷⁴ Judicial salaries are not only paid irregularly, but their relative generosity has recently been attacked. The Party for BiH, a major partner in the Alliance for Change government, has demanded in Zenica-Doboj Canton that they should be cut in response to the judiciary's poor performance, and that the savings should be devoted to improving cantonal health and social services. See "Necemo placati nerad sudija i tuzilaca", *Oslobodjenje*, 7 January 2002.

⁷⁵ As of 1 January 2002, the PTT cut off telephone service to all the courts and prosecutors' offices in the Una-Sana Canton, due to unpaid bills. The cantonal government has reportedly failed to provide the courts' budgetary allocations for 2001 and 2002. In response, the courts have suspended trials for non-custodial offences, conveniently postponing major corruption cases against high-ranking public officials. CJAU weekly report, 4-11 January 2002.

⁷⁶ The creation of the Mostar Central Zone municipal court and the unification of the two (Bosniak and Croat) higher courts in one cantonal court took place in 2000. ICG interview with an IJC officer, 11 October 2001.

⁷⁷ "Decision Enabling the Allocation of Court Cases to other Courts within the same Entity", 3 August 2001. Available at

What the protesters want, of course, is their own form of superior 'ethnic justice' whereby each nation tries its own with the sympathy and understanding that is its due.⁸⁰ This twisted logic, and the manipulation of public opinion that accompanies it, damages the rule of law, convincing people that justice in Bosnia is both contingent and far from blind.

The transfer of cases, therefore, is but a partial and ad hoc solution. It should not serve as the only defence against systemic incompetence or the exertion of undue and prejudicial influences in particular national milieus. Rather, it is to the reform of the courts and the institutionalisation of judicial independence that Bosnians and their foreign helpmates should look to guarantee that justice is done, and seen to be done.

2. Republika Srpska

The courts in Republika Srpska are organised differently than those of the Federation, but they exhibit the same weaknesses. Although the RS has fewer courts and a more centralised system, it is no more coherent than that of the Federation. For example, the lower courts in Trebinje and Nevesinje, which were formerly oriented towards Mostar's higher court, are now subordinate to Srpsko Sarajevo (i.e., Lukavica), which is a couple hundred kilometres away over very bad roads. The far-flung remoteness of such lower courts makes them vulnerable to neglect, impoverishment, and extra-legal political influences.

Like the Federation courts, those in the RS are financially dependent on the executive and permanently broke. Banja Luka's basic court receives less than half the funds it needs to be fully operational.⁸¹ RS courts are also heavily in debt – for their heat and light, lawyers, expert witnesses, and other services. By the end of 2001, the Banja Luka District Court (the largest in the entity) owed its creditors a sum twice as high as its annual funding from the government.⁸² Were the court a company, it would have gone bankrupt long ago. Indebtedness and under-funding not only exacerbate the courts' dependence on the executive, they also impede their capacity to assure due process and to

dispense credible justice if forensic scientists cannot be employed and defendants cannot be kept in custody.⁸³

Interminable cases and huge backlogs are also characteristic of the RS system. The backlog of 16,000 administrative cases in the Banja Luka basic courts prompted the IJC to demand that the judges should improve their 'work ethic' and professional performance.⁸⁴ Meanwhile, important and politically salient cases relating to official corruption, privatisation scandals, and tax and customs evasion accumulate in the queue.⁸⁵ The absence of trials or verdicts in such cases is then used by politicians as a stick with which to beat the judiciary, and as a cause for bickering between police and prosecutors about who is to blame for the perpetuation of a climate of criminal impunity in the RS.⁸⁶

3. What Is to be Done?

It is clear that the courts in both entities face the same systemic problems and require equivalent restructuring. Any new structure should have fewer and better-funded

⁸³ For more details on what courts cannot afford, see UNJSAP Thematic Report V – "Enforcement: Execution of Court Judgments in Civil Cases" (September 2000); Thematic Report VIII – "Prosecuting Corruption: A Study of the Weaknesses of the Criminal Justice System in BiH" (November 2000); and Thematic Report IX – "Political Influence: The Independence of the Judiciary in BiH" (November 2000).

⁸⁴ See "Sudije zatrpane predmetima", *Glas Srpski*, 6-7 October 2001.

⁸⁵ The privatisation of four timber companies (*Vrbas*, Banja Luka; *Inga*, Gradiska; *Kozara*, Kozarska Dubica; and *Lignosper*, Novi Grad) which had elicited interest on the part of a U.S. investor was stopped in February 2001. The recommencement of this privatisation depends on a court ruling in regard to alleged tender irregularities. In the meantime, the long court procedure has already meant mounting debts for the four companies and so diminished their attractiveness to any foreign investor. See "Sudsko natezanje oko privatizacije", *Oslobodjenje*, 5 January 2002; and ICG Balkans Report No. 115, *Bosnia's Precarious Economy: Still not Open for Business*, 7 August 2001.

⁸⁶ Press reports accusing the judiciary of serving local political interests include: "Pravosudje u sluzbi kriminala", *Reporter*, 18 April 2001; and "Glavobolja zbog dugih sporova", *Glas Srpski*, 12 January 2002. For an example of mutual accusations between the police and the judiciary concerning responsibility for unresolved cases, see "Prijava podignute, a sta radi pravosudje", *Nezavisne novine*, 19 October 2001. For an account of the failures of the RS police to investigate violence against non-Serb returnees, see ICG Balkan Report No.118, *The Wages of Sin: Confronting Bosnia's Republika Srpska*, 8 October 2001.

⁸⁰ For a sample of media reports on public debates of 'ethnic justice', see Emir Habul, "Nepovjerenje", *Oslobodjenje*, 29 October 2001, "Mogu li Bosnjaci suditi Hrvatima", *Dani*, 28 September 2001, and "Struka ispred kljuca", *Glas Srpski*, 9-10 February 2002.

⁸¹ See "Sudovi u dugovima", *Glas Srpski*, 3 January 2002.

⁸² At the end of 2001, Banja Luka District Court was KM 363,000 in debt. Its annual government-provided budget for the year was KM 186,000. *Ibid.*

courts, as well as provision for second instance courts to take charge immediately of major crime cases. The principal difference between the Federation and the RS is that court restructuring in the former will require constitutional amendments, whereas the RS will need only to amend the relevant legislation. No constitutional changes will be required to restructure prosecutors' offices in either entity.

What structural reform does require is political consensus. Although the cost-cutting argument seems to resonate well among the politicians ICG has interviewed, the constitutional rights of the Federation's ten cantons are more difficult to renegotiate. The cantons might be glad save money, but are loath to lose their 'own' judges. Cantonal political elites and their constituents will need to be convinced that their vital interests, including the right to a fair trial, will be protected by a reformed court structure.

This is unlikely to happen unless the Constitutional Court's decision on the equality of the "constituent peoples" is fully applied to the judicial system. Until judges of the three constituent peoples are adequately represented on every bench, the cantons will remain reluctant to give up their expensive but 'domesticated' judiciary. Judges and prosecutors interviewed by ICG, on the other hand, were all in favour of a leaner and more rational court structure, irrespective of the entity or canton from which they hailed.

B. CONSTITUTIONAL COURTS

There are three constitutional courts in Bosnia: one in each entity and one on the state level. These courts rule on disputes between the different levels and branches of government, evaluate the constitutionality of laws, and can be invoked to unblock the parliamentary process when questions of "vital interest" are at stake.⁸⁷ The constitutional courts also have appellate jurisdiction over constitutional issues arising from lower entity courts. In addition, they can consider cases referred to them by the highest executive bodies in the state and entities, as well as by parliamentarians, provided one-quarter of the deputies of the given chamber or legislature approve.

The BiH Constitutional Court is superior to its entity

⁸⁷ The constitutional concept of "vital interests" is analysed in ICG Balkans Report No. 108, *After Milosevic: A Practical Agenda for Lasting Balkans Peace*, 26 April 2001, pp. 156-7.

counterparts, and can take cases submitted by any court in the country. Unlike the constitutional courts of the former SFRJ, which could also consider initiatives by ordinary citizens, Bosnians do not now have that right, either in the entities or at the state level.⁸⁸ They can, however, appeal an existing case to the BiH Constitutional Court.⁸⁹ Once Bosnia becomes a full member of the Council of Europe, Bosnians will be able to initiate an action in the European Court of Human Rights after they have exhausted all domestic legal remedies.

All three courts have made decisions crucial to Bosnia's post-war development. In July 1997, the RS Constitutional Court ruled that President Biljana Plavsic's attempt to dissolve the National Assembly and call new elections was unconstitutional. This decision contradicted the provisions of a constitution expressly designed to give her predecessor, Radovan Karadzic, full powers to dissolve the National Assembly. What was more, it had to be produced by severely beating and hospitalising one judge, scaring another into staying away and browbeating a third to change his vote in a procedurally irregular second ballot of the five justices present.⁹⁰ Although she lost this battle with the Pale-based SDS establishment, it set the scene for the international community's intervention to give Plavsic (in November 1997) the elections she needed to wrest power – at least temporarily – from the 'four Ks' of the SDS: Radovan Karadzic, Momcilo Krajisnik, Dragan Kalinic and Gojko Klickovic.

In a more positive mode, the Federation Constitutional Court has ruled in cases establishing the primacy of the Federation over the cantons, including outlawing the display of the checkerboard flag and shield of the former Croat para-state of "Herceg-Bosna".⁹¹ Although

⁸⁸ In the RS, citizens can initiate a case with the entity's Constitutional Court, but only as members of a collective association, not as individuals. For details on the RS Constitutional Court, see www.ustavisud.org. In the Federation, only the highest executive bodies and parliamentarians can lodge a case with the Federation Constitutional Court. ICG interview with the President of the FBiH Constitutional Court, 23 January 2002. See also, FBiH constitution, Chapter IV, Section C, Article 10, www.ohr.int.

⁸⁹ Details on the BiH Constitutional Court's jurisdiction, procedures, membership, and legal basis can be accessed on www.ustavisud.ba.

⁹⁰ Ahmed Zilic and Saba Risaluddin, *Dayton vs. Attorneys* (Sarajevo, 1997), p. 44. Also, ICG interview with an international legal expert, 9 October 2001.

⁹¹ The domestic judges' votes were split. Equal numbers of Serbs, Croats and Bosniaks voted for and against, leaving it

this decision has not been fully implemented, the Federation Constitutional Court has had greater success in enforcing its will on Tuzla Canton. It was compelled both to drop the implicit claim in its former name (Tuzla-Podrinje) to territory now in the RS, and to replace its formerly 'Islamic' coat of arms.

Most importantly, the state Constitutional Court ruled in summer 2000 that the Bosniak, Croat and Serb "constituent peoples" must have equal constitutional rights on the entire territory of Bosnia & Herzegovina. The court, however, was divided on this issue. The Serb and Croat judges voted against, while the Bosniak and foreign judges voted in favour.⁹² The decision requires the entities to make fundamental amendments to their constitutions, stripping them of nationally exclusive and exclusionary provisions, establishing equivalent mechanisms for the defence of national rights, and enacting legislation providing for equitable representation of all three constituent nations (and "others") in their governments, parliaments and judiciary at all levels. The ruling effectively obliges the entities to reverse the legal legacy of ethnic cleansing and to do away with all inhibitions to the exercise of political, social and cultural rights by the constituent peoples.

If fully implemented, the "constituent peoples" ruling will alter both the nature of the entities and their relations with state-level bodies. In fact, it will help realise the integrative potential of Bosnia's Dayton constitution and provide an alternative – and happier – ending for the war. After more than a year of intermittent work behind closed doors by the entity parliaments' constitutional commissions – and considerable uncertainty over what, if anything, might be the result – the likely scope, content, bases and 'symmetry' of their respective draft amendments are now the principal focus of political debate. The High Representative has decreed that consultations in and between the entities and their political parties should be completed in March 2002.

Since it is unlikely that anything more than a partial

to the foreign judges to cast the deciding ballots. ICG interview with the President of the FBiH Constitutional Court, 23 January 2002.

⁹² Long after the decision, some judges continued publicly to express their opposition, despite the final and binding nature of the ruling. Snjezana Savic, serving President of the BiH Constitutional Court, continues to seek to sabotage the implementation of the court's decision and to lobby against renewing the mandates of her foreign colleagues. This might be thought to constitute grounds for dismissal. See "Za unitarizaciju BiH", *Glas Srpski*, 19-20 January 2002.

bridging of the gulf that separates the entities' positions on the nature and extent of the required changes will be forged in the course of the current inter-party talks, the High Representative will eventually have to impose a settlement. Whether the result is a damp squib or an epoch-making redefinition of the state, it remains the case that this second – and perhaps last – chance to consolidate Bosnia would not have arisen had it not been for the BiH Constitutional Court and the foreign judges who still sit on its bench.⁹³

1 Already, however, the three constitutional courts have embarked upon reforming themselves and, in the case of the entity courts, seeking to comply with the "constituent peoples" decision by broadening their composition to embrace all three nations and the "others".

The seven (Serb) judges of the RS Constitutional Court are nominated by the entity president and confirmed by the National Assembly. They serve for eight-year terms, without possibility of reappointment. Five judges were appointed in 1994 and two in 1998. The need to make five new appointments thus coincides conveniently with the "constituent peoples" case and the requirement to provide representation of non-Serbs. In line with its minimalist interpretation of the Constitutional Court decision, however, the RS proposes to add only one Bosniak and one Croat, thereby preserving an unassailable Serb majority on the bench.

The Federation Constitutional Court has been treading water for more than a year. The five-year terms of its nine judges expired in January 2001.⁹⁴ The court currently operates according to a 'technical' mandate that, according to some interpretations, permits its judges to receive and consider cases, but not to decide them.⁹⁵ This 'technical' mandate is a euphemism designed to obscure the limbo into which the court has been cast by the inability of both the previous and current governments to agree on a list of successors.

⁹³ The issues at stake and the positions of the parties involved will be analysed in a forthcoming ICG briefing paper.

⁹⁴ The court has six domestic judges, comprised of equal numbers of Bosniaks, Croats and Serbs (the latter effectively classed, however, as "others"), and three foreigners (one each from Belgium, Nigeria and Syria).

⁹⁵ The IJC regards the continuing service of judges whose terms of office have expired as sufficiently improper to disqualify them for any further judicial service. The time-expired judges naturally beg to differ. See "Omer Ibrahimagic nije podoban za sudiju", *Oslobodjenje*, 27 January 2002.

The need to take the “constituent peoples” decision into account has further complicated matters: the new appointees will have to satisfy both national and enhanced professional criteria. The category of “others” is particularly problematic, since it is not clear whether appointees in that category must themselves be “others” (i.e., members of national minorities) or merely represent these “others”. Since national affiliation (or identification) can be completely arbitrary in Bosnia, there can also be dissent over a given individual’s choice (or non-choice) of labels.⁹⁶ Another contentious and publicly debated issue concerns the suitability for appointment of otherwise highly qualified candidates who left Bosnia during the war and who are, as a consequence, being assailed as morally unfit to serve.⁹⁷ As with the implementation of the “constituent peoples” decision generally, there is still much to play for – and to argue over.

The first five-year mandate of the nine judges of the BiH Constitutional Court expires in May 2002. At present, responsibility for their appointment (or reappointment) is shared three ways. The President of the European Court of Human Rights appoints three foreign judges after consultation with the collective BiH Presidency. The foreign justices must not, however, come from Bosnia’s immediate neighbours. The Federation House of Representatives selects four judges and the RS National Assembly appoints two. (This example of proportional representation is reinforced by the interesting absence of any requirement that the entity-appointed judges should either be members of particular nations or even come from the entity selecting them.)⁹⁸

⁹⁶ The exact national composition of the court is still being debated. See “Treba li u izboru sudija Ustavnog suda FBiH postivati princip konstitutivnosti?”, *Dnevni avaz*, 17 January 2002.

⁹⁷ The wartime brain drain did not spare Bosnia’s pool of legal and judicial talent. The IJC recently introduced new rules for judicial appointments, including provision for the advertisement of posts both throughout BiH and in the neighbouring ex-Yugoslav republics where most potential returnees are likely to reside. This already successful effort at least to attract better candidates has been met, however, with howls of protest at the prospect of hiring ‘traitors’. Such populist agitation is also a transparent example of the determination of current elites to protect their perquisites. See “Zarko Radovanovic advokat u Beogradu, Mirjana Micic zivi u Ljubljani”, *Dnevni avaz*, 20 January 2002.

⁹⁸ The appointments of BiH Constitutional Court judges are renewable up to age 70. They can, of course, also resign or be removed for cause if a majority of their colleagues agrees.

The status of the three foreign judges is now under particular scrutiny. Both RS President Mirko Sarovic and the current (RS) president of the BiH Constitutional Court, Snjezana Savic, have argued that the time has come to ‘domesticate’ the court. Objections to the foreigners’ high salaries and to the affront their presence supposedly offers to Bosnia’s “sovereignty” have been to the fore, but other RS leaders and intellectuals have come clean in admitting that it is the foreign judges’ deciding vote in the “constituent peoples” case that really rankles.⁹⁹ Savic has gone so far as to say that the Constitutional Court decision has “undermined the BiH constitution”.¹⁰⁰ For Bosniaks, of course, this is an equally compelling reason for keeping them.

On the other hand, Bosnian judges sometimes gang up to defeat the foreigners. This happened when the Constitutional Court decided in June 2001 not to allow former Federation Premier Edhem Bicakcic’s appeal for a change of venue in the corruption case confronting him. The majority, composed of five Bosnian judges, ruled that the Sarajevo Canton Court, not the Federation Supreme Court, should try the case. The minority, consisting of two foreign and one Bosniak judge, argued in dissent that the appeal to the Constitutional Court was premature while the criminal investigation was still proceeding. The effect of the majority verdict was to consign Bicakcic to a court he expected to be less sympathetic, both as regards the charges themselves and his claim to ministerial immunity.¹⁰¹ The message,

⁹⁹ Sarovic has argued that the BiH parliament should amend the Constitutional Court law to provide for six justices from the Federation and three from the RS, expecting, no doubt, that the Serbs would often find common cause with the Croats. See OHR, “RS Press Review”, 30 January 2002, as well as “Bosnjaci koriste strance” and “Za unitarizaciju BiH”, *Glas Srpski*, 19-20 January 2002. For a comprehensive and revealing sample of RS expert opinion on the BiH Constitutional Court decision, see the series of interviews published in *Glas Srpski* on 29-30 December 2001.

¹⁰⁰ See the interview with Mrs Savic (“Poprijeko u promjene ustava”, *Glas Srpski*, 6 February 2002) and the commentary by Zija Dizdarevic on her and other Bosnian officials’ legal ignorance (“Snjezana, Ivica i ‘marica’”, *Oslobodjenje*, 10 February 2002).

¹⁰¹ The main objection of the minority was that the court could have no standing in the matter until the criminal process had run its course. All the Bosnian judges except Azra Omeragic opposed this argument. One of the three foreign judges was absent. See *BiH Official Gazette*, 27 August 2001. Bicakcic also failed in his bid to claim

however, was that foreign justices do more than tip the balance in favour of national equality. They can also play a crucial role in upholding European standards which, on this occasion, appear to have been compromised.

Even if the state Constitutional Court were to be 'domesticated' as early as this year, Justice Savic has argued, Bosnians will soon have recourse to the European Court of Human Rights and, therefore, need have nothing to fear. But getting a case accepted in Strasbourg will not be as easy as submitting a case to a domestic court that is trusted by Bosnians because it has foreign judges. Nor has Savic mentioned that it usually takes many years for the ECHR to agree to hear and then to rule on a case.

The essence of the argument against foreign judges is not more sovereignty for Bosnia, but less independence for the BiH Constitutional Court and fewer rights for Bosnians, at least in the short term. Although Strasbourg will indeed be the final arbiter on human rights issues in future, the advantages of having an accessible court with the credibility and integrity conferred by ECHR-appointed judges – and the clout to push constitutional reform forward – should not be sacrificed at this point in Bosnia's evolution.

C. HUMAN RIGHTS

1. Human Rights Chamber

The Human Rights Chamber (HRC) is defined in the BiH Constitution (Article XVI of Annex 6) as having final authority to decide on alleged or apparent violations of human rights incorporated in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.¹⁰² Since March 1996, it has received 8,000 complaints and dealt with 1,200 cases. It is currently processing 7,000 cases, most of which were lodged in 1998 and 1999 and employs 35 people, including fifteen lawyers (eight of whom are foreigners). Each lawyer handles from 150 to 300 cases. The HRC has nine international and six national judges (four from the Federation and two from the RS), who reach decisions on between three and six cases each month. The HRC is supposed to have an operating budget of KM 4 million per annum but

immunity from prosecution. See "Edhemu Bicakcicu odbijen zahtijev za imunitet", *Dnevni avaz*, 25 September 2001.

