

**ASSESSMENT OF THE CURRENT MANDATE OF THE  
INDEPENDENT JUDICIAL COMMISSION  
AND A REVIEW OF  
THE JUDICIAL REFORM FOLLOW-ON MISSION FOR  
BOSNIA AND HERZEGOVINA**

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## Summary

Prior to the creation of the Independent Judicial Commission, results in the area of judicial reform in BiH were not significant. The IJC was given a mandate to establish an independent judiciary and improve the quality and efficiency of the judicial system. Unfortunately, the IJC was given a flawed process and too little time to achieve the goal of establishing an independent judiciary. As the review period for judges and prosecutors is nearing its end and with the IJC mandate scheduled to expire at the end of 2002, the international community is provided with a window of opportunity – and perhaps the last opportunity – to take decisive action and achieve a truly independent BiH judiciary supported by a quality, efficient judicial system. That will not occur, however, under the current disconnected rule of law structure and the current system of review for judges and prosecutors.

This paper calls for bold action by the international community. It call for a more aggressive and comprehensive co-ordination process to be centred in IJC to ensure meaningful co-ordination, co-operation and communication between all elements in rule of law spectrum: the police; the prosecutors; the judges; and the penal system.

It 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 necessary results. Systemic changes need to be made. Before any further review is undertaken, a restructuring of the BiH judiciary is necessary to bring the number of judges in line with European standards. High Judicial Councils, based on the continental model, need to be created so that political interference in the appointment/discipline/removal process for judges and prosecutors is removed. 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. All this must be completed by the end of 2003 – which will require an extension of the IJC mandate until that time.

The paper concludes with a review of current judicial reform projects and discusses the requirements for a follow-on judicial reform mission, once the IJC mandate concludes.

## Introduction

The Office of High Representative (OHR) has been charged by the Peace Implementation Council (PIC) to develop and implement a “streamlining” project in Bosnia and Herzegovina. The project includes the development of a strategy for the police monitoring follow-on mission and rule of law. For the purposes of the streamlining project, OHR has defined “rule of law” to include the police, prosecutors, judges and the penal system. This paper will address the current status of the judicial reform effort in BiH and will provide an analysis for the follow-on judicial reform mission, including the penal system. The issues involved in the police monitoring follow-on mission are being addressed by Richard Monk, Tor Tanke Holm and Serge Rumin in a separate paper.

OHR has compiled a streamlining flowchart which identifies each major issue in rule of law area, the desired end state, the activities necessary to achieve that end state, who has the responsibility, and the estimated time for completion. The author of this paper did not feel constrained by that compilation as it reflects the rule of law system as it now exists. This paper recommends significant changes to the “Independence of the Judiciary” segment of the OHR analysis.

This paper was written at the direction of Ambassador John Bennett, Head of the OHR Political Department. The author was requested to examine the current mandate of the Independent Judicial Commission (IJC) and also determine what should be included in a judicial reform follow-on mission once the IJC mandate has expired. The opinions and recommendations expressed in this paper are solely the opinions and recommendations of the author<sup>1</sup> and are not the opinions or recommendations of OHR or any other international organization.

## Background of the Judicial Reform Effort in BiH

After the adoption of the General Framework Agreement for Peace (GFAP) in 1995, the initial efforts of the international community focused on restoring peace, rebuilding crucial infrastructure, economic development, returning people who were displaced or fled the country during the war, ensuring respect for human rights and establishing democratic elections. While development of the rule of law was inherent in Annex 11 to the GFAP [establishment of UN IPTF to monitor advise and train local law enforcement personnel], there was no specific reference to “rule of law” or “judicial reform” in the GFAP. A number of minor rule of law projects were initiated by OHR and other international organizations, but in the first years following GFAP, those efforts were *ad hoc* and without formal co-ordination.

After the war, the BiH judicial system was in shambles. A number of unqualified individuals had been appointed to the judiciary during the war. As politicians from the dominant political parties strengthened their control of government power structures after the war, the judiciary was no exception. Corruption, political influence, lack of resources and inefficiency plagued the system. In recognition of this situation, additional judicial reform efforts were

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undertaken, but they remained *ad hoc* and localized. In an attempt to identify what projects were underway, OHR initiated a judicial reform co-ordination effort. These initial efforts were recognised by the Bonn Peace Implementation Council (PIC) in December 1997 as it endorsed "...the High Representative's co-ordination of the various judicial and legal reform programs with a coherent and focused program..."

This process became more formalised when, in response to a recommendation of the OHR Human Rights Task Force, a Judicial System Reform Co-ordination Group was established, comprised of the international organizations and non-governmental organizations involved in the various judicial reform efforts in BiH. The purpose of this Group was to develop a co-ordination structure for the efforts of the international community in the judicial reform area.

The Luxembourg Peace Implementation Council, meeting in June 1998, called for expanded judicial reform efforts to be coordinated by the High Representative. Specifically mentioned by the Luxembourg PIC were the creation of an independent judiciary, revision of the criminal codes and a strengthening of the Federation Prosecutor's office. Priorities were developed by OHR in consultation with other international organizations and progress was set forth in a September 1998 paper entitled "Judicial System Reform Plan and Midyear Report".<sup>2</sup>

The Madrid PIC in December 1998 again emphasized that the establishment of the rule of law and the need for judicial reform were high priorities. The Madrid PIC welcomed the creation of the UN Judicial System Assessment Program (JSAP) and also called for the development of a comprehensive OHR judicial reform strategic plan, which would identify short and long term priorities. The strategy was developed by OHR in July 1999 and ultimately approved by the PIC.

