

United Nations Mission in Bosnia and Herzegovina

Judicial System Assessment Programme (JSAP)

THEMATIC REPORT VII

JSAP and the Judicial Review Process in Bosnia and Herzegovina

November 2000



UNITED NATIONS

The designations employed and the presentation of material in this report do not imply the expression of any opinion whatsoever on the part of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

CONTENTS

1	Judicial Review in Bosnia and Herzegovina	2
2	JSAP and the Judicial Review Team	3
3	The Judicial Review Procedure	4
4	The Legal Framework	5
5	The Pilot Study	6
6	Books of Rules	6
7	The Public Information Campaign	7
8	Manuals	7
9	Conference on the Professional Review of Judges and Prosecutors	7
	ANNEX 1 Pilot Study	9
	ANNEX 2	
	A – Statement by Mr. Julian Harston, Deputy Special Representative of the Secretary-General	17
	B – Statement by Judge Iver Huitfeldt, Head of JSAP	18
	C – Conference Agenda	22

1 Judicial Review in Bosnia and Herzegovina

In 1998, a consensus began to develop among international observers that one of the reasons for the slow pace of implementation of the Dayton Agreement was the lack of “rule of law” and an independent judiciary in Bosnia and Herzegovina (BiH). In July 1998, the UN Security Council created the UNMIBH Judicial System Assessment Programme (JSAP), whose mandate was to monitor and assess the country’s court system. In December 1998, at its meeting in Madrid, the Peace Implementation Council declared that “(b)uilding the rule of law, founded upon an independent judiciary and a reliable police force, will be a top priority for 1999.”

In particular, the Madrid Declaration mandated “the adoption, by 30 June 1999, of legislation to achieve an independent and impartial judiciary(...).” The Office of the High Representative (OHR) took the lead in preparing this legislation, and drafts (one for each Entity) were circulated in early 1999. The drafts encountered opposition from BiH experts, who felt that they did not take into account their own tradition and style of legal drafting. Objections were also raised to the inclusion of provisions calling for a review of the qualifications and suitability of all sitting judges, which was viewed by some domestic and international observers as an unacceptable infringement on the independence of the judiciary.

It was generally felt by those with practical experience of the state of the judiciary in BiH that such a review was necessary. During the war, persons without basic qualifications had been appointed as judges, and after the war the appointment process was controlled by the ruling political parties. There were numerous accusations of lack of impartiality, corruption, and general incompetence in the judiciary. It was clear that the local judiciary was not independent and that it could not be independent until it had undergone a basic reform.

Although there were calls for harsh action, such as mass removal of judges, or removal based on mere suspicion, any reform of the judicial branch had to be based on the rule of law. Removal of judges from office was a serious step, and an independent and competent judiciary could not be created without respecting the principle of due process.

OHR appointed a working group of BiH experts to prepare a new draft law for the Federation of BiH (the Federation), the Law on Judicial and Prosecutorial Service. The draft law dealt with the review process in a single article, which stated that the Federal and Cantonal Commissions would, over a period of one year, “give their opinion whether judges and prosecutors who are currently performing their duties as judges and prosecutors are fulfilling criteria for performing judicial and prosecutorial services.” A similar provision was included in the draft Republika Srpska (RS) law, the Law on Courts and Judicial Service, which provided for the establishment of a High Judicial Council. The laws were submitted to the Entity parliaments in the early fall of 1999.

Although the Madrid Declaration had called for passage of the laws by 30 June 1999, by the end of the year the laws had not been approved. Croat delegates in the Federation parliament objected to the adoption of Federal standards for salary, selection and review. In the RS, the ongoing governmental crisis delayed consideration of the law. It was clear that there was no political commitment to creating an independent judiciary.

2 JSAP and the Judicial Review Team

Having gathered detailed information about the state of the judiciary in its first year of existence, JSAP sought to apply its expertise by participating in the review process. In September 1999, UNMIBH proposed that JSAP assist in monitoring, assessing and advising the Federal Commissions and the High Councils. The High Representative, Wolfgang Petritsch, accepted this proposal, stating on 5 November 1999 that “(m)y office expects JSAP to take a leading role in the implementation of the pending laws regarding judicial selection once they are passed.” At the end of January 2000 the UN approved the creation of five new positions in JSAP for the period through June 2000 to carry out this work.

In February 2000, the Judicial Review Team (JRT) was created within JSAP. At the time, it was expected that the laws would finally be passed by the Entity parliaments in the middle of February and that the JRT would immediately begin to monitor the work of the Federal and Cantonal Commissions and the High Judicial and Prosecutorial Councils. The first two members of the team, a Polish judge and an American lawyer, began work at the beginning of March. The JRT’s remaining members, two Norwegian judges, a Finnish judge and an American lawyer, were in place by the middle of April.

There was significant debate within JSAP concerning the role of the JRT and how to deal with the review process. In many respects, this mirrored the confusion over how the Commissions and Councils would actually carry out the review process. Before the establishment of the JRT, no thought had been given to the mechanics of the review, which was, after all, a process with no precedent anywhere else. The OHR-approved draft had simply stated that the Commissions and Councils would “give their opinion” of the judges and prosecutors, without providing any material or procedural guidance as to how they would reach such an opinion.

One option discussed was that JSAP would perform its own parallel review of each judge and prosecutor, identify those who should be removed and prepare a case for their removal to be presented to the Commissions and Councils. It was decided, however, that this approach would require much greater resources than JSAP had at its disposal, and would violate the basic principle that the review process should be carried out by domestic jurists.

Such an approach would have required a commitment on the part of JSAP to follow the review process from beginning to end, a process that should take at least eighteen months. By the early spring of 2000 it became clear that JSAP’s mandate would not be extended past the original two-year period, and that the programme would come to an end in 2000. It was therefore decided that the JRT would focus on ensuring that the Commissions and Councils would be able to begin their work in an effective manner.