¹⁰² For the full account of the HRC guiding documents and its authorities, see Article II of Annex 6 of the Dayton Peace Agreement.

because the state continually fails to meet its obligation to pay one-third of the costs, it actually operates on 75 per cent of its ostensible budget.¹⁰³

The HRC has made a considerable contribution to raising human rights' standards in Bosnia, especially by addressing employment and property rights and questions related to due process and judicial equity.¹⁰⁴ Despite having no mechanisms by which to enforce its decisions – and no power to impose penalties for non-compliance¹⁰⁵ – the HRC both inspires trust and enjoys respect among the populace. It is generally regarded as possessing moral integrity and authority, and as serving the cause of justice, even when its decisions are disregarded or denounced.¹⁰⁶

The HRC ruled in December 2001, for example, that pre-war officers of the Yugoslav People's Army (JNA) were entitled to reclaim their army-owned flats in the Federation. This hugely unpopular decision was rejected by the Federation government, which has otherwise maintained an excellent record of compliance with HRC decisions.¹⁰⁷

¹⁰³ In 2000, the state paid KM 250,000 of its KM 400,000 assessment. In 2001, it paid only KM 100,000 of the KM 600,000 that was due. Foreign contributors to the HRC include the European Commission (35 per cent), the U.S. government (25 per cent) and other states (among them Canada, Switzerland and Norway) which provide about 10 per cent of the budget. ICG interview with an HRC official, 22 October 2001.

¹⁰⁴ In reviewing one war crimes case (*Damjanovic v. the Federation of BiH [CH/09/638]*), the HRC found that the trial court's reasoning in regard to the evidence presented was "grossly inadequate and devoid of the appearance of fairness". In numerous civil cases the HRC has ruled that the proceedings were not completed in a "reasonable time". HRC Annual Report for 2000, p. 9.

¹⁰⁵ In the absence of enforcement mechanisms of its own, the HRC relies on the High Representative to implement its decisions. Compliance with HRC decisions was originally a pre-condition for Bosnia's accession to the Council of Europe, but this requirement has now been made a post-accession condition. ICG interview with an HRC official, 22 October 2001.

¹⁰⁶ Government compliance records have improved, although more so in the Federation than in the RS. The latter tends to delay implementing decisions for years or does not pay the full compensation awarded by the HRC. HRC Annual Report for 2000, p. 5.

¹⁰⁷ The Federation government repudiated any idea of 'rewarding' JNA officers for their attack on a sovereign state and punishing its defenders by depriving them of their homes. See "Presude sokirale javnost!", *Dnevni avaz*, 8 December 2001; "Vlada ce odluciti hoce li postovati presude o vojnim stanovima", *Dnevni avaz*, 9 December 2001; and

The RS compliance record, on the other hand, is poor. Despite the application of pressure by OHR and such bodies as the Council of Europe and the European Commission,¹⁰⁸ the RS government fails regularly to implement HRC decisions in full, particularly in politically contentious cases involving missing persons or the issuance of permits for the rebuilding of mosques.¹⁰⁹

The HRC's ultimate fate will be to merge with the state Constitutional Court after Bosnia ratifies the European Convention on Human Rights and adopts a law to regulate the merger. To protect human rights in Bosnia, however, the Constitutional Court must be equipped – as well as empowered – to carry on the work of the HRC. Although it is often argued that there is already an overlap in competency between the HRC and the Constitutional Court, and that their amalgamation ought, therefore, to be accelerated, the accessibility of the HRC to ordinary citizens is an inestimable advantage at this point in Bosnia's legal development.¹¹⁰

On the other hand, once Bosnians gain access to European courts, they will benefit by having an additional layer of legal recourse for the defence of their human rights.¹¹¹

Meanwhile, the HRC serves as a useful check on the

“Trazice restrikciju zakljucaka ili odustanje od odluka”, *Dnevni avaz*, 11 December 2001.

¹⁰⁸ Both the CoE and the EC have included respect for human rights and full implementation of HRC decisions among their requirements of BiH. The former has set these out in its post-accession demands, while the EC Road Map (a list of eighteen conditions BiH must fulfil before it can be considered for a Stabilisation and Association Agreement) also covers HRC issues.

¹⁰⁹ Nevertheless, and after long delays, the RS finally paid a compensation award of KM 65,000 to the presumed widow of Avdo Palic, the BiH Army officer who commanded the Zepa “safe area” in 1995. He disappeared during negotiations with the Bosnian Serb Army on the surrender of the enclave after the fall of Srebrenica. See the Human Rights Chamber Annual Report for 2000, and “Esmi Palic za nestanak supruga vlasti RS isplatilo 65.000 maraka”, *Dnevni avaz*, 9 January 2001.

¹¹⁰ The HRC and the Constitutional Court have an agreement not to process cases that have already been filed with the other institution. HRC Annual Report for 2000, p. 6.

¹¹¹ As a member of the Council of Europe, Bosnia will gain access to the European Court of Justice and the European Court of Human Rights. The CoE Parliamentary Assembly voted to admit Bosnia on 22 January 2002. This decision is expected to be endorsed by the ministerial council in May. The HRC-Constitutional Court merger is expected in 2004, the HRC's mandate having been extended in late 2000 to the end of 2003. ICG interview with an HRC official, 22 October 2001.

judicial system and its propensity to malfunction. As such, it should be fully utilised while it exists.¹¹² Its immediate presence ‘on site’, and the fact that it has lower standards of case admissibility than the European Court of Human Rights, give it a continuing role. For example, the HRC admits cases arising from judicial processes that are still in train. The Strasbourg court, however, will only take up a case after the plaintiff has exhausted all domestic remedies – a process that may extend over many years.¹¹³

The HRC has recently issued two decisions emblematic of the state of the rule of law in Bosnia. The first confirmed that the Federation House of Representatives had discriminated against eight judges of the Federation Supreme Court when it sought to dismiss them on grounds of age.

The second decision concerned the rights of six naturalised Bosnian citizens of Algerian origin who were detained in October 2001 on suspicion of plotting an attack on the U.S. Embassy in Sarajevo. Although carried out by Federation police, their arrests had been ordered by the U.S. commander of SFOR. The Americans refused subsequently, however, to provide the Bosnian authorities with any evidence against the six such as might have justified their indictment and trial. The Federation Supreme Court therefore ruled on 17 January 2002 that the six (who had in the meantime been stripped of their BiH citizenship in a questionable procedure) must be released. Since Algeria apparently declined to have them, the Council of Ministers acceded to a U.S. offer (or demand) to take the men off its hands, notwithstanding a last-minute HRC ruling prohibiting the deportation of at least some of the detainees. They were thus handed over to the U.S. military in the early morning hours of 18 January and

¹¹² One little appreciated and inadequately utilised feature of HRC decisions is their broadly educational potential. Not only might they serve as a basis for considering legislative changes, but they should also inform human rights rulings by judges generally. Unfortunately, funding constraints mean that HRC decisions are not widely distributed. Nor have HRC judges been offered as many public or university platforms as would be desirable. Given the importance of HRC case law, efforts should be made to disseminate their rulings as widely as possible.

¹¹³ For example, in the period 1999-2001, Macedonia submitted 123 cases to the ECHR, of which 66 were registered, 38 dismissed, twenty returned to the government for observations, and only 14 declared admissible. The ECHR issued only one decision in a case from Macedonia in 2001. European Court of Human Rights Annual Surveys, 1999-2001, www.echr.coe.int

promptly spirited out of the country. It was subsequently confirmed that they had been sent to Camp X-Ray on Cuba.¹¹⁴

According to the majority faction of Bosnia's Helsinki Committee for Human Rights,¹¹⁵ this series of decisions and actions represented a grave violation of the BiH constitution by the Federation government and the Council of Ministers.¹¹⁶ Other critics argued (albeit briefly, in the event) that defiance of the HRC ruling might jeopardise Bosnia's acceptance into the Council of Europe.¹¹⁷ Still others bemoaned the fact that the Americans – heretofore staunch supporters of rule of law projects in Bosnia – should have inflicted such a blow on the legal order they had done so much to build up in recent years.

The Bosnian authorities were confronted in this case with a 'no win situation'. Forced to choose between *raison d'état* and the rule of law, they chose the former.

In the process, they split the Bosniak intellectual and media establishments down the middle. Bosnia may have had, in fact, no choice but to side with the U.S. in the "war on terrorism", but neither should anyone imagine that human rights and the rule of law emerged

unscathed.¹¹⁸

2. Ombudsmen

There are three ombudsman offices in Bosnia: one for each entity and one state-level institution. The Federation and state ombudsmen were provided for in their respective constitutions. The Federation ombudsman has been operating since January 1995, and the state ombudsman since early 1996, serving a key role in investigating and exposing faulty or discriminatory decisions by the public administration, governments and the courts. The RS National Assembly only enacted legislation establishing an ombudsman's office in 2000, thanks to arm twisting by OSCE.¹¹⁹ Given its tardy debut, the RS ombudsman has received less foreign funding and has had much less time to make a mark than its state and Federation counterparts. On the other hand, since the Federation ombudsman's office established its routines and approach during and immediately after the war, it has had some difficulty in adapting to a changed environment, and particularly one characterised by a thoroughly bureaucratised public administration. The state ombudsman likewise confronts the need to adapt procedures to contemporary realities.

The current state-level ombudsman, Frank Orton of Sweden, aims to merge the entity ombudsmen into his office before the expiry of his mandate at the end of 2003, so making the state office a truly Bosnia-wide institution.¹²⁰ Although the wisdom of this move is being debated, there seems to be no question of centralising operations to the extent that Bosnians would lose the access they currently enjoy to sub-offices across the country.¹²¹ Besides assisting individuals to

¹¹⁴ For the reasoning behind the decision of BiH Council of Ministers in the case of the "Algerian Six", see the interview with Zlatko Lagumdžija, "Zasto smo morali isporuciti alzirsku grupu", *Dani*, 8 February 2002. For a vigorous dissection of the legality of the handover, see "Besplatna lekcija Kresimiru Zubaku i Slobodnoj Bosni", *Dani*, 8 February 2002.

¹¹⁵ For an account of the ructions inside the Helsinki Committee that followed the denunciation of the handovers by its president, Srdjan Dizdarevic, see the interview with Dizdarevic ("Nema prodaje ni obraza ni guzice") in *Dani*, 25 January 2002.

¹¹⁶ See "Podnijet cemo tuzbu protiv Federalnog MUP-a", *Oslobodjenje*, 19 January 2002, and "Alzirska grupa deportovana je zbog ucjena i pritisaka SAD", *Dnevni avaz*, 20 January 2002.

¹¹⁷ See "Deportacija 'Alzirske grupe' usporit ce prijem BiH u Vijece Evrope", *Dnevni avaz*, 20 January 2002. In fact, compliance with HRC decisions is no longer a pre-condition for Bosnian accession to the CoE, but a post-accession requirement. Among other requirements are ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 4, 6, 7 and 12. ICG interview with an HRC official, 22 October 2001, and List of Commitments to be fulfilled by Bosnia & Herzegovina after its Accession to the Council of Europe, Document of the Parliamentary Assembly of the Council of Europe. The Parliamentary Assembly duly voted to admit BiH on 22 January.

¹¹⁸ For the reaction of other parties, including the U.S. State Department, see "Veliki poen za vladu u Sarajevu", *Oslobodjenje*, 21 January 2002, and "Bosnia Hands Over Algerian Suspects" (18 January 2002) and "Bosnia Seeks Clues on Crime Suspects" (20 January 2002), *The Washington Post*. Not only did the Helsinki Committee split on the issue, but so did the principal Sarajevo dailies and weeklies. *Slobodna Bosna* and *Dnevni avaz* supported the hand overs, while *Dani* and *Oslobodjenje* opposed them.

¹¹⁹ Since the role of ombudsman is not enshrined in the RS constitution, it could be abolished relatively easily once foreign arm-twisters and busybodies are gone.

¹²⁰ One of Bosnia's post-accession commitments to the Council of Europe will be to move towards the establishment of a unified Human Rights Ombudsman's Office at state level.

¹²¹ See "Potrebna reforma i ujedinjavanje institucija", *Dnevni avaz*, 29 January 2002, and 25 January 2002 press release of

find their way through bureaucratic labyrinths and to win redress in cases of maladministration, ombudsmen can also serve as watchdogs on the executive and the judiciary, reporting publicly on their performance in making disinterested decisions and upholding the rule of law. Ideally, in fact, the ombudsmen's findings should inform and stimulate improvements in administration, legislation and the courts. But this has yet to happen in Bosnia.

On the other hand, the ombudsmen have had a positive impact over the past five years,¹²² in large part because of financial resources from foreign donors and political support from OSCE.¹²³ This situation is set to change as foreign funding ebbs away in 2002, and all three ombudsmen's offices find themselves increasingly dependent on domestic governments and parliaments for their funding. Since these governments have often failed to pay (or to pay regularly) their previously assigned shares of the ombudsmen's costs, the work of the ombudsmen may now be in jeopardy.¹²⁴

The terms of the three RS ombudsmen expired on 1 May 2001, while those of their three counterparts in the Federation expired in September 2001.¹²⁵ This means that the impending financial grip of the executive will be compounded by the opportunity now to appoint

the State Ombudsman which says that the merger:

would for instance avoid existing risks for duplication, contradiction and, not least, public confusion. Such a merger of the present state institution and the two entity institutions into one institution would also mean closer and thus better contact between all the country's currently fifteen ombudsman field offices. And it would not only be cheaper but also more efficient, without any remarkable political implications, given that the ombudsman role is not to rule but to protect ordinary people according to established laws and to promote the Rule of Law and good governance. Available at www.ohro.ba.

¹²² Since 1996, the Federation Ombudsman has dealt with over 370,000 complaints and issued five annual reports and many special reports targeting specific issues or problem regions. Available at www.bihfedomb.org

¹²³ Donations from the Canadian (CIDA), Norwegian and U.S. governments, as well as from the EU and OSCE, have covered most of the state and the entity ombudsmen's annual budgets. The state failed to make its contribution last year, whereas the RS government paid its full share. ICG interviews with the three ombudsmen, September and October 2001.

¹²⁴ With the new fiscal year, the funding problems have already started, requiring intervention by the international community. See "OSCE demanding an adequate funding for Ombudsmen", OSCE press release, 31 January 2002.

¹²⁵ RS legislation also provides for three entity ombudsmen.

potentially tame successors to individuals who owed their original appointments not to the Federation, but to OSCE. The combination of a financial squeeze, the power of patronage and recent public attacks on the high costs and supposedly scant achievements of the Federation ombudsmen seems to be calculated to impair their ability to expose failures by the administrative and judicial apparatuses.

For example, Seada Paravlic, a prominent lawyer and SDA representative in the Federation House of Representatives (who until recently also represented the Alliance government before the HRC),¹²⁶ has criticised the Federation ombudsmen, arguing that their salaries, which now match those of judges, should be cut by two-thirds, since their work is not nearly so important as that of the judiciary.¹²⁷ She also observed that, unlike judges, whose performance can be measured by the number of cases they decide, the ombudsmen's supposed success in dealing with 370,000 complaints since 1996 was nothing of the sort, since these cases had not been resolved. As a counsel to the Federation, she ought to have known that an ombudsman has no authority to 'solve' cases. Rather, the ombudsman's job is to expose and criticise those who fail to do so in good time and in accordance with the law.¹²⁸

The Federation ombudsmen, for their part, have assessed the judiciary and found it severely wanting in terms of the independence it displays and the trust it inspires among citizens.¹²⁹ Their damning assessment is based on analyses of thousands of cases. Their

¹²⁶ Mrs. Paravlic served as the Federation government's agent before the HRC until 14 February 2002. See "Seada Paravlic razriješena dužnosti", *Oslobodjenje*, 15 February 2002.

¹²⁷ See "Prosijecna placa KM 3300: Koliko zaraduju Federalni ombudsmeni?", *Oslobodjenje*, 22 January 2002.

¹²⁸ The ombudsmen struck back, requesting that Palavric be removed from the Federation commission for human rights (which is involved in the appointment of ombudsmen) and claiming that she is biased against them and opposes their reappointment. Mrs. Palavric denied either that she was taking any part in the appointments' process or that she wanted an ombudsman's post for herself. See "Federalni ombudsmeni traže smjenu Seade Paravlic", *Dnevni avaz*, 7 February 2002.

¹²⁹ See the Annual Report of the Federation Ombudsman, as well as special reports such as "Special report on payment of salaries to the judges of the Cantonal Court in Bihac", Sarajevo, 11 January 2001, www.bihfedomb.org; and an interview with Esad Muhubic, one of the three Federation ombudsmen. "Sudska vlast u F BiH nije nezavisna", *Oslobodjenje*, 11 October 2001.

knowledge (and that of their colleagues in the RS and at state level) puts them in a unique position to advise on judicial reform. Although all these ombudsmen have assisted the IJC to some extent, their full potential to contribute to judicial and legal reform has yet to be realised.

Still, the ombudsmen's interventions, plucking individual cases out of administrative and judicial error or neglect, make a tangible difference to those involved, especially in the realm of property law implementation.¹³⁰ The ombudsmen's recommendations are usually taken into account when they relate to specific cases. But doing good in this manner may create a pattern that effectively undermines the larger purpose of their work. Instead of acting as a spur to systemic changes that would benefit everyone, the ombudsmen provide a safety valve for the persistent, the obstreperous or the truly victimised, leaving generally shoddy practices unaltered. In fact, they may be abetting the emergence of a parallel or shadow system of redress that exacerbates the irresponsibility and unaccountability of those who remain in charge.

This could be avoided by striking a balance between considering individual cases – which is in any case necessary to discover where in the system the problems lie – and preparing reports that governments and parliaments would be obliged to heed. To achieve such a balance, the power of the ombudsmen would need to be enhanced, not reduced. Moreover, the experience accumulated in probing and battling the administrative and judicial systems should be fully utilised by involving the ombudsmen in the reform of the judiciary and civil service. If, however, the ombudsmen are consigned to the financial mercy and decision-making caprice of the executive, they will have no useful future.

In the RS they will be swept aside or abolished. In the Federation they will likely be co-opted into the ruling establishment or maintained as a baroque decoration on the façade of the rule of law, useful only for the edification and amusement of foreign guests.

¹³⁰ In first eight months after starting to accept clients' cases in November 2000, the RS ombudsmen received over 10,000 complaints, most of which were made in person. Seventy per cent of the complaints concerned property issues – administration slowness or silence – while 10 per cent related to the work of the courts in dealing with property or labour disputes that had been going on for two or three years. The common factor in these complaints was that court hearings were either not being scheduled at all, or that they were only taking place after lengthy delays. ICG interview with RS Ombudsman, 10 September 2001.

D. THE STATE COURT

On 12 November 2000, the High Representative decided that Bosnia should have a new court to rule on issues related to the competency of the state and to serve as a link connecting the country's otherwise fragmented legal and judicial space.¹³¹ RS parliamentarians disputed the constitutionality of this innovation. After considerable deliberation, the BiH Constitutional Court ruled in September 2001 that the High Representative was within his powers in creating the court. The state court is intended to help the Bosnian state assert itself domestically and internationally. It may soon be authorised to take on one of the most contentious of tasks – the trial at home of several hundred or more war crimes cases.

The state court is to have civil and criminal jurisdiction in matters of state and appellate jurisdiction over election-related issues, as well as in requests for “extraordinary legal remedies” submitted by the entities and Brcko District. The court will have fifteen judges working in administrative, criminal, and appellate divisions. At the time of writing, various commissions were sifting through applications for judicial positions. However, the would-be court still lacks premises, secure funding and laws to apply because OHR has been slow in arranging, facilitating or completing these prerequisites. Although the state court is meant to start work in late spring 2002 – just in time to receive election appeals – it may not make it.¹³²

Establishing a court from scratch is no small feat.¹³³

¹³¹ The High Representative imposed the Law on the State Court of BiH on the basis of recommendations and a draft law proposed by the Council of Europe's Venice Commission on 16 June 2000. The Commission had opined that BiH required judicial remedies to be available at the state level which were consonant with the guarantees enshrined in the European Convention on Human Rights. The Convention, of course, forms a part of the BiH constitution. Decision imposing the Law on the State Court of BiH, 12 November 2000, www.ohr.int, and presentation by Richard Barrett, legal adviser in OHR Legal Department, OHR Legal Seminar, Vogosca, 10 October 2001.

¹³² Elections to be held according to the new electoral law are scheduled for 5 October 2002, which means that the state court must be operational in time to deal with the appeals that can be expected as parties and candidates face registration difficulties and voters discover they have been deprived of the franchise because they inhabit somebody else's property.

¹³³ For a commentary on the slow progress towards establishing the state court from the perspective of 2000, see

The state criminal law and other state-level laws will have to define the offences that state officials might commit against the institutions they are meant to serve and the violations of state acts (such as treaties and other international obligations) that might occur. The most important of the latter currently relate to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the surrender of indictees to The Hague. No less significant roles for the state court will be to facilitate and resolve eventual disputes arising from legal cooperation between the entities, as well as to oversee international legal cooperation. The court may be empowered in other areas as the corpus of state law increases, but its scope for expansion is limited by the fairly restrictive provisions of the Dayton constitution.

As a new-born institution, the state court can be expected to spawn associate bodies such as a state attorney, whose role will be to advise and represent the BiH state. A state attorney will be needed to represent the state before the court and the Council of Ministers before the Constitutional Court, as well as to represent BiH in international courts, tribunals, and arbitration panels.¹³⁴ For example, Bosnia was disadvantaged in recent disputes among the successor republics over the carve-up of the former SFRJ's assets by not having an attorney general either to represent it adequately or to negotiate on its behalf. Given its intended criminal jurisdiction, the state court will also need a state prosecutor.¹³⁵ A law providing for one has been drafted and adopted by the Council of Ministers, but awaits consideration by parliament.¹³⁶

"Olako obecana brzina", *Reporter*, 25 October 2000.

