

***Contract Enforcement and Judicial Systems  
in Central and Eastern Europe***  
Warsaw, Poland, June 2005.

**Bosnia Herzegovina**

**1. What have been your country's (or territories) 2-4 most successful achievements in the area of judicial reform in recent years, and what were the main factors contributing to that success?**

a. Restructuring of the Courts/Reappointment of Judges/Prosecutors

In 2002 a plan to restructure the courts of Bosnia and Herzegovina was developed by the Independent Judicial Commission which was a project under the sponsorship of the Office of the High Representative to Bosnia Herzegovina. The restructuring plan was later implemented by the Independent Judicial Commission with the active assistance and participation of local authorities. In May, 2002 a report entitled "*Restructuring the Court System: Preliminary Report and Proposal*" was published which included a recommendation that there be an overall reduction of courts and judges of roughly one third. The proposed location and territorial jurisdiction of the future courts was also included. After input from all interested parties, the recommendations made in this report were amended, taking into consideration the views and comments which had been received and the report was republished in August, 2002.

As a result of the implementation of the restructuring plan the number of first instance courts was reduced by 41% or 33% if court branches are taken into account. Prior to the implementation of the restructuring plan there were 80 first instance courts in Bosnia and Herzegovina and subsequent to its implementation there were 49 (with a number of court branches). This brought the average number of inhabitants served by a first instance court in Bosnia and Herzegovina well within European averages.

As a result of the restructuring of the courts it was no longer necessary to maintain the same number of judges and their numbers were also decreased from 868 to 629 or by 28%.

At the same time the prosecutors' offices were also restructured and this project was undertaken by the Criminal Institutions and Prosecutorial Reform Unit of the Office of the High Representative to Bosnia and Herzegovina. Prior to the restructuring there was one prosecutor's office for each regular court (with a few exceptions). After the restructuring process there were no prosecutors' offices at the level of Basic or Municipal Courts (the lowest level courts in the country). This reform was completed in late 2003/early 2004.

In 2002 once the restructuring plan was completed, all judges and prosecutors (with a few exceptions) were obliged to apply for their posts in an open competition (the reappointment process). Since the reappointment process began in October 2002 a total of 1,892 applications have been received. At the time of writing, 935 judges and prosecutors have been reappointed with 23 judges and 5 prosecutors yet to be selected. It is anticipated that the reappointment process will be complete by the Autumn of 2005.

The reappointment of judges and prosecutors was managed by the Independent Judicial Commission. The appointments were actually made by three High Judicial and Prosecutorial Councils<sup>1</sup> and later by the single High Judicial and Prosecutorial Council. The establishment of the three councils necessitated amendments to the Entity Constitutions and the adoption of three High Judicial and Prosecutorial Council Laws which were imposed by the High Representative in May, 2002. During the period from the establishment of the three councils to the establishment of one council in June 2004 there were, over time, twenty-one national and ten international members of the Councils.

A very comprehensive review of each candidate was undertaken. Initially, every applicant was interviewed but later it was left to the discretion of the Councils/Council. In addition, the public was invited to submit complaints about applicants and on average 200 complaints were received per month.

In so far as was possible the High Judicial and Prosecutorial Councils (and later the single High Judicial and Prosecutorial Council) endeavored to ensure that the ethnic balance of appointees reflected the results of the 1991 census.

One of the key factors which contributed to the success of the reappointment process/restructuring of the courts was the intervention by the international community. The Office of the High Representative together with the Norwegian government funded the Independent Judicial Commission and, in addition, secondments were made to the High Judicial and Prosecutorial Councils by Canada, Finland, Germany, Italy, Portugal, Sweden, the UK and the USA. It was also important that the Independent Judicial Commission was well staffed with an energetic and enthusiastic work force who, within a very short time frame, carried out a number of major reforms. Finally, the power of the High Representative to impose legislation meant that the reform process could be carried out in a far more speedy fashion.