3 The Judicial Review Procedure

If, as originally intended, the laws had been passed in the first months of 2000, the Commissions and Councils would have been faced with the difficult task of defining the standards and procedures for a review of hundreds of judges and prosecutors without any legal guidance.

The JRT took advantage of the delay to think about the problem in a systematic and practical manner. First, it was necessary to establish the material standards by which the serving judges and prosecutors would be judged. Second, it was necessary to create a way for the Commissions and Councils to gather information. And finally, it was necessary to establish a detailed set of procedures to guide the Commissions and Councils through the review, ensuring that the review could be completed in the allotted period of time, and guaranteeing the observance of appropriate standards of due process.

The JRT did not have any precedent to guide it, or any pre-existing legal framework it could adapt. Judges in the former East Germany had been subject to review in the early 1990s during the period of German reunification, but in that case all serving judges were removed and forced to reapply for their jobs. They were then subject to a thorough review of their entire careers. There were insurmountable legal and practical obstacles to following such an approach in BiH. An entirely new procedure needed to be developed.

The review process was subject to the fundamental principle that judges could only be removed through procedures set forth in the Constitutions of the Entities (and the Cantonal Constitutions in the Federation). In RS, judges can only be removed by the National Assembly. Judges of Federation courts can only be removed by the consensus of their colleagues, cantonal judges by consensus of the Federation Supreme Court and municipal judges by consensus of the cantonal judges. This meant that the Commissions and Councils could only recommend the removal of a judge.

The presumption had to be that judges were suitable to remain in office unless shown to be unsuitable. The first priority, therefore, was to define standards for unsuitability. The JRT established nine specified criteria which would render a judge or prosecutor unsuitable to continue to hold office.

Since the Commissions and Councils would not have the resources to examine every case file, or perform a full background investigation of every judge, it was necessary to create a procedure that allowed them to target individuals meriting further investigation. The solution was to provide them with a flow of information, which could then be sifted for evidence of unsuitability. Courts and other government offices would be required to send information in their files to the central offices of the Commissions and Councils. Judges and prosecutors would be required to complete detailed Disclosure Forms, and court presidents would be required to fill out Evaluation Forms for each judge within his/her court. One of the most innovative sources of information was the general public, who could come forward with any information relating to the suitability of a judge or prosecutor. Credible allegations of unsuitability would then be assigned for further investigation.

The next step was to provide for a procedure to allow judges and prosecutors to respond to the charges against them. In doing so, it was necessary to balance the need to remove unsuitable judges and prosecutors with principles of fairness and due process.

Creating these procedures involved lengthy debate among the members of the team, whose breadth of experience – four were judges, two were lawyers; four were from civil law countries, two were from common law jurisdictions – allowed them to analyze the issues involved from a number of perspectives. The goal was to create a simplified, expedited procedure, so it was decided instead of referring to existing Bosnian procedural codes, such as the laws on administrative or civil procedure, it would be necessary to specify procedural rules. As a result, it was necessary to address a number of complex problems involving hearing procedure, compulsory testimony of witnesses, confidentiality and conflicts of interest.

The JRT codified all of these points in 35 articles, intended as an amendment to the Republika Srpska and Federation laws. These articles were submitted to OHR in the middle of April, and a series of meetings were held in order to develop a final consensus.

The political deadlock in RS was broken with the passage of the Law on Courts and Judicial Service and the Law on the Public Prosecutor on 25 April 2000. The versions passed by the parliament contained a number of unacceptable provisions, making it necessary for the High Representative to impose several amendments. The JRT took advantage of this necessity to draft amendments to the laws allowing the High Judicial and Prosecutorial Councils to adopt the detailed review procedures drafted by the JRT in their Books of Rules. These amendments, together with the others, were imposed by the High Representative on 9 June.

Meanwhile, the political deadlock in the Federation continued. It became clear that the Federation parliament would not pass an acceptable version of the law, and so the High Representative imposed the Law on Judicial and Prosecutorial Service, including the 35 additional articles drafted by the JRT, on 17 May 2000.

4 The Legal Framework

The law imposed in the Federation created a seven-member Federal Judicial Commission and ten Cantonal Commissions of three or five members, depending on the population of the canton. Similar Commissions were created for prosecutors. The Federal Commission deals with matters affecting Federation-level courts, and meets together with the relevant Cantonal Commission to deal with matters affecting cantonal or municipal courts. The Commissions are responsible for reviewing candidates for judicial (and prosecutorial) vacancies and providing opinions on discipline procedures and new laws affecting the judiciary (or prosecutors). No person can be appointed as a judge or prosecutor unless the relevant Commission has given him or her a positive rating.

In the RS, the laws passed by the National Assembly create a High Judicial Council (13 members) and a High Prosecutorial Council (11 members). In addition to providing opinions on candidates, the Councils play a direct role in the process of discipline.

The laws require the Commissions and Councils to carry out a Comprehensive Review of serving judges and prosecutors over a period of eighteen months. The laws also establish significantly higher pay scales for judges and prosecutors. Low pay was considered to be one of the most serious obstacles to improving the status and independence of the judiciary.

5 The Pilot Study

It was one thing to create a detailed judicial review procedure, but the real question was whether the procedure could work in practice. How could the Commissions and Councils generate the information needed to conduct the review, and how could that information be analyzed? In order to answer these questions, JSAP decided to carry out a Pilot Study, focusing on two courts, one in the Federation and one in RS. The purpose of the study would be to find what potential evidence of judicial unsuitability could be found in government files or collected from the international community. This would serve as a guide to the Commissions and Councils, which would also have access to the Disclosure and Evaluation Forms, as well as materials submitted by the public.

In April 2000, it was decided to carry out the Pilot Study in the Tuzla region. Over the following two months, the Tuzla JSAP team and the JRT carried out a thorough review of the files in two courts and met with representatives of the international community working in the area.

