
FUNCTIONAL REVIEW OF THE BIH JUSTICE SECTOR

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PART A

SECTION 1 - INTRODUCTION

1.1 Purpose of the Review

This Functional Review of the Justice Sector of Bosnia and Herzegovina (BiH) is one of several reviews of aspects of public administration in BiH financed by the Commission of the European Union as part of its overall assistance to the process of public administration reform in BiH.

More specifically, the objectives of this review are:

- To identify and analyse the responsibilities and core functions of the Ministries of Justice (MoJs) and other institutions within the justice sector in respect of planning for and managing the operation of that sector at all levels within BiH
- To assess how those responsibilities are divided and those functions performed and, to the extent possible, to compare this with the situation in other European countries
- To make recommendations that would allow the functional competencies of the MoJs and other relevant institutions to be rationalised and re-organised in order to promote efficiency and to enhance performance.

While the phrase “justice sector” can be assumed to encompass, at a minimum, the prosecutorial service, the courts and the correctional sanctions sector, the review is not concerned with how those institutions perform their core tasks (e.g. how the courts deal with their workload or how the prison system deals with individual prisoners). Rather, it is concerned with how the justice sector as a whole is managed in the sense of who decides its structure, how its operations are regulated and the provision of the necessary resources, such as financing and staff. The review is, therefore, essentially targeted at the different functions currently undertaken by the MoJs, but in some respects focuses more closely on other institutions. The High Judicial and Prosecutorial Council (HJPC), in particular, has been given a significant role in respect of the operation of the prosecutorial and judicial services.

It is hoped that the recommendations in this review will assist the BiH authorities in making decisions on the overall structure and functioning of the justice sector, in particular with respect to the MoJs and the HJPC which will result in the efficient and effective administration of justice in line with BiH’s needs and financial capacity and consistent with its commitment to EU accession.

1.2 Context of the Review

The responsibility of the MoJs for the operation of the judicial system presents them with challenges that are different from those faced by other ministries, which can usually exercise tighter control over the operation of governmental agencies within their sector. The judiciary is an independent pillar of government and, whilst politically responsible for ensuring the general

functioning of the court system, the MoJs should not intervene in the judicial decision-making process, which is the primary function of the courts.

The importance of an independent judiciary is obvious and accepted. However, although in many situations the meaning of judicial independence is relatively clear, this is not always the case. For example, it clearly means that judges should decide on the case presented to them and not on the basis of instructions from outside sources, such as those who pay their salary or to whom they owe their appointment. Equally, it is generally accepted that the government, usually through the MoJ, is required to undertake some administrative functions in respect of the judiciary, such as ensuring that the courts have adequate premises and equipment. However, there are some grey areas, such as the extent to which a MoJ can or should interfere if a court is clearly not functioning properly (such as by the failure to keep up with its workload) or how to deal with complaints about court administration. Some of these issues and how to resolve them in the BiH context are discussed in this review.

The perceived lack of judicial independence in the immediate post-war framework led various international organisations to devote considerable attention to analysing the functioning of the court and prosecutorial systems. This was followed by a series of wide-ranging reforms which began in around 2000, and which aimed at increasing the independence of the judiciary and at improving its efficiency and effectiveness. One result of the reforms was to remove government control over parts of the process of judicial administration through the creation of new, independent institutions. The most important of these was the establishment of three High Judicial and Prosecutorial Councils (HJPCs) in 2002 (merged in 2004 into one HJPC for the whole of BiH), whose primary function was the appointment and discipline of judges and prosecutors and court/prosecutorial administration. Another is the two Judicial and Prosecutorial Training Centres.

A second important aspect of the reforms within the Federation was the upwards transfer of functions from the cantonal MoJs to the Federation MoJ. This included the setting of judicial and prosecutorial salaries by Federation rather than cantonal law in 2000, the harmonisation of criminal jurisdiction between different levels of court across the Federation in 2001, and more recently the constitutional amendments that gave the Federation the right to determine the location and territorial jurisdiction of all Municipal Courts. These and other changes are dealt with in more detail in the body of this review.

One other significant development in the justice sector has been the creation of new institutions at BiH level. This includes the establishment of the BiH MoJ in 2003 and the creation of the Court and Prosecutor's Office of BiH in the same year. The need to enact legislation on criminal procedure at BiH level to enable the court to function was used as a springboard to get harmonised criminal procedure laws in the two entities. The importance of harmonisation is reflected in the functions given to the BiH MoJ.

These changes have all involved a shift in the balance of power between institutions, and in particular with respect to the functions and role of the MoJs vis-à-vis the courts, the prosecutorial services and the HJPC and among different levels of MoJ. On the whole, the role of the MoJs within the justice sector, and in particular the judicial and prosecutorial part of it, has been reduced. However, not all the changes are as yet completely implemented or have been completely taken into account by way of consequential legislative amendment or changes to the internal structures

within the MoJs. The consequences of some changes are only now beginning to be understood. This is, therefore, a particularly appropriate time to undertake this review.