¹³⁴ A law to establish a state attorney was drafted (on the Italian model) as long ago as 1999 as part of a PHARE-funded project. Presentation by Richard Barrett, legal adviser in OHR Legal Department, OHR Legal Seminar, Vogosca, 10 October 2001.

¹³⁵ The international community has recently begun to debate whether to go all the way and assign exclusive jurisdiction over organised crime, money laundering, corruption, and fraud to a state level court. Such a court would, it seems, employ foreign as well as domestic judges and prosecutors. If implemented, this innovative idea would require significant financial support. ICG interview with a top international official, 12 March 2002.

¹³⁶ ICG interview with the state Ministry for Civil Affairs and Communications, 25 January 2002.

IV. CRIMINAL LAW REFORM

The criminal law system in Bosnia & Herzegovina stands on the verge of a major overhaul. After four years of drafting a variety of criminal and criminal procedure codes for each entity, OHR has finally got to the stage of launching uniform criminal legislation for the entire country. The local political establishments naturally preferred the piecemeal and incremental approach to criminal law reform adopted by OHR in 1997.¹³⁷ That meant they could stifle any real progress towards implementing a common system. The result of four wasted years is that the Federation still has only minimally reformed criminal legislation and procedures, whereas the RS has managed to limit reforms to the criminal code alone. Its criminal procedures remain those of the old SFRJ, which empower the police rather than the judiciary.

In autumn 2000, OHR abandoned its piecemeal strategy of reforming one entity at a time. Since then it has focused on creating state level criminal and criminal procedure codes to serve as standards according to which the entities' and Brcko District's criminal legislation will be fully harmonised. By autumn 2001, OHR drafts,¹³⁸ largely modelled on German and Swedish legislation, were presented to the entity ministries of justice and to the state Ministry of Civil Affairs and Communications for consideration and discussion. OHR hopes the new laws will be passed in spring 2002.

A. THE SCOPE OF CHANGE

The shortcomings of both the current criminal legislation and its implementation have been much analysed.¹³⁹ One of their main inadequacies is that they

¹³⁷ OHR went through several different drafts of the criminal procedure codes. These were sent back and forth among OHR, the entities' justice ministries, various working groups, and the Council of Europe (for expert advice). Inadequate coordination by OHR led, at one point, to the literal loss of one draft for several months in spring 2000. It turned out that the RS Ministry of Justice was sitting on it. When the draft was finally located, new experts had been seconded to OHR who proceeded to change its criminal law reform policy. ICG interview with a former OHR official, 1 January 2002.

¹³⁸ OHR's Anti-Fraud Department led the drafting effort.

¹³⁹ Critics have included UNJSAP, the OHR Anti-Fraud Department and ICG. See ICG Balkans Report No. 85, *Denied Justice: Individuals Lost in a Legal Maze*, 23

afford too many opportunities for delays in judicial proceedings.¹⁴⁰ Additional problems are caused by the absence of proper definitions of criminal acts such as corruption, money laundering and other economic crimes and, consequently, of effective sanctions against them, such as the confiscation of illegal profits. The lack of legal tools – exacerbated by a general unwillingness to tackle contentious cases on the part of inadequately trained policemen and judges – means that there are few, if any, convictions for such crimes.¹⁴¹ The new criminal legislation should help rectify matters by providing modern legal tools and more efficient judicial procedures. The qualification of serious crimes will be in accordance with European legal standards set by the Council of Europe’s Criminal Law Convention on Corruption, the Convention on Laundering, Search,

February 2000, and UNJSAP reports: “Interim Report on Delays and Detentions” (February 2000); “Amnesty and Return – A Report on Implementation of Amnesty Legislation in the RS” (June 2000); Thematic Report V – “Enforcement: Execution of Court Judgments in Civil Cases” (September 2000); Thematic Report VI – “Expert Evidence: the Use and Misuse of Court Expert” (November 2000); and Thematic Report VIII – “Prosecuting Corruption: A Study of the Weaknesses of the Criminal Justice System in BiH” (November 2000).

¹⁴⁰ A majority of the judges, prosecutors and lawyers interviewed by ICG pointed to this as the most debilitating aspect of judicial processes in Bosnia. There are many ways to sabotage a case without doing anything illegal. These stratagems include: sending an important criminal case to a minor offence court; ensuring the police submit a flawed crime report, so causing the prosecutor to reject the case; invoking the wrong article of the criminal code, usually by underestimating the magnitude of the alleged offence; failing to locate either witnesses or the accused during the investigation or trial; making sure the investigative judge or prosecutor asks witnesses few or inadequate questions during the investigation and trial; having recourse to a “court expert” who takes months to finish his or her report; getting the trial judge to delay scheduling the main trial; encouraging the trial judge to postpone the case for more than one month, which usually creates a mistrial; and lodging appeals that result in a retrial. ICG interview with a court monitor, 12 December 2001.

¹⁴¹ Despite the fact that many corruption cases have been launched in the Federation during the past two years – a trend just beginning in the RS – none of these cases has reached a final verdict. The lack of verdicts in proceedings that have been going on for years is a frequent subject of polemics between the government and judiciary. On the other hand, at a recent Federation conference on fighting corruption the OHR representative expressed satisfaction over the leadership shown by the Federation prosecutor in anti-corruption investigations, mostly concerning mismanagement or worse by the previous government. “OHR Hosts the Second Federation Anti-Corruption Conference”, OHR Press Release, 29 January 2002.

Seizure and Confiscation of Proceeds from Crime, and the Convention on Organised Crime.¹⁴²

Other big changes are envisaged. Although not yet finalised, the role of the investigative judge is in process of being abolished, putting prosecutors in charge of investigations, as has been done in Brcko. The proposed legislation also distinguishes clearly between the roles of the prosecutor and the judge. In the pre-criminal process, the prosecutor will be in charge, with the judge retaining only the authority to decide on human rights issues relating to the use of covert surveillance, searches of premises and other investigative methods.

There is still some resistance, however, to giving prosecutors the lead in investigations, despite the fact that this change has been widely canvassed since 1998.¹⁴³ An alternative proposed by the state-level working group is that prosecutors should run investigations of crimes punishable by up to five years’ imprisonment, but that more serious crimes should remain within the purview of investigative judges.¹⁴⁴ The main argument for the latter suggestion is that prosecutors, unlike investigative judges, are inadequately trained and experienced in the handling of complex cases. The relevance of this argument is limited, however, by the fact that the new laws defining – and the new procedures for dealing with – complex

¹⁴² Bosnia has signed all but the Convention on Laundering, Search, Seizure, and Confiscation of Proceeds from Crime, the ratification of which is one of the Council of Europe’s many post-accession requirements.

¹⁴³ Opponents of putting prosecutors in charge of investigations argue that such a change is too radical and an alien import from the common law tradition. Radical change, however, is surely necessary. In any case, other continental countries employ prosecutors to lead investigations. In fact, the only two Western European countries that still have investigative judges are France and Austria.

¹⁴⁴ Apparently, the proportion of cases punishable by sentences of up to five years represents 80 per cent of all criminal cases, which would give prosecutors plenty to do. ICG interview with state-level official. On the other hand, this option is already available in both the current Federation and RS criminal procedure codes, thereby providing for essentially the same result as what is proposed by the state-level working group. The FBiH code (Article 152(6)) stipulates that the prosecutor can directly indict, without an investigative judge’s inquiry, if the “information gathered” supports a presumption of guilt and if the offence is punishable by less than five years’ imprisonment. There is a similar provision in RS law. If this option prevails, the five-year cap would keep prosecutors from investigating most cases of corruption and organised crime. ICG interview with an international legal expert, 11 March 2002.

economic crimes, organised crime and corruption will in any case require extensive retraining of the judiciary. And, if the institution of the investigative judge is indeed abolished, then the jurists who formerly performed this function will be able to apply for positions as prosecutors, since the new system will surely need more of them. This would not only ensure that their investigative skills are put to good use, but would also make for a smoother transition.

One of the more significant innovations is provision for the seizure and confiscation of the proceeds from crime.

Individuals suspected of legitimising illegal profits (as well as their family members) will have to prove that their investments, bank deposits or newly acquired real estate come from legally made profits. This amounts to an almost revolutionary change since, as matters stand, ill-gotten gains are never confiscated because the law is so weak. For example, the loophole that permits individuals suspected of benefiting from a non-repayable bank 'loan' to avoid confiscation of their resulting acquisitions by registering members of their family as the owners will be closed.¹⁴⁵ Unfortunately, the law on the seizure and confiscation of proceeds from crime will not apply retrospectively. This means that wartime and post-war profiteers, empire-builders and gangsters will be able to keep their loot.¹⁴⁶

The new draft legislation incorporates several provisions first implemented in Brcko. In particular, it requires trials to start within 120 days of an indictment, as well as obliging an appellate court to make a final decision on an appeal or to order a re-investigation of

the evidence if this is inadequate for the purposes of reaching a final verdict. On the other hand, Brcko's experiment with plea bargaining, which provides for shorter sentences and proceedings in cases where the accused admits his guilt and/or testifies for the prosecution, has yet to be fully considered, let alone adopted. Domestic legal experts object strongly to this reform, mainly because they regard it as alien to continental legal tradition.

The role of expert witnesses is also slated to change. Current practice overemphasises their testimony and is open to abuse. In future, parties to a case will be able to appoint their own experts, while the court may itself engage them.¹⁴⁷ In addition, the new legislation will reform trial procedures. Prosecutors, for example, will take a more active part, commensurate with their enhanced pre-trial roles. Trials will also be fully recorded, obviating the risk that judges' dictated summaries of testimony and legal arguments to court stenographers (which are all that is recorded at present) will deviate from what has actually been said and facilitate deliberate or accidental misinterpretations of the record.

Another major reform is in the area of witness protection. Although set to be treated in separate legislation, it is nonetheless a vital part of criminal law reform. Protection of witnesses is essential to prosecuting and punishing serious crimes, including war crimes. Only the Federation now has a law to protect witnesses' identities. By permitting the identity of a witness to be kept secret, the Federation law avoids the need for elaborate and expensive witness protection schemes involving the relocation and renaming of witnesses and their families. This solution accords well with reality, since Bosnia is a small and poor country in which people cannot move around either anonymously or in full security.¹⁴⁸

Although still not finalised, the current OHR reform

¹⁴⁵ The fact that persons convicted of illegally acquiring millions of marks face sentences of less than five years' imprisonment *and* get to retain their spoils excites public outrage and makes a mockery of the law. ICG interviews with several Sarajevo taxi drivers, December 2001. For example, Sarajevo businessman Alemko Nuhanovic has been accused of defrauding SAB Banka, which went bust in 1998, of some KM 7 million. Although his trial is still going on, Nuhanovic will surely avoid confiscation because he apparently owns very little property in his own name. For more details on bank fraud and the weakness of confiscation laws, see ICG Balkans Report No. 115, *Bosnia's Precarious Economy: Still not Open for Business*, 7 August 2001.

¹⁴⁶ Although the new provision may be applied to crimes committed before the new laws come into force, whether or not that happens will depend on the accused. For it is a fundamental legal principle that defendants can choose to be tried under the more favourable law in cases where two are applicable to the alleged crime. This will disallow swift action against those who invest their illegal profits before the new law comes into force. ICG interview with the Federation Ministry of Justice, 1 November 2001.

¹⁴⁷ For details on the misuse of court experts in the current system, see UNJSAP Thematic Report VI – "Expert Evidence: the Use and Misuse of Court Expert", November 2000.

¹⁴⁸ The Federation law on witness identity protection allows witnesses to testify before a panel of Supreme Court justices. The resulting testimony is then presented to the trial court without the witness having to be present. Defence lawyers can cross-examine the witness, but through the panel of Supreme Court judges. Law on Special Witness Identity Protection in Criminal Proceedings in the Federation of Bosnia & Herzegovina, 30 July 1999 (*Official Gazette FBiH*, No. 33/99).

proposal envisages the extension of witness protection – not the protection of witnesses’ identities – across Bosnia. This means that new homes, new jobs and new identities will have to be found for witnesses at risk, as well as agreements with and participation by neighbouring states in the program.¹⁴⁹ This seems overly ambitious, assuming resources that Bosnia does not have and presuming levels of inter-entity and inter-state cooperation that have yet to be attained. Moreover, it is posited on the establishment of a state-level law enforcement agency to run the scheme before war crimes trials make that essential in 2004.

Separate legislation is also planned to equip Bosnia to deal with its endemic problem of money laundering in a manner consonant with prevailing international standards.¹⁵⁰ The Federation Finance Police will be transformed into a Financial Intelligence Unit (FIU) within the Ministry of Justice and charged with following the trail of suspicious transactions. The solution will be different in the RS, where the finance police have already been abolished. Although the economic crime units in the police force might be authorised to perform the same functions as are envisaged for the Federation’s FIU, they will require considerable upgrading (and higher salaries) if they are to do so.¹⁵¹ The British and German governments have offered to provide six-month training courses for investigators.

Doing battle with money laundering is the crux of the war against organised and economic crime. But it requires not only a developed system of sanctions (such as provision for the seizure and confiscation of proceeds), but also highly sophisticated prevention and monitoring systems based on cooperation among banks, exchange offices, the tax and customs administrations, land and business registries, and the police. These and other agencies must be able to work together across internal and external frontiers.

¹⁴⁹ The idea of involving other states is based on the existing collaboration between Germany and Austria, which have an agreement on a joint witness protection program. ICG interview with a foreign legal expert, 27 November 2001.

¹⁵⁰ For details on how Bosnia currently fails to deal with money laundering, see ICG Balkans Report No. 115, *Bosnia’s Precarious Economy: Still not Open for Business*, 7 August 2001.

¹⁵¹ Not only are Federation police and customs officers better and more regularly paid than their RS counterparts, but the creation of the State Border Service (which pays even higher and more regular salaries) has led to large scale defections of the best RS policemen. ICG interview with senior OHR official, 27 November 2001.

B. INTERNATIONAL AND INTER-ENTITY LEGAL LIAISON

The investigation and prosecution of money laundering and other economic crimes require an inter-entity agreement on judicial cooperation, regular exchanges of information and joint investigations – none of which either exists or is practised at present. The OHR-led initiators of criminal law reform have pondered making the fight against money laundering a state responsibility, but have held back for fear of a constitutional challenge by the RS, given that a state-level law enforcement agency and court would also be necessary.

Yet because money laundering and organised crime are by definition trans-national businesses, it can be expected that other countries will only want to sign agreements, exchange confidential data and collaborate on prevention and enforcement with the state, and not with its entities or cantons. International realities will, therefore, push Bosnia towards creating state-level enforcement mechanisms.¹⁵² Should it continue to show itself incompetent to fight organised crime, trafficking and terrorism, other countries will both maintain their quarantine measures (including strict visa regimes) and treat Bosnia’s sovereignty and legal order with contempt. Local decision-makers are unlikely in the long run to be willing or able to resist this sort of pressure.

OHR has been pressing for legal cooperation between the entities since 1998, when the two justice ministries signed a Memorandum of Understanding that was intended to facilitate judicial and law enforcement links.

¹⁵² On 28 January 2002, the Italian and BiH governments signed an agreement to cooperate in the prevention of organised and cross-border crime. This agreement will enable Italian investigators to work alongside Bosnian law enforcement agencies such as the State Border Service. An Anglo-Danish “Impact” team, tasked to combat illegal migration, has been doing so since mid 2001. See “BiH i Italija zajedno protiv kriminala”, *Oslobodjenje*, 29 January 2002. Collaboration with neighbouring countries is proving more problematic. With the help of OHR’s Anti Fraud Department, Croatian and BiH entity prosecutors came close to signing an agreement on mutual legal assistance that would have allowed prosecutors to speed up their exchanges of information on tax and customs fraud, smuggling, trafficking, and organised crime. The agreement was not signed, however, because the Croatian government took over the negotiations, insisting that they must result in an inter-state agreement. This meant starting again from scratch – and with less chance of ultimate success. ICG interview with a foreign legal adviser, 27 November 2001.

This agreement has remained a dead letter. OHR tried again in April 2000, drafting a state-level law regulating judicial exchanges and obliging the entities and Brcko District to collaborate in criminal matters.¹⁵³ The draft law requires courts and law enforcement agencies to respect each other's requests, orders, warrants, verdicts, and other directions. Communications are meant to be direct and to be acted upon without delay. In cases of hot pursuit and seizure of material evidence, police authorities will be entitled to take the necessary action throughout BiH, including the use of force and weapons without previous notification or consent. The role of the state court will be to resolve any disputes between the entities arising from this presumption of automatic collaboration.

Were it to be adopted, this draft law would fundamentally undermine the judicial exclusivity of the entities, compelling their judges and law enforcement agencies to work together to combat and prosecute serious and organised crimes and, eventually, war crimes as well. Unsurprisingly, the draft has been regarded with fear and loathing in the RS. Surprisingly, it has also lacked supporters in state-level institutions. Although it has been presented to the Council of Ministers (CoM), the law has not yet been endorsed and passed on to parliament. Nor was it included – as might have been expected – in the package of anti-terrorism legislation rushed through parliament in the aftermath of the 11 September 2001 attacks on the United States.¹⁵⁴

It seems, therefore, that the same *raison d'etat* that led the CoM to approve in January 2002 the handover to the U.S. of six Algerian-born, naturalised Bosnians suspected of terrorist connections was not strong enough for Bosnians to seek to bridge their internal law enforcement and judicial frontiers. It is thus likely that the draft law on inter-entity judicial cooperation will have to be imposed by the High Representative. The sooner this law is on the statute book the better since, without it, Bosnia risks relegation to a virtual black hole of opprobrium and illegality.

¹⁵³ OHR's Anti-Fraud Department drafted the Law on Legal Assistance and Official Cooperation in Criminal Matters between the Federation of BiH, the RS and the District of Brcko. Since then, other OHR legal experts have been working to add civil and administrative matters to the draft. ICG interview with OHR official, 27 November 2001.

¹⁵⁴ For an account of Bosnia's initial response to the war on terrorism, see ICG Balkans Report No. 119, *Bin Laden and the Balkans: The Politics of Anti-Terrorism*, 9 November 2001.

C. THE POLITICS OF LEGAL REFORM

Having belatedly changed its own approach to legal reform, OHR needs now to work on changing the attitudes of the domestic authorities. They too must abandon gradualism, renounce obstructionism and embrace wholesale modernisation of the country's criminal law framework. Bosnian jurists have often complained that the international community appears hell-bent on imposing solutions at odds with the country's continental legal tradition.¹⁵⁵ This they continue to assert, regardless that the current draft criminal legislation is based almost entirely on German and other continental models.

Nevertheless, some new thinking seems to have taken place in the Federation and, to a lesser extent, on the state level. The Federation government installed in early 2001 has shown itself willing to move towards criminal law reforms reflecting international standards. The CoM, for its part, appears to have accepted the need both for a state court and criminal legislation on the state level. It remains reluctant, however, to endorse inter-entity legal cooperation and an enhanced role for prosecutors. Only actual implementation of the draft reforms now on the table will show whether or not these authorities are in earnest.¹⁵⁶

No similar change in attitude has been observed in the RS. Although its leaders have long declared themselves ready to undertake all manner of reform, they have avoided or subverted any follow through if the matter to hand could be portrayed as inimical to RS "sovereignty".¹⁵⁷ They have not even pretended to favour criminal law reform since, once in place, the new laws could be used to dismantle the criminal power structures that rule large swathes of the RS.¹⁵⁸ Their resistance, therefore, is only too predictable. But it could soon lead to a situation in which the state, the Federation and Brcko District have enacted common

¹⁵⁵ As noted above, the Brcko reforms have been particularly criticised for their evocation of the common law. Such criticism has been voiced by some foreign ambassadors, as well as by local legal scholars.

¹⁵⁶ Intimations of changed thinking on criminal reform have been noted and commended by both foreign and domestic experts interviewed by ICG.

¹⁵⁷ For details, see ICG Balkans Report No. 118, *The Wages of Sin: Confronting Bosnia's Republika Srpska*, 8 October 2001.

¹⁵⁸ One long-serving foreign legal expert in BiH noted that for the SDS to accept criminal law reform would be equivalent to "giving a gun to one's enemy". ICG interview, 10 October 2001.

and modern criminal legislation, but the RS has not. It would then be up to the High Representative to impose legal consistency and compatibility across BiH.

D. TOWARDS A BETTER FUTURE

Implementation of legal and procedural reforms will necessitate comprehensive training (or retraining) of the judiciary.¹⁵⁹ Given their present number (some 1,200),¹⁶⁰ the logistical and financial challenge will be formidable. Bosnia will need help from foreign donors in planning, mounting and funding such courses. It will also be necessary to prioritise. Prosecutors and police should be trained together in using the new criminal procedure code. OHR's Anti-Fraud Department has sought to do this since 1999, but such schemes will in future need to be absorbed into a comprehensive plan that should also include joint training for police and prosecutors from the entities and Brcko in the investigation of complex financial and organised crime.

The promulgation of new codes and laws – and the training (or retraining) of rule of law staff – will have to be followed by extensive monitoring to make sure the system works, to identify problems and to find remedies. Monitoring will be crucial to ensuring the reforms stick and become established practice. Either the IJC will need to build up its own monitoring capacity or it will have to engage other agencies to do the job.