The Pilot Study uncovered a surprising amount of evidence of political influence and miscarriage of justice, particularly in the RS court. At the same time, however, the study showed how time-consuming the process of identifying unsuitable judges could be without “leads” from the public or other sources of information. The findings of the study were summarized in a report which was translated and made available to the members of the Commissions and Councils. (Annex 1)

6 Books of Rules

The law imposed in the Federation by the High Representative required the Federal and Cantonal Commissions to hold their initial meetings within 30 days. The JRT immediately began drafting a Book of Rules, to govern additional aspects of procedure not addressed in the law, and standard Disclosure and Evaluation Forms. The Book of Rules also included a detailed agenda for the initial meetings, to ensure that the Commissions would be able to start their work on a full legal footing.

The draft Book of Rules and forms were submitted to the statutory members of the Commissions for comment, and final drafts containing their suggestions were submitted for approval at the initial meetings, held on June 15 and 16. The initial meetings, attended by members of all the Federal and Cantonal Commissions, as well as the members of the JRT, were concluded without any difficulties.

Meanwhile, the JRT was also preparing a draft Books of Rules for the RS Councils. Since the RS law, passed by the parliament, did not include the detailed review procedures included in

the Federation law, these needed to be incorporated in the Books of Rules. The JRT discussed the drafts with members of the High Councils and incorporated some of their suggestions. The Books of Rules and forms were approved at the first meeting of the High Judicial Council, held on 18 July 2000, and at the first meeting of the High Prosecutorial Council, held on 22 August 2000.

7 The Public Information Campaign

Soliciting information from the public was one of the most innovative and controversial aspects of the new law. The JRT felt that it was essential to involve the public in the review process, both as a source of information, and as a way to create public confidence in the judiciary. The law, as drafted by the JRT, contained a provision requiring the Commissions and Councils to place advertisements in several newspapers, and the JRT prepared a draft version for consideration by members at the initial meetings of the Federal Commissions.

Members of the Federal Judicial Commission, however, objected to the length of the advertisement, and instead approved a less conspicuous notice. The members expressed their concern that an invitation to the public to submit information would result in a flood of scurrilous, unprovable accusations. The JRT fully expected that unfounded accusations would be received, but it felt that this would not place an excessive burden on the Commissions and Councils, and that any such burden would be outweighed by the positive impact on public confidence. More importantly, the JRT believed that encouraging public comment would permit the review process to focus on the ethical aspects of judicial suitability, rather than relying entirely on court records and statistics.

The JRT therefore initiated a series of meetings with the public information sections of UNMIBH and OHR in order to develop a strategy for an information campaign. UNMIBH and OHR issued a joint press release, entitled “You Have the Right To Be Heard,” and JSAP gave a lengthy interview to *Oslobodenje*, which received prominent coverage in the newspaper’s 30 June issue. UNMIBH’s UN Radio produced an announcement, and the OHR Refugee Return Task Force, which had received a number of queries about the public comment procedure, coordinated the production of a television spot, which was broadcast in compliance with the High Representative’s authority to require stations to air public service announcements.

8 Manuals

The JRT prepared four detailed manuals – one for each Commission or Council - to guide the members in their work. In addition to the laws, books of rules and forms, these manuals contained copies of the Pilot Study and diagrams showing the steps of the review process. Translated copies of the manual were delivered to every member of the Commissions and Councils.

9 Conference on the Professional Review of Judges and Prosecutors

Although JSAP continued to play a role in monitoring the work of the Commissions and

Councils and providing guidance as requested, the JRT was disbanded at the end of June 2000, having succeeded in providing a legal and procedural foundation for the judicial review process.

As a conclusion to the work of the JRT, JSAP and the Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (IRZ) cosponsored a conference on 8 September 2000 to discuss the lessons of the German judicial review process. Members of all the cantonal and federal judicial and prosecutorial commissions and the High Judicial and Prosecutorial Councils, together with other local and international representatives, attended and heard three speakers from Germany, as well as members of the JRT. In addition, the Presidents of the High Councils and the Federal Commissions gave reports on the initial work of their organizations. Some of the papers from the conference are attached as Annex 2.

Although the review process in Germany differed significantly from the procedure envisioned for Bosnia-Herzegovina, the three German experts – a judge, a prosecutor and a lawyer – provided the audience of local judges and prosecutors with a historical perspective on the results of the reform of an East European judicial system.

ANNEX 1

REPORT ON A PILOT STUDY **IN ANTICIPATION OF THE COMPREHENSIVE REVIEW OF JUDGES** **BY JSAP TUZLA**

I. INTRODUCTION

I. 1. Background

On 17 May 2000, the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina (Federation) was imposed by the High Representative and entered into force. The law contains in Articles 50 - 81 detailed provisions for a comprehensive review on judges and prosecutors, which is to occur over the course of a period of 18 months. The review will assess the suitability of all judges and prosecutors to hold office. The review is carried out by a Federal Commission for the Election and Appointment of Judges in cooperation with counterpart Cantonal Commissions. The Commissions have adopted a Book of Rules to regulate the review process.

In the Republika Srpska (RS), the National Assembly has recently passed the Law on Courts and Judicial Service and the Law on Public Prosecutors Office. The laws were published in the Official Gazette on 25 May 2000, and they enter into effect eight days thereafter. Article 105 of the Law on Courts and Judicial Service and Article 81 of the Law on Public Prosecutors Office also create a legal basis for the comprehensive review of judges and prosecutors, leaving the detailed regulations to be set forth in a Book of Rules. In the RS, the High Judicial Council will conduct the review process.

A detailed review procedure in the Federation law has been drafted by the Judicial Review Team, a component of the Judicial System Assessment Program (JSAP). Similar provisions are adopted in the Book of Rules of RS, as proposed by the Judicial Review Team.