1.3 Methodology and scope of this review

The assessment provided in this review is based on an analysis of the relevant laws and regulations governing the work of the MoJs and the HJPC, detailed budgetary and organisational information obtained from the MoJs, and from interviews with MoJ and HJPC staff members. Work on the project began in early 2004 and almost every senior staff member at the BiH, entity and five cantonal MoJs (listed below) was interviewed at that time to discuss the functions of his or her position and its role within the Ministry. Interviews were also conducted at other organisations, such as the Federation Ombudsman's Office, the RS Ministry of Administration and Local Self-Government, and various international organisations. Although some time has passed since those interviews were conducted, it is assumed that in most cases the information obtained is still by and large accurate. However, because the BiH MoJ was still in the process of establishing itself in early 2004, further information has been received in relation to it from the Ministry.

The review has also been able to draw on the comprehensive analyses of the judicial system of BiH carried out by the international community over recent years, and in particular from the Final Report of the Independent Judicial Commission (IJC), published in November 2004, as well as many of the internal documents of the IJC.¹ The review team was also provided with the interim reports (and some of the final reports) of the System Review team within the Public Administration Reform project. These reports considered six aspects of public administration (legislative drafting, administrative procedure, human resources, public finance, information technology, and institutional communication) within four levels of government (BiH, RS, Federation and Brcko). To the extent possible, this review has taken the findings of those other reviews into account when making its assessment.

In making its recommendations, the review considers the situation in other European countries and uses comparative data on the MoJs and judiciary in a number of European States to provide benchmarks.

One of the challenges of benchmarking in the justice sector is that there is no standard model for an MoJ or high judicial council within the European Union or elsewhere. The tasks, structures, and responsibilities of different parts of the justice sector, including the MoJs and the courts themselves, are quite different in different countries. In comparison with the police, on which a lot of data can be collected and whose tasks are similar in most countries, the nature of the work and the structures of MoJs cannot be broken down into a series of statistics.

It was also difficult to get comparable information on the internal structure of European MoJs. Some European MoJs have responsibility for the police, immigration and asylum, border control or land registration, or sometimes they have general responsibility for the provision of legal advice to the government or for representing the government in legal disputes. This review does not consider

¹ The Final Report of the IJC can be found at www.hjpc.ba. The IJC, which was established in January 2001 and operated until 31 March 2004, was the lead international agency for judicial reform in BiH during its lifetime. It spearheaded the move towards the creation of the HJPCs and carried out the comprehensive restructuring of the courts, among other things.

the allocation of these responsibilities between ministries or whether the MoJs in BiH should take on some of these non-core justice issues.

As explained in the next section, BiH has thirteen MoJs plus relevant institutions in Brčko District. Time did not permit the assessment of all of these. While it is assumed that the work of the ten cantonal MoJs is largely similar, some were not included in the assessment. This review, therefore, concentrates on the following institutions:

- BiH MoJ
- RS MoJ
- Federation MoJ
- MoJ of Zenica Dobož Canton
- MoJ of Central Bosnia Canton
- MoJ of Herzegovina Neretva Canton
- MoJ of West Herzegovina Canton
- MoJ of Sarajevo Canton

It should also be noted that, of these, all but the RS MoJ is a Ministry not only of justice but also of administration, whether its name reflects this fact or not.² Administration in this sense refers to public administration or the administration of public bodies and the responsibilities of the MoJ in this area include policy making and legislative drafting (for example on administrative procedure and on some aspects of the organisation of the government, such as legislation on ministries), some general administrative operations (such as maintaining registers of citizens) and administration inspection. The MoJs have one or more separate units dealing with these issues. As the primary purpose of this review is to consider the role and functioning of the MoJs within the justice sector, no general assessment is given on how the MoJs carry out their competence with regard to public administration. However, some reference to policy making in the administration sector is given in subsection 3.1 and a brief outline of the administrative inspection process is given in subsection 3.5 in relation to dealing with public complaints.

The review begins with an overview of the MoJs and the HJPC, and then considers the legal framework and internal structure of each MoJ in turn. Some general conclusions and recommendations can be found in this section. The review then deals with how the relevant levels of MoJ or other institutions handle particular functions within the justice sector.

Essentially, the functional responsibilities for the operation of the justice sector can be broken down into the following core areas:

- Policy-making and planning
- Judicial and prosecutorial administration (in general and not at the level of the internal operations of each court and prosecutor's office)
- Administration of the prisons and correctional sanctions
- International co-operation and the provision of mutual legal assistance.

² The combination of justice and administration functions appears to be unusual. Belarus is the only European country outside the former Yugoslavia to assign those two functions to one ministry, and of the former Yugoslav states, only Montenegro continues to do so.

However, because there is a variety of separate functions included in each of these areas some of these topics have been further divided and are discussed in separate chapters. The analysis is presented thus:

- Justice sector policy-making (including associated legislative drafting) in general
- The structure of the judicial and prosecutorial systems (by and large part of the policy-making responsibility)
- The financing of courts and prosecutors' offices
- The administration of courts and prosecutors' offices
- Administration inspection and public complaints
- Correctional sanctions and
- International co-operation.

1.4 Summary of key/primary recommendations

The key recommendations made as a result of the analysis undertaken in this report are outlined later in Section 3. A number of flaws were identified in the system and a number of suggestions as to how best to deal with these flaws are suggested and explained.