V. WAR CRIMES

Bosnia will have to take on more responsibility for trying war crimes' cases at home if they are to be tried at all. Because its time and resources are limited, the ICTY will concentrate in future only on major cases. It expects to cease dealing with first instances cases in 2007, by which time as few as 120 – and as many as 200 – cases will have been heard in The Hague.¹⁶¹

Trials of lesser war crimes have already taken place in Bosnia, based on principles set out in the Rome Agreement and its "Rules of the Road". According to this 1996 agreement, the Bosnian authorities must consult with the ICTY before initiating a case to ensure there is sufficient evidence for a prosecution that will meet international legal standards. Thus far, such trials have taken place exclusively in the Federation, with approximately 35 verdicts against some 70 accused, and sentences of between seven and fifteen years' imprisonment.¹⁶²

But the number of cases looks set to rise significantly in both entities over the next few years. According to the most recent data received by ICG, there are some 5,500 individuals under investigation for war crimes in the Federation, while 278 have actually been accused. In the RS, approximately 700 new investigations are under way, the largest numbers in Banja Luka (277), Srpsko Sarajevo (179), Bijeljina (146), and Trebinje (112).¹⁶³

¹⁵⁹ Judicial training and capacity-building should include practical workshops, moot trials and the production and distribution of commentaries on the use of the new codes and procedures.

¹⁶⁰ Thoroughgoing reform of the entire system should, of course, lead to reductions in the numbers of judges, if not of prosecutors, depending on the results of streamlining the prosecutors' offices.

¹⁶¹ ICG interview with top international official, 13 December 2001.

¹⁶² Application of the "Rules of the Road" serves two purposes: (1) to determine whether [Rule 7a] "sufficient evidence has been produced to provide reasonable grounds for believing that a person who is the subject of the request has committed a serious violation of humanitarian law", and (2) [Rule 7b] "whether the Prosecutor intends to take steps under the Tribunal's rules to secure the arrest or detention of the person who is subject of the request, or intends to request national courts to defer to the competence of the International Tribunal." The focus of the "Rules of the Road" is to establish whether the threshold set by international humanitarian law has been reached in the pre-trial phase. The original purpose of the Rome Agreement was to facilitate freedom of movement across BiH in the run-up to the first post-war elections in September 1996. See www.ohr.int.

¹⁶³ ICG requested details on the number of in-country war crimes cases from the Federation Prosecutor's office in January 2002. Not having such data available, the Prosecutor's office sought details from the cantonal prosecutors. Some refused to provide this information, citing its supposed confidentiality. The cantons which failed to provide data on the number of war crimes cases were

In February 2002, the ICTY cleared 62 cases for trial in Bosnia, all of which involve alleged crimes against Bosniaks. In response to the mounting number of war crimes cases either under investigation or approved by The Hague for in-country trial, the Council of Ministers established an expert group charged with finding solutions to the problems of adequately organising trials at home.¹⁶⁴

Debates on how and when Bosnia might stage such trials broke into the media in autumn 2001. ICTY functionaries, international community advisers in Bosnia, UN Security Council members, and domestic officials have generally agreed that Bosnia must be ready by 2004.¹⁶⁵ Two possible jurisdictions have been suggested. One option is to empower the nascent state court to try war crimes; the other is to create a special state-level court that could allocate cases for trial in either entity. As this debate proceeded at home and abroad, intensified efforts to put alleged war criminals on trial in existing courts exposed both the extent to which such cases remain politically neuralgic and the risks of entrusting the resulting trials to the entities or cantons. It seems that the mounting number of cases is already putting a significant strain on the judicial system, forcing Bosnia's governments to identify solutions much sooner than they had expected.

Sarajevo, Siroki Brijeg and Tuzla. As if this were not odd enough, ICG received a telephone call from the BiH agent at the ICTY, warning that ICG's inquiries might provide the Federation Prosecutor's office with an excuse to obtain information that is meant to be restricted to the prosecutors in charge of cases cleared by the ICTY in accordance with the Rules of the Road. ICG telephone conversation with Amir Ahmic, BiH agent at the ICTY, 7 February 2002. The RS Prosecutor's office provided ICG with the information requested without demur or delay.

¹⁶⁴ "Zeleno svjetlo za sezdeset dvije haske optuznice", *Oslobodjenje*, 26 February 2002. For details on the expert group studying war crime trials, see "Formirana ekspertna grupa", *Oslobodjenje*, 26 February 2002.

¹⁶⁵ ICTY Chief Prosecutor Carla Del Ponte argued in a speech at the UN in November 2001 that Bosnia should take on more responsibility for trying its war criminals. Local media coverage focused on the issue of whether and when the state court could discharge this responsibility. See "Mali Hag u Sarajevu", *Oslobodjenje*, 22 October 2001; "Zlocini uskoro pred lokalnim sudovima", *Nezavisne novine*, 28 November 2001; and "Specijalni sud za ratne zlocine u BiH do 2004 godine", *Oslobodjenje*, 29 November 2001.

A. THE INADEQUACIES OF ENTITY-BASED JUSTICE

Events in the Federation in September and October 2001 helped build a political consensus behind calls for state-level war crimes' trials.¹⁶⁶ The Zenica and Sarajevo cantonal courts indicted several Croats – the "Zepce Group" – for war crimes committed against Bosniaks in central Bosnia in 1994. The inclusion of current Croat political leaders such as Ivo Lozancic, a wartime HVO commander turned democratic politician,¹⁶⁷ exposed the fragility of the ruling Alliance for Change. Croat members of the Alliance promptly labelled the indictments, issued by 'Bosniak' courts, as 'ethnic' prosecutions. The accused requested the Federation Supreme Court to move the case from Zenica to another court where they might expect to receive a fair trial. The Supreme Court rejected the motion as unjustified.¹⁶⁸ This led the NHI (New Croat Initiative, a small partner party in the Alliance) to appeal to the High Representative to order the transfer of the 'Zepce Group' trial to neutral ground. The 'neutral' courts proposed were in Croat-dominated Livno, Orasje and Mostar.¹⁶⁹

¹⁶⁶ Local media reported that the case of the "Zepce group" convinced the Alliance for Change government to support state-level trials. See "Uskoro bh. sud za zlocine: slucaj "zepakke grupe" ujedinio Alijansu", *Nezavisne novine*, 17 October 2001.

¹⁶⁷ Ivo Lozancic and thirteen other Croats are accused of imprisoning some 5,000 Bosniak civilians in camps around Zepce and Zavidovici where many were beaten and abused and some were killed. Lozancic served as a HVO (Croat Defence Council) general and is currently a vice-president of the moderate NHI. See "Mogu li Bosnjaci suditi Hrvatima", *Dani*, 28 September 2001.

¹⁶⁸ See "Nastavlja se istraga protiv 15 osumnjicenih iz Zepca: Vrhovni Sud FBiH odbacio zahtijev za izuzeece Kantonalnog suda u Zenici" and "Sedjenje zepackoj grupi moze imati nesagledive posljedice: Mijo Anic trazi od Volfganga Petrica obustavu procesa u Zenici", *Oslobodjenje*, 27 September 2001; "Na sceni politicki a ne sudski procesi" (interview with Kresimir Zubak), *Nezavisne novine*, 27 September 2001; and "Mogu li Bosnjaci suditi Hrvatima", *Dani*, 28 September 2001.

¹⁶⁹ The CJAU recently expressed deep concern over the Mostar court's ability to deal with over 100 war crimes investigations cleared by the ICTY:

CJAU believes these cases will overwhelm the capacity of the local courts, and inflame ethnic tensions within the newly unified court system, and the community as a whole. UNMiBH JSAP and CJAU monitored the first five war crimes cases in Mostar and found that the judiciary was unable or unwilling to deal with the cases in a professional

Matters escalated soon afterwards as public demonstrations in support of the ‘Zepce Group’ and violent attacks on the police attempting to arrest the suspects broke out.¹⁷⁰ The incipient crisis dissipated, however, when the High Representative changed the law requiring those accused of serious crimes to be held in jail pending their trials, giving judges discretion in deciding on the necessity or otherwise of detention. This allowed the ‘Zepce Group’ to remain at liberty before or during proceedings.¹⁷¹ The High Representative’s decision was widely interpreted as having been aimed at patching up the rift in the Alliance.

In the meantime, the Sarajevo Canton court indicted another Croat, Tibor Prajo, for war crimes committed against Bosniaks in the vicinity of Kiseljak. This time the Federation Supreme Court decided that a change of venue – to the more Croat-friendly court in Travnik – was justified. There were no demonstrations by Croats alarmed at the prospect of ‘ethnic justice’ and no disturbance of the equilibrium inside the Alliance.

Reactions did come, however, from a Sarajevo Canton court judge and prosecutor who appealed to the BiH Constitutional Court, alleging that this decision risked giving legitimacy to the practice whereby each nation would try only its ‘own’.¹⁷² Public debates and mutual accusations of pursuing ‘ethnic justice’ with the aim of eliminating political competitors or protecting one’s brethren continued, involving a wide range of politicians, judges and human rights’ activists.¹⁷³ A

manner. Four of the five cases resulted in acquittals. Based on previous experience, CJAU fears that the State court would return the cases for retrial before the Canton Seven Court, based on technical, procedural grounds. CJAU weekly report, 1-8 February 2002.

¹⁷⁰ The Zepce police were attacked and prevented from carrying out the arrests, despite being a mixed Croat-Bosniak force. See “Croat police officers in Zepce receive threats” (26 October 2001) and “An explosive device goes off in Zepce” (4 November 2001), OHR BH Media Round-Up, www.ohr.int. Also see “Zahtjevi za obustavljanje progona i izuzece zenickog suda”, *Oslobodjenje*, 27 October 2001.

¹⁷¹ See the High Representative’s “Decision allowing judges in the Federation to decide on the need of detention of individuals charged with serious offences during criminal proceedings”, and the equivalent decision for RS, “Decision allowing judges in RS to decide on the need of detention of individuals charged with serious offences during criminal proceedings”, 8 November 2001, www.ohr.int.

¹⁷² See “Tibor Prajo kao i Alija Delimustafic!”, *Oslobodjenje*, 28 September 2001; and “Bisic predlaze privremenu mjeru”, *Oslobodjenje*, 10 October 2001.

¹⁷³ For examples of the public bickering between various

leitmotif of the controversy was a widely shared recognition that the local judiciary was incapable of handling war crimes cases either competently or fairly.¹⁷⁴ Plenty of evidence was presented to support this claim, as some war crimes trials have been dragging on for unconscionably long periods. The Goran Vasic and Sretko Damjanovic (mis)trials for war crimes committed against Bosniaks have been going on for years. Several attempts to bring matters to an end and to pronounce sentence have failed because of judicial incompetence.¹⁷⁵

B. THE ROLE OF THE STATE COURT

Arguments both for and against assigning war crimes trials to the state court have been adduced. Those in favour contend that such trials would be freed to some extent from their immediate ethno-political contexts. Their removal from the cantonal and entity courts would also afford war crimes cases the significance and seriousness they merit. Their manipulation for narrowly political ends demeans their moral and potentially cathartic purpose. By dealing with war crimes on the state level, Bosnia would show both its citizens and the outside world that it was capable of coming to terms with all the crimes committed in its multisided war, and that neither victor’s nor victim’s justice was being dispensed.

These arguments in favour of state court trials have

players see: “Tajni rat Haskim optuznicama”, *Nezavisne novine*, 27 September 2001; “Kadija te tuzi, kadija ti sudi”, *Oslobodjenje*, 25 October 2001; and “Bisic ima jedan arsin za Srbe, drugi za Bosnjake!?: Dusko Tomic trazi smjenu kantonalnog tuzioca iz Sarajeva”, *Oslobodjenje*, 26 October 2001.

¹⁷⁴ “Predloženo formiranje suda u BiH koji bi procesuirao ratne zločine”, *Dnevni avaz*, 8 September 2001; and “Treba utvrditi model procesuiranja ratnih zločina na BH sudovima”, *Dnevni avaz*, 28 September 2001.

¹⁷⁵ Goran Vasic is a wartime Serb soldier accused of killing Bosnian Prime Minister Hakija Turajlic while he was travelling in a French UNPROFOR vehicle in January 1993. Vasic is currently on trial for the third time on this charge in the Sarajevo Canton Court, the two previous trials having been quashed because of procedural irregularities. His third trial was recently suspended because the mandates of the lay judges who sit on the judicial panel had expired. Vasic has been detained since 1998. ICG interview with a prominent Bosnian lawyer and “Odgodjeno sudjenje Vasicu”, *Nezavisne novine*, 7 December 2001. For details of the Damjanovic case, see the Human Rights Chamber decision (CH/98/934 Damjanovic v. Federation of Bosnia & Herzegovina), which described the court’s reasoning in relation to evidence as “grossly inadequate and devoid of appearance of fairness”. HRC Annual Report 2000.

come to prevail in the Federation.¹⁷⁶ But no such consensus has been reached in the RS,¹⁷⁷ even though most RS judges and prosecutors interviewed by ICG supported trying war crimes on the state level.

International opinions on this issue are varied. Some authorities argue that a separate state-level court should be created to try war crimes. Otherwise, the new state court might find itself mired in war crimes trials, to the detriment of its other jurisdictions and the establishment of its credibility and usefulness. Moreover, any constitutional challenge to or political obstruction of the state court's trial of war criminals should be avoided. It would be better, therefore, if the UN Security Council were to establish a court on the state level with a modified ICTY mandate, and to give it the exclusive task of trying war crimes in Bosnia.¹⁷⁸

On the other hand, it seems that the Bosnian constitution provides ample scope for entrusting war crimes trials to the state court. According to Article III (5a), the state can take on additional responsibilities if the entities agree. Other provisions in Annexes 5-8 of the DPA covering Bosnia's adherence to the Convention on the Prevention and Punishment of the Crime of Genocide, Conventions against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Geneva Conventions I-IV and its Protocols also offer grounds for the state court to assume jurisdiction over war crimes. Finally, the constitutional provisions on territorial integrity and sovereignty, regulated in Article III(1g), give the state authority over international and inter-entity criminal law enforcement, thereby allowing it to assert its primacy in dealing with the most serious and challenging crimes.

Another point of contention is whether or not the state court should include international judges. Their inclusion would certainly boost the cost of the enterprise, both on account of their high salaries and the associated translation and administrative costs. The benefits, however, would outweigh the expense.

¹⁷⁶ See "Entitetsko pravosuđe nije objektivno", *Glas Srpski*, 1-2 December 2001, and "Ratnim zlocincima suditi pravom, a ne politikom", *Nezavisne novine*, 21 December 2001.

¹⁷⁷ In October 2001 it seemed that Serb representatives on the state level (and Presidency chairman Zivko Radisic in particular) were supporting the state level court, whereas the RS government opposed it. See "Zlocinci pred Drzavnim sudom BiH", *Oslobodjenje*, 1 October 2001, and "Nepotreban poseban bh. sud za ratne zlocine", *Nezavisne novine*, 19 October 2001.

¹⁷⁸ ICG interviews with several senior international officials in BiH, 27 November and 13 December 2001.

Foreign judges have thus far proved crucial in providing balance, independence and expertise at the highest level – attributes which Bosnia's judiciary conspicuously lacks.¹⁷⁹ War crimes trials are more likely than others to test local judges' disinterestedness and ability to resist political and tribal pressures.¹⁸⁰ According to a comprehensive study of judicial attitudes towards war crimes and the ICTY undertaken in 2000, judges' views on these matters did not differ from those of their respective national cohorts. The study's authors concluded that this evidence of national partiality should be countered by thorough retraining of judges and a public information campaign about war crimes and the work of the ICTY.¹⁸¹ Accordingly, pending the completion of a comprehensive reform process, the international community should not yield to Bosnian arguments against the participation of foreign judges.

C. OTHER CHALLENGES IN STORE

Media coverage of – and political comment on – the proceedings in The Hague is currently insufficient and inadequate, for several reasons. One is that the ICTY lacks funds to publicise its own work in Bosnia. Another reason is that the entities determine the extent of the coverage their 'public service' broadcasters provide. News media in the Federation evince more interest in and offer more extensive reports on the ICTY than do their counterparts in the RS. And while the press covers The Hague in both entities, the RS

¹⁷⁹ In past two years, the ICTY has organised three training sessions for Bosnian prosecutors on how to build good cases that comply with the Rules of the Road. No judges, however, have received any training on how to try war crimes cases. ICG interview with an OHR official, 13 December 2001.

¹⁸⁰ In the absence of foreign judges, one prominent RS jurist remarked that "a judge serving in the state-level war crimes court would be equivalent to a clay pigeon used for shooting practice". ICG interview, 11 September 2001.

¹⁸¹ The study sampled 32 Bosnian judges and prosecutors with primary and appellate jurisdiction for war crimes trials and discovered that: "To the extent that they [the judges] expressed reservations about conducting national war crimes trials, they stated that political pressures may corrode due process protections. However, strong associations between the 'legal opinion' offered on genocide related questions and the national group identity of participants indicates that Bosnian legal professionals may not be neutral on issues regarding accountability for war crimes and genocide." *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, Human Rights Centre, International Human Rights Law Clinic, University of California, Berkeley, and Centre for Human Rights, University of Sarajevo, May 2000, p. 45.

broadcast media either give it short shrift or carefully choose which witness statements to broadcast. The RS government usually excuses the paucity of ICTY reports on its airwaves by referring to the supposed absence of Serb journalists in The Hague.¹⁸² This discrepancy in the attention paid to the ICTY between the two entities reinforces ‘ethnically’ specific perceptions of war crimes (as invariably committed by ‘others’ against ‘us’) and The Hague Tribunal (as preternaturally biased against ‘us’).¹⁸³

If war crimes trials are or ought to be of concern to all Bosnians, then the main medium that should be used to reach them is the new, state-wide Public Broadcast System (PBS).¹⁸⁴ If, moreover, war crimes are to be tried in the state court from 2004 or sooner, citizens must be informed about the issues at stake beforehand. Not only would countryside television coverage serve to educate people in distinguishing between individual and collective responsibility for war crimes, it would also serve as an advertisement for the rule of law. For these reasons it is important that the PBS should provide extensive coverage of all trials related to Bosnia.

Once the decision is made on whether a special court or the BiH state court should try war crimes, Bosnia will need to develop the structures and agencies required to investigate crimes, apprehend those accused and enlist and protect potential witnesses. Bosnia has no such capacities at present. To have them up and running by 2004 will require the mobilisation of political and popular will, as well as financial and technical support by the international community. For as time goes by, likely witnesses – and especially those who have returned to their pre-war homes to find their one-time tormentors still living in the vicinity – will become less ready to testify. To do so may appear too dangerous

and too costly, jeopardising their hard won repossessions of their properties, their relations with their neighbours and even their lives.¹⁸⁵ All this indicates that taking on responsibility for trying war crimes at home requires serious preparation and commitment – by Bosnians and the international community alike – if the exercise is not to do more harm than good.

¹⁸² ICG interview with an international official, 1 December 2001.

¹⁸³ The discrepancy in ICTY coverage has also been marked in “the trial of the century”: that of Slobodan Milosevic, which started on 12 February 2002. Federation TV failed to provide live coverage of the entire opening of the trial, for which it was roundly condemned in the print media. FTV has since broadcast extensive live daily coverage. RTRS and RS radio stations, on the other hand, broadcast Milosevic’s lengthy opening harangue, but neglected to cover the first witness’s statement. See “Pretplata na primitivizam”, *Dani*, 22 February 2002, and Hamza Baksic, “Krivac i krivica”, *Oslobodjenje*, 15 February 2002.

¹⁸⁴ PBS currently provides several hours of common programming for FTV and RTRS each week. To date, however, it has confined its offerings to major sporting events and American sitcoms.

¹⁸⁵ ICG sources have indicated that potential witnesses to war crimes among ‘minority’ returnees are already being offered trouble-free repossession of their homes and even jobs in exchange for assurances that they will not testify in court. Some would-be witnesses are being intimidated and harassed with the same object. These phenomena are likely to become more common as domestic trials gain momentum.

VI. PROFESSIONALISING THE JUDICIARY

A. THE FAILINGS OF COMPREHENSIVE PROFESSIONAL REVIEW

[This paper] calls for the current review process for judges and prosecutors to be scrapped – it isn't working and attempts to fix it will not produce [the] necessary results.... All current judges and prosecutors must be required to reapply for their positions and undergo a comprehensive evaluation – by the newly created High Judicial Councils. – Charles Erdmann, “Assessment of the Current Mandate of the Independent Judicial Commission and a Review of the Judicial Reform Follow-on Mission for Bosnia & Herzegovina”, November 2001, p. 2.

So-called comprehensive peer review started in June 2000, when the entities' new laws on judicial and prosecutorial service established independent commissions (in the Federation) and councils (in the RS) to vet all judges and prosecutors. These bodies were charged with determining incumbents' professional and moral suitability for continued service, albeit under the close supervision of the IJC.¹⁸⁶ The review process was intended to last eighteen months, a period that expired in the Federation at the end of 2001 and in early 2002 in the RS. This period proved insufficient to complete the job, leading the IJC to ask the entities to extend the process until the end of 2002. The RS agreed to prolong the review until June 2002, but the Federation, in effect, rejected any extension.¹⁸⁷

¹⁸⁶ In the Federation, the Federal Judges' Commission was tasked with reviewing all judges of the municipal and cantonal courts, as well as of the Federation Supreme Court and Constitutional Court. Ten cantonal judges' commissions were delegated to assist the federal body in gathering information on judges and to sit with it when reviewing applicants for judicial positions in their respective cantons. A separate Federal Prosecutors' Commission was set up to deal in analogous fashion with prosecutors, assisted by cantonal prosecutors' commissions. In the RS, the procedure is more centralised, with a High Judicial Council and a High Prosecutorial Council reviewing judges and prosecutors, respectively. Upon the completion of peer review, the 22 Federation commissions and the two RS councils are meant to continue their work on appointing, disciplining and removing judges and prosecutors. Erdmann, p. 6.