For purposes of that strategy, OHR defined judicial reform to include not only the judiciary, but all aspects of the criminal justice system, including the police, prosecutors, courts and the correctional system – a concept that has been re-embraced by OHR in the streamlining process. The strategy recognized that in order to encompass the comprehensive reform mandated by the Madrid PIC, all areas interrelated to the judiciary must be included in the reform efforts.

The stated goal of the strategy was to build a genuine rule of law in Bosnia and Herzegovina in which all citizens had real confidence and under which they would receive equal respect. The Constitution of Bosnia and Herzegovina provides that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law. It further obliges Bosnia and Herzegovina and both Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms.<sup>3</sup>

The OHR strategy noted that the successful implementation of the objectives set forth in the BiH Constitution would depend upon a judiciary which protected the innocent, punished the guilty and resolved disputes in a timely, fair and impartial manner. It went on to note that a strong, effective and independent judiciary in Bosnia and Herzegovina would be a corner stone in developing democratic structures and a positive force for economic and social development.

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<sup>2</sup> This paper was provided to the Peace Implementation Council Steering Board in September 1998.

<sup>3</sup> BiH Constitution, Articles I.2; II.1

The strategy identified four categories of judicial reform goals: Structural Reforms, Institution Building, Improving Access to Justice Through Public Information and Legal Advice; and Law Enforcement and Corrections. The strategy then provided short and long term prioritization for those goals. While some progress was realized under this strategy, meaningful reform was not achieved. Obstruction by political parties, the unfamiliarity of many members of the judiciary with democratic judicial concepts and their unwillingness to embrace systemic change, combined with a lack of commitment on the part of the international community for systemic change, all hampered progress.

Despite all of these ambitious plans, the judicial reform process in BiH has been long on talk, good intentions and promises, but short on results.

OHR continued working on this strategy and later versions until the creation of the Independent Judicial Commission (IJC), when responsibility for most judicial reform tasks were transferred to IJC. Perhaps the most significant OHR effort during this period was the development of new laws for each entity which would establish an independent method of selecting judges and prosecutors and which also would establish a procedure to review current judges and prosecutors and remove those who were unfit for their position.

The UN JSAP became operational in November 1998 and initially adopted a conceptual framework to monitor and assess the judicial system in BiH in three main aspects: Technical (legislation and other legal norms and standards); Institutional (the capacity of the system in terms of physical resources, personnel and their organization); and Political (the political framework and factors which determined the operation of the judicial system and the level of independence of the judiciary). International and national JSAP officers located in field offices throughout the country monitored the courts and provided support and assistance to judges located in their areas.

JSAP produced a number of detailed assessments of the judicial system, and also produced a series of thematic reports on various segments of the BiH judicial system. However, while the Madrid December 1998 PIC envisioned that there would be “full integration” of JSAP “within the High Representative’s judicial reform strategic plan”, that goal was never realized. JSAP’s efforts operated in parallel to the OHR strategic plan and there was little coordination between the two efforts. One area where there was cooperation, however, was in the final drafting of the laws on selecting, reviewing and removing prosecutors and judges. A JSAP Judicial Review Team revised the final drafts of these laws and designed most of the current procedures.

The JSAP mandate was scheduled to expire at the end of 2000 and as that time approached, an effort was undertaken to establish a follow-on judicial reform mission. During these discussions, there was a recognition by the international community that the judicial reform efforts, while achieving progress in some areas, had not progressed in a timely manner and had not achieved the fundamental changes necessary to support a successful transition to a truly independent and professional judiciary. The discussions on the future of the judicial reform effort culminated with the establishment of the Independent Judicial Commission (IJC) on 14 March 2001. Unfortunately there was a gap of well over six months between the time that JSAP began winding down its activities and the time that the IJC became operational, resulting in an additional loss of momentum in the judicial reform area.

## **The Independent Judicial Commission**

The IJC was established by a 14 March 2001 Decision of the High Representative with the responsibility and authority, among other things, to supervise "...the entity and cantonal commissions/council responsible for selection and disciplining judges and prosecutors and to continue the monitoring and assessment of courts and prosecutor's offices in line with the closing mandate of JSAP."<sup>4</sup> The Decision provided that the IJC's mandate would expire on 31 December 2002, although the door was left open for a continuation of the IJC at that time.

The IJC became operational within a relatively short period of time and in July 2001 published a comprehensive Strategy Paper for 2001 and 2002. The IJC Strategy adopted two principal goals: to improve the independence of the judiciary; and to improve the quality and efficiency of the judicial system.

IJC has two departments, the Monitoring and Implementation Department, which primarily deals with the review of judges and prosecutors, and the Plans and Policy Department, which deals with the other areas of judicial reform in which IJC is involved. There are six field offices, each with a staff of one or two internationals and one national, as well as support staff.<sup>5</sup> The IJC currently has total of 64 positions with only a few vacancies.

### **The Review of Judges and Prosecutors**

The Monitoring and Implementation Department is responsible for implementation of the professional review components of the entity's laws on judicial and prosecutorial service, as well as the re-appointment/appointment process and developing recommendations for reform of the commissions and councils. The IJC inherited the judicial and prosecutorial service laws, which were the result of national working groups assisted by OHR. The review process in the laws was later amplified by a JSAP Judicial Review Team. The Federation Parliament was unable to enact the Federation law and it was imposed by the High Representative in May 2000. The Republika Srpska National Assembly did adopt their version of the laws in May 2000, but the High Representative found it necessary to amend those laws in June 2000.