In addition, quite an amount of groundwork had been done prior to the commencement of the reappointment process/restructuring of the courts. The Judicial System Assessment Programme of the United Nations Mission in Bosnia Herzegovina had compiled quite an amount of research on the courts. Various reforms proposals had been developed and implemented (e.g. the Comprehensive Review Process) but had not yielded results. Many of the people who worked on these projects were subsequently employed by the Independent Judicial Commission.

In terms of the restructuring of the courts, close cooperation developed between the Independent Judicial Commission and local authorities. As the benefits of restructuring were clear to most, local authorities willingly took the lead on implementation and this certainly added to the successful completion of the court restructuring plan. The fact that the financial implications of the court restructuring plan had also been carefully considered assisted in making sure that the reform could be accepted more easily by local authorities.

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<sup>1</sup> One at State level and one for each of the Entities of Bosnia and Herzegovina. Since the war (1992-1995) the country has been divided into two Entities – the Republika Srpska and the Federation of Bosnia and Herzegovina. In addition, one particular part of Bosnia Herzegovina called Brčko District is held “in condominium” but not under the authority of either Entity (see Brčko Arbitral Tribunal for the Dispute over the Inter Entity Boundary Line of 1999). The State of Bosnia Herzegovina has very limited powers/competences with the more significant powers lying with the Entities.

#### b. Establishment of a single HJPC

In June, 2004 a single High Judicial and Prosecutorial Council at state level for the whole of Bosnia Herzegovina was set up which replaced the three High Judicial and Prosecutorial Councils which were established in 2002.

The single Council has authority to appoint judges and prosecutors to practically all courts and prosecutors' offices in BiH and is obliged, in this regard, to complete the reappointment process. It also has authority in relation to the discipline of these judges and prosecutors. The mandate of the Council is broadly defined in the Law on the High Judicial and Prosecutorial Council and it also includes competence in relation to the training of judges and prosecutors, judicial administration and monitoring, implementing an Information and Communications Technology Strategy for the judiciary, judicial budgets and judicial policy/legislation. Many of the functions which it is obliged to carry out are those which are often carried out by Ministries of Justice in other European countries.

The High Judicial and Prosecutorial Council also oversees a number of projects which are financed by the European Commission and the US government, such as, the Minor Offence Restructuring Project, the Support to the Judicial Training Centres Project and the Judicial Premises Survey Project. Since 2005 it has been funded primarily from domestic funds (with assistance from the Norwegian government) and it is expected that from 2006 it will be funded exclusively from local sources.

Again one of primary reasons for the successful establishment of the single High Judicial and Prosecutorial Council was the intervention by the international community. It was important, in this regard, that the creation of a single High Judicial and Prosecutorial Council was mentioned as a condition for the commencement of negotiations for the conclusion of a Stabilisation and Association Agreement between the European Union and BiH. The single High Judicial and Prosecutorial Council was later identified as a flagship priority under the Rule of Law reforms of the Office of the High Representative for the first half of 2004.

In order to establish a single, permanent High Judicial and Prosecutorial Council the agreement of the two Entities to the transfer of power to state level was necessary. This involved intensive lobbying and negotiations on the part of all sides and the negotiating skills displayed ensured that the transfer of power became a reality. An agreement was finally signed in March 2004.

#### c. Establishment of the Entity Training Centres

A Judicial and Prosecutorial Training Centre was established in each Entity by legislation in 2003 and the centres are now functional. They have competence to provide both continuing training to judges and prosecutors and induction training for people who wish to become judges and prosecutors. In May, 2003, the Laws on the Entity Training Centres were imposed by the High Representative. They were, however, broadly local initiatives with some input from the Council of Europe and the Independent Judicial Commission. It has been suggested that the Centres should be merged. In addition, in a review commissioned by the EC as part of its strategy in the area of Public Administration Reform entitled *Functional Review of the Ministries of Justice* (published March 2005) it was recommended that the merged training centres be brought under the authority and budget of the High Judicial and Prosecutorial Council.