¹⁸⁷ Given the IJC's urgent pleas, the RS agreed to extend review until June 2002 and, “exceptionally”, to the end of the year. But the Federation House of Representatives failed to

Peer review was conducted in three phases: (1) a preliminary review; (2) a subsequent review; (3) and a final review. After the initial information-gathering process, the commission (or council) met to determine if the evidence warranted further investigation. If so, the matter moved to the second stage, during which a “referee” conducted an enquiry and submitted a report to the commission/council. The commission/council then voted on whether the case should proceed to the final stage involving a formal hearing to determine whether or not the individual was fit to retain his or her post. An alternative route for initiation of the second stage was the submission of a substantive and well-documented complaint against a judge or prosecutor by a member of the public. By February 2002, citizens had submitted a total of 1,594 complaints against 1,145 post holders.¹⁸⁸

Consultations with international and local agencies also provided information on the work of the judiciary. Both OSCE and the Ombudsmen's offices supplied valuable material on judges' and prosecutors' adherence to and implementation of the property laws.¹⁸⁹ A good many judges and prosecutors were compelled to vacate other people's houses or flats as a result.

Overall, 1,145 judges and prosecutors were processed during what turned out to be the eighteen-month life span of comprehensive review. Only five incumbents were removed (two more are pending) and 32 disciplinary procedures were initiated. Another 30 individuals resigned rather than face appraisal. (Five of these resignations were directly attributable to the review process.) Thirty-three new judges and prosecutors were appointed, while twenty judges and prosecutors (in the Federation only) were reappointed when their mandates expired.¹⁹⁰ The review process, therefore, resulted in less than a 2.5 per cent rate of replacement. General reappointment in Brcko, by contrast, led to replacement of 80 per cent of post holders.

approve any extension. ICG interview with IJC, 5 February 2002.

¹⁸⁸ According to IJC data, there were 596 complaints against RS judges and 32 against RS prosecutors. In the Federation, citizens submitted 864 complaints against judges and 102 against prosecutors. ICG correspondence with the IJC, 7 February and 12 March 2002.

¹⁸⁹ For example, OSCE provided a comprehensive report on property law violations by a judge in Zepce, but his case still required another two months of investigation before a legally sound decision could be reached. ICG interview with IJC, 14 November 2001.

¹⁹⁰ ICG correspondence with the IJC, 7 February 2002.

1. What Went Wrong?

The disappointing if not abysmal results of peer review had a variety of causes, ranging from a badly designed law fathered by an unprincipled compromise to ill-equipped and inadequately motivated commissions/councils put in charge of appraising their own colleagues. OHR, wanting to tick the box labelled “ownership”, struck a deal with the domestic authorities. They, on the other hand, aimed to disturb the status quo as little as possible. In combination, the two approaches resulted in a compromise that did nothing to improve Bosnia’s chances of institutionalising the rule of law any time soon.

The Bosnian context of a highly politicised, war-inflated, post-socialist, nationally divided, financially dependent and institutionally deficient judiciary made peer review a virtual contradiction in terms. Such a judiciary could not and would not transform itself into a competent, freedom-loving and disinterested bastion of democratic values, human rights and civil society. Although the top international officials interviewed by ICG through autumn and winter of 2001-2002 appeared to have recognised this truth, they also felt stuck with their own creation, and obliged to persevere with an inherently flawed policy. Their main argument against junking peer review was that a root and branch purge of the judiciary would offend against its independence – as if such independence existed in the first place.¹⁹¹ It was precisely *because* the judiciary is not independent that the professional review process was created *in order* to clear the ground for real independence to take root.¹⁹²

The law on the judicial and prosecutorial service was so ill conceived that, as soon as implementation started, its several inadequacies began to appear. The High

Representative was compelled to amend the law a year after he imposed it in the Federation,¹⁹³ notwithstanding denials that anything was amiss. Thus the IJC, set up to animate and oversee judicial and legal reform, inherited the impossible task of redeeming the credibility and assuring the success of peer review – and saving the face of the international community in the process.

In its efforts to make peer review work, the IJC sought to professionalise the judiciary in an objective and transparent manner; to instruct the commissions and councils – and the judiciary itself – in the virtues of accountability and adherence to high moral and professional standards; to instil discipline through exemplary removals; and to introduce new laws to regulate and perpetuate these attributes.¹⁹⁴

Yet the 26 members of the two councils in the RS and the 60 members of the 22 commissions in the Federation worked in a system so decentralised, bloated, complicated, and resource-poor that it could not succeed. Commission and council members were expected to serve without any remuneration for the time they were required to devote to this extra job. Just as problematically, they were charged with shaking up a profession and a tradition that had shaped them, and which they were likely to have every interest in perpetuating. Although there were commissioners who worked hard to ensure fair representation of all national

¹⁹¹ ICG interview with senior international official, 26 December 2001.

¹⁹² Although the PIC decided on 28 February to “reinvigorate” judicial reform, the methods and mechanisms have yet to be negotiated. One of the main objections to suspending judicial mandates – and which is put forward by the Council of Europe – is that suspension prior to reappointment would compromise the independence of the judiciary. This ignores the fact that the wartime and post-war appointments of currently serving judges and prosecutors were inherently tainted, made as they were by regimes characterised by political manipulation, ethnic discrimination and corruption. To endow such judges and prosecutors with life tenure would perpetuate a system of ‘ethnic justice’ that imperils the rights of vastly larger numbers of Bosnian citizens. ICG interviews with international legal experts, 9–12 March 2002.

¹⁹³ The High Representative imposed a Decision amending the Law on Judicial and Prosecutorial Service in the Federation on 3 August 2001. The amendments relate to judicial appointments’ procedures, aiming to limit the powers of the cantonal and Federation assemblies to reject the appointment of candidates proposed by the review commissions. Should they attempt to do so, the assemblies must provide written explanations for their rejection of candidates. This effort to get the assemblies to release their political grip on judicial appointments proved unavailing when the Federation House of Peoples refused in September 2001 either to reappoint eight Federation Supreme Court judges or, initially, to explain its reasons. It later gave in, citing the candidates’ advanced ages in justification for its decision. Having learned from this embarrassing contretemps, the political elites thereupon shifted the field of battle to the commissions where the lists of candidates are drawn up. See “Komisija mora predložiti više kandidata nego ih se bira”, *Dnevni avaz*, 29 July 2001; “Tuzilastvo po mjeri Alijanse”, *Oslobodjenje*, 4 August 2001; “Nepotvrđene sudije Vrhovnog suda trebaju ici u penziju”, *Dnevni avaz*, 5 October 2001; and www.ohr.int

¹⁹⁴ Disciplinary measures range from loss of salary for up to six months to mere admonishments and the placement of notes in personal files. ICG interview with IJC, 18 December 2001.

groups and otherwise to promote reform, poachers are more easily turned into gamekeepers than judges and prosecutors into radical reformers.¹⁹⁵

There were other problems. Some cantonal commissions, such as in Livno and Gorazde, could not work for months because the judges and prosecutors who served on them were not reappointed when their five-year mandates expired.¹⁹⁶ The Federation Judicial Commission was seriously incapacitated when the Federation House of Peoples failed to reappoint eight Supreme Court justices, three of whom sat on the Judicial Commission. The Federation House of Representatives then inflicted what seems to have been the final blow – both to the already dysfunctional commissions and to the review process generally – when it refused in January 2002 to extend either the review period or the mandates of the commissioners.¹⁹⁷

This meant that, even if the IJC and OHR had remained firm in their determination to persevere with peer review and had eventually persuaded the House of Representatives to relent, they would have had to find and appoint new commission members.¹⁹⁸ This would have taken many weeks if not months, eating up precious time just as the process was meant to be entering its most difficult phase: the assessment of individual judicial performance.¹⁹⁹

¹⁹⁵ A member of a judicial commission told ICG of his knowledge that some judges were corrupt, but that he had no evidence to prove it. He also noted that he would “let some judges through the door of the courtroom only if they were heading to be tried”, but was, alas, unable to do much to initiate a disciplinary or dismissal procedure. Interview, 13 September 2001. According to the IJC, positive exceptions to this dismal rule were recorded in Zenica-Doboj and Herceg-Bosna cantons, on the bench of the Federation Constitutional Court and in the Federation prosecutor’s office, where good appointments were made. ICG correspondence with the IJC, 12 March 2002.

¹⁹⁶ For example, Canton Ten was without a prosecutor for eighteen months, during which time the commissions did not work. ICG interview with IJC, 11 October 2001.

¹⁹⁷ “FBiH – nesigurna za zivot”, *Oslobodjenje*, 31 January 2002.

¹⁹⁸ Although the IJC argues that review could have continued – and without having to appoint new commissioners – if the Federation parliament had agreed to an extension, both the press and Federation officials differed in their interpretations of the state of play. ICG correspondence with IJC, 12 March 2002.

¹⁹⁹ There are alternative interpretations. Vlado Adamovic, President of the Federation Judges’ Association and a Supreme Court judge, argues that no extension of the review period is necessary because the Federation Commission can legally continue with its work. Television discussion of

In so far as it worked, the review process was driven by complaints, solicited from the public by means of media advertisements inviting citizens to report evidence of impropriety on the part of judges and prosecutors.²⁰⁰

The number of complaints increased over time, but very few led to dismissals. Most complaints related to procedural delays or to dissatisfaction with verdicts. However legitimate they might be as evidence of inadequate performance, such grumbles do not, in and of themselves, provide grounds for dismissal. Very few complaints concerned improper behaviour and almost none centred on allegations of corruption or bribery. To prove that an act of bribery or corruption has taken place, plaintiffs would usually have to incriminate themselves as parties to the crime, since there are unlikely to be other witnesses. In the absence of any material evidence that a crime has been committed, any claim to the contrary amounts to hearsay. This means that widespread allegations – and ‘common knowledge’ – that Bosnia’s judges are corrupt could not be proved. But neither could it be proved that they are not.²⁰¹

In any case, the procedure for soliciting citizens’ complaints was set up in such a way that it discouraged people from coming forward. Complaints had to be signed in full, and anyone submitting one was liable to be summoned to testify. Bearing false witness is a criminal offence. Moreover, the standard of proof required for removal of a judge or prosecutor was high, which rendered the act of complaining even more risky.²⁰² Such provisions might have been appropriate to a country with an established system of checks and balances and fully competent to protect its citizens’ rights, but they were not conducive to encouraging victims of wartime injustices, post-war ‘ethnic justice’ or politically inspired discrimination in property restitution cases to come forward. Nor did they inspire confidence that plaintiffs would not be subjected to harassment or intimidation if they did.

The most obvious way to overcome the disadvantages of a scheme offering more disincentives than incentives

judicial reform, “Pravosudje u BiH”, Federation TV (FTV1), 7 February 2002.

²⁰⁰ *Guidelines for Complaints against Judges and Prosecutors in BiH*, IJC.

²⁰¹ A member of a prosecutorial commission told ICG of his personal knowledge that some prosecutors are corrupt, but also that he was unable to prove it. Interview, 11 September 2001.

²⁰² One long-serving foreign legal adviser in Bosnia described the prevailing tone of the citizens’ complaint process as “you had better be right, and have material evidence, and testify publicly, otherwise we may prosecute you for false allegations”. ICG interview, 9 October 2001.

to participate – whether to commissioners or to ordinary citizens – would have been for the IJC to have taken charge. This happened to some extent. In addition to urging the commissions to shift their emphasis to performance-based review, the IJC required judges and prosecutors to fill in a personal history statement by 21 December 2001 – and to disclose fully their wartime activities, financial and housing circumstances, political affiliation, education, and other data. By these means the IJC sought to propel a step change: from an unfruitful, complaint driven process to one based on the assessment of judges' and prosecutors' performance.²⁰³ This would have meant, however, that reviewers would have had to examine all the cases heard and verdicts pronounced during and after the war by current judges, including those in notorious and/or politically sensitive cases.²⁰⁴

The intrusiveness of the detail required by the IJC's disclosure form – and the intimation it provided that a thoroughgoing review might finally be in the works – led some jurists to complain that such treatment was unfair, humiliating and unprecedented, especially as no other branches of government were being subjected to similarly intense scrutiny.²⁰⁵ Such complaints were justified, but beside the point. The real problem is that other public servants (with the exception of the police) have not been subjected to rigorous vetting.²⁰⁶

On the other hand, no results of the review have yet been disclosed, and so cannot be humiliating enough for

those who have violated rather than upheld the law or have in other ways compromised their judicial positions.

The beneficent and deterrent effect of public exposure upon those who imagine themselves invulnerable has been underestimated. Unfortunately, the insecurity caused by prolonged scrutiny may indeed be demeaning to judges and prosecutors who have maintained high moral and professional standards yet are nonetheless tarred by the same brush as those responsible for the wretched reputation of Bosnia's legal system. It will be important, therefore, to introduce any further revisions in the vetting system with appropriate circumspection.²⁰⁷

But even in the absence of official review results, the IJC seems to have ferreted out evidence of impropriety.

A recent IJC inspection visit to courts in Tuzla and Mostar and, in particular, to their business registration departments appears to have revealed an elaborate scheme for doing work 'on the side' by some judges whose computer files on cases which may have been resolved for private gain had been erased.²⁰⁸ Further investigations of this sort could reveal other means by which the judicial system has been compromised.

2. Problems with Appointments

Reviewing, investigating and – when appropriate – penalising judges is an enormously demanding task. Because the burden of proof lies on the reviewers to prove impropriety, and not on those who are reviewed to prove their fitness, the process requires dogged perseverance and a formidable investment of time. The IJC appeared to acknowledge this difficulty by focusing from autumn 2001 on judicial appointment procedures as a means of increasing the effective rate of replacement. In making appointments the burden of proof is reversed, and the unpleasant business of close scrutiny is transformed into an openly competitive exercise that enhances the chances of professionalising the judiciary.

In 1996, all judges and prosecutors in BiH got initial five-year mandates that expired at the end of 2001 or the beginning of 2002. (In the RS, they already had life tenure.) This has provided the IJC and other reformers with an opportunity to select candidates who are

²⁰³ IJC letter to the presidents of the Supreme Court and cantonal courts, as well as to chief prosecutors, November 2001.

²⁰⁴ See UNJSAP thematic reports and ICG Balkans Report No. 85, *Denied Justice: Individuals Lost in a Legal Maze*, 23 February 2000.

²⁰⁵ Bosnian jurists interviewed by ICG in both entities and in Brcko District all agreed that the comprehensive review process had many defects, ranging from inconsistent treatment of different judges and prosecutors (offering lenient treatment to some and a hard ride to others) to neglect of wartime pasts, particularly in the RS. Other than Brcko judges, who have actually gone through a general reappointment process, all the others interviewed stopped short of endorsing such a scheme. However, the majority of lawyers interviewed, especially those who served in the judiciary before the war, were adamant about the need to switch to a general reappointment system. ICG interviews with Bosnian jurists conducted between September and December 2001.

²⁰⁶ For details on the state of Bosnia's civil service, see ICG Balkans Report No. 84, *Rule of Law in Public Administration: Confusion and Discrimination in a Post-Communist Bureaucracy*, 15 December 1999.

²⁰⁷ Nada Dalipagic, a judge of the Mostar Cantonal Court, emphasised the need to show due respect and sensitivity in dealing with judges and prosecutors, since any policy change that does not do so could prove counterproductive. "Pravosudje u BiH", Federation TV (FTV1), 7 February 2002.

²⁰⁸ ICG interview with IJC, 18 December 2001.

suitable for the lifetime appointments now being made. The candidates selected by the judicial and prosecutorial commissions – and approved by the IJC – were then proposed to the entity parliaments for confirmation.²⁰⁹ The process, however, has not been going according to plan.

First, the Una-Sana and Sarajevo cantons endowed their serving judges and prosecutors with lifetime tenure by automatically confirming their new mandates irrespective of whether their initial five year mandates have expired, thus skipping the vital intermediate steps of advertising the positions and going through a formal appointments' procedure. The only way now to replace these people is through the adoption of general reappointment. Neither canton violated the law. They simply harmonised their own laws on judicial and prosecutorial service with that of the Federation without following the appointment procedures as prescribed by IJC and before anybody expected them to do so.²¹⁰

Secondly, the power of the assemblies to stifle the appointments' procedure – and the political resolve to use this power to ensure the appointment of one's 'own' people – has become obvious.²¹¹ It has been seen in the recent controversies over appointments to the Federation Supreme Court and Constitutional Court, as well as in the attempts by the RS National Assembly to get rid of the entity's chief prosecutor.²¹² The parties'

resolve to pack the bench with friendly jurists can be expected to play out in the forthcoming appointments to the BiH Constitutional Court, and will be maintained so long as the parliaments have the power to stall the confirmation of appointees who do not suit their political interests.

In order to obviate such interference, the IJC has started work on plans to merge the judicial and prosecutorial commissions or councils and to expand their memberships to include representatives of the executive, the legislature, the bar, and notables from civil society, replicating the appointment boards that exist in other European countries.²¹³ But implementing any such important change will require a political consensus sufficient to pass constitutional amendments reducing the prerogatives of the parliaments and the effective power of the executives.

This will not be easy.²¹⁴ Indeed, apparently anticipating the IJC's move, the RS government sought in November 2001 to alter the composition of the High Judicial Council by including members of the executive.

This would have shifted the balance in favour of the executive, providing 'lay' members with a majority. Objections by the IJC to the proposed amendments led the government to stay its hand on this occasion.²¹⁵ Intervention by the High Representative will very likely

²⁰⁹ According to the Memorandum of Understanding between the entities, advertisements for judicial positions are to appear throughout the country, both in newspapers and official gazettes, so as to attract the widest possible field of candidates. Signed in July 2001, this MoU will one day become law. ICG interview with IJC, 14 November 2001.

²¹⁰ Having been made aware of this loophole, the IJC urged other cantons not to follow suit. Although compliance with IJC advice is voluntary, since autumn 2001 no other canton has employed this device. ICG interview with IJC and correspondence between the IJC and the Sarajevo Cantonal Judicial Commission, 17 October 2001.

²¹¹ A high level Federation official told ICG that the parliamentary assemblies will never agree to reduce their constitutionally guaranteed rights to appoint judges and prosecutors. Instead, they will use these powers to work to replace those who are 'tainted' and whom the politicians blame for the system's corruption and fraud. The official also opined that the IJC is not really independent, but is under the influence of the judiciary it is supposed to reform. ICG interview, 14 October 2001.

²¹² In autumn 2001, the SDS attempted to oust RS Chief Prosecutor Vojislav Dimitrijevic. The SDS failed (just) to win a majority in the RS National Assembly, and the RS High Prosecutorial Council cleared Dimitrijevic of all SDS charges of impropriety and unprofessional behaviour. The

offensive, however, did not stop there. A prosecutor from Prijedor filed a criminal charge against Dimitrijevic for dismissing him as a result of the professional review. For a full account of the campaign against Dimitrijevic, see "SDS zeli smijeniti Vojislava Dimitrijevic kako bi prikrio vlastiti kriminal", *Dnevni avaz*, 1 October 2001; "Odnokud se mora poceti: Republicko javno tuzilastvo RS", *Reporter*, 7 November 2001; "Tuzilac tuzio tuzioca", *Glas Srpski*, 8-9 December 2001; and "Tuzilastvo jos bez stava", *Glas Srpski*, 10 December 2001.

²¹³ The model mentioned most often to ICG is the Italian Judicial Commission, which has 33 members, including three MPs. All its members are appointed by the president of the republic. ICG interview with IJC, 14 November 2001.

²¹⁴ Both entities' constitutions define the role of the parliaments in appointing judges and prosecutors. According to the RS constitution, judges and prosecutors are appointed or elected and recalled by the National Assembly (Chapter 10, Article 130). In the Federation, candidate judges are nominated by the president of the Federation in concert with the vice-president and submitted to the House of Peoples for majority confirmation. Chapter IV, Section C, Article 6 (b).

²¹⁵ The RS government's move may, on the other hand, have been motivated by the victory won by the High Prosecutorial Council when it quashed the National Assembly's attempt to sack Vojislav Dimitrijevic (see footnote 188 above). IJC correspondence with the RS government, 20 December 2001.

be required to frustrate this sort of political manoeuvring in future.²¹⁶

B. A BETTER WAY

Both Bosnian jurists and international community officials had largely agreed by 2002 that comprehensive peer review was fundamentally flawed. But there the consensus ended. Disagreement prevailed until the end of February over whether it would better to junk peer review and adopt general reappointment or somehow to muddle on, putting out fires as required and trying to salvage something from the process.²¹⁷

Then, on 28 February, the PIC put peer review out of its misery. Although it is assumed that general reappointment will be adopted instead – to be implemented by a state-level High Judicial Council responsible for recruitment, appointment, career progression, and termination of judges and prosecutors – the term “general reappointment” is being avoided. It has been decided, moreover, that new appointees will not serve probationary terms, but will be appointed for life from the outset. The main (and face-saving) argument deployed by the IJC is not that peer review has failed, but that the needs to streamline the courts and enact new procedural codes require, in their turn, a

smaller number of judges and prosecutors.²¹⁸

General reappointment requires the suspension of all serving judges and prosecutors, who would then be invited to reapply for their jobs in a transparent and competitive exercise open to anyone. An independent commission would review applications according to set criteria and make the appointments, without parliamentary confirmation. Based on the model employed in the former German Democratic Republic after its unification with the Federal Republic – and used also in Georgia following its independence from the USSR – this pattern was successfully copied in Brcko District from 1999.²¹⁹ Although it was also considered by OHR for the whole of BiH in the autumn of 1999, and was widely canvassed among judges, the general reappointment option was rejected in favour of comprehensive review.