These laws were seen as a major step forward in establishing an independent judiciary. They increased judges' salaries and established independent commissions (Federation) and councils (RS) to initially review all judges and prosecutors for fitness, and later to act as the permanent institution for the appointment, discipline and removal of judges and prosecutors. The review process is nearly identical in both entities.

In the Federation, the Federal Judges Commission is intended to review all judges of the Municipal Courts, Cantonal Courts, Supreme Court and Constitutional Court. The ten Cantonal Judges Commissions assist the Federal Judges Commission in gathering information on judges and each cantonal commission sits with the federal commission when reviewing judicial applicants for positions in their canton. A separate Federal Prosecutors Commission works in the same manner in regard to prosecutors, as do the cantonal prosecutor

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<sup>4</sup> The High Representative's decision establishing the IJC mandate also included a mandate to guide and coordinate virtually all other aspects of judicial reform in BiH, a responsibility which is carried out by the Plans and Policy Department of IJC.

<sup>5</sup> The IJC currently has field offices in Mostar, Bihac, Tuzla, Sarajevo, Banja Luka, and Brcko. On 1 November 2001 the IJC absorbed some members from the Brcko Law Revision Commission, which was winding down, to form the Brcko Field Office.

commissions. In the RS the procedure is more centralized with a High Judicial Council and a High Prosecutorial Council reviewing judges and prosecutors respectively.

The review procedure adopted has three levels: (1) a preliminary review; (2) a subsequent review; (3) and a final review. After the initial gathering of information the commission/council meets to determine if the information gathered warrant further review. If so, the matter moves to the second stage where a “referee” conducts an investigation and submits a report to the commission/council. The commission/council then votes as to whether the matter should proceed to the final review level where a formal hearing is held on the fitness of the individual to retain his/her office.<sup>6</sup> The commission/council can then determine: there is a lack of sufficient cause for action, find the judge/prosecutor unsuitable and recommend removal to the appointing/removing authorities, find there was an improper selection and request that a new selection procedure be initiated, or recommend the imposition of discipline. Some national participants in the review process have complained that the procedure is too complicated and that it should be streamlined. This procedure, labeled the Comprehensive Review Procedure (CRP) was envisioned to take 18 months.

The laws, however, did not amend the traditional appointment or removal procedures in entity law.<sup>7</sup> In the Federation at the Federal level the President nominates judges and prosecutors who are then appointed by Parliament. At the cantonal level the canton president nominates judges and prosecutors who are then appointed by the cantonal assemblies. The authority to remove judges in the Federation is contained in the judicial branch with the consensus of all federation judges necessary for the removal of a Federation level judge; the consensus of the judges of the Federation Supreme Court to remove a cantonal judge; and the consensus of the judges of the highest cantonal court to remove a municipal judge.

Prosecutors in the Federation can be removed by either the executive branch, the legislative branch, or a combination of both. At the Federation level, the Federation president, with the consent of the Vice President, can remove a prosecutor or deputy prosecutor. At the cantonal/municipal levels, although it varies in each canton, typically the Canton governor can initiate removal proceedings before the Cantonal Assembly, which votes for dismissal.<sup>8</sup>

In the Republika Srpska the appointment and removal of judges and prosecutors is the responsibility of the National Assembly, which must have a removal recommendation from the High Councils prior to removing either a judge or prosecutor.

The 18-month Comprehensive Review Period, in which all judges and prosecutors were to be reviewed, is scheduled to terminate in December 2001 in the Federation and in early 2002 in

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<sup>6</sup> There are eight grounds for removal: lack of basic qualifications; failure to abide by the principles of impartiality or independence; corruption; incapacity due to mental illness, alcoholism or drug addiction; failure to act in an ethical manner; commission of a serious breach of law; originally selected for office in an improper manner; failure to submit a disclosure form or intentionally providing false information or otherwise failing to cooperate with the commission/council.

<sup>7</sup> On 4 July 2001, the IJC facilitated a Memorandum of Understanding (MOU) between the Presidents of the Federation Commissions and the Republika Srpska Councils and the entity Ministers of Justice. The MOU standardized the appointment process in both entities. In addition, the Federation law was amended in August 2001 to eliminate the parliament role in appointing and removing prosecutors.

<sup>8</sup> The Federation law, as amended in August 2001, requires the removing authority to first obtain a removal recommendation from the relevant Federation or Cantonal Commission prior to initiating removal proceedings.

the Republika Srpska. The laws require that all prosecutors and judges holding office at the time the laws were passed be subject to review. Under the procedures currently followed, a file is created for each judge and prosecutor and certain basic background information is placed in each file. Those files are then reviewed by the commissions/councils, however, unless a complaint has been filed against the judge or prosecutor, the basic information will rarely if ever trigger a further review. The reality therefore is that unless a complaint has been filed against a judge or prosecutor, no action will be taken on that individual. In reaction to this situation, the IJC formed regional monitoring groups comprised of international organizations to utilize their collective resources and knowledge and file documented complaints against those judges who deserve greater scrutiny. Even with this additional effort, however, the process does not work well.

As of November 2001, the Federation Judges Commission has received 724 complaints.<sup>9</sup> Of these, only three cases have completed the entire process resulting in the removal of one judge and the resignation of three others. The Federation Prosecutors Commission has received 102 complaints. Of these, none has progressed to the final review process.