The grounds for finding a judge or a prosecutor unsuitable are as follows:

- 1) The judge or prosecutor is incapable of performing judicial or prosecutorial functions for lack of basic qualifications,
- 2) The judge or prosecutor has not abided by the principles of impartiality or independence,
- 3) The judge or prosecutor is corrupt,
- 4) The judge or prosecutor is incapable of performing official duties due to mental incapacity, alcoholism, or drug addiction,
- 5) The judge or prosecutor has failed to act in a professional or ethical manner or has otherwise committed nonfeasance to a substantial degree,
- 6) The judge or prosecutor has committed a serious breach of law,

- 7) The judge or prosecutor was selected in an improper manner, or
- 8) The judge or prosecutor has intentionally failed to submit a completed Disclosure Form, has intentionally provided false information on a Disclosure Form, or has otherwise intentionally failed to cooperate with the Commission concerning a matter substantially material to a determination of unsuitability.

The comprehensive review process commences with a preliminary review by the Commission/Council of the personal review files of judges/prosecutors. The Commission/Council creates for each judge/prosecutor a personal review file, which will contain copies of all relevant information held in official government files related to the person's qualifications or work. The personal review file will also contain a disclosure form filled out by the judge/prosecutor and an evaluation form providing an assessment of each judge/prosecutor by a Court President. In addition information from the public (and the international community) should be placed in the personal file.

The Commission/Council reviews the personal review files and institutes subsequent review for each file that contains credible evidence that the judge/prosecutor may be unsuitable to hold office. A referee will be appointed to gather evidence and conduct investigations for such files and will submit a report to the Commission/Council for consideration.

The Commission/Council reviews the evidence gathered in the report, and may designate the file for final review. At this stage, the judge/prosecutor may reply to the referee's report and demand a hearing. If the Commission/Council in its final decision finds that the judge/prosecutor is unsuitable, or that he/she was selected in an improper manner, then the Commission/Council will forward a report to the competent body with a recommendation for removal of the judge/prosecutor or an initiation of a new selection process, as appropriate.

I. 2. The Goal of the Pilot Study

The main goal of the Pilot Study is to draw experience in gathering information from relevant sources and outline that experience in this report in order to serve as a tool for the international organizations that will monitor the work of the Commission/Council. The Pilot Study may also be of direct use to the Commission/Council in developing a methodology of gathering information, even if the members are familiar with the sources of information. As an additional benefit, the Pilot Study contains information on the judges from the courts that the Pilot Study surveyed.

I. 3. Description of the Study

The Pilot Study surveyed two courts, one in each entity. JSAP met with the court presidents to gain access to court archives. Both presidents were cooperative in the project and provided necessary access and assistance in finding and copying files. The Ministry of Justice (MOJ) cooperated with the Pilot Study. The MOJ provided information on the courts and the judges from the ministry archives.

It was a JSAP decision that the Pilot Study, as a test project, should not include

interviews on the background and behavior of judges with judges, court presidents, members of the Bar Association, or the public. In addition, JSAP decided that the disclosure form and evaluation form, developed for the review process, would not be used during the Pilot Study. As a result, the Pilot Study concentrated on the methodology of gathering information from internal sources, such as, the court registries and files, and from external sources, such as, the International Community (IC) and Federal Ombudsman's Office. An important part of the study has been to compare information from the different internal files with external information and thus establish a profile of the judges' background and behavior.

I.4. Brief description of the courts/judges

I.4.1. The Basic Court in the RS

The Basic Court has its seat in a small town in the RS. The town contained a mixed population before the war. Now it is almost entirely Bosnian Serb. The post-war population is approximately 16,000 in comparison to a pre-war population of 32,000.

The Basic Court consists of five judges, including the Court President. All judges are Bosnian Serbs. Four judges were born in the town where the Basic Court has its seat. All judges possess degrees from a law faculty and have passed bar exams. Their professional experience ranges from 39 years, with a maximum judicial experience of eight years, to three years, with maximum judicial experience of six months. Prior legal experience of the judges includes activity associated with private enterprise, municipal government, public practice of law, and private practice lawyer. Two judges were appointed in 1992, one in 1997 and two in 1999. None of the judges possessed judicial experience prior to appointment. Basic Court statistics show that all the judges deal with a range of cases. At the time of the Pilot Study, one of the judges was involved in a dismissal proceeding and had been under suspension since September 1999. He is now reinstated to his judicial post upon a 'gentleman's agreement' with the President of the Basic Court, and is mainly assigned probate matters. In addition to the judges, the Basic Court's administrative staff consists of 12 individuals, who are Bosnian Serbs.

The Basic Court handles first instance criminal, civil and commercial cases, except property registration cases, which are handled by municipal organs. In 1999, the Basic Court had a caseload of 1,196 cases (215 cases from previous years and 981 new cases). As of 31 December 1999, the Basic Court had processed 932 cases, and 269 cases remained pending. The Pilot Study compiled charts containing detailed statistics of the cases handled by the Basic Court in 1999, as well as statistics related to each judge.

A book of rules (*Pravilnik o unutrašnjoj organizaciji osnovnog Suda*) regulates the activity of the Basic Court. The Pilot Study contains a translation of the book of rules.

I.4.2. The Municipal Court in the Federation

The Municipal Court has its seat in a town of approximately 70,000 inhabitants, of which more than 90% are Bosniaks.

The Municipal Court consists of ten judges, including the President of the Court, who has occupied this post since 1997. Nine judges are Bosniaks. One judge is Bosnian Serb. All judges possess degrees from a law faculty and have passed bar exams. Their professional experience ranges from 23 years, with a maximum judicial experience of 16 years, to nine years, with a maximum judicial experience of two years. These judges received judicial appointment in 1984, 1990, 1993, 1994 and 1998. Only two judges possessed previous judicial experience prior to appointment to this Municipal Court. Prior legal experience of the judges includes activity associated with private enterprise and the public practice of law (military prosecutor). At least four judges have been members of the municipal assembly of the town where the Municipal Court has its seat. The judge of the Municipal Court elected its President in 1997. The former President of the Municipal Court was re-appointed as a judge. At the time of the Pilot Study, suspension/dismissal cases were pending against two judges. In addition to the judges, the Municipal Court has an administrative staff of 31 individuals.