The success of this project was attributable again, in large part, to the intervention by the international community. However, the domestic institutions also played a large part in the

process by assisting in the drafting of the laws, by allocating quite generous funding for 2003 and 2004 and by allocating suitable premises to the training centres. Funding has also been provided by the European Commission, the Norwegian Bar Association and the Dutch government.

#### d. Establishment of the State Court

Recognizing a need for judicial remedies to exist at the State level within Bosnia and Herzegovina which would comply with guarantees enshrined under the European Convention on Human Rights, the Law on the Court of Bosnia and Herzegovina was adopted in November 2000. The appointment process of judges to the Court commenced in May 2002 and following the adoption of criminal, civil and administrative legislation at the level of the State of Bosnia and Herzegovina in the course of 2003 and 2004, the Court has become fully operational. The Court of Bosnia and Herzegovina has competence to deal with criminal, administrative and electoral matters pursuant to the relevant substantive and procedural legislation.

It is important to stress that two special sections, the Section for War Crimes and the Section for Organized Crime, Economic Crime and Corruption have recently been established within the Criminal Division of the Court enabling the Court to deal efficiently with crimes constituting the violations of international humanitarian and human rights law and with organized crime and crimes of corruption.

#### e. Other Reforms

A number of other important reforms were also undertaken during the past number of years, such as, the development of a strategic proposal for the computerization of the judiciary – this strategy has been partially implemented and should be fully implemented by late 2006, early 2007. This initiative is being funded by the European Commission.

New Civil and Criminal Procedure Codes were drafted and adopted. Both Codes are a radical break with the past. The Criminal Procedure Code abolishes the role of the investigating judge, increases the role of prosecutors and introduces a more adversarial form of procedure. This latter innovation initially caused some problems as judges came to grips with this radically different system.

In terms of the Civil Procedure Code some elements of the inquisitorial process were abandoned in favor of a more adversarial process with parties having the right to determine how their cases would be presented. In addition, parties, as well as the courts, are held to fairly strict, short deadlines. The principle of *material truth* which meant that courts had to ensure that all relevant evidence was brought before it was abandoned in favor of a party's obligation to prove its case – this proved to be a quite controversial move.

The new Law on Enforcement is not such a radical break with the past as the Civil and Criminal Procedure Codes. It does, however, introduce the possibility to search for property of the debtor and a corresponding obligation on banks and others to disclose information at the request of the court. The new law also decreases the number of enforceable documents and also reduces the range of property which is exempt from enforcement.

A USAID project Fostering an Investment and Lender-Friendly Environment (FILE) has been monitoring the problems with the new regime and in proposing solutions to deal with these problems.

There are a number of problems with the law which have been identified. For example, uncontested claims (such as utility bills) are dealt with in a similar manner to other claims – this is considered to be a waste of the judge’s time and is not an efficient use of resources. In addition, the appraisal and auction mechanisms are not operating effectively. The aim of these mechanisms was to get a greater value for property but this aim is not being realized. Finally, in this regard, it has been suggested that the system for the enforcement of court fees needs to be amended – currently it is the case that a plaintiff can have his case processed and collect on a judgment without having paid court fees and these fees then need to be collected through the regular enforcement mechanisms. A resolution to this problem would necessitate both an amendment to the Law on Enforcement and the Civil Procedure Codes. In addition to problems with the Law on Enforcement itself it has been suggested that there is also a lack of adequate resources in the courts together with a lack of private collection mechanisms which could be called upon in order to supplement (when necessary) court resources.

## **2. What major problems do you currently face with regard to:**

### **- judicial independence**

#### Funding authorities of courts and prosecutors’ offices

Currently the budgets of the courts and prosecutors’ offices (211 bodies in total) are administered by 14 different funding authorities, i.e. the State of BiH, the Republika Srpska, Brčko District, the Federation of Bosnia and Herzegovina, Una Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosansko-Podrinje Canton, Central Bosnia Canton, Herzegovina-Neretva Canton, West Herzegovina Canton, Sarajevo Canton and Canton 10 (Livno).