In the Republika Srpska, the High Judicial Council has received 388 complaints. None have completed the final review process, although the removal of one judge is pending before the National Assembly and two other judges have resigned due to the review process. The High Prosecutorial Council has received 23 complaints. None have completed the final review process, although the removal of one prosecutor is pending before the National Assembly.

This review process, clearly the most important judicial reform initiative ever undertaken in BiH, has unfortunately not worked well. There are a number of reasons for this situation. First, the laws or amendments became effective in May and June 2000, which triggered the commencement of the 18-month Comprehensive Review Period. While the IJC was formally established in March 2001, it did not become operational until June 2001 – at which time there were only 5 or 6 months remaining of the CRP. This presented the IJC with an impossible timeline.

Further, the process itself has revealed a number of weaknesses. There are approximately 300 judges and 80 prosecutors in the Republika Srpska and 580 judges and 180 prosecutors in the Federation subject to the review process.<sup>10</sup> While the current review system contains a great deal of national control, it also has a number of negative elements. The commissions/councils are entirely comprised of judges or prosecutors – all of whom have other full time jobs. There is no additional compensation for service on the commissions/councils, nor is there currently any support staff.<sup>11</sup> In addition there is a good deal of turnover in commission/council members and a lack of time and resources for adequate training.

Peer review is a difficult procedure in any situation, but the problems are exacerbated when the members of the commissions/councils are expected to complete what is essentially a full time endeavor without any support staff and while retaining their other jobs. The fact that the

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<sup>9</sup> See Appendix 1 for the IJC's Comprehensive Review/Appointment Statistics as of November 2001.

<sup>10</sup> These figures are IJC estimates, see page 14, IJC Strategy Paper. Only those judges and prosecutors holding office at the time the laws went into effect are covered by the laws.

<sup>11</sup> The IJC has obtained funding from the Finnish government to finance a national support staff of two lawyers and one investigator for each Federation Commission and each RS Council. The IJC expects these support staffs to start working in December 2001.

commissions/councils are comprised entirely of judges and prosecutors, with no involvement of other elements of society has also resulted in criticism of the process. In the review process, the burden of proof is not on the judge or prosecutor – the commissions/council must develop and present the case. It is unrealistic to believe that the commissions/councils as currently structured can meet this heavy burden. Many national participants feel that the process is overly complicated. As a result of these frustrations, there is high turn over on the commissions/councils.

The IJC has done a good job in working with a flawed procedure under an unrealistic time frame. To IJC's credit, they have recognized these problems and have already started a dialog with the international community as to how the problems should be resolved. Most of the options discussed in this paper have been the subject of these discussions.

The bottom line, however, is that the current system for the review of judges and prosecutors is unlikely to provide the comprehensive review envisioned or the systemic changes necessary to ensure an independent and professional judiciary.

### **The Appointment/Reappointment Process**

A much more encouraging area is that of the appointment and reappointment of judges and prosecutors under the new laws. The IJC's mandate includes the authority to "ensure that the judicial and prosecutorial commissions and councils comply with their legal obligations."<sup>12</sup> Under this authority the IJC developed and facilitated a Memorandum of Understanding between the Commissions/Councils and Ministries of Justice of both entities. The MOU, entitled "The Standardization of the Appointment Procedure for Judicial and Prosecutorial Posts in the Federation of Bosnia and Herzegovina and the Republika Srpska", has proven to be an excellent framework for the appointment of judges and the appointment or reappointment of prosecutors.

While there has been some debate as to the tenure of judges in Federation, the Federation Constitution does provide that judges shall serve until age 70.<sup>13</sup> In the RS, the Constitution provides that judges shall have life tenure, which is further defined by statute to be 65, 67, or 70, depending on the judicial post. The Federation prosecutor (but not deputy prosecutors) at the Federal level is subject to a specific term while at the cantonal/municipal levels prosecutors (including some deputy prosecutors) are subject to specific terms. In the RS, prosecutors have life tenure, similar to RS judges.

In any event, the prosecutor positions with specified terms do become vacant, as do judicial and prosecutorial positions when the incumbent resigns, is removed for cause or dies. Under the new procedure these vacancies are opened to anyone who is qualified and who has an interest in applying. The positions are widely advertised, which has resulted in an increase of

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<sup>12</sup> 14 March 2001 Decision of the High Representative providing the IJC with a Comprehensive Mandate, Paragraph 3.

<sup>13</sup> The Federation Constitution also limits "first judges" to a mandate of 5 years at the Federation level. All cantons except two limit first judges to a mandate of 5 years via statute. There is some debate as to whether these limitations are contrary to the Federation Constitution.

ross-entity applications and applications from individuals displaced, including some now residing in Yugoslavia.<sup>14</sup>

Each applicant is required to complete a comprehensive application process which includes: a lengthy application form; a declaration of non-affiliation with a political party; declaration of compliance with property repossession laws, copies of all university and law degrees; copies of judicial examination; copies of citizenship of BiH, and a certificate that no criminal proceeding is pending against the applicant. All applicants invited to interviews must also complete a disclosure form. This disclosure form solicits the pertinent background information concerning each applicant.<sup>15</sup> An applicant can be rejected if he/she is found to have provided false information or failed to provide material information in the disclosure form.

Recently the IJC delivered to all judges and prosecutors a separate more comprehensive IJC disclosure form that must be completed by 21 December 2001. The IJC will use the information on this separate disclosure form for both the application and review process. There are some concerns, however, that in this regard the commission/council procedure and the IJC procedure are needlessly duplicative.