The Municipal Court handles first instance criminal, civil and commercial cases, as well as property registration cases. In 1999, the Municipal Court had a caseload of 10,241 cases (6,452 cases from previous years and 3,789 new cases). As of 31 December 1999, the Municipal Court had processed 4,523 cases, and 5,718 remained pending. The Pilot Study compiled charts containing detailed statistics of the cases handled by the Municipal Court in 1999, as well as statistics related to each judge.

A book of rules (*Pravilnik o unutrašnjoj organizaciji općinskog Suda*) regulates the activity of the Basic Court.

II. SOURCES OF INFORMATION

II.1. Internal sources

II.1.1. Personal files of judges

The Law on State Administration and the Law on Labor Relations and State Bodies, in addition to the Decree on Office Operations at the Court Administration, state that a court shall keep personal files (*personalni dosije*) employee, including judges. The personal files contain basic data about judges, such as, birth and health certificates, citizenship certificates, diploma certificates from the law school where the judge graduated, and proof of successful bar examination. However, inspection made in February 2000 established that the files of the President of the Basic Court and another judge of that court did not contain any certificates of citizenship or proof of graduation from a law school or successful bar examination. The personal files contain no information about the judge's prior professional experience or any detailed evaluation of his/her professional abilities prior to or after the appointment to the position as a judge.

II.1.2. Booklet of employment

The Booklet of Employment (*Radna Knjižica*) is based on the Law on Working Relations. This booklet records an individual's professional experience (name of the employer, period of employment, and location). However, it does not systematically indicate the type of position

occupied by the employee. In some Basic Courts, this booklet is included in the judges' personal files. The Pilot Study contains a translation of the Booklet of Employment.

II.1.3. Evaluation of judges

The current system of evaluation judges is based on two aspects of the court statistics.

- 1) *The Quota System.* The quota system measures the *quantity* of the judge's work. The judge is supposed to fulfill a *quota* (that is, a certain number of cases). The quota is an established norm in the RS and in each Canton of the Federation. The evaluation of a judge using the quota system is based upon a statistical analysis of the number and type of cases processed by the judges, including the type of decision. Such an evaluation mainly serves to identify the most blatant examples of judges who are not capable of handling a reasonable number of cases. An evaluation based upon the quota system, however, does not have a deterrent effect on the delay of important or sensitive cases. The Pilot Study contains a translation of the quota system of Canton, in which the Municipal Court is located.
- 2) *The Reversal System.* The reversal system measures the *quality* of the judge's work. The evaluation of a judge using the reversal system is based upon a statistical analysis if the number of a judge's decisions, which are confirmed, modified or overruled on appeal. An abnormal percentage of overruled decisions can indicate unsuitable job performance. This type of qualitative evaluation of a judge's work, however, may have limited value for the review process (see below Part III).

II.1.4. Statistics

The courts produce statistics on a range of court activity. A few of the statistics are related to individual judges. The statistics gathered from the Basic Court are compiled on a six-month or annual basis. The Municipal Court compiled statistical information for each judge on a monthly, quarterly, and annual basis. The statistics show the volume of cases handled by each judge. These statistics contain relevant case data; such as, the types of cases, the number of cases pending from previous years, the number of case files opened in the current year, the number of cases processed in the current year, the number of cases currently pending, and the total caseload. The Pilot Study contains statistical charts documenting this activity for 1999 and 2000.

Another statistical chart describes a judge's performance in three areas. The first area is civil proceedings. With regard to civil proceedings, the statistics describe, for each judge, the number of cases processed, including the type of action taken in the case (for example, the nature of the verdict, whether the case was handed over to the competent institution, whether the complaint was withdrawn, whether the case was dismissed for procedural reasons, etc.). The second area is criminal proceedings. With regard to criminal proceedings, the statistics include such details as the nature of the verdict, acquittal or conviction, whether the case was transferred to the competent institution, whether the case was dismissed by the court, whether the court's decision was overruled on appeal, etc. The third area concerns matters not related to litigation.

II.1.5. Registries

The Book of Rules on Internal Work of Regular Courts (*Pravilnik o unutrašnjem poslovanju redovnih sudova*) was adopted in 1974 and still applies in both Entities. This book of

rules provides a list of about 30 types of registries and other secondary books for the lower court use.

The Pilot Study contains a list of the main registries, including those registries examined during the Pilot Study. Basically, there are two types of registries:

- 1) *The SU registry.* The SU (*Sudska uprava*) registry refers to “court administration.” This registry keeps track of any incoming/outgoing mail for the court, as well as a summary of the issue in question, without systematically referring to a specific case. It is particularly useful in obtaining a first glimpse into how a court is functioning, as well as its contact with citizens, other state organs, the bar association, the IC, etc. It usually contains information about current suspension/dismissal proceedings against judges, proposals for disqualification of judges, and complaints made by ordinary citizens or other state organs against specific judges, requests for information from the MOJ or the Higher Courts, exchanges of information between a municipality and the court, etc.
- 2) *Other registries.* - The other registries are systematically arranged based upon which court is assigned a case. These registries describe a case's procedural history as well as other relevant data, such as, the names of the parties, the type of case, and case remarks. The Pilot Study previously has described the possible use of such registries in the review process.

II.1.6. Other court files

The courts have, apart from the personal files of judges, different types of files that correspond with the different types of registries referred above. There are SU files and case related files, which can be divided into closed (archive) and pending cases. In addition to these files, files of the competent District/Cantonal Court and Supreme Court may provide information regarding the activity of a judge handling cases in a Municipal Court or Basic Court.