Judges and prosecutors interviewed by ICG opposed introducing general reappointment while comprehensive review was still in train. Their reasons were several. In the first place, they argued that general reappointment would signal mistrust of the entire Bosnian judiciary, blackening the reputations even of its finest members. Moreover, any change could be counterproductive, disheartening effective professionals and dissuading them from making the effort to reapply for their jobs. Thirdly, even if general reappointment were to be adopted, the entity legislatures would subvert it if they retained their powers to confirm appointees. (This, of course, was not the case in Brcko District, where – as described below – the Brcko Law Revision Commission enjoyed full powers to carry out reappointment.)²²⁰ Finally, it would be unrealistic to imagine that qualified candidates would come forward in sufficient numbers to replace those who would be purged during – or refuse to subject themselves to – any general reappointment

²¹⁶ According to an RS legal expert, the entity’s judicial regulation regime makes conflict between the National Assembly and the judicial and prosecutorial councils inevitable. If it keeps its current constitutional powers, the RSNA will retain the right to abolish any and all laws purporting to guarantee the independence of the judiciary. Once the foreigners decamp, the Assembly will be able to do so with impunity. ICG interview, 11 September 2001.

²¹⁷ A recent public spat between OHR and Zlatko Lagumdžija illustrated their shared mistrust of the judiciary, but also their disagreement over who should be held responsible both for its unreformed state and for putting it right. Referring to a deal reputedly struck between OHR’s Anti-Fraud Department and the CoM at the beginning of 2002 to the effect that the former would push some high profile corruption and fraud cases through Bosnia’s courts with the aim of getting politically saleable results, Lagumdžija expressed dissatisfaction with the absence of progress. If there was none within three months, he threatened, the CoM would blow the whistle on the IC’s foot-dragging and cover ups of corruption cases. OHR fanned the fire by suggesting that the FRY should extradite the recently arrested Alija Delimustafic not to BiH (where the former minister is wanted on bank fraud charges), but to Germany (where he is accused of kidnapping). The implication was that OHR did not believe that Delimustafic would ever be put behind bars in Bosnia. “OHR sugerirao da se Delimustafic izruci Njemackoj?!” , *Oslobodjenje*, 6 February 2002.

²¹⁸ See the IJC paper, “The Reinforced Review of Judges and Prosecutors in BiH: Preview Paper for Peace Implementation Council Meeting”, undated.

²¹⁹ For greater detail on how Brcko has done it, see the *Brcko Law Revision Commission: Chairman’s Final Report*, 31 December 2001.

²²⁰ The BLRC had four members: a foreigner, Michael Karnavas, served as chairman, with one member from the RS and two from the Federation. The BLRC also had a secretariat created to provide expert and technical support. Besides various international experts who came to Bosnia for fairly short periods, the BLRC employed three to four domestic lawyers and six interpreters. There was one foreign expert who assisted in the implementation of the judicial reforms for eight months. *Brcko Law Revision Commission: Chairman’s Final Report*, 31 December 2001, p. 6.

process.²²¹

These concerns are real and generally justified. But they are also inadequate as grounds for rejecting general reappointment. The arguments in favour of its urgent introduction are compelling. In the first place, the abandonment of peer review means there is no alternative if the rule of law is to be securely established in Bosnia. But the apprehensions of current judges do need to be addressed. It should prove feasible to implement general reappointment with sufficient delicacy and transparency to preserve the self-respect of good judges and prosecutors. It should also be possible to sweeten the pill for others through early retirement options and enhanced pensions – if the funding is available.

Secondly, general reappointment will be simpler and easier to operate than was peer review, especially as the onus of proving fitness and integrity will be on applicants competing for positions. Since a level playing field will be established for all candidates, the process should also be less humiliating for incumbents than the past threat of close scrutiny based on potentially malicious accusations or arbitrary decisions by commissioners with axes to grind.

Thirdly, although there may not be so many highly qualified candidates from outside the current cadre as to make the 80 per cent replacement rate achieved in Brcko either possible or desirable, a fair and transparent process is certainly likely to attract sufficient applicants to improve markedly upon the 2.5 per cent turnover achieved by peer review.

Having found the resolve to admit error, endure embarrassment and make a u-turn, the international community can now at least hope to spare itself the outraged reactions that would have followed if it had stuck to peer review. Moreover, the resources long wasted in trying to repair the irreparable can now be used to implement general reappointment by the end of 2002. The experience and expertise accumulated in tilting at the peer review windmill – not to mention the information derived from judicial disclosure forms and on-the-spot investigations – should serve the IJC well in carrying general reappointment. On the other hand, it is obvious that the current IJC will have to be substantially

reinforced.²²²

One objection to a change of course at this stage is strong. International officials have been rightly concerned about possible violations of the rights of judges and prosecutors who have already been appointed or reappointed for life. Would it be fair to expose them to a form of “double jeopardy”, or should they be exempted and thereby compromise the integrity of the process? This is a sensitive issue that will be difficult to resolve. On the other hand, implementation of the principles underlying the Constitutional Court’s decision on the “constituent peoples” could help both to square this particular circle and to put an end to ‘ethnic justice’ in Bosnia.²²³ This is because the laws defining judicial service in the entities’ constitutions will be among those requiring amendment in order to provide for fair representation of all three “constituent peoples” and “others”.

Addressing this issue, the RS Association of Judges has objected vehemently to the imposition of any quotas that would assure a pre-defined level of representation by non-Serbs in the RS judiciary. They argued that members of the judiciary should be appointed exclusively on the basis of merit, and not according to other criteria – as if non-Serbs could not also be fully

²²² The IJC has previously had some doubts about whether it possesses the requisite expertise and capacity to deal successfully with complex judicial and legal reforms. As IJC Director Judge Raket Surlien wrote to BLRC Chairman Michael Karnavas on 21 August 2001, “In my opinion Brcko is reforming the judicial system at a pace that the IC actually always demanded because it restructured judicial administration on many levels in a coordinated, strategic approach. I am sceptical that OHR through the IJC can assume the level of expertise to carry forth the very demanding level of implementation down to details that are now going on under your leadership and logically must continue into next year.” Although the formidable complexities of judicial and legal reform are undeniable, there are lessons to be learned from the Brcko and German experiences. The factors key to success are the unquestioned leadership and authority of the reformers and the maintenance of sustained and coordinated effort until completion of the reforms. *Brcko Law Revision Commission: Chairman’s Final Report*, 31 December 2001, p. 50.

²²³ The IJC has already urged the entities to respect the principle of non-discrimination when making appointments, after having found that preference continues to be accorded to candidates from the ‘majority’ nation in its area of control. IJC position paper, “Fair Representation of Judges and Prosecutors in the Judiciary”, November 2001.

²²¹ For example, two well-paid positions in the RS were advertised at the end of 2000. Both Kotor Varos (KM 1,800) and Srpsko Sarajevo (KM 2,500) sought prosecutors, and yet no one applied for either post. ICG interview with RS legal expert, 11 September 2001.

qualified judges.²²⁴ In this context of opposition to the Constitutional Court decision, general reappointment can serve to recast both the national composition and the professional competence of the RS judiciary in one go.²²⁵

To succeed, general reappointment must be based on objective selection criteria. These, in turn, require an independent implementing body akin to the interim commission (Judicial Commission) the IJC plans to establish. There should be only one interim commission for the entire country, and it should function only during the process of general reappointment. Such a commission should include IJC staff, domestic and foreign judges of the BiH Constitutional Court and Human Rights Chamber, distinguished Bosnian jurists, ombudsmen, and representatives of civil society from bodies such as the Helsinki Committee for Human Rights. It would also need to have appropriate representation from the executive, calculated to provide political input while limiting opportunities for political obstruction. The High Representative, in consultation with the IJC, might make final decisions in any cases where consensus on a given candidate could not be reached. Such provisions should assure the fairness and integrity of the process.

It will also be necessary to determine the tenure of the appointments to be made by an interim commission. One option would be to follow Brcko's example and to appoint judges and prosecutors for a probationary period of one year, the successful completion of which would lead to their confirmation in permanent appointments. Alternatively, successful candidates might be appointed to lifetime posts from the outset. The first model would imply either the prolongation of a supposedly interim commission or its surrender to a permanent (and 'nationalised') judicial commission of the responsibility for confirming appointments. The latter option would give the last word to a foreign-dominated and provisional body, although it might also be reckoned to offer some recompense to the abused dignity of Bosnia's judges and prosecutors. On

balance, the option providing *both* for probationary periods and final confirmation by a permanent judicial commission that has been 'Bosnianised' appears preferable.

General reappointment criteria should also be based on evidence of respect for human rights, since the SFRJ was a signatory of the Universal Declaration on Human Rights, as well as of the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (1966). Other criteria should include political party activity that may not have been (or be) appropriate to judicial office and evidence of personal or professional misbehaviour, in particular verdicts issued during and after the war. In other words, candidates for reappointment should expect their records to be tested against both general human rights standards and Bosnia-specific issues like implementation of the property laws.

The issue of legal competence is especially relevant in Bosnia because of the large number of wartime and post-war entrants into the profession who are widely presumed to lack adequate legal training, whatever their other merits might be. This problem could be addressed by requiring candidates to sit a written examination, general in nature, but demanding a demonstration of logical and analytical thinking in resolving mock cases with national, political and human rights' dimensions. To ensure fairness, the examination might be based on the application of a new or draft law with which none of the candidates would be familiar. The point would be to assess individuals' grasp of basic legal principles and interpretative powers. Testing and marking some 1,200 candidates should not take an inordinate time.

Given the international community's successive failures to make comprehensive peer review work, it has lately been confronted with the need to choose between two unpalatable options: to continue trying to fix comprehensive review while wrestling with and losing out to local power elites, or to admit defeat, embrace the role of the benevolent despot, and force through general reappointment as a last chance to equip Bosnia for the rule of law. It is heartening that it has chosen the latter.

German, Georgian and Brcko precedents. Germany's general reappointment scheme met with legal challenges, but was deemed to have been fully consonant with the rule of law. All the constitutional objections – and subsequent cases submitted to the European Court of Human Rights – were rejected. The criteria employed included banning all would-be reappointees who had been members of the East German security service (the *Stasi*) or who had collaborated with

²²⁴ See "Struka ispred ključa", *Glas Srpski*, 9-10 February 2002.

²²⁵ The RS Constitutional Court is regulated separately from other entity courts and, therefore, appears to fall outside the IJC's remit. General reappointment, not to mention the implementation of constitutional amendments, will need to address this issue, making sure the RS Constitutional Court adheres to whatever principles of non-Serb representation are established and that it is subject to the same appointments' procedures as are other judicial bodies. ICG interview with IJC, 14 November 2001.

it. Judges and prosecutors who were considered to have deliberately or wantonly violated human rights were also excluded. For example, approval of illegal surveillance or detention orders and meting out disproportionate penalties (such as ten-year sentences for unauthorised movements of residence or attempts to leave the country) led to bans. The application of a human rights criterion in the general reappointment process was possible because the German Democratic Republic had been a signatory to the Universal Declaration on Human Rights (1948), so making its observance obligatory, even under the laws of the existing regime.

General reappointment in Germany is nowadays judged a success in that it eliminated violators of human rights. But it failed to address issues of competence (or incompetence) because the legal expertise of holdovers was never examined.²²⁶ Post-Soviet Georgia followed the German example, but added an examination of legal knowledge. Brcko District assessed both the legal aptitude and moral integrity of candidates and sought to promote national and gender balance. Brcko also gave preference to younger applicants who were expected to be more flexible in their thinking. The Brcko reform did not include a formal examination, focusing instead on training appointees in the district's new legislation.²²⁷

VII. PROFESSIONALISING THE LAWYERS AND THEIR EDUCATION

A. THE LAWYERS AND THEIR PROFESSION

Lawyers in Bosnia share most of the attributes of the legal and judicial system in which they operate. But unlike the judiciary, lawyers have so far been largely left out of the ongoing reforms, whether as objects of reform or as participants in the process with possibly valuable contributions to make – despite the fact that their reform figures in the IJC's mandate.²²⁸ This is not for want of admonitions to the contrary. Meeting in Philadelphia in September 1997 for its annual congress, the Union Internationale des Avocats adopted a resolution calling for a single law to regulate the profession and to be enforced through a state-level bar association.²²⁹

Both ABA CEELI and the IJC, however, have continued to pursue entity-based solutions. Their stance is based on the widespread but arguably erroneous assumption that lawyers do not constitute a constitutional category defined in the BiH Constitution and, therefore, fall under the purview of the entities.

It can be forcefully maintained, however, that by virtue of Bosnia's incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which defines and guarantees a person's right to have legal counsel of his or her choice, lawyers in BiH represent a constitutionally recognised category and should be regulated on the state level.²³⁰

Unsurprisingly, the profession is regulated by outdated laws that differ between the entities and is organised in three bar associations based effectively on national criteria.²³¹ Since the war, the profession has acquired a

²²⁶ ICG interview with a German legal expert, 27 November 2002.

²²⁷ *Brcko Law Revision Commission: Chairman's Final Report*, 31 December 2001, p. 54.

²²⁸ The IJC may have the requisite mandate, but it has lacked the resources to prioritise reform of the legal profession. ICG interviews with the IJC, 12 November 2001 and 12 March 2002.

²²⁹ This resolution was inspired by the infamous case of the "Zvornik Seven": Bosniaks tried and convicted for murdering four wood cutters in the RS in 1996 who were denied their right to counsel of their own choice. ABA CEELI reportedly supported this resolution. ICG interview with a Bosnian lawyer, 12 March 2002.

²³⁰ ICG correspondence with the IJC and an interview with a Bosnian legal expert, 12 March 2002.

²³¹ The three are the BiH Bar Association, the Hercegovina Bar Association, and the Republika Srpska Bar Association.

negative reputation because its ethical standards have been perceived to fall. Rumours of racketeering schemes organised by lawyers, reports of intimidation of witnesses, and accounts of scams in which defence attorneys at The Hague agree to split their fat fees with their client's families are being investigated.²³² Meanwhile, dubious behaviour by lawyers at home has gone largely unchecked.²³³ The existing codes of ethics are either not enforced or are applied inconsistently, leaving those found unfit to practice law by one bar association free to register with another.²³⁴

Yet if the Bosnian bar associations include some crooks and shysters, they also contain some of the best legal minds in the country. Several prominent lawyers who were formerly judges or prosecutors told ICG that they had reverted to the bar because of the plummeting standards of the judiciary. In any case, the rule of law requires both good judges and good lawyers. The latter are indispensable in asserting the rights of their clients and in checking the overweening pretensions of judges and prosecutors. To carry out these roles, however,

Bar Association and the RS Bar Association. There are discrete branches of the BiH Bar Association in Sarajevo, Tuzla, Bihac, and Zenica. The BiH Bar Association appropriated the title of the pre-war body, an act that has often been disputed by Serb and Croat lawyers who have argued against the misuse of a title implying that the association covers the entire country and embraces all lawyers. The Herceg-Bosna Bar Association, based in Mostar, was created during the war and continues to represent most Croat lawyers. Republika Srpska naturally has its own bar association.

²³² See Moma Ilic and Tihomir Loza, "Crime Does Pay", *Transitions Online*, 15 October 2001.

²³³ For examples of lawyerly misconduct, see "Da li advokati svoje klijente 'uzimaju lopatom?'" *Oslobodjenje*, 9 December 2001, and "Advokati svojim izostancima odugovlace pretrese!?" *Oslobodjenje*, 8 August 2001.

²³⁴ For example, Faruk Balijagic, a prominent Bosniak lawyer disbarred by the BiH Bar Association for unethical behaviour, was later licensed by the Herceg-Bosna Bar Association. Balijagic has represented high-profile defendants such as Hazim Vikalo, a former premier of Tuzla Canton accused of corruption, and Sefer Halilovic, a former Bosnian army general and recent Federation minister indicted by the ICTY for war crimes committed against Croat civilians in 1993. Balijagic is notorious for his no-holds-barred defence methods, which include public campaigning against the Federation police. Accused by Balijagic of conspiring to assassinate him, the police responded with a criminal charge of making false accusations. ICG interview with a member of the BiH Bar Association, 27 October 2001.

See also, "Prekršena ljudska prava Edina Garaplije", *Dnevni avaz*, 6 February 2002, and "Podnijeta krivična prijava protiv advokata Balijagica", *Dnevni avaz*, 28 June 2001.

lawyers must act professionally, with integrity and demonstrable independence.

As legal, judicial and economic reforms proceed, the importance and complexity of lawyers' responsibilities will increase along with the introduction of new criminal and civil legislation, the establishment of the market economy, and the repatriation of war crimes trials. A dominant private sector will require corporate and commercial lawyers. The complexity of modern financial crime likewise calls for specialist lawyers. In such circumstances, the legal profession will need to be – and to be seen to be – competent, honest and accessible, and the bar associations will have to assert and maintain the highest possible moral, ethical and professional standards. At present, however – and due largely to the profession's fragmented structure and its inconsistent application of standards – these things are far from happening.

The deep concern over the state of their profession expressed by prominent lawyers interviewed by ICG centres on the impunity of colleagues who bring it into disrepute, its fragmentation and its marginalisation in the current reform process. Many spoke with pride about legal traditions dating back to Habsburg times and about the preservation of professional standards during a half-century of socialism, when Yugoslavia was the only Eastern European state whose lawyers were members of the International Union of Lawyers.²³⁵ As they see it, the decline of their vocation dates, rather, from the war of the 1990s, when lawyers, like everyone else, were riven by extremist imperatives, subjected to thoroughgoing politicisation and subordinated to executive power.

Federation lawyers are still regulated by pre-war law. Over the past two years, the BiH and Herceg-Bosna bar associations have worked together with ABA CEELI on negotiating a draft law on lawyers. The draft was finalised last autumn and presented to the government, which then proceeded to rewrite it without consulting the lawyers. One of the significant changes made concerned the conduct of the bar exam. Aiming to preserve its upper hand over the profession, the government amended the draft to provide for a Federation-administered examination, rather than one set and organised by the profession itself, which is what lawyers wanted. Protests from the IJC led the

²³⁵ Both the BiH and Herceg-Bosna associations are now members. See the web site of the Union Internationale des Avocats, www.uianet.org

government to relent.²³⁶ At this writing, it is the original draft law that awaits adoption by the Federation parliament.

RS lawyers, although regulated by a post-war law now scheduled for amendment, are in a similarly subordinate position. Not only are they dependent on the executive, but they are also often called upon to support government policies.²³⁷ This politicisation is one of the reasons why ABA CEELI cut off support to the RS Bar Association.²³⁸ On the other hand, despite echoing the government line on RS “sovereignty”, many RS lawyers do see – and would wish to pursue – common professional interests with their colleagues in the Federation.

The proposed laws on public notaries have highlighted the need for inter-entity collaboration. The two entities’ draft laws short-change lawyers by providing public notaries with exclusive authority over company registrations and property transactions. This would deprive lawyers of between 15 and 30 per cent of their income. The threat has belatedly galvanised lawyers to mount a common, if still unavailing, defence of their pocket books.

Lawyers have also argued for changes in the law that would permit them to establish firms and partnerships with specialist expertise. At present lawyers in both entities can work only as individuals. The absence of any legal provision for the establishment of law firms seriously limits lawyers’ professional development, militates against clients getting high quality

representation and promotes a fierce, ‘ambulance-chasing’ variety of competition among lawyers that damages their collective reputation.²³⁹ Specialisation is in any case increasingly necessary in an ever more complex legal and commercial environment. Having recognised this problem, the IJC and ABA CEELI have included provisions permitting the creation of law firms in the draft legislation.

Another gap in legal provision that needs to be filled relates to inter-entity reciprocity. Although lawyers registered in one entity or in Brcko District can in theory represent clients throughout BiH, it is rare in practice for a lawyer from one entity to work in the other.²⁴⁰ This state of affairs disadvantages ‘minority’ litigants or defendants and reinforces perceptions of ‘ethnic justice’.²⁴¹ The lack of uniform enforcement of ethical standards across the country has the same effect.

These lacunae have been recognised. A partial attempt to remedy them was initiated in a draft state-level law on advocates prepared in spring 2001.²⁴² The draft seeks to establish high and uniform professional standards throughout the country by requiring all lawyers to be certified by and registered with the BiH Bar Association. Lawyers would still be free to join entity or canton-based bar associations, but the final arbiter in licensing and upholding professionals standards would be the state-level association.