The small size of some of the political units funding the courts and prosecutors’ offices does not provide the necessary distance and objectivity from local political realities and influence in the budget process. Politicians have traditionally used the budget process as a way of exerting influence over the courts either to reward “good” courts or to punish “bad” ones. For example, in Banja Luka Basic Court in the Republika Srpska the accumulated debt was allowed to grow from 443,000 KM to 1.2 million KM during 2003 or by 160%. On the other hand, during the same period, the accumulated debt of the Basic Court in Derventa was decreased by 61% and that of the Basic Court in Teslic by 60% (both courts are in the Republika Srpska). In addition, the Independent Judicial Commission found examples of uneven funding even within the one canton which is likely to have been as a result of political favoritism towards the “lucky” court. The transfer of funding competence to a centralized authority would assist in delivering the necessary distance and objectivity to the system.

### **- judicial efficiency**

#### Judicial budgets

Courts and Prosecutors’ Offices cannot operate effectively or efficiently without adequate funding. In 2005 approximately 90 million KM (45 million Euro) was allocated to first and second instance courts in both Entities of Bosnia Herzegovina. For many courts that was simply not enough. For example, in one particular canton the amount allocated for 2005 is 23% less than the budget amount recommended by the HJPC which would allow the court to operate at a satisfactory level. The figure calculated by the HJPC does not take into account the accumulated debts of the courts of that particular canton and so the shortfall for the year will actually be

significantly more. The story is the same in some other cantons with some having between 3 and 17% less than what is considered to be an appropriate allocation and again these figures do not take into account the amount which would be needed in order to deal with accumulated debts.

The accumulated debts of many of the courts at the end of 2003 were quite staggering. For example, as at the end of 2003 the accumulated debt of one particular canton in the Federation of Bosnia and Herzegovina reached over 3.5 million KM. As a result of efforts made by the HJPC the situation in relation to accumulated debts has been regularized in many courts but it is still less than optimal. The accumulated debt has been reduced from approximately 25 million KM to 16 million KM from 2002 to 2004.

#### Backlog of cases in the courts

The backlog in the courts is a cause for major concern and has to be dealt with in the short term if the courts are to operate in an efficient manner. Significant backlogs have accumulated in a large number of courts for a variety of reasons. In the first place, as a result of the war, there was a significant increase in case types and categories which the judiciary of Bosnia and Herzegovina had not been designed to handle. In addition, the displacement of a large proportion of the population of Bosnia Herzegovina as a result of the war meant that it was difficult for many cases to be investigated and dealt with as the parties to the proceedings (and often the witnesses to the events which led to the proceedings) were impossible to locate.

Furthermore, Bosnia Herzegovina lacks an efficient system for mediation and a procedure for dealing with non-contested claims (often in the area of debt collection in respect of utility bills) has not been developed as of yet.

In addition to the backlogs which have accumulated, Bosnia Herzegovina lacks an efficient mechanism for measuring judicial efficiency.

#### - **judicial accountability**

The courts do not have separate budget allocations in the Republika Srpska and instead a global figure is allocated to all courts. Without separate budget allocations it is impossible for each court president to manage their respective courts efficiently. However, according to the new Law on Courts in the Republika Srpska each court is to have its own budget line and it is anticipated that this will become a reality in the budget year 2006.

In addition, the lack of a centralized budget authority raises issues in terms of accountability. As mentioned above, the judiciary in Bosnia Herzegovina does not operate at an optimum level. It is important that the budget authority is able to assess data in relation to performance indicators. If there was one budgeting authority it would be far easier to carry out this task.