Once the application process is completed the commission/council interviews the applicants and then recommends appointment or reappointment of the most qualified individuals. A decision not to reappoint a prosecutor is essentially a removal. In this process, unlike the review process, the burden of proof is on the applicant to prove that he/she is qualified and fit for the position. This process has worked well. In the RS 17 new judges and 2 new prosecutors have been appointed under its provisions. To date, in the Federation, 8 judges have not been re-appointed<sup>16</sup> and 13 prosecutors have not been re-appointed. In addition, 4 new prosecutors in the Federation have been appointed under this process.

An example of the efficiency of this process is a recent situation in the Zenica and Doboje area, where 25 prosecutor positions came open. The appointment/re-appointment process took one month and 23 of the 25 positions were filled, with 7 prosecutors not being returned to their positions.

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<sup>14</sup> The wider scope of applications will help achieve fair representation of the three constituent peoples and Others in the judiciary. Nothing is more encouraging to return than having judges and prosecutors from a minority ethnicity. This is an area in which IJC has been actively working.

<sup>15</sup> The revised Disclosure Form requires: current judicial/prosecutorial posts; education; professional qualifications; prior professional experience; membership in professional organizations; details of family/relatives who are lawyers, judges, prosecutors or otherwise working for government; military service from January 1991 – December 1996; government service or compulsory work obligation between January 1991 – December 1996; judicial, prosecutorial, or other legal activity during January 1991 – December 1996; involvement in war crimes cases from January 1991 to date of application; details of any criminal offense other than minor offenses or traffic offenses; professional disciplinary proceedings; political activity; displacement, compliance with property repossession laws, government allocation of property, and business property; steering board member or executive officer of a public or private corporation; legal education; and language proficiency.

<sup>16</sup> These judges had completed the initial 5 year term and were considered “first judges” and therefore had to reapply for their positions.

## **The Future of the IJC and the Review Process**

The current IJC mandate in this area is to “ensure that the judicial and prosecutorial commissions and councils comply with their legal obligations.” The authority of those commissions/councils now consists of a review of all judges and prosecutors in an 18-month period and processing applications or re-applications for open positions. As the Comprehensive Review Periods are on the verge of expiration and the mandate of the IJC itself expires at the end of December 2002, there are several options that the IJC, OHR and the PIC should consider if meaningful judicial reform is to be achieved.

As noted above, the current review system is not working well and even if extended will not result in meaningful reform. Rather than view this as a failure in the judicial reform efforts of the international community, it should be viewed as a window of opportunity to institute a comprehensive reform that the current effort would not have achieved – even if completely successful. This juncture provides the international community with the opportunity, and perhaps the last opportunity, to create a truly independent, professional judiciary in BiH.

While the international community has worked to achieve reform in the judiciary, those efforts have been insignificant when compared to the efforts devoted to police reform. Successful police reform will be for naught if they must present cases to a judiciary which contains unfit or corrupt prosecutors and judges. Economic and social reform will be hindered without an independent and professional judiciary. It is well past time that the commitment to reform of the judiciary in BiH match the commitment to reform the police. The first critical step is to construct a framework for a judiciary that is independent from the executive and legislative branches, and then develop a workable review process that will identify and remove all judges or prosecutors who serve without qualification, or who are unfit or corrupt.

### **Options**

As noted, the current Comprehensive Review Periods are scheduled to expire in December of 2001 or early 2002. The options to be considered are to allow them to expire; extend the periods under the current system; or develop a new system and institute a new review period.

Option 1. If the international community believes that the reviews of individual judges and prosecutors that have taken place under the CRP constitute as good a comprehensive review that can be achieved, then perhaps the process should be allowed to expire, and bring to an end the involvement of the international community in this process. It is difficult to argue, however, that the process has had a chance to be effective, given the short duration of the program and the flawed process.

There are some national officials who favour this option and who argue that any judge who has not had a complaint filed against him/her during this period should be considered to have no problems as to fitness or qualifications. These individuals further argue that the judges have been under close scrutiny for the 18 month period, which has distracted them from their duties and has been a professional cloud over the entire profession.

Option 2. This option is to extend the CRP and continue under the current system for an additional period of time. If this option is considered, the period should be extended at least 12 months to give the program its full 18 months of operation. This option would accept the premise that a judge or prosecutor is fit and qualified for office if they have not had a complaint filed against him or her. If this option were chosen, IJC should be provided with significantly increased assets to assist in gathering and reviewing information and the commissions/councils should be provided with full time staffs and commission/council

members should be paid for their services. IJC should also consider simplifying the review process. Even with these additional measures, this option may not provide for a comprehensive review of all judges and prosecutors - it would merely be a band-aid for a system that needs major surgery.

Option 3. This option is to discard the current review system in favour of a reappointment system similar to the process utilised in East Germany after reunification, restructure the framework of the current judicial selection/discipline/removal process and require all judges and prosecutors to reapply for their positions. This option is described in greater detail below.

## **A Comprehensive Change**

Given the lack of meaningful results in the current review process, and the problems inherent in the procedure, the IJC, OHR and the PIC must seriously consider making a major revision to the manner in which judges and prosecutors are to be reviewed. Clearly the current process, even if extended, will not result in the review of all judges and prosecutors as originally envisioned by the High Representative when the laws were imposed.

The lack of capacity, resources and incentive in the current review system, combined with an unrealistic burden of proof placed on part-time commission/council members, will not result in a comprehensive review process. Certainly once this review process was commenced, the international community owes it to the citizens of BiH to ensure that the comprehensive review they were promised is achieved.