The draft law has not yet been adopted or passed. Although sponsored by Bosniak lawyers, the proposal has also had discreet support from many Croat and Serb lawyers interviewed by ICG. But they have shied away from endorsing it in public for fear of national-political accusations of betrayal. The proposed law is supported as well by some smaller international agencies; yet those

²³⁶ Presentation by Branko Maric, Head of BiH Bar Association, at a Lawyers Forum organised by the French Embassy and *Advocats sans Frontieres*, Sarajevo, 27 October 2001. The IJC protested to the Federation justice minister over the proposed changes. He then reverted to the previously agreed draft. ICG correspondence with the IJC, 12 March 2002.

²³⁷ This tendency has been much in evidence in recent public discussions on the implementation of the Constitutional Court’s “constituent peoples” decision. The head of the RS Bar Association, Jovan Cizmovic, has argued strongly for the preservation of Serb-majority control in all RS institutions and against quotas for non-Serb representatives. RTRS panel discussion on constitutional reform, broadcast 25 January 2002. Cizmovic is a long time supporter of the SDS.

²³⁸ ABA CEELI initiated assistance projects to the bar associations as early as March 1995, but discontinued its support of the RS Bar Association in 1998 because of inadequate cooperation and “dissatisfaction with how some funds were handled”. ICG interview with ABA CEELI, 6 November 2001.

²³⁹ ICG interviews with Bosnian lawyers, September – December 2001.

²⁴⁰ It is also interesting that lawyers from neighbouring countries (FRY and Croatia) are allowed to practice law in Bosnia, but there is no reciprocity for Bosnian lawyers except in arbitration procedures. ICG interview with a prominent Bosnian lawyer, 11 March 2002. See also, Republic of Croatia Law on Attorneys, Article 47 and 48, and the correspondence between the Croatian Ministry of Justice and FBiH Ministry of Justice, 15 September 1999, Document No. 720-02/99-01/26.

²⁴¹ For a full account of how these factors play out in the courts, see A. Zilic and S. Risaluddin, *Dayton vs. Attorneys* (Sarajevo, 1997).

²⁴² *Draft Zakon o advokaturi Bosne i Hercegovine*, June 2001.

with decision-making powers have ducked the issue. The IJC and ABA CEELI continue to support entity-based laws. This is even more absurd now that the PIC has recognised the need to establish a state-level High Judicial Council to assure uniformity and fairness in judicial appointments and the subsequent enforcement of professional standards.

All this is unfortunate. The creation of a truly state-level body would be a step forward, and would help assure respect for international standards of legal representation at home and abroad. In particular, it would facilitate Bosnia's representation in those international legal forums to which Council of Europe membership and European integration processes will open the door.²⁴³

It should be clear that no thoroughgoing legal reform can take place if lawyers continue to be neglected. In Bosnia, however, only a few smaller international bodies have worked to upgrade the profession. Chief among them has been ABA CEELI. Latterly, however, the Barreau de Paris and *Advocats sans Frontieres* have announced plans to open an office in Sarajevo to help organise bar associations, build capacity to represent clients before international legal institutions, offer advice on implementing codes of ethics, and train counsel in organising criminal, commercial and trade-related cases. Although all such support should be welcome, this agenda seems strikingly similar to what ABA CEELI has been attempting since 1995.²⁴⁴ Every effort should be made to avoid duplicating existing schemes. There are, after all, plenty of tasks to go round, and future service providers ought to identify carefully what needs are most pressing. In any case, technical assistance projects cannot hope to be effective in the continuing absence of comprehensive reform of the profession.

²⁴³ Bosnia's official inclusion in international professional associations would also follow. L'Union Internationale des *Advocats*, based in Paris, is the oldest international grouping of bar associations and law societies that do not necessarily represent the countries from which they originate. Both the BiH and Herceg-Bosna bar associations are members, but the RS Bar Association is not. Presentation of Nicholas Stewart, President of the International Union of Lawyers, Lawyers Forum organised by the French Embassy and *Advocats sans Frontieres*, Sarajevo, 27 October 2001 and www.uinanet.org.

²⁴⁴ Many Bosnian jurists' resentment of the creeping 'Anglo-Saxonisation' of their legal canon thus seems to have met with some Gallic sympathy. As countries like Canada, the UK and U.S. show, however, the common and civil law traditions can successfully cohabit.

B. REFORMING LEGAL EDUCATION

The inadequacy of Bosnian law schools and the education they nowadays offer is another aspect of the rule of law that has largely been left out of the reform equation. High quality training of young lawyers will prove essential to lasting legal and judicial reforms: not simply because the young will one day inherit responsibility for maintaining the rule of law, but also because the radical reform of the legal environment now underway necessitates a profound change in legal education. The current system of faculty-based university law training is incapable of providing what is required.

The universities have not been exempt from Bosnia's comprehensive fragmentation. There are thus too many ill-funded universities providing law degrees of dubious quality: in Banja Luka, Bihac, Mostar, Sarajevo, Srpsko Sarajevo, and Tuzla. Of the 500 law students entering the Sarajevo Law Faculty each year, only 35 will be graduated within four years.²⁴⁵

The low pass rate does not, alas, testify to extraordinarily high standards, for students are required neither to write essays nor even to sit written examinations during their courses. All the exams – which take place two to three times during the academic year – are oral, and so brief as to preclude any demonstration of logical argument and analytical thinking. What they do require is regurgitation of an assigned text, usually that of the professor teaching the subject. Law students told ICG of one professor who scheduled 180 oral examinations on a single day. Others referred to set 'prices' of between KM 600 and KM 1,500 for a passing mark in a given exam.²⁴⁶ Although such corruption and dysfunction are not unique to Bosnian higher education, they are indicative of deep systemic problems.

With the exception of a few professors who cover contemporary human rights and criminal law issues, most lecturers appear to oppose any modernisation either of the curriculum (to make it more relevant to Bosnia's legal evolution) or of their teaching methods

²⁴⁵ This discussion will focus on Sarajevo's Law Faculty, not because it is typical, but because it is the largest, the best funded and is generally reckoned to be the least bad of the bunch. Moreover, it has benefited from some international assistance and certain of its prominent professor-politicians have been active in legal reform.

²⁴⁶ Prices in medicine are reputed to be much higher, which may be another index of the slump in lawyers' stock.

(by, for example, involving experienced judges and prosecutors in seminars). Students and some dissident faculty members, as well as international agencies, cite rigid resistance to any reforms that might upset the status quo and expose those who benefit from it as redundant or incompetent. It was, for example, considered a great breakthrough when, last summer, ABA CELLI succeeded in its longstanding efforts to organise moot courts in the Sarajevo and Mostar faculties, as well as lectures by serving law enforcement officers and judges. The German GTZ has also had to work hard to get the Sarajevo faculty to accept its proffered support for the civil law department.

Notwithstanding its grudging acceptance of such international assistance projects, even the best graduates leave the Sarajevo Law Faculty hugely unprepared for practical legal employment. According to the judges and law interns working under their supervision to whom ICG has spoken, graduates need another one or two years of training after leaving university – either to learn the things they failed to learn at university or to relearn how things are in the real world.

Reform of tertiary education in Bosnia – including its law faculties – is meant to be complete by September 2002. An earlier reform scheme in the Federation came to naught, save the introduction of an element of student participation in faculty governance.²⁴⁷ This time the reform is supposed to be real, and to establish European standards in marking, university autonomy,²⁴⁸ measures of educational outcomes, and international recognition of Bosnian university degrees.²⁴⁹

Yet the necessary modification of the law curriculum can only be carried out to good effect if those who have been involved in legal and judicial reform are involved. This is nowhere in sight. The IJC does not want to

include law faculty reform in its remit, pleading lack of resources and according the job a relatively low priority.²⁵⁰ Other international bodies should prove more interested (e.g., ABA CELLI, GTZ, and the Council of Europe), but would only be able to lend a helping hand.

The international community's failure to address legal education systematically in its law reform programs means that Bosnia risks being unable to sustain the structures and standards that its foreign patrons aim to bequeath. Curriculum modernisation is essential, but so too are reforms in university finance and governance, not to mention adequate professorial salaries in return for committed scholarly and pedagogical endeavour.

Such changes, however, are well beyond the scope of even the most comprehensive program of legal reform. On the other hand, a state-level bar association could take the lead by demanding evidence of academic attainment and practical skills from would-be members. As the doorkeepers to their profession, bar associations and law societies in other countries can usually set standards, specify course content and even decree student numbers to universities seeking to teach law, whether they be the most prestigious, hidebound or weak institutions. Failure to comply spells either de-certification of a non-compliant law school or extra hurdles for its law graduates to surmount before they can be accepted into the professional community.

Resistance to any (by Central and Eastern European standards) revolutionary proposals of this sort would be intense. However great their penury and however deep their intellectual torpor, university faculties remain formidable defenders of their autonomy and prerogatives. But degree courses in subjects like law, which also require membership in a professional body before they can be practised, would be the obvious place to start in dismantling the tyranny of the faculties.

If, in the process, it also provided Bosnia with lawyers who can write, think and speak, whose knowledge is based on more than the memorisation of set texts and whose experience encompasses the variegated legal environment now emerging – then so much the better.

²⁴⁷ For an account of the 140 amendments proposed to the Federation Law on Higher Education three and a half years ago (of which only one was adopted), as well as citations of the views of Sarajevo University deans of faculties, see "Dekani i studentsko prigovaranje", *Dani*, 15 February 2002.

²⁴⁸ The Bosnian political and university establishments overlap to an astonishing and unhealthy degree. The former (Bozidar Matic) and current (Zlatko Lagumdžija) chairmen of the Council of Ministers are Sarajevo University professors, as are CoM minister Azra Hadžiahmetović and Federation Premier Alija Behmen. Other professor-politicians with roots in academe include Jadranko Prlić, Ivo Komsić, Haris Silajdžić and Mladen Ivančić.

²⁴⁹ For a comprehensive account of the projected reforms, see "(Ne)moguća misija – Univerzitet u Sarajevu: Forma ili Reforma", *Dani*, 15 February 2002.

²⁵⁰ ICG interview with IJC member, 13 November 2001. The IJC has subsequently disputed this assessment, arguing that while law faculty reform is important, it lacks the resources to tackle the job. Rather, the IJC believes that organisations such as ABA CEELI are better suited to such a task. ICG correspondence with the IJC, 12 March 2002.

VIII. BRCKO: HOW THE EXCEPTION PROVES THE RULE²⁵¹

Favourable reference has been repeatedly made in this report to the judicial reforms undertaken in Brcko District. These reforms merit separate consideration, in order that appropriate lessons can be drawn for application elsewhere in Bosnia.

The special status of Brcko was established by the long-delayed Brcko Arbitration Award in March 1999, thereby completing business left unfinished at Dayton. The decision also provided the district with a unique governmental structure. Its 87,000 residents are citizens of BiH and of either entity, while its executive (comprising a mayor and numerous departments and divisions) is nominated and overseen by an internationally appointed Supervisor who is himself only formally subordinate to the High Representative in Sarajevo. In the absence thus far of local elections, the 29-member legislative assembly has also been appointed by the Supervisor.

The Arbitration decision empowered the District to enact and apply its own laws if no adequate or appropriate legislation was on the books in either entity or at the state level.²⁵² Since then, Brcko District has provided itself with over 40 laws enforceable only on its territory of some 30 by 40 kilometres. These laws regulate the executive, legislative and judicial branches: their organisation, (prospective) election and/or appointment, their budgeting and financing, assembly and court procedures, and many other functions. Judicial reform in Brcko was conceived and implemented by a single agency, the Brcko Law Revision Commission (BLRC).²⁵³ It, in turn, was answerable directly and exclusively to the Supervisor.²⁵⁴

²⁵¹ This section is based on interviews with Michael Karnavas, Chairman and Executive Director of the Brcko Law Revision Commission, and judges and prosecutors of the Brcko district, 4 September and 10 October 2001, as well as with other international and Bosnian legal experts from the two entities, September–December 2001.

²⁵² See Brcko Final Award, 5 March 1999, and Statute of the Brcko District, 7 December 1999 (although not enacted until 8 March 2000). Also, ICG interview with Michael Karavas, 4 September 2001.

²⁵³ The BLRC operated from June 1999 to October 2001.

²⁵⁴ The autonomy of the Supervisor has been the object of some envy on the part of other international agencies, including OHR, while the work of the BLRC has been criticised as non-transparent and unaccountable. ICG

The goals of judicial reform were to establish an independent judiciary, to set up efficient appointments procedures and a judicial commission charged with selecting, disciplining and dismissing judges, to amend criminal codes and procedures, and to ensure to the judiciary budgetary means independent of the executive.²⁵⁵ This was accomplished in just over two years.

A. INDEPENDENT JUDICIARY

To review members of the judiciary, the BLRC adopted the general reappointment model based on the experiences of East Germany after unification and of Georgia after independence. According to this model, the mandates of judges and prosecutors are suspended and all positions are advertised. Suspended judges and prosecutors continue, however, to carry out their functions until new appointments are made. Both new and incumbent competitors are required to meet set criteria and to prove that they are fit to serve. An independent judicial body – the BLRC, assisted by a panel of distinguished national jurists – interviews, selects and appoints the new judges, prosecutors, and lawyers (for the Agency for Legal Aid). The Brcko positions were advertised throughout Bosnia and in the neighbouring countries, thereby attracting a large field of candidates.

General reappointment in Brcko resulted in the replacement of 80 per cent of the previous office holders. The new cohort comprises 21 judges, seven prosecutors and six lawyers who work in the Agency for Legal Aid (which provides legal assistance to Brcko residents). Seventy per cent of those appointed are either returnees to Brcko or people who were attracted to the District by the open competition for the jobs (and the regular salaries of KM 3,000 to 4,000 per month) on offer.²⁵⁶

The new judges and prosecutors were appointed in April 2001 for a probationary period of one year. They will secure tenure until retirement age following reviews of their performance by the Brcko Judicial Commission and the IJC. Meanwhile, every appointee has been given tools in the form of new laws, as well as the incentive to earn permanent positions. Although only

interviews, September–November 2001.

²⁵⁵ See Statute of the Brcko District of BiH, Chapter V.

²⁵⁶ Judicial salaries in Brcko are no higher than elsewhere in BiH, but they are paid on time. As is discussed below, the important distinction in this regard between Brcko and the entities is that, in the former, decent pay followed rather than preceded review.

time will tell whether the Brcko judiciary proves more competent than its predecessors or counterparts in the rest of Bosnia, the framework in which it operates should enhance its chances of establishing the rule of law. According to several prosecutors and judges from both entities, it was the participation of international officials in the Brcko reappointment process that symbolised its equity, and lent credibility to the process for applicants and public alike.

Already corruption and bribery have been banished from Brcko's courts – the result of wholesale personnel changes, the imposition of tighter controls, and the removal of incentives for malversation. The old milieu in which judges and prosecutors could be bought by the new rich, by politicians and by lawyers has gone. The public appears now to understand that attempts to bribe court officials are likely to meet with swift punishment. It was both citizens' complaints against corrupt former judges and prosecutors and the availability of better-qualified candidates that led to so many incumbents' failure to win reappointment.

B. BRCKO JUDICIAL COMMISSION

The Brcko Judicial Commission is the successor body possessed of exclusive powers to review the work of judges and prosecutors, to decide on disciplinary measures, dismissals and future appointments, as well as to confer or deny permanent tenure after the expiry of appointees' year-long probationary periods. In the latter case, however, decisions on tenure will be monitored by the IJC office in Brcko, which absorbed some former members of BLRC. The Judicial Commission is composed of the four senior members of Brcko's judiciary (the presidents of the basic and appellate courts, the prosecutor and the director of the Agency for Legal Aid); two local citizens appointed by the BiH ombudsman; and the president (or other judge) of the state Constitutional Court.

C. THE COURTS

The Brcko court system comprises a first instance (basic) court with fourteen judges, a second instance (appellate) court with seven judges and a third instance court (which will be the state court). The previous minor offences' court was merged with the basic court, which now has divisions for misdemeanours, criminal offences, civil cases, and commercial matters (covering bankruptcy and registration of enterprises). The Court Secretary – an attorney – administers the courts and answers to their presidents.

High salaries (by Bosnian standards) and political and budgetary independence brought with them heavier work loads for fewer judges and increased responsibilities. A single judge now tries cases involving offences carrying sentences of up to ten years, while a panel of three judges sits in cases involving more severe sentences. Brcko's unique Legal Aid Agency, meanwhile, offers free legal assistance to citizens who cannot afford counsel. This assistance is provided in criminal matters and, to a more limited extent, in civil suits. As was intended, Brcko's judicial budget (KM 4,326,750 million in 2001) is completely separate from that of the government. It is drafted and passed to the assembly for approval by the Judicial Commission.

D. REFORM OF CRIMINAL PROCEDURES

Since April 2001, Brcko has possessed a modernised criminal and criminal procedure code that is the envy of the rest of the country. The code has markedly improved the efficiency of judicial procedures in criminal cases, radically changed the role of the prosecutor, and introduced elements of an adversarial system that is more characteristic of common law countries than of those, such as Bosnia, with a continental European legal tradition. Although many judges, prosecutors and lawyers admire the code for its innovations, the most common objection to such radical change centres on the alleged importation of 'Anglo-Saxon' common law precepts. Though widespread, this perception is largely inaccurate, since, in fact, the Brcko code was modelled on those of the ICTY and several European countries, in particular Italy, Germany and Sweden.

The code's main changes include:

- ❑ Abolition of the role of the investigative judge. Instead, the prosecutor is now charged with leading an investigation and supervising the work of the police. In addition, the prosecutor must now also exchange evidence regularly with defence counsel.
- ❑ Abolition of the position of the lay judge (*sudija porotnik*) who served previously as a juror in a judicial panel during a trial. The lay judge, although possessing no professional legal training, had the power to decide on the value and relevance of evidence. Nor was the lay judge's conduct regulated by any code of ethics. This provided opportunities for the exercise of external influence to go unchecked. Now the individual professional judge disposes of more authority and responsibility.
- ❑ Abolition of the institution of the private

prosecutor. This system allowed citizens to initiate a criminal investigation through a legal representative.

- Introduction of new rules and standards of evidence, including definitions of such terms as “suspicion” and “sufficient grounds” which set the degree of proof required for a suspect to be indicted or convicted.
- Introduction of more rigid requirements for detention. A person can now be detained for only 24 hours without charges being filed. This puts great pressure on the prosecutor and police to do a thorough investigation before they arrest anyone.
- Speeding up the judicial process by the introduction of strict time lines requiring trials to start within 120 days of an indictment.
- Introduction of an adversarial procedure in trials, modelled on ICTY and Italian practice. This system gives the prosecutor an active role during a trial. It also allows all parties involved to call their own expert witnesses to evaluate evidence and permits their cross-examination.
- Prescription of sanctions on lawyers, witnesses and clients who fail to appear at court hearings. Moreover, judges can now send witnesses who refuse to testify to jail. It is also for judges alone to permit the removal or replacement of defence counsel, and not for defendants or their lawyers. (Changing counsel during judicial procedures is often employed in the rest of Bosnia in order to delay proceedings. Swift penalties are an effective way to discourage such behaviour.)²⁵⁷
- Introduction of plea-bargaining in order to obviate the necessity for a trial in cases of crimes carrying

sentences of less than ten years where the accused admits his guilt. (This provision amounts to a heresy elsewhere in the country, where plea-bargaining is strictly prohibited.)

- Abolition of the possibility of returning a case to the first instance court for retrial. According to the new procedures, a case must be completed and a final verdict recorded by the second instance court.

Upon assuming office, the new Brcko judiciary organised a month-long inventory and found the system in disarray. Judges and prosecutors had inherited a backlog of 28,000 cases, nearly half of which were for minor offences (unpaid bills, speeding tickets, and the like). An additional (supposedly completed) 1,550 cases had to be added to the backlog when the inventory revealed that the verdicts had not been executed.

There were other problems. The court archive of some 30,000 cases, housed in the basement of the courthouse, was soaked by rainwater and had deteriorated seriously.

The inventory also revealed many improprieties in the court’s organisation. Some 40 cases had not been allocated to any judge for action, giving literal meaning to the colloquial expression about a ‘case sitting in a drawer’. Incompetent and untrained individuals were discovered to have written appeals and complaints. In some cases, judges themselves had produced appeals and motions; while certain lawyers were found to have falsified authorisations to sell or transfer property.

There proved to be significant discrepancies, too, in the number of cases that had been allocated to different judges. Some former judges had been assigned over 400 cases, while others had charge of only 60. Such variations in judges’ caseloads were a clear indication of conflicts of interest and perhaps even of an elaborate system of bribery. In any case, the state of the court and its docket was testimony to its astonishingly bad former leadership.

Over three months, the newly appointed judges of the Brcko basic court nearly halved the backlog to 16,200 cases, all of which were completed using entity laws. In comparison to the non-productivity of the old judiciary, which had dealt with 4,200 cases in two years, the new judiciary was twelve times more productive.

E. SHORTCOMINGS AND RELEVANCE OF THE BRCKO MODEL

Two questions come immediately to mind in regard to judicial reform in Brcko. First, how relevant is it to the

²⁵⁷ Several Bosnian lawyers admitted to ICG that they regularly fail to show up at hearings or abandon a case as a means of advancing their clients’ interests. Such manoeuvres are apparently preferable to a judicial process in which the outcome is uncertain because no bribe or political fix is available or desirable. Interestingly, some Federation lawyers have expressed interest in transferring cases to Brcko in order to benefit from the efficiency and probity of its courts. ICG interviews conducted at the international forum “Building the Rule of Law in Bosnia & Herzegovina: Example of the Lawyers’ Profession”, held in Sarajevo, 27 October 2001. Similar views were expressed during other ICG interviews between September and December 2001.

rest of the country? And, secondly, will the reforms really make any difference, either in Brcko District or in Bosnia generally?