### **3. What is your top priority in the coming year for improving the judicial system? How do you plan to address this priority?**

#### Centralised funding authority

One of the top priorities for the coming year is the transfer of funding authority for the courts and prosecutors' offices to a centralized body. In the "*Functional Review of the Ministries of Justice*" which was mentioned earlier it was recommended that the courts and prosecutors' offices in Bosnia Herzegovina should be financed at the level of Bosnia Herzegovina from the budget year

2007. In this way the Entities would no longer have a direct role to play in the preparation, adoption or execution of the budget for the courts and prosecutors' offices. It was also recommended, in the review that an analysis should be conducted into the sources of funding for courts and prosecutors offices at the level of Bosnia Herzegovina.

The Functional Review outlines a number of negative consequences which flow as a result of the distribution of funding responsibilities amongst 14 different funding authorities. Amongst these negative consequences the Review highlights the fact that the lack of a central funding authority results in significant inequalities in the administration of justice – in other words, because of the lack of a centralized funding authority, funding priorities cannot be made on the basis of the most urgent problems which arise but instead need to be made by each individual funding authority on the basis of the urgent needs which arise amongst the institutions within its competence. In addition, the Review points out that the current funding structure means that it is almost impossible to develop a long term strategic vision for the judiciary in BiH. In light of these negative consequences it is urgent that the transfer of funding authority to a centralized body be carried out as soon as possible.

#### Lack of adequate funding

Significant steps have been taken to address the financial situation in the judiciary. As mentioned earlier, the number of courts, judges and support staff was dramatically reduced. In 2003 the Entity governments reduced the benefits for judges and prosecutors and in December 2004 the High Representative froze judicial salaries and also initiated a package of legislation that would reduce those salaries. However, there is much yet to be done in this area and the HJPC intends to make every effort to ensure that the financial situation of the courts and prosecutors' offices is improved in the coming years.

#### Judicial administration

As mentioned earlier, there is a significant problem in the courts due to the backlog which has accumulated both during and after the war. It is important to find a solution to the backlog problem as it directly impacts on the public's impression of the courts. The current situation also undermines the morale of judges and staff at the courts. The reduction of case backlogs will, therefore, be a major issue for the High Judicial and Prosecutorial Council in 2005-2006.

The High Judicial and Prosecutorial Council intends carrying out a thorough review of the situation with respect to accumulated backlogs in each court in BiH and, depending on the results, it will initiate appropriate measures. The High Judicial and Prosecutorial Council will also initiate closer communication between court presidents so that information can be shared between courts. The High Judicial and Prosecutorial Council, in cooperation with the USAID Justice Sector Development Project, has also initiated the development of a new system for the measurement of judicial efficiency. This will be introduced from 2006 and it is anticipated that it will have a significant impact on overall effectiveness of the judiciary. Finally, more efficient procedures for case handling and management will be introduced through the implementation of the Information and Communications Technology Project which is under the sponsorship of the High Judicial and Prosecutorial Council.

#### Training Centres

The training of judges and prosecutors at an increased level is also a priority for the coming year. As mentioned above, the Functional Review recommended that the Entity Training Centres be consolidated under the authority and budget of the HJPC.

In addition, it also recommended that a long term strategic plan for the induction and continuous training of judges and prosecutors be developed. The development of such a plan is a key priority for the High Judicial and Prosecutorial Council in the next 12 months. This is particularly urgent because of the lack of a sufficient number of qualified candidates for positions in the judiciary – this lack of a sufficient number of qualified candidates was noted during the reappointment process.

#### Unsuitable judicial premises

Judicial premises in Bosnia Herzegovina are often unsuitable for the needs of a modern and fully functioning judiciary. There are often insufficient courtrooms in each court building and certain buildings do not have public areas or protected areas for judges and court staff. Furthermore, most courts and prosecutors offices are in quite a bad state of disrepair with no investment having been made in them since their construction some 20 to 30 years ago.

A survey is currently being carried out on the material conditions of all courts and prosecutors' offices in Bosnia Herzegovina and the results of this survey should be available in November of this year. Based on these results the High Judicial and Prosecutorial Council will lobby both foreign donors and domestic authorities for funding for renovation and repair of judicial premises. The High Judicial and Prosecutorial Council has already submitted a request for funding to the European Commission in this regard.