Under this option the current “review” process would be terminated – or perhaps simply not extended – and a procedure adopted that would require all judges and prosecutors to reapply for their positions. This option would ensure a comprehensive review of all judges and prosecutors, under a process that has already proven its efficiency. This option has several elements.

### **Step One: Restructuring of the Judiciary – Reducing Judicial Positions**

It has long been evident to both the international community and national officials that BiH has many more judicial positions per population than the European standard. Before initiating a new review process, it is only logical to first determine the number of judicial positions that is appropriate for a restructured BiH judiciary. That reform was scheduled for a follow-on judicial reform project, but it should be moved to a top priority. Restructuring at this time will eliminate the problem of having judges and prosecutors successfully complete the review process only to be subject to another review process when the judiciary is later restructured and judicial positions reduced.

### **Step Two: Creating High Judicial Councils**

While both entities have adopted commissions or councils to provide input into the appointment/discipline/removal process for judges and prosecutors, there are a number of problems with the process – not the least of which is that it is nothing more than a recommendation process. The real power remains in the hands of the politicians. The judicial system in BiH will never become truly independent as long as it is linked to the dictates of the dominant political parties. The current system requires the action by both the executive and the legislative branches for the appointment and removal of judges. Through this process the political parties continue to exert political control and pressure over the judiciary.

This political interference is evident in the current situation facing the Federation Constitutional Court and the Federation Supreme Court. The Federation Parliament has been unable to appoint the individuals who were recommended for these courts as a result of the new re-appointment/appointment process. This has left the Constitutional Court with no judges and the Supreme Court with 16 of 30 judges. Obviously the Constitutional Court does not function at all and the Supreme Court is seriously hampered with half its seats vacant. At the same time that national politicians complain that the judicial branch is ineffective, they ensure that result by refusing to take action on recommended appointments and by not supporting the court system through adequate funding.

In addition, the multi-layered commissions with their multi-layered procedures are inefficient and cumbersome. A more streamlined, forward looking structure is needed for this process – a structure that will evaluate judicial and prosecutorial candidates on merit and avoid the conflicts of both local and national politics.

The IJC, OHR and the PIC should therefore consider the option of creating a High Judicial Council in each entity and at the state level,<sup>17</sup> before the reappointment process is commenced. The High Judicial Council should be based on the Continental model of High Judicial Commissions and should have the authority to appoint, discipline and remove judges and prosecutors. The membership of the council should be at least 50% judges and prosecutors, but should also have members appointed by the executive and the legislative branches. It has also been suggested by some national officials that the council should have members of the international community for several years.

Similar models work well in other European countries and adoption of a High Judicial Council in BiH will establish the courts as a truly independent branch of government and remove it from the influence of politics. It does not matter how good the screening process for judges is, if the power of appointment is ultimately a political decision or politically driven compromise. The creation of a High Judicial Council received support from all individuals consulted on this project.

### **Step Three: Adopt a Re-Appointment Procedure for all Judges and Prosecutors**

The second step is to amend the laws on judicial and prosecution service in both entities to terminate (or allow to expire) the current review procedure and to adopt a re-appointment procedure for all judges and prosecutors, similar to the East German model.

### **Step Four: Modify the Entity Constitutional Provisions Which Grant Life Tenure to Judges and Terminate their Current Terms in 2002**

Adoption of the reappointment process would require a modification of the entity constitutions to remove the guarantee of life tenure in judicial positions for judges (and prosecutors in the RS). This modification would only be applicable to current judges and the life tenure protection would be restored to all judges appointed under the new process.<sup>18</sup> The

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<sup>17</sup> A single High Judicial Council for the entire country would be desirable – with representation from both entities. That option, however, may be too optimistic in the near timeline.

<sup>18</sup> A possible alternative to modifying the entity constitutions in this regard would be to have the High Representative, under the Bonn Powers, order the removal of all current judges and prosecutors in such a manner that would require them to reapply for their positions, without hindering the ongoing operation of the judicial system.

life tenure for prosecutors in the RS is not consistent with international standards and should be eliminated.

Legislation should then be enacted to terminate the current terms of all judges and prosecutors<sup>19</sup> in 2002. The termination dates of these terms should be staggered throughout 2002 to allow for the orderly processing of the re-application/application process. Upon expiration of the terms, the positions would be advertised under the MOU procedure and the incumbents and new applicants would compete equally for the reduced number of positions. This procedure would also significantly advance the goal of fair representation in the judiciary of both entities.

This process has the advantage of placing the burden on the applicant to establish his/her fitness to serve as a judge or prosecutor and all would be processed by the High Judicial Commission at the entity level, ensuring a high level of quality and consistency without political interference. The IJC should continue with its recent plans to increase its investigative capabilities and the High Judicial Commission should have a full time staff. Individuals who are fluent in the local language and experienced in legal procedure should be hired to assist the High Judicial Commissions. As this will be require a significant commitment for a prolonged period, commission members should be granted official leave from their regular positions and be compensated for their services.

While this is an ambitious project, the re-appointment/appointment procedure in the former East Germany was successful in reviewing approximately 6,000 judges and prosecutors after reunification. This will, however, be an extremely demanding procedure and will require a substantial devotion of resources and the strong support of all members of the international community.