In particular, it was discovered that the policy making functions of the MoJs, a core function of any ministry of justice, are being carried out in a less than optimal manner and, at some levels and in certain instances, not being carried out at all. This means that policy is developed in an *ad hoc* manner by a variety of bodies and, particularly in the recent past in the justice sector, by international organisations which do not always coordinate and liaise with each other. It also means that the legislation which is being developed as a result of policy decisions taken is also being produced in an unsystematic and incoherent manner. In order to deal with the situation which has arisen in this respect in the MoJs it is recommended in subsection 3.1 that the BiH MoJ should take the lead on justice sector policy making allowing policy making units in the Entity MoJs to liaise with the MoJ at BiH level. In such a system, the cantonal MoJ would not have any policy making or legislative tasks and any such functions would be transferred to the Entity level. Cantonal MoJs would be suppressed and would be replaced by Cantonal Offices for Legal Affairs.

In subsection 3.2 an outline of the current structure of the courts and prosecutors' offices is given. The only structural change which is being suggested at this stage is the restructuring of the minor offence courts by making them departments of the regular courts. As discussed later in section 3.2.3.3 this would bring BiH in line with European standards with respect to the number of first instance courts. The cost savings generated as a result of this change should be quite significant and, therefore, should be realised as quickly as possible given that the court system is currently in quite a difficult financial situation.

Subsection 3.3 outlines the gravity of the financial situation of the BiH court system. Data is given in relation to the accumulated debts of the courts and the effect of current levels of judicial salaries. Information is also given on recommended annual budgets for first and second instance courts for 2005 which are based on calculations made by the HJPC. These recommended annual budget figures (which would allow the courts to operate effectively) often fall well short of actual adopted budgets and data is also given in this regard. It is recommended that the courts and POs should be financed at the level of BiH, that the HJPC should prepare a consolidated budget for all of the courts and POs and that it should monitor budget execution through the BiH treasury. The

advantages of such a system are manifold and are explained in detail in subsection 3.3: the HJPC would no longer need to liaise with 13 different funding authorities; courts and POs would be funded in an equal and non-discriminatory manner as they would all be financed from the one source; a long term strategic vision for investment in the court and PO system could be developed; the independence of the courts and POs would be increased and the purchasing power of the system as a whole should yield cost savings and improved services.

Following such a decision to finance the entire judiciary and prosecution at the level of BiH, the BiH MoJ and the HJPC could together decide on the optimum number of judges, prosecutors and support staff in the courts and POs and on the yearly production requirements of judges, prosecutors, courts and POs. The rationale and reasoning behind these recommendations are outlined in subsection 3.4 of this review. Other recommendations are also made in relation to the administration of courts and POs, e.g. that salaries and other compensations for judges, prosecutors and support staff should be harmonised and regulated by BiH legislation, that new and harmonised legislation for the prosecutorial services should be passed in both entities and that immediate steps should be taken to limit the inflow of cases to courts that do not require judicial consideration, such as the enforcement of unpaid utility bills.

Subsection 3.5 outlines the role of the administration inspectorate and highlights difficulties with their operation in BiH. For the most part the recommendations made by the System Review of Public Administration in BiH are adopted in this report. However, it is noted that the enforcement of the decisions of the administration inspectorates may continue to be a problem even after the aforementioned recommendations have been implemented. The role of court inspectors is also outlined and it is suggested that the Office of the Disciplinary Counsel is optimally placed to deal with complaints and to carry out court inspections.

In relation to correctional sanctions it is recommended that authority over the correctional sanctions sector should be transferred to the level of BiH and that this could be managed either through the BiH Ministry or through a separate agency. It is suggested that further investigation should be undertaken into the feasibility of the merger of the two existing prison systems. The current status of the prison system in BiH, the manner in which prisons are managed and the way in which legislation is produced in this area are outlined in subsection 3.6 of this report together with the rationale and reasoning behind the recommendation that authority over this sector should be transferred to the BiH level.

Finally, the question of the manner in which BiH deals with and manages its international commitments and obligations is considered. For the most part these commitments are fulfilled at the level of BiH and it is recommended that the BiH MoJ should be adequately staffed and resourced in order to fulfil its obligations in this regard. Currently this is not the case as the BiH ministry is not adequately staffed in this area and there is no clear delineation of functions and tasks between various staff members in this sector of the BiH MoJ.

SECTION 2 - THE MINISTRIES OF JUSTICE

2.1 Overview and Historical Background

BiH has thirteen MoJs - ten cantonal Ministries in the Federation, two entity-level Ministries and one at the BiH level. In the District of Brčko, some of the functions of an MoJ are performed by the Brčko Judicial Commission and some by the Brčko District Government.

Before 1992, the Socialist Republic of Bosnia and Herzegovina was one of the constituent republics of the Socialist Federal Republic of Yugoslavia (SFRY). The Federal Secretariat for Judiciary and Organisation of Federal Administration in Belgrade was responsible for the development of all procedural laws, Federal-level substantive legislation relating to the justice and administration sectors, the operation of the Federal Supreme Court and Federal Prosecutor's Office and international legal assistance. All other courts and prosecutors' offices came under the auspices of the republic-level Secretariats for Judiciary and Organisation of Administration, which were also responsible for various substantive laws in the justice sector.