Brcko's small size and population make the District reliant on the rest of the country in most respects, including on the entities' judicial systems. Its judicial and law enforcement systems must work closely with their counterparts in the entities if they are to be successful in fighting crime, especially organised crimes such as trafficking and prostitution. The present inadequacy of such coordination creates numerous problems.

1. Non-Cooperation with the Entities

The administrative boundaries between Brcko District and the entities represent real borders for the police and the judiciary. Cooperation across them is haphazard and arbitrary, and depends on the good will of the officials involved. There are no formal agreements between the entities and the District regulating or institutionalising such cooperation.²⁵⁸ The lack is exacerbated by the procedural differences in regard to the weighing of evidence between Brcko and the entities. Effectively, such legal cooperation and exchanges as take place are conducted as if Brcko and the entities were different countries.

Crimes which extend beyond the territory of the District – smuggling, trafficking, tax evasion through fictitious companies, and even simple car theft – are almost impossible to investigate and prosecute successfully because they require effective liaison with the entities' law enforcement agencies. This cooperation is sporadic and inconsistent in car theft cases, and almost non-existent in human trafficking and tax evasion cases. The performance of the Brcko courts is adversely affected as a result. The investigation and prosecution

of human trafficking and prostitution in Brcko amounts to chasing one's own tail if the head resides outside the jurisdiction of the District.²⁵⁹ An investigation of a tax evasion case led to the discovery that the fictitious companies set up to evade taxes had been registered in Bijeljina. This breakthrough ought logically to have required the RS police to continue the investigation on their turf. Instead, the investigation ground to a halt, thereby stifling further action by the police and judiciary in Brcko.

Another problem is posed by the non-apprehension of suspects sought by the Brcko authorities on the territory of the Federation or the RS.²⁶⁰ This was not a problem before Brcko's reforms. Until then, an arrest warrant issued in Brcko and sent elsewhere was regularly enforced.

An analogous difficulty arises when efforts are made to prosecute a politician suspected of corruption. Such persons can often invoke parliamentary immunity. It is then up to the legislative body of which the suspect is a member to revoke his immunity if the investigation is to proceed. This is a problem common to all corruption cases involving former or currently serving public servants throughout Bosnia. The Brcko prosecutor is currently investigating both Munib Jusufovic (a member of the BiH House of Peoples and a former mayor of Rahic-Brcko municipality) for allegedly misusing KM 1.7 million and Mijo Anic (the current Federation minister of defence and a former mayor of Ravne-Brcko municipality) for reputedly appropriating some KM 100,000 in illegal capital gains.²⁶¹ The prosecutor's inquiries as to who should revoke the suspects'

²⁵⁸ One top OHR official with a legal background has argued that such agreements are not essential for cooperation in legal matters. According to this official, it is the Bosnian culture of non-cooperation and the socialist heritage of strictly prescribed courses of action (which are lacking in this case) that are the main culprits behind the absence of cooperation. Judges and prosecutors could work together if they wanted to, irrespective of their locations. This may be so, but the existence of vested interests which are served by non-cooperation and the institutionally fragmented Bosnian judicial space are also signs of rational choices, not only of inertia and incompetence. This is why it is important to introduce legislation prescribing regular and automatic exchanges of information and cooperation in legal matters. ICG interview with OHR official, 26 December 2001.

²⁵⁹ Although acknowledging that there are problems of coordination between the law enforcement agencies and courts of the District and the entities, the IJC argues that collaboration occurs more often than not as a result of informal agreements. ICG correspondence with the IJC, 12 March 2002.

²⁶⁰ This problem was corroborated by jurists from both Brcko District and the Federation. ICG interview with Jadranko Grcevic, President of Brcko Basic Court, 5 September 2001, and Suada Selimovic, President of the Federation Supreme Court, 14 September 2001.

²⁶¹ The Ravne municipality in Brcko District (of which Anic was formerly the mayor) provided him with KM 100,000 to renovate an apartment. Once Anic moved to take a position in the Federation government, he sold the flat, but allegedly kept the proceeds. The media interpreted these corruption cases as instances of 'ethnic justice', since the Brcko judiciary appeared to be focusing on Bosniak and Croat officials while neglecting Serbs. See "Osumnjiceni uzvracaju ptuzbama", *Glas Srpski*, 5 November 2001, and "Jamina tuzi, Karnavas sudi", *Dani*, 9 November 2001.

immunity fell on deaf ears in the Federation parliament, defence ministry and presidency.²⁶²

2. Implementation Problems

Difficulties in the implementation of the new criminal codes have started to appear. The requirement to charge a suspect with an offence within 24 hours of his arrest (although an extension of a further 24 hours is possible) is proving hard to meet.²⁶³ According to one Brcko judge, it “does not fit very well in this environment”. Such a high standard requires exemplary police work and close liaison between the police and the prosecutor.

The former, however, are not yet fully trained or equipped to conduct demanding investigations, which were previously carried out by an investigative judge. Judges, for their part, are concerned that prosecutors may be so keen to get convictions that they will conduct unbalanced investigations.²⁶⁴ Other legal professionals worry about the unwillingness of the police to investigate anything unless the prosecutor is present.²⁶⁵ In any case, because of the changed role of the prosecutor, there is an obvious need to boost the capacity of the police to undertake proper investigations of more serious crimes.

Not only do the police lack the professional skills to undertake investigations of more complicated or serious crimes; they may also actually facilitate the commission of crimes that they are subsequently called upon to

investigate.²⁶⁶ For example, the police have the authority to issue documents confirming that individuals are not under criminal investigation or prosecution, so enabling such persons to obtain a residence or work permit. The police regularly issue these documents to women from Moldova, Ukraine and Romania who are later prosecuted for prostitution and/or deported from Bosnia. Moreover, when issuing these documents, the police appear to be unconcerned about how the women entered Bosnia. The issue of illegal entry is raised only after the women have been arrested and prosecuted for working as prostitutes in brothels. By such means the police shift the responsibility for dealing with a complex crime problem from their own shoulders to those of the judiciary.

The Brcko criminal code does not adequately regulate the seizure and confiscation of illegal profits, which is essential to combating organised crime and money laundering.²⁶⁷ Although money laundering is a crime in the District, both preventive systems and legislation providing for confiscation of the proceeds have yet to be developed. To be effective, preventive measures would need to be elaborated in conjunction with the entities. Legislation on the confiscation of the proceeds from crimes committed in Brcko and, particularly, of the profits from human trafficking and enslavement, was being considered at the time of this writing.

3. Prospects

The Brcko Law Revision Commission ceased to exist in October 2001. That part of its mandate concerned with the drafting of laws passed to OHR Brcko, while its responsibility for supervising and assisting the judiciary was taken over by the IJC. In April 2002, subject to the Supervisor’s final approval, the IJC and the Brcko Judicial Commission will make their final decisions on life tenures for those Brcko judges and prosecutors who have demonstrated their professionalism and

²⁶². See “Skupstina ce odluciti o ukidanju imuniteta poslanicima”, *Oslobodjenje*, 1 November 2001, and “Anic jos cuti”, *Glas Srpski*, 28 November 2001.

²⁶³ The function of the investigative judge was removed from the Brcko criminal procedure code in order to enhance the quality and efficiency of investigations. As the BLRC final report notes, because of “the late involvement of the investigative judge in the procedure and the lack of cooperation between the prosecutor and police, the police often performed unnecessary tasks, while neglecting to perform essential duties.” Chairman’s Final Report, “Reforming the Criminal Justice System”, pp. 40-41. Despite the IJC’s apparent desire to believe that meeting the 24-hour deadline should not be so difficult, ICG interviews with those who implement the law indicated otherwise. ICG correspondence with IJC, 12 March 2002.

²⁶⁴ According to the new criminal procedure code, the prosecutor must order the police to investigate and collect all relevant evidence, including that which may be favourable to the suspect. ICG interview with M. Karnavas, Chairman of BLRC, 4 September 2001. On the other hand, judges to whom ICG has spoken expressed concern about prosecutors’ possible bias against suspects.

²⁶⁵ ICG interview with an international court monitor, 9 October 2001.

²⁶⁶ See ICG Balkans Report No. 118, *The Wages of Sin: Confronting Bosnia’s Republika Srpska*, 8 October 2001, which discusses the inadequacies of the RS police. Also see the forthcoming ICG report on an international follow-on police mission for BiH.

²⁶⁷ While the criminal code does not specify confiscation of profits from human trafficking and enslavement, it does provide for the seizure of the proceeds (including money, valuables and any other property) obtained from the commission of a criminal offence. See Brcko Criminal Code, Articles 109 and 110. Hence, the confiscation of profits from human trafficking is possible, but is not enforced. ICG correspondence with IJC, 12 March 2002.

competence after one year's probationary service.

It is clear that Brcko's judiciary has experienced difficulties stemming both from exogenous factors (such as Bosnia's fragmented judicial space) and endogenous factors (such as the shortcomings of the new criminal legislation). Nevertheless, judicial and legal reform in Brcko District is an impressive example of a successfully conceived and executed reform from which the rest of the country could and should learn, especially politicians and judges who remain oblivious to what is required to create an honest and efficient system. The Brcko experience also offers valuable lessons for international agencies engaged in rule of law issues in the Federation and the RS.

As judicial and legal reforms aimed at improving and harmonising provision in the two entities proceed,²⁶⁸ the system in Brcko will have to be changed accordingly, so that Bosnia eventually has a uniform and coordinated system. It will be important to ensure, however, that the gains made in Brcko are not lost in the process. According to the IJC, there is growing sentiment among international and national experts in both entities that the Brcko laws should be used as models for the rest of the country.²⁶⁹

F. LESSONS

Among the lessons from Brcko that should be applied in the remainder of the country are the following:

- The general reappointment of judges and prosecutors, accompanied by comprehensive reforms of laws and procedures that assure the independence of judges, contributed mightily to establishing the rule of law in Brcko District. No meaningful judicial reform can be expected in the Federation and the RS while the current cadre of judges remains in place. Too many judges are beholden to too many diverse vested interests to

serve anything other than the status quo. If the judiciary is to be professionalised and to repossess the integrity and credibility that should be its hallmark, the dysfunctional practice of peer review must go.

- The role of the court president is of particular importance for instilling professional order in courts. The court president should be held accountable for judges' unprofessional behaviour and inadequate performance. Unfortunately, most court presidents sit on the cantonal and entity commissions tasked with professional review of their colleagues. Dumb judges will not be removed so long as court presidents who share responsibility for their colleagues' lame performance are among those making the decisions.
- International judges and prosecutors must be involved in a general reappointment process. There is consensus to this effect among judges and prosecutors in both entities and in Brcko District. According to one Brcko judge, "If the internationals were not involved during and after the judicial reform to assure the integrity of the process and fend off attacks after the reform, there would have been an open run at the judiciary."²⁷⁰ This is a poignant reminder of the stakes involved in reform – and of the extent to which even those who operate the system mistrust it.
- The general reappointment model has the potential to tap a large pool of talented younger lawyers who may lack experience, but are untainted by political ties and eager to learn. Such people may have been residing and practising abroad or working for international organisations. General reappointment would also assist in making the judiciary and prosecutors compliant with the "constituent peoples" decision of the Constitutional Court.
- The independence of the judiciary must be ensured on three fronts: human resources; appointment and dismissal procedures; and financial independence. The Brcko reforms covered all three. In the entities and cantons, however, a significant measure of responsibility for appointing and dismissing judges and prosecutors has been given to the assemblies, inviting political intervention. There should, instead, be an independent body in charge of appointing judges and prosecutors, one that

²⁶⁸ The judicial and legal reform agenda is outlined in the "Strategy Paper of the Independent Judicial Commission, 2001-2002". It sets out an action plan for major reforms in such areas as civil law and procedure, as well as court administration and financing.

²⁶⁹ Heated debates have taken place over the extent to which changes necessary to accommodate the rest of Bosnia will jeopardise what has been achieved in Brcko. Many domestic and international legal professionals acknowledge and support Brcko's achievements, both publicly and privately, and wish them to be preserved. ICG correspondence with IJC, 12 March 2002.

²⁷⁰ ICG interview with a jurist from Brcko District, 5 September 2001.

involves representatives from several levels of the judiciary, lawyers' associations, the executive and perhaps civil society.

- One agency with a clear mandate and the full political support of its masters should be placed in charge of judicial and legal reform. The BLRC planned and effectively executed the comprehensive reform in Brcko in two years. A partial and half-baked reform agenda implemented by a variety of separate agencies, each pushing its different priorities on reform, will not advance the prospects for institutionalising the rule of law across Bosnia & Herzegovina.

IX. CONCLUSION

Promotion of the rule of law in Bosnia & Herzegovina has been an international and domestic priority for the past five years. Yet despite the expenditure of considerable effort, ingenuity and money – and the elaboration and implementation of a range of more or less coherent and consistent reforms – the law does not yet rule. Political interference, national discrimination and simple incompetence remain rife. Over the past two years, more vigorous attempts have been made to reform both the judiciary and the law itself. The results, where they are in, have been discouraging.

The comprehensive professional review that was supposed to sift through the judiciary and remove inept and corrupt judges has failed. Criminal law reform and the establishment of a state court have been proclaimed, but still await implementation. Overhaul of the courts has been deferred, even though it ought logically to have proceeded apace with other reforms. Local power elites push only for changes that will permit them to keep their ascendancy over the judiciary, blaming it for most of the legal system's (if not all of Bosnia's) ills. Meanwhile they disown any responsibility for perpetuating the political and financial dependence of the judiciary, the bloated and unproductive structure of the courts and the near-feudal fragmentation of Bosnia's judicial landscape.

The picture, however, is not all bleak. The window of opportunity remains open. The Peace Implementation Council has recently accorded the establishment of the rule of law a still higher priority, making it one of the international community's four core tasks in BiH. Moreover, the pending implementation of the Constitutional Court's decision on the "constituent peoples" could transform the national-political context in which reforms take place. For their part, the IJC and OHR appear to have adopted a more thoroughgoing approach to reform. The leaders of the Alliance have recently started to call for more thorough reforms.

What remains to be seen, however, is whether or not Bosnia's international guardians and domestic leaders also possess the will to force through change. The past propensity of the foreigners to plead lack of resources, to point to the complexity and political sensitivity of the undertaking and to deny the need either to acknowledge or fix their own mistakes is not encouraging. The decision of the PIC on 28 February 2002 to scrap comprehensive peer review is thus doubly welcome: not just because it breaks the mould, but also because it is right.

The international community set a precedent of root and branch reform in Brcko District that can now be applied to the rest of Bosnia – if the will and the resources hold.

The Brcko Law Revision Commission conceived, organised and implemented a comprehensive judicial and legal reform in just two years, endowing Brcko with modern criminal legislation, an efficient court structure and an independent judiciary selected through general reappointment. The results have already proved positive, even if the full effects of the reforms cannot be realised until Bosnia is reunified as a single judicial space with uniform laws.

For that to happen, comprehensive reform of Bosnia's judicial and legal systems should take place without delay and simultaneously in both entities and on state level. The reforms should embrace the judiciary and, in particular, the judicial appointment mechanism. They should also harmonise legislation and rationalise court structures across the length and breadth of the country. General reappointment of judges and prosecutors should not only replace peer review, but be consonant with both the Constitutional Court decision requiring fair representation of each constituent nation and the new criminal procedure code.

To ensure the political independence and integrity of the process, general reappointment should be administered by a state-level interim judicial commission and led by a much-augmented IJC. The interim commission should also involve judges of the BiH Constitutional Court, jurists and civil society activists who have demonstrated their commitment to and expertise in human rights, as well as representatives of the executive. Judicial appointments should be made for one year in the first instance, with life terms dependent on subsequent confirmation by a permanent judicial commission. The new model judiciary should operate within a streamlined and financially sustainable court structure, comprising fewer, more centralised and less vulnerable courts. Finally, enforcement of the new and uniform criminal and civil legislation must disregard the internal judicial and policing borders that have heretofore compromised the rule of law and perpetuated criminal impunity.

Daunting as this agenda may be, it is also urgent. If reforms are not implemented this year, the window of opportunity will probably close. "Comprehensive" peer review has come to an untidy and highly non-comprehensive end. For the moment, there is nothing in its place. Meanwhile, the entity constitutions must be amended to comply with the Constitutional Court decision. This will require the appointment of 'minority' judges and prosecutors in both entities. The

civil and criminal legislation prescribing new and modern rules of investigation and judicial procedures is on the verge either of completion or of enactment. This, in turn, will mean extensive retraining of judges and prosecutors. In short, it is now or never for general reappointment – the single most important means for redeeming past failures and entrenching the rule of law.

Necessity also counsels speed. The mounting number of in-country war crimes cases awaiting trial and the rising tide of organised and economic crime highlight the incapacity of the current judicial and legal order. The dispensing of nationally partial, capricious or politicised justice continues to imperil human rights, impede economic recovery, deter investors, and separate Bosnia from Europe. If Bosnia is ever to overcome its wartime past, break the power of well-connected criminal networks and earn the loyalty of all its citizens, it must institutionalise the rule of law. The international community still has the power, funds and time to help make this happen. But all are now dwindling.

Countries do not normally confront anything so dramatic as a last chance. Bosnia & Herzegovina, however, may well be an exception. Ten years after independence, seven years after a devastating war, and six years into an international regime designed to consolidate the former and end the latter, Bosnia remains fragile and formless. The belated establishment of the rule of law would offer the best available guarantee that it will have as many more chances as normal states.

Sarajevo/Brussels, 25 March 2002

APPENDIX A

GLOSSARY OF ABBREVIATIONS

ABA/CEELI	American Bar Association/ Central and Eastern European Law Initiative	IJC	Independent Judicial Commission
BiH	Bosnia & Herzegovina	IPTF	International Police Task Force
BLRC	Brcko Law Revision Commission	KM	Konvertibilna Marka
CJAU	Criminal Justice Advisory Unit, within UNMiBH	OHR	Office of the High Representative
CoE	Council of Europe	OSCE	Organisation for Security and Co-operation in Europe
CoM	Council of Ministers	PIC	Peace Implementation Council
ECHR	European Court of Human Rights	RS	Republika Srpska
EU	European Union	SDA	Party of Democratic Action
GTZ	German Society for Technical Co-operation [Deutsche Gesellschaft für Technische Zusammenarbeit]	SDP	Social Democratic Party
HDZ	Croatian Democratic Union	SDS	Serb Democratic Party
HRC	BiH Human Rights Chamber	SZBiH	Party for Bosnia & Herzegovina
ICG	International Crisis Group	UNMiBH	United Nations Mission in Bosnia & Herzegovina
ICTY	International Criminal Tribunal for Former Yugoslavia	UNJSAP	UN Judicial System Assessment Program

APPENDIX B

MAP OF BOSNIA AND HERZEGOVINA



APPENDIX C

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (ICG) is a private, multinational organisation committed to strengthening the capacity of the international community to anticipate, understand and act to prevent and contain conflict.

ICG's approach is grounded in field research. Teams of political analysts, based on the ground in countries at risk of conflict, gather information from a wide range of sources, assess local conditions and produce regular analytical reports containing practical recommendations targeted at key international decision-takers.

ICG's reports are distributed widely to officials in foreign ministries and international organisations and made generally available at the same time via the organisation's Internet site, www.crisisweb.org. ICG works closely with governments and those who influence them, including the media, to highlight its crisis analysis and to generate support for its policy prescriptions. The ICG Board - which includes prominent figures from the fields of politics, diplomacy, business and the media - is directly involved in helping to bring ICG reports and recommendations to the attention of senior policy-makers around the world. ICG is chaired by former Finnish President Martti Ahtisaari; former Australian Foreign Minister Gareth Evans has been President and Chief Executive since January 2000.

ICG's international headquarters are at Brussels, with advocacy offices in Washington DC, New York and Paris. The organisation currently operates field projects in more than a score of crisis-affected countries and regions across four continents,

including Algeria, Burundi, Rwanda, the Democratic Republic of Congo, Sierra Leone, Sudan and Zimbabwe in Africa; Myanmar, Indonesia, Kyrgyzstan, Tajikistan, and Uzbekistan in Asia; Albania, Bosnia, Kosovo, Macedonia, Montenegro and Serbia in Europe; and Colombia in Latin America.

ICG also undertakes and publishes original research on general issues related to conflict prevention and management. After the attacks against the United States on 11 September 2001, ICG launched a major new project on global terrorism, designed both to bring together ICG's work in existing program areas and establish a new geographical focus on the Middle East (with a regional field office in Amman) and Pakistan/Afghanistan (with a field office in Islamabad). The new offices became operational in December 2001.

ICG raises funds from governments, charitable foundations, companies and individual donors. The following governments currently provide funding: Australia, Canada, Denmark, Finland, France, Germany, Ireland, Japan, Luxembourg, the Netherlands, Norway, the Republic of China (Taiwan), Sweden, Switzerland and the United Kingdom. Foundation and private sector donors include the Ansary Foundation, the Carnegie Corporation of New York, the Ford Foundation, the William and Flora Hewlett Foundation, the Charles Stewart Mott Foundation, the Open Society Institute, the Ploughshares Fund and the Sasakawa Peace Foundation.

March 2002

APPENDIX D

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APPENDIX E

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