II.1.6.1.Rules concerning archives

Regulations concerning the archiving of cases or court documents are contained in Law on Regular Courts (Article 78). In RS, the Rulebook on Internal Management of Regular Courts (Article 117) regulates archiving of cases. In the Federation, similar regulations are contained in the rulebooks on internal operation of the courts at the Cantonal level. Most case files are not required to be retained permanently and may be destroyed after a period of 2 – 30 years, depending on the decision and type of case. The Pilot Study contains a translation of the relevant rules governing the retention of cases/document processed by the Municipal Court.

II.1.6.2.Files in both first instance and higher courts

Files corresponding to inspections conducted by higher courts. The higher courts have an obligation to perform inspection of a lower court's administrative and case files. Inspection reports can be located in SU files at the higher court and at the first instance court. There were two inspections performed in the Basic Court after 1992. The Supreme Court and the District Court conducted these inspections.

Every year the Cantonal Court conducts an inspection in each municipal court of the Canton. This inspection covers various types of cases. The Cantonal Court issues an inspection report, which informs the judges about the problems observed and requests the judges to correct those problems, if possible before the next inspection.

Complaint files. The courts retain files of complaints from ordinary citizens or state organs concerning the actions of judges. Also on file are requests for disqualification made by a party against individual judges or against the entire court. Higher courts also receive such complaints concerning the first instance court under their jurisdiction and maintain files accordingly. Usually, files at the first instance court level contain at least the request or complaint, as well as investigative measures taken by the President of the Court in response to the complaint. These files should contain a statement from the judge concerned, a review of the case, and a decision made by the President of the Court. At the higher court level, the file usually contains a memo addressed to the President of the first instance court concerning the necessary investigation and an opinion.

Appointment files. The lower courts (Basic Court and the Municipal Court) and the higher courts (District Court and Cantonal Court) keep files containing material related to the nomination of judges. Such information may concern the applications of candidates and the opinions of the President of the Court concerning a candidate's working skills. The opinion of the President of the Court is expected to be more detailed when the candidate previously has worked in the court as trainee or legal assistant to the court. The files kept at the Cantonal Court also contain the opinions the Mayor and the Cantonal MOJ on whether the candidate fulfills the legal requirements set forth in the Cantonal Law on Courts.

II.2. External sources

II.2.1. The MOJ

At the outset of the Pilot Study, it was assumed that MOJs would constitute a relevant source of information. Time constraints prevented us from reviewing any registries or files at the MOJs.

II.2.2. Inspections conducted by the RS Ministry of Administration and Local Self Management

Two inspections of this kind were conducted in the Basic Court since 1996. The last inspection occurred in 2000. The scope of the inspections was limited to administrative matters that do not pertain to the comprehensive review process.

II.2.3. Municipal organs

Archives of municipal organs may contain useful information on judges in a limited number of cases. Time constraints, however, prevented a close examination of these archives.

II.2.4. The Federal Ombudsman, and The Commission of Human Rights

The deputy Federal Ombudsman in the Canton has investigated some cases pending in the Municipal Court. The deputy Federal Ombudsman expressed the opinion that none of these cases indicates significant breaches of human rights provisions. However, the Federal Ombudsmen is about to start a more in depth assessment of certain sensitive areas, such as the enforcement of property decisions and labor cases, throughout the courts of the Canton. Cases handled by the Commission of Human Rights (that is, Office of the Ombudsman and Human Rights Chamber) at the state level of Bosnia and Herzegovina (BiH) may also be a valuable source of information relevant to the work of the Commission/Council during the comprehensive review.

II.2.5. The Bar/Lawyers

Lawyers constitute an essential source of information about judges given their contacts on a daily basis with members of the judiciary and their direct insight into the work performed by courts. However, as stated in Section I.3. the scope of the Pilot Study did not include any substantial contact with private attorneys concerning the conduct of the judges,

The Pilot Study nevertheless did establish an informal contact with a lawyer who is very active in the local Bar Association. According to this individual, lawyers are strongly interested in the comprehensive review process and regret that the law does not provide for their participation in the process. The members of local Bar Associations may well possess the most comprehensive overview of the conduct and attitudes judges and prosecutors. In addition, the lawyers are aware of which judges are working in private companies. There are indications that the Bar Association will appoint a special body to collect relevant information to be turned over to the Commission/Council.

II.2.6. International Community sources

The Pilot Study Team contacted different international agencies that were believed to possess information relevant to the conduct and attitude of judges in the Basic Court and the Municipal Court. The Pilot Study Team sent to the local representatives of OHR, OSCE, UNHCR and BOSPO in Tuzla and Bjeljina. In addition, Pilot Study Team met in person with these representatives and explained discussed the purpose of the Pilot Study. In spite of these contacts, obtaining useful information from these organizations was time-consuming and difficult. We anticipate that gathering information from the IC will require a coordinated effort. The IC is a potentially good source of information for the Commission/Council, but the information possessed by the IC needs to be updated, accurate, and case specific.

ANNEX 2A

Statement by Mr. Julian Harston Deputy Special Representative of the Secretary-General

Opening of the Conference on The Professional Review of Judges and Prosecutors

Sarajevo, 8 September 2000

Distinguished Ladies and Gentlemen,

It gives me great pleasure to welcome you to this Conference on the Professional Review of Judges and Prosecutors, sponsored by the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and the Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (IRZ).

It is appropriate that the United Nations should organise a conference on this theme. A major preoccupation of the United Nations is ensuring respect for the rule of law within and among nations.

Specifically, UNMIBH's core mandate is to bring up to acceptable international standards, justice and the rule of law in Bosnia and Herzegovina. The proper functioning of the police and judiciary is our main work.

These two core responsibilities are the essential underpinnings for the return of refugees and displaced persons, for economic investment and development, for democratisation and institution building, and for the international community to be able to reduce substantially its presence, confident that its achievements will not be lost. Without effective police services and judicial follow-up, everything the international community strives for in Bosnia and Herzegovina will be superficial and incomplete. In short, justice and the rule of law are the keys to self-sustaining peace.