In 1992, when BiH declared its independence, the Secretariat in Sarajevo became the Ministry of Justice and Administration of the new Republic of BiH. Shortly afterwards, the Republika Srpska (RS) declared its own independence and established a parallel Ministry of Justice and Administration. Both Ministries established sections dealing with international legal assistance. In Croat-controlled areas, a government calling itself the "Republic of Herzeg-Bosna" was created, with its own MoJ.

The Washington Agreement of 1994 that created the Federation resulted in the promulgation of a Constitution dividing responsibility for the judiciary between the cantons and the Federation. Most courts were to be financed and administered by the cantons, and so it became necessary for them to create MoJs, which were also given responsibility for administration. The Ministry of Justice and Administration of the Republic of BiH was succeeded by the Federation MoJ. All of the archives and records of the Ministry in Sarajevo were destroyed in the war.

In accordance with the Dayton Agreement of 1995, BiH was established as a state consisting of two entities, the Federation and RS. The competences of the state were highly circumscribed. There was no MoJ established at BiH level and the only BiH-level court was the BiH Constitutional Court. Justice sector policy development and the drafting of substantive and procedural laws in that sector were the responsibility of the entity MoJs or, for many issues within the Federation, the cantonal Ministries. International legal assistance continued to be handled by the entity-level ministries. Then, in 1997, the new Ministry of Civil Affairs and Communications at BiH level was established and given responsibility for dealing with "international and inter-entity criminal law enforcement", including international legal assistance. In 2003, an MoJ was created at the BiH level, and some staff from the Ministry of Civil Affairs and Communications were transferred to it. The new Ministry was given responsibility for administrative functions related to BiH-level judicial institutions, which by then included the Court and Prosecutor's Office of BiH, as well as for administration and residual matters.

In the RS, the Ministry of Justice and Administration was divided into the Ministry of Justice and the Ministry of Administration and Local Self-Government in 1997.

The municipality of Brčko, split between the Federation and the RS at the end of the war, was given a special status as a “District” in 1999, not under the control of either entity. Since 2000, the judiciary in Brčko has been administered by the Brčko Judicial Commission.

Having such a plethora of MoJs is, of course, unusual. Only three other European countries - Germany, Switzerland and Serbia and Montenegro - have more than one MoJ, and of those only Germany and Switzerland divide responsibility for justice between different levels of government.³ In other decentralised states within Europe, justice is within the exclusive competence of the central government.

Parallel with these developments in respect of the MoJs, in 2000 a series of judicial and prosecutorial commissions and councils were set up with competence to make recommendations to the appointing authority in respect of judicial and prosecutorial appointments and with certain powers over the discipline of judges and prosecutors. These commissions and councils were also charged with conducting a once-off 18-month review of the suitability of all sitting judges and prosecutors. Because of the complex constitutional structure of the country, it was necessary to create two councils in the RS and 22 commissions within the Federation.

Failure of the 18-month review process and the continued political interference in the judicial and prosecutorial appointment process led the IJC to recommend the establishment of three HJPCs in 2002 (one at BiH level and two entity Councils). These HJPCs were given full power of appointment and discipline over judges and prosecutors (with some limited exceptions), as well as the power to determine the number of judges and prosecutors in each court and prosecutor’s office and various other powers in respect of the court and prosecutorial budget process and in respect of the continuing training of judges and prosecutors. At the same time as the HJPCs were established, legislation was also enacted creating two entity Judicial and Prosecutorial Training Centres, charged with providing advanced professional training to judges and prosecutors and induction training to those considering a career as a judge or prosecutor.

In 2004, the entity governments agreed to transfer certain responsibilities for the affairs of the judiciary to BiH level and on 1 June that year, a new Law on the HJPC of BiH came into force, establishing one HJPC for the entire BiH. It is made up of eleven judges and prosecutors, elected by judges and prosecutors, two attorneys and two lay members. It retains the powers of the former Councils in respect of appointment and discipline, and has additional powers in respect of court and prosecutorial administration. These are outlined in more detail in the relevant chapters of this review. A diagram showing the organizational structure of the High Judicial and Prosecutorial Council is attached as **Attachment 1** to this report.

³ In Serbia and Montenegro there is no MoJ at the Federal level. International legal assistance is handled by the Ministry of Human and Minority Rights.

2.2 Outline of structure and functions of MoJs

To give an initial impression of the size of the MoJs, the table below shows the number of employees in each and their most recent budget figures. Later in the report we will give details of the number of employees prescribed as opposed to the actual staff levels. This chart, however, gives details of actual staff levels only.

MoJ/Brcko Judicial Commn	Number of employees*	Budget for 2004 (KM)	Budget for 2005 (KM)
BiH MoJ	43	3,186,000	4,822,705
RS MoJ	23	3,446,000	2,290,870
Federation MoJ	35	3,296,000	3,515,286
Una Sana Canton MoJ	8	729,000	751,620
Posavina Canton MoJ	3	137,000	129,840
Tuzla Canton MoJ	22	1,033,000	1,040,300
Zenica-Doboj Canton	7	1,428,000	715,000
Bosansko-Podrinjski Canton MoJ	3	174,000	170,000
Central Bosnia Canton MoJ	11	621,000	668,836
Herzegovina-Neretva Canton MoJ	14	822,000	460,800
West-Herzegovina Canton MoJ	11	537,000	343,700
Sarajevo Canton	14	1,977,000	5,965,880
Canton 10	-	180,316	201,925
Brcko Judicial Commission	6	1,052,000	Not available
TOTAL	191	17,788,000	21,076,789

* Figures as at March 2004

As can be seen, the MoJs are relatively small, with a total of less than 200 employees, a reasonable proportion of whom are engaged with tasks of public administration rather than justice. Although no attempt is made to analyse this information, it is curious to note that there is quite a disparate level of expenditure per employee across these ministries.