#### **Step Five: Extend the New Comprehensive Review Period and the IJC Mandate**

This proposal embodies sweeping changes and sufficient time should be provided if it is to be successful. Work on the necessary changes to the constitutions and laws should commence at once. The re-application/application process should not commence until mid 2002 (after the necessary legislative and constitutional changes are completed and the new High Judicial Council established) and run until at least mid 2003. This would provide IJC with six months in which to draft and obtain passage of the necessary changes – to the constitutions, laws as well as to the procedures to be followed by the High Judicial Councils. The reappointment period itself would then take 12 months. IJC's mandate would therefore need to be extended for one full year, until the end of 2003 to complete the re-appointment/appointment process and transition unfinished projects to the follow-on judicial reform organisation.

#### **Conclusion and Estimated Cost**

If this option is not adopted, the current process certainly should be revised to improve the procedure, but even with improvements, the current system will never result in a comprehensive review of the judicial system. As a consequence public confidence will not be restored in the system, there will not be a sound foundation for the other judicial reform projects that are underway or planned for the future, and domestic and foreign investors will opt for those countries with a more established rule of law.

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<sup>19</sup> Except those prosecutors and judges who have been appointed/re-appointed under the procedures set forth in the MOU.

The substantive mandate of IJC need not be changed under this option, as once the entity constitutions and the laws on judicial and prosecutor service are amended, it is IJC's mandate to ensure those laws are carried out. As noted, however, the IJC mandate would need to be extended through 2003.

The cost of this option is roughly estimated to be \$3 million for the additional calendar year 2003. That figure contemplates that additional resources and personnel will need to be devoted to the re-appointment process.

### **Penal System Reform**

While police reform has received much more attention than judicial reform and is consequently much further progressed, judicial reform has received much more attention than penal reform, where there has been little co-ordinate effort. The 1999 OHR judicial Strategy recognised that "judicial system reform should be carried out in parallel with reform of the prison system in BiH."

The Council of Europe sponsored reports on the prisons and penal systems of each entity in 1998 and 1999. These comprehensive reports provided a baseline as to the conditions of the systems and concluded with a list of specific recommendations based on European standards. While the Council of Europe and the UN have remained somewhat active in the field, this is an area which must be brought into to overall rule of law co-ordination effort.

A follow-on review to the two Council of Europe reports must be undertaken as soon as possible and necessary projects identified. The IJC should assume the lead role in co-ordinating this effort in their role as the overall co-ordinator of all rule of law efforts in BiH.

### **Co-ordination of the Rule of Law Effort**

The mandate given to the IJC in the 14 March 2001 Decision of the High Representative "embraced matters regarding the rule of law and judicial reform." This included the responsibility and authority to: "guide and co-ordinate reforms affecting the judiciary, the prosecutor's office, professional associations, and related structures, procedures or institutions, including assisting in or facilitating the development of new legislation."

This language envisions a co-ordinated international community approach to the establishment of the rule of law. As noted earlier, OHR has taken an integrated approach to the rule of law by defining it to include police, prosecutors, judges and the penal system. Not only is this integrated approach welcome, it is essential if there is to be any meaningful progress in the overall rule of law area.

The functions of each of these rule of law elements are so inter-related that co-ordination at the international, national and local levels is imperative. As the new criminal procedure code comes on line in 2002, structures need to be in place to ensure that both the police and prosecutors understand their new roles – and that communication and co-ordination must become part of the everyday routine. No one element of the criminal justice system can stand alone, nor can they operate effectively in isolation. The planning and implementation of new procedures in one element will invariably have an effect on the other elements, and therefore the entire system. Overall co-ordination and co-operation is essential.

As long as the IJC continues in existence, it should be the lead organisation for this co-ordination effort in the international community. It should actively co-ordinate the activities of all organisations involved in rule of law activities, including police, prosecutors, judges and

the penal system. All aspects of the judiciary and the criminal justice system should be co-ordinated by IJC and if the current mandate does not make that clear, it should be clarified.

Currently judicial reform projects are found in the OHR Anti Fraud Department (AFD), the OHR Legal Department and the OHR Human Rights Department, as well as the IJC. The judicial reform areas within OHR include the BiH Constitutional Court; the establishment of the State Court of BiH; the proposed merger of the Human Rights Chamber with the BiH Constitutional Court, the development of a free legal aid scheme, criminal procedure reform, legislation on court experts, and monitoring of domestic war crimes trials. Any area that does not require the OHR mandate for successful completion should be transferred to the IJC.

While there are compelling reasons why some of the reform projects currently located in OHR should remain there, there is no reason that those efforts not be included in the overall co-ordination effort of IJC. Not all of projects contained in the IJC strategy paper are implemented by the IJC, but are implemented by other international organisations or NGOs. The overall co-ordination of all rule of law projects – whether they are implemented by OHR or elsewhere - is important to ensure a comprehensive approach to rule of law reform rather than the *ad hoc* approach of former days.

OHR has recently decided that OHR Legal will have the lead on completion of the revised criminal procedure act, with assistance from Anti-Fraud Department. There are, however, a number of judicial reform issues involved in the criminal law area other than criminal procedure reform and the only way those issues will not be lost are to have overall co-ordination of every aspect of rule of law. For instance, it will be necessary to have a field presence to foster the police-prosecutor relationship at every level. While OHR Anti-Fraud is working in this area their effort are limited to fraud and corruption cases – a broader approach is needed.

It is recommended that the IJC take a much more aggressive role in the co-ordination of all rule of law efforts in BiH, and if needed, seek an expansion of their mandate in order to ensure success. The international community cannot expect the different elements of rule of law to communicate and co-ordinate at the national and local level if there is no communication and co-ordination at the international level.