Since its inception in November 1998, JSAP has been an excellent and essential programme. It has closely monitored and assessed the court system, recommended essential legislative changes to OHR, advised local officials and cultivated good working relations with the judiciary.

We regret that for reasons beyond our control the programme will come to an end in December, although it is more urgently needed than ever. It is our hope that OHR with the support of the Council of Europe will continue JSAP's vital work of judicial assessment and reform.

I hope you will have a productive conference and that your exchanges here will help achieve the goals we share and hold dear.

ANNEX 2B

CONFERENCE ON THE PROFESSIONAL REVIEW OF JUDGES AND PROSECUTORS

Hotel Grand, Sarajevo 8 September 2000

INTRODUCTORY WORDS

Iver Huitfeldt, Head of JSAP

Ladies and Gentlemen

It is a pleasure to have here today the members of the High Judicial Council and the High Prosecutorial Council in Republika Srpska (RS), the members of the Federal and Cantonal Judges Commissions and the members of the Federal and Cantonal Prosecutorial Commissions in the Federation of Bosnia and Herzegovina (FBiH).

The United Nations Mission in Bosnia Herzegovina (UNMIBH), together with the Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit E.V. (IRZ), is organizing this conference. The aim is to inform you about the German experience of dealing with sitting judges and prosecutors when Germany was united, to give you an update on the work of the councils and the commissions, and to inform you about the work of the Judicial Review Team (JRT) in the Judicial System Assessment Programme (JSAP). In doing this we also thought it might be useful to invite a number of other participants from the local legal community and the International Community (IC).

The passage of the new laws on the courts and the prosecution in the RS and the Federation is one of the main achievements in the Office of the High Representative (OHR) and the IC Judicial Reform Strategy based upon the Peace Implementation Council in Madrid December 1998. In a way, this is unfortunate - the IC should have been able to lean back and watch the local politicians reform the court system. Only independent courts in a well functioning judicial system are able to effectively deal with crime and solve civil legal disputes. This is a prerequisite for an open economy attracting investment and in turn for a growing standard of living for the citizens of BIH, whose interests the politicians should serve. In the RS the two laws were only passed in the National Assembly after strong pressure from OHR, and in the Federation the law had to be imposed by the High Representative.

With these new laws the base for an independent judiciary in Bosnia and Herzegovina (BiH) is laid down. In turn, building an independent judiciary promotes a vigorous democratic process.

The idea of the review is based upon a common understanding between the leading professional jurists in BIH and the IC that a review of sitting judges and prosecutors is necessary in the transition from the former system to democracy and in going from war to peace. Judges

and prosecutors appointed in a system when judicial independence did not exist should not be given life tenure without a review. This also applies to appointments made during and after the war. Some of them have been made in violation of the basic standards of fairness and competitive evaluation. Thus, due to the political interests of the ruling parties that want to control the judiciary, inexperienced lawyers have been appointed before experienced judges. There is even reason to believe that there has and still is political agreements under which parties have their own “quotas” on the judiciary. The more you know about how the judiciary was and still is politically influenced, I think, the more you realize the need for a review. In short, the review constitutes the first phase in building independence for the judiciary.

Furthermore, the review can be seen as part of a reciprocal relationship between the judiciary and Bosnian society. As the new laws have increased the salaries of the judges and prosecutors considerably, Bosnian citizens in return can require quality and efficiency in the administration of justice. This point has paved the way for the overall acceptance in society for the process.

The new salaries have not yet been paid in the RS and not in all the cantons. Based on the history of the laws I am confident that, if necessary, OHR will take the required action to force the implementation of the financial side of the laws.

It is the JSAP mandate to monitor and assess the court system in BIH. Based upon this mandate, and also upon a letter from the High Representative dated 5 November 1999, the UN set up a Judicial Review Team led by an experienced JSAP officer, the Polish judge Agnieszka Klonowiecka-Milart to work especially with the review part of the new legislation. In addition five new temporary positions were created. Three of the positions were filled with judges. Svein Kristensen and Jon Høyland from Norway both had earlier BIH experience as Rule of Law Coordinators in the OSCE. Kari Kiesilainen from Finland had visited BIH as a speaker in the six conferences on the Independence of Judiciary organized by OHR, UNMIBH and the OSCE in September 1999. The two American lawyers in the team were Charles Forrest and Timothy Hughes, one with previous experience from ABA/CEELI and the other from the OSCE Election Appeal Sub Commission. The team was fully operational from the beginning of April and ended its work by the end of June. After Agnieszka Klonowiecka-Milart was reassigned to Kosovo at Easter time, Svein Kristensen headed the team.

The review provisions in the draft laws did not give much direction for the material and the procedural part of the review. The JRT therefore especially engaged in drafting amendments to the Federation law. This work is reflected in the imposed law with 33 new articles. In addition the team drafted a Book of Rules for the commissions in the Federation. As the RS laws were passed in the National Assembly, regulations similar to the articles in the Federation law were included in a draft Book of Rules for the two Councils. I am happy to say that in this work, the JRT benefited from the relationship of trust that they themselves had established through their former positions in BIH, and from JSAP’s long-standing contacts with the BIH judiciary. I especially want to mention the cooperation with the two Supreme Court Presidents, Jovo Rosic and Venceslav Ilic, the Republic Prosecutor Vojislav Dimitrijevic, the Federal Prosecutor Suljo Babic and the Deputy Federal Prosecutor Fatima Basic. Furthermore, the JRT and the JSAP team in Tuzla carried out a Pilot Study to find out what sources of information were available on judges in two courts in their area of responsibility searching the court files and seeking other information from local sources and the IC. Once the laws came into effect, JSAP and the JRT

assisted in establishing the High Councils in the RS and the Commissions in the Federation. For instance JSAP prepared manuals containing the provisions for the review and the Pilot Study. JSAP has distributed these manuals to members of the Councils and the Commissions. Moreover, JSAP retains regular contact with the Councils and the Commissions and consult with them on questions concerning the review process.