2.2.1 BiH MoJ

2.2.1.1 *Legal Background*

Constitutional provisions

The institutions of BiH were given very limited competence under the BiH Constitution and all other matters became specifically the responsibility of the entities. The only BiH-level competence that related to the justice sector was that of “international and inter-Entity criminal law enforcement, including relations with Interpol.”⁴ In practice, however, criminal cases with an inter-Entity element came before the entity courts. The provision of all international legal assistance continued to be dealt with by the entity MoJs, although the establishment of the Ministry of Civil

⁴ BiH Constitution, Article III 1 (g).

Affairs and Communications in 1997 meant that technically such assistance became the responsibility of that Ministry.

Only one judicial institution was created by the BiH Constitution, namely the BiH Constitutional Court. The Constitution contained provisions on its jurisdiction, procedures and the appointment of its judges. Thus, the Court could operate without further legislation or the provision of administrative support from the government, as is normally provided by the MoJs for other courts. Indeed, the BiH Constitutional Court has considered that the provisions of the Constitution on its procedure refer to all internal organisational issues and not just the procedures regulating the conduct of proceedings before it.⁵

The need for a ministry to undertake the normal functions of an MoJ in respect of justice policy development and court administration was really created by the establishment of the Court of BiH. In 2000, the High Representative imposed the Law on the State Court of BiH. The court was given relatively limited jurisdiction: crimes created by BiH level legislation, administrative disputes over decisions of BiH-level administrative bodies, and final appellate jurisdiction from decisions of the Brčko Appellate Court. Although the Law has interim provisions on the procedure to be used until other legislation might be enacted, in the longer term, establishment of the court was considered to require the enactment of a BiH-level Criminal Code, Criminal Procedure Code, and Laws on Administrative Procedure and Administrative Disputes, as well as necessitating the establishment of a parallel prosecutor's office. It would also require government involvement in providing premises and security, in the budget process, and possibly in staffing and other tasks.

As the existence of a regular court at BiH level was not provided for in the BiH Constitution, the law creating it was challenged by the RS in the BiH Constitutional Court. Although the challenge was unsuccessful, it does raise the questions of whether, if amendments to the Constitution are ever considered, it would not be prudent to include a reference to the BiH level court system, perhaps in the context of a general provision on the independence of the judiciary, similar to that already contained in the entity constitutions.

Prior to the creation of the BiH HJPC in 2004, the entities transferred "certain responsibilities for the affairs of the judiciary" to the BiH, as they were desirous "to strengthen the independence of the judiciary" through the establishment of the new HJPC. The power of the entities to make such an upwards transfer of authority was provided for in Article III.5 of the BiH Constitution. While there is no strict necessity to refer to these new powers in the Constitution, the transfer is an additional reason why it may be appropriate to consider a general reference to the judiciary in the BiH Constitution.

The Law on Ministries

Article 13 of the Law on Ministries and Other Bodies of Administration of Bosnia Herzegovina⁶ prescribes the competences of the BiH MoJ. These are:

⁵ However, in December, 2004 a draft Law on the Constitutional Court of BiH was submitted to the House of Representatives. This law regulates the composition, selection, organisation and competencies, methods of decision-making and other provisions on the work of the Constitutional Court.

⁶ OG 5/03

Justice policy and legislative drafting⁷

- drafting of relevant legislation to address the issues (arising from the exercise of the Ministry's competence in respect of judicial institutions at BiH level and international and inter-Entity judicial co-operation);
- generally acting as a central co-coordinating body for ensuring inter-Entity legislative and justice system harmony and best practice, whether by providing good offices for the discussion or co-ordinating initiatives
- providing guidelines and monitoring legal education to ensure inter-Entity harmonisation and compliance with best practice.

Judicial administration

- administrative functions related to the judicial institutions at state level;
- inter-Entity judicial co-operation.

International legal issues and assistance

- international judicial co-operation (mutual legal assistance and contacts with international tribunals);
- ensuring that legislation and implementation by BiH at all levels is in compliance with the obligations of BiH derived from international treaties;
- co-operating both with the Ministry of Finance and with the Entities in the drafting of international bilateral and multilateral treaties ;
- extradition .

Administration and administrative inspection

- the tasks of administrative inspection of legislation governing civil servants and employees of the bodies of administration, of administrative proceedings and special administrative proceedings, as well as of office operations in the bodies of administration;
- issues relating to associations of citizens and the keeping of registers of associations of citizens and of non-governmental organisations operating within BiH.

Other

- other tasks and duties that do not fall within the competence of other Ministries of BiH and that are related to the tasks and duties of this Ministry.

The Rulebook on Internal Organisation

The Rulebook on Internal Organisation of the Ministry of Justice of Bosnia and Herzegovina (the BiH Rulebook) provides that the Ministry is to be divided into nine units⁸, as follows:

⁷ While the divisions according to subject matter have been included here for editorial purposes and largely follow the division of responsibilities as discussed in this report, the wording of each bullet point has been taken directly from the Law on Ministries.

- Office of the Minister
- Office of the Deputy Minister
- Secretary of the Minister
- Unit for Personnel, General and Financial/Material Affairs
- Unit for Judicial Authorities at State Level
- Unit for International and Inter-Entity Legal Assistance and Co-operation
- Unit for Administration at State Level
- Administration Inspectorate at State Level
- Court Police at State Level.

The specific tasks are, as follows:

Office/Cabinet of the Minister

Article 4 of the BiH Rulebook prescribes that the Office or Cabinet of the Minister is to carry out the following functions:

- To prepare opinions on materials produced by the Council of Ministers and the Parliament which are within the competence of the Ministry;
- To prepare for the meetings of the Collegiums of Experts of the Ministry and to implement their conclusions;
- To maintain records on confidential/top secret mail;
- To co-ordinate the work of the Ministry;
- To implement the work plan of the Ministry;
- To provide a translating service for the Ministry;
- To ensure that the work of the Ministry is publicized;
- To perform protocol tasks with diplomatic and consular offices and international organizations and delegations;
- To perform administrative tasks for the execution of its responsibilities;
- To provide a driver for the Minister.

Cabinet of the Deputy Minister

Article 5 of the BiH Rulebook prescribes that the Cabinet of the Deputy Minister is to carry out the following functions:

- To provide opinions for the Minister in relation to materials prepared by both the Council of Ministers and the BiH Parliament, as well as opinions on documents within the competence of the Ministry;
- To prepare the sessions of the Collegiums of Experts of the Ministry;
- To coordinate the work of the various sectors of the Ministry;
- To perform protocol tasks with diplomatic and consular offices, international organizations and delegations;
- To carry out administrative tasks for the execution of the responsibilities of the office;

⁸ This Rulebook is set to be amended in the near future. However, we outline here the sectors as prescribed in the current Rulebook of the BiH MoJ

- To provide driving facilities for the Deputy Minister.

Secretary to the Minister

Article 6 of the BiH Rulebook outlines the functions of the Secretary to the Minister as follows:

- To ensure the efficient use of the financial, material and human resources in the Ministry;
- To assist the Minister in developing the work plans of the Ministry;
- To monitor the implementation of those work plans.

Sector for Personnel, General and Financial/Material Affairs

Article 7 of the BiH Rulebook prescribes that this Sector is to be divided into two divisions namely, the Division for Personnel and General Issues and the Division for Financial Issues.

The BiH Rulebook provides that the Division for Personnel and General Issues is to be involved in the following tasks:

- Production of documentation of the Ministry including its workplan;
- Dealing with the personnel files of the Ministry;
- Ensuring that the public has free access to information in the control of the Ministry and that staff at the Ministry have access to their files;
- Harmonization of its activities with those of the Civil Service Agency and the Appeal Committee of the Agency;
- Approval of the seals of government bodies;
- Provision of translation services;
- Issuance of certificates in respect of official records;
- Carrying out of general administrative duties;
- Provision of courier and driver services for the requirements of the Division.

The BiH Rulebook prescribes that the Division for Financial/Material Operations is to be involved in carrying out the following tasks:

- Development of financial plans and annual balance sheets for the Ministry;
- Accountancy tasks;
- Organizing for the payment of salaries and benefits;
- Invoicing, purchasing operations and other financial tasks.

Sector for Judicial Authorities at BIH Level

Article 8 of the BiH Rulebook prescribes that this Sector is to be involved in the following tasks:

- Preparation of legislation concerning the State level judicial bodies;
- Collection of information in relation to the judiciary;
- Development of feasibility studies and programs in relation to the judiciary;
- Development of classifications of the judiciary;
- Preparation of research programs in relation to the judiciary;

- Informing responsible authorities on the situation and problems of the State level judiciary;
- Making sure that the legislation in relation to the State judiciary is enforced.

Sector for International and Inter-Entity Legal Assistance and Cooperation

The BiH Rulebook prescribes that this sector is to be divided into three Divisions, the Division for International Assistance and Co-operation, the Division for Inter-Entity Cooperation and Cooperation with the Brčko District of Bosnia and Herzegovina and the Division for International Agreements.

The BiH Rulebook prescribes that the Division for International Assistance and Cooperation is to be responsible for the following:

- Providing legal assistance to other countries in relation to extradition;
- Arranging for the enforcement of foreign court rulings in criminal, civil and other matters;
- Providing assistance in relation to criminal matters;
- Cooperation with other countries and international organizations so as to implement international conventions of which BiH is a signatory party;
- Cooperation with international and national courts and other institutions;
- Development of reports and analysis within the competence of the Division;
- Ensuring that the policy and legislation within the competence of the Division is fully enforced and monitoring its enforcement;
- Verification of documents to be used abroad.

The BiH Rulebook does not detail the functions of the Division for Inter-Entity Cooperation and Cooperation with the Brčko District of Bosnia and Herzegovina.

According to the BiH Rulebook, the Division for International Treaties is to carry out the following functions:

- To ensure that conventions in relation to international legal assistance are adopted;
- To develop international agreements concerning the judiciary and administration;
- To provide opinions on draft international agreements in all areas;
- To co-ordinate the drafting of international agreements within the public administration;
- To collect information and produce reports and analysis on matters which come within the competence of the Ministry;
- To propose measures within its competence;
- To insure harmonization of legislation at all levels in BiH as a result of obligations which flow from international obligations;
- To cooperate with the Ministry of Foreign Affairs of BiH and of the Entities in the development of both bilateral and multilateral agreements.

Sector for Administration at a State Level

Article 10 of the BiH Rulebook outlines the tasks of this sector, as follows:

- Development of legislation in the area of administration at a state level;

- Production of regulations concerning state level administration;
- Compilation of information concerning state level administration;
- Production of feasibility studies and programs in relation to state level administration;
- Preparation of research programs and provision of information to appropriate authorities in relation to the problems within the administration;
- Implementation of administrative procedures.
- Investigation of breaches of administrative procedure within the competences of the Ministry;
- Issuance of permits and relevant certificates within the competence of the Ministry;
- Provision of opinions on rulebooks on internal organization of the ministries;
- Maintenance of registries of associations, foundations and legal persons at a BiH level.

Administration Inspectorate at State Level

The BiH Rulebook prescribes that the inspectors are to carry out the following tasks:

- Public administration inspection including implementation of the legal provisions applicable to civil servants and administrative employees;
- Administrative procedure and special administrative procedures.

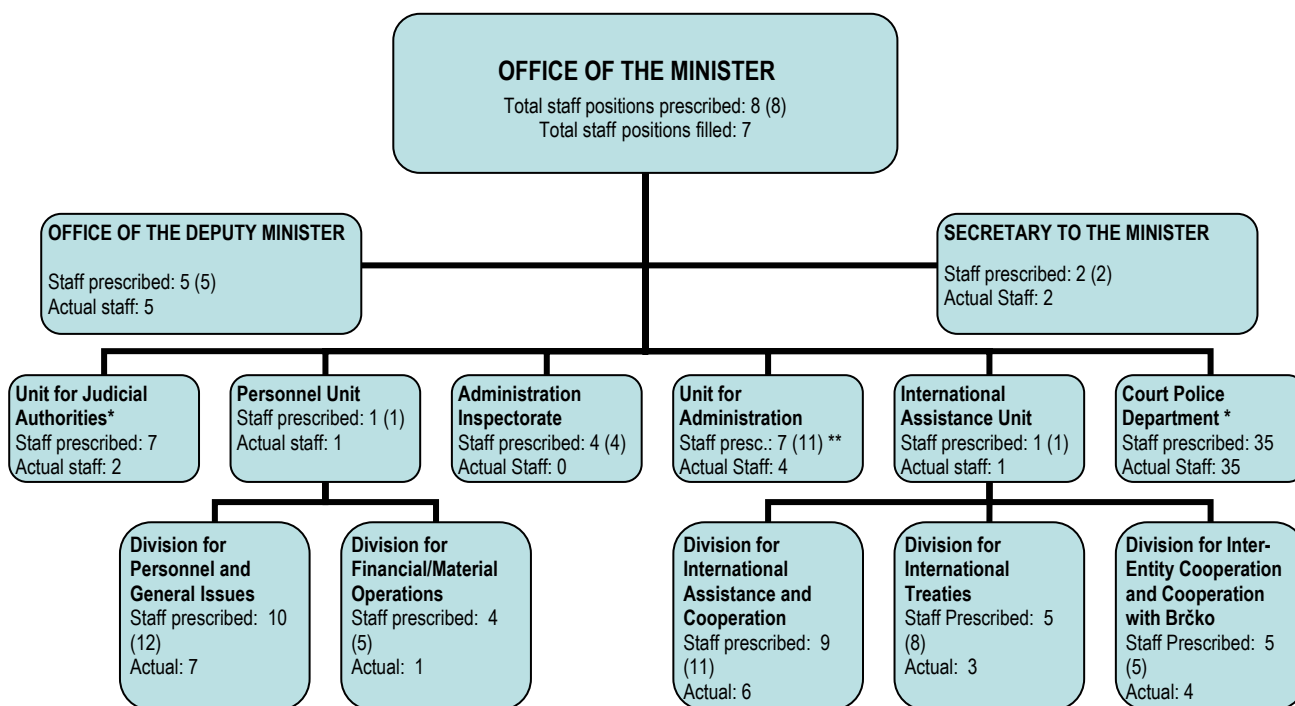
State Level Court Police Department

The BiH Rulebook prescribes that the Court Police Department is to carry out the following tasks:

- To render assistance to the Court of BiH and the Prosecutor’s Office of BIH in terms of information gathering, implementation of court orders and implementation of sanctions contained in court rulings;
- To maintain order in the courts;
- To provide security to judges and other people in the court;
- To secure the court buildings;
- To provide assistance in securing inspection into official court files.

The following diagram represents the organisational structure of the BiH MoJ as well as the staffing levels (actual and prescribed) for each unit. The prescribed staffing levels are set to change in the near future because as mentioned above the Ministry has proposed amendments to its rulebook and is awaiting the approval of the Council of Ministers. In the diagram below we have included in brackets the new prescribed staffing levels as proposed by the Ministry.

2.2.1.2 *Organisational chart of the BiH MoJ*



The new Rulebook envisages that the Unit for Judicial Authorities and the Court Police Department will be merged into a new Sector State Level Judicial Bodies. The new sector would be staffed by sixty-six people, fifty four in the division dedicated to court police 11 in the division dedicated to state level judicial bodies. It is also envisaged that there would be one person to coordinate between two sections.

** The new Rulebook envisages the establishment of an Office for the Registry of Liens to be staffed by four people.

The new Rulebook also envisages the establishment of a Sector for the Enforcement of Criminal Sanctions and the Work of Prisons. It is to be divided into two divisions, a Division for the Enforcement of Criminal Sanctions and the Work of the Prisons and a Division for Prison Police at State level. The former division is to be staffed by five people and the latter by 47. There is also to be one person with coordination duties between the two divisions.

As will be seen, this structural division is similar to that of the other MoJs in BiH. Some general comments are provided at the end of this section in this regard. The division of the competences of the Ministry among these units is discussed in the relevant subsections of section 3. However, two issues do not fall within the competence of other MoJs and are, therefore, commented upon here.

2.2.1.3 *Inter-Entity Judicial Co-operation*

The BiH Rulebook does not prescribe the functions of the Division for Inter-Entity Co-operation and Co-operation with the Brčko District, so it is not clear what was intended.

One aspect of this could be ensuring co-operation between the courts in the entities and in Brčko, which has many different facets. Such co-operation has been problematic in the past, but most issues are now resolved. Recent legislation such as the entity Laws on Enforcement Procedure of 2003 and the entity Law on Courts of the RS and draft in the Federation ensure the recognition of judgements throughout the country. Requests for legal assistance between courts, for example in

questioning witnesses, now pass smoothly from court to court and do not require the intervention of MoJs. Given this situation, there is unlikely to be a need for the BiH MoJ to play a role in inter-Entity judicial co-operation similar to its role in providing international mutual legal assistance.

The other possible aspect of inter-entity co-operation, although not accurately reflected in the name of the division, would be implementation of the BiH MoJs responsibility in respect of harmonisation of justice sector legislation and policy between the entities and Brčko. Some comments on this part of the Ministry's work are given in subsection 3.1 on justice sector policy.

2.2.1.4 Court Police

The Court Police is a relatively new institution for BiH. The first court police force to be established in the country was in the Federation. The Federation Constitution of 1994 required such a force to assist the courts in securing information, ensuring the presence of witnesses and the transport of accused persons, in maintaining decorum in courtrooms and the security of court premises and in carrying out court orders. A court police force separate from the regular police was expected to provide a mechanism for the judiciary to be further separated from the executive at a time when the regular police were not always co-operative in enforcing court orders. The court police were to be under the management of the President of the Federation Supreme Court. It took several years for the Federation court police force to be fully up and running, but officers were trained and deployed to all cantons by 2002.

There was no constitutional requirement to create a court police force in the RS, but following its creation in the Federation, a Law on the Court Police was passed in the RS in 2002 and officers deployed to all courts by 2004. A small court police force was also established in Brčko in 2004.

Given the prevalence of the court police system in BiH, when the Court of BiH was about to become operational, the choice of having such a system there was more or less automatic. The Law on the Judicial Police of Bosnia and Herzegovina was imposed by the High Representative in January 2003, although until it was implemented in 2004, the Federation court police provided the necessary assistance to the Court. However, the new criminal procedure regime, which eliminated the role of the investigating judge and gave the prosecutors the responsibility of leading criminal investigations led to some changes to the court police system. The BiH court police were made responsible to the BiH Minister of Justice (and so are included in the BiH MoJ staffing and organisation) and are required to provide assistance to the BiH Prosecutor's Office as well as the Court.

However, given the purpose of the court police, it is not clear that the decision to place them under the BiH MoJ was better than paralleling the entity systems by making the court police responsible to the president of the Court of BiH. While the wording of all the various laws on the court police appears to give them a very broad competence to enforce all court orders, there is some lack of clarity with respect to the division of competence with the regular police. The core responsibilities of the court police would seem to be more in terms of court building security, ensuring the presence of witnesses and transporting defendants in custody to court. The regular police may be the more appropriate body to enforce certain orders in criminal proceedings, such as search and arrest warrants and to generally assist the prosecutors' offices in conducting criminal investigations.

Following release of the Functional Review of the BiH Police Forces in July 2004, a Police Restructuring Commission (PRC) was set up to propose a “single structure of policing under the overall political oversight of a ministry or ministries in the Council of Ministers”. The PRC recommended that the institutions of BiH should enjoy exclusive constitutional competences over all policing matters in BiH and that this exclusive competence would imply exclusive competence to legislate in the field. The State level legislation would include a single state level law establishing the single structure of policing (Law on Police Services of BiH) and a single state level law regulating the working relations and police powers of all police officials of the single structure. The PRC also recommended that the Institutions of BiH be competent to finance any activities falling within their competency over all police matters and that the Ministry of Security should maintain political oversight over all activities of all police bodies in BiH.

Neither the Functional Review nor the Commission considered the future of the court police forces. In the PRC’s report it is simply stated under the section entitled “Organisation of Local Police Bodies” that local police bodies should form a close partnership with a range of law enforcement agencies (including court police) in order to ensure an economic, efficient and effective police service. However, given the ongoing reform process, it would be an