### **The Judicial Reform Follow-on Mission**

The IJC is focusing on two areas: ensuring that the review of current judges and prosecutors is completed in an effective manner, which is the responsibility of the Monitoring and Implementation Department, and; improving the quality and efficiency of the judicial system, which is the responsibility of the Plans and Policy Department. The actions involved in the review of prosecutors and judges involves the extraordinary powers and authority granted in the March 2001 Decision of the High Representative and that process should be completed when the IJC mandate ends. The follow-on judicial reform mission will therefore be comprised of the unfinished judicial reform projects of the Plans and Policy Department and of those reform projects not currently included in the IJC strategy or handled by other OHR departments.

In the interests of efficient co-ordination and streamlining, all judicial reform projects must be subject to an overall co-ordination process. As long as the IJC is active in implementing its mandate concerning the review of judges and prosecutors, it should continue in existence. During that time it is logical that it co-ordinate all aspects of the rule of law area, and implement those projects for which it has primary responsibility.

## **Current and Future Judicial Reform Projects**

The IJC has identified 15 projects that they anticipate completing or developing by the end of their original mandate in December 2002. These completion estimates were designed for the under the current mandate and are somewhat optimistic. The programs are listed below along with the author's comments as to whether the programs will extend into 2003.

The 15 initial projects include those involved with the review, appointment and removal of judges and prosecutors:

- (1) the comprehensive review process - *completed in 2003*
- (2) appointment of judges and prosecutors - *completed in 2003*
- (3) reform of commissions/councils - *completed in 2003*

The remaining projects do not directly involve the review/appointment/removal process:

- (4) court funding – *will continue into 2003*
- (5) court security – *will continue into 2003*
- (6) civil procedure reform – *monitoring and training in 2003*
- (7) enforcement of civil judgements – *monitoring and training in 2003*
- (8) court administration reform – *will continue in 2003*
- (9) judicial training institutes – *liaison and support will be required. Once the institutes are operational, all judicial training should be done through the institute to build capacity*
- (10) criminal procedure training – *will be on going in co-ordination with Judicial Training Institute.*
- (11) access to legal information – *will continue into 2003*
- (12) the legal profession – *will continue into 2003*
- (13) inter entity legal co-operation – *the commission should be operating but will require monitoring and assistance in 2003*
- (14) possible merger of minor offence courts into regular courts, and subsequent inclusion of minor offence judges in review process – *will continue into 2003*
- (15) the Herzegovina Neretva Canton – *the restructuring and facilities should be completed in 2002 but will require monitoring and assistance.*

Additional projects not part of the current IJC core strategy include:

- (16) monitoring of judicial appointment/discipline/removal process after the end of the Comprehensive Review or Reappointment Process – *will continue after 2002*
- (17) trial monitoring – domestic war crimes trials will become more frequent; property, return and corruption trials – *will continue after 2002*
- (18) court restructuring – *should be done early in 2002*

- (19) computerisation of courts – *a 2003 project*
- (20) legal education – *a 2003 project*
- (21) possible merger of different levels of prosecutor's offices – *a 2003 project*
- (22) reform of administrative law and procedure – *a 2003 project*
- (23) prison reform – *co-ordination by IJC should commence in 2002*

There will be no shortage of relevant judicial reform projects in 2002 and 2003. As there are several options for the future of the IJC, including a change in the review process for judges and prosecutors and a possible extension of the IJC mandate, the follow-on judicial reform mission will be addressed under several possible scenarios.

### **Follow on if the IJC Mandate Terminates on 31 December 2002**

As noted, it is somewhat optimistic to assume that the IJC will complete all of its stated projects by the end of December 2002. A number of these projects, however, benefit from the authority and mandate of IJC in order to ensure their completion and those projects should have priority over those projects that can be appropriately handled by a judicial reform follow-on mission. Those projects which should be given priority by the IJC include: inter entity judicial co-operation; Herzegovina-Neretva Canton; court restructuring.

The remaining projects, listed above, would be transferred to the judicial reform follow-on mission. If the IJC mandate is to expire at the end of 2002, the decision on that issue should be made as soon as possible. The follow-on agency should be designated early in 2002 and the transition of the projects should commence by mid-2002 to ensure a seamless transition.

The IJC Plans and Policy Department head office currently has five international judicial reform officers, three national judicial reform officers, a chief and deputy chief. In addition, 16 international and national judicial reform officers are located at the 6 IJC Field Offices and assist in the judicial reform projects.

The judicial reform follow-on mission should anticipate a similar head office and field office staffing requirement, in addition to office facilities and office and IT equipment, vehicles, communications equipment, a support staff of interpreters/translators, administrative support, IT support, security, drivers, and cleaning services. The follow-on mission must establish a field presence in BiH to facilitate assistance and advice to judges and prosecutors on a regional basis, as well as facilitate country-wide trial monitoring. The time available for this paper did not allow the development of cost estimates for establishing such a follow-on mission.

### **Follow-on If the IJC Mandate Terminates on 31 December 2003**

The judicial reform requirements for 2004 are too remote at this point to develop a realistic follow-on mission requirement. Many of the projects listed above will continue into 2004, but what those projects will be and the amount of resources required for the necessary development work is difficult to assess at this time.

If the IJC mandate is extended until the end of 2003, an assessment should be commissioned for late 2002 or early 2003 to develop the requirements of the judicial reform 2004 follow on mission.