The three Nordic judges returned to their home countries but I am glad to see them here today to address the conference. The two American lawyers are still working for JSAP and are following up the review together with the JSAP officers in the field.

The JSAP mandate will, however, end in December of this year. To take over the assessment mandate and engage in reform and training issues OHR with support from the Council of Europe (CoE) will set up a new unit called the Independent Judicial Commission.

I am pleased to say that the first phase of the review is meeting expectations. According to the information I have, the RS Councils and the Federation Commissions are performing very well and are taking their work very seriously. It will be a great achievement if the councils and the commissions can carry out the review in a proper way according to the laws and if the competent bodies, in turn, follow their recommendations to remove from office those judges and prosecutors deemed unfit. The ideal scenario is that the IC only will follow the review process from a distance and that OHR in the end avoids using its interventionist powers.

The review is a sensitive issue. I know that many of the judges and prosecutors do not like the public comment aspect of the process. The TV commercial has been especially difficult to swallow. Tell your colleagues that this is like going to the dentist, it may be painful but afterwards you will be glad you did it. Frankly, this is part of the new role you must adapt to; to serve the public means working within the scrutiny of the public. After the review you are in a much better position to meet public criticism.

I will admit that dealing with BiH judicial problems has been a varied and challenging experience. The JSAP Judicial Systems Officers and I have met a number of very qualified judges and prosecutors working under difficult conditions, concerned not only with the material funding of the courts but also with their ability to support their own family from day to day. In particular, many court presidents have had to face the reality that a “good relationship” with the Ministry of Justice and the Ministry of Finance might be of vital importance for the allocation of money to “their” court and judges. I will not elaborate here about the performance which is expected from the courts to establish and keep this relationship, but many judges have been facing severe dilemmas. In this respect the new laws seem to have had a much more positive effect in the short term than might have been expected. I would say that the judges and the prosecutors are now raising their heads in a newly-gained self-confidence, as they see legislation passed that establishes the judiciary’s independence from other branches of government.

Building an independent and well functioning judiciary is a long-term effort and is not achieved overnight or by the review itself. I will shortly make some main points for the future:

- the courts should focus on their role in society - solving legal disputes and serving the interests of the citizens and the public;
- the overall inquisitorial system should be done away with by adopting the principles of

disposition and concentration, with responsibility for evidence production and legal submissions placed on the parties, thus allowing the courts to have preferably one main hearing;

- the second instance should, as an overall rule, make the final judgement, and the present Kafkaesque situation where cases commonly are sent back and forth between the first and the second instance courts numerous times should be done away with;
- all cases, even the complex ones, should be processed properly and timely, and no internal regulation of quotas should tempt a judge to pick specific cases to fulfill his monthly work load; (frankly, I think the quota system should be done away with)
- the system of expert witnesses should be reformed so that experts should only present opinions on facts in complicated cases, not in cases where the judge can do it as well, and experts should not draw legal conclusions, which is the role of the judge;
- the judiciary should get rid of non-judicial tasks;
- impartial, unbiased and trained judges should solve legal disputes with the merits of the case deciding the outcome, which is partly not the case in BIH;
- in criminal cases initiating an investigation, the indictment and the conviction or acquittal should not depend on ethnicity, which partly is the case in BIH;
- the investigating judge should be done away with;
- BIH has too many first instance courts, too many judges, too few prosecutors and a complete lack of regular state courts.

The passing of the new laws on the courts and prosecution has been a “joint operation” between the leading local professionals and the IC. In the future to develop a well functioning court system I think you mainly have to rely on your own resources. I know you can do it and I hope that the growing self-confidence in the judiciary will help you to take the burden upon yourself without depending on the IC. You know, in the long term you cannot expect society to throw money into a dysfunctional court system that does not deliver results. Final judgments should be reached within reasonable time and with reasonable use of resources.

Thank you.

ANNEX 2C

CONFERENCE AGENDA

- 0900 – 0920 Introduction
(Judge Iver Huitfeldt, Head of JSAP
Justice at the Bogarting Court of Appeals in Oslo)
- 0920 – 1000 A General Overview of the Review Process of Judges and Prosecutors in
Germany
(Dr. Hans Hubertus von Roenne, Lawyer)
- 1000 – 1015 Morning Coffee Break
- 1015 – 1045 Discussion Session
- 1045 - 1130 The Internal Proceedings of the German Review Committees
(Judge Rudolf Rainer,
Presiding Judge, Administration Court of Wiesbaden)
- 1130 – 1200 Discussion Session
- 1200 – 1330 Lunch
- 1330 – 1410 Ethical Considerations Affecting the Review of Judges and Prosecutors
(Hansjoachim Hauer,
Supervising Prosecutor, Office of Prosecutor in Tuebingen)
- 1410 – 1440 Discussion
- 1440 – 1540 Commission/Council Update – 15 Minute Presentations by the Presidents of the
Commissions and Councils
(Judge Vjenceslav Ilic, President – Fed. Judges Commission)
(Judge Jovo Rosic, President – RS High Judicial Council)
(Pros. Fatima, President – Fed. Prosecutorial Commission)
(Pros. Vojislav Dimitrijevic, President – RS High Pros. Council)
- 1540 – 1600 Afternoon Coffee Break
- 1600 – 1640 Assessment of the Judicial and Prosecutorial Review Process
(Judge Svein Kristensen, Judge, Oslo City Court)
(Judge Jon Hoyland, Chief Judge, Jaeren District Court)
(Judge Kari Kiesilainen, Judge, District Court of Helsinki)
- 1640 – 1700 Concluding Discussion and Closing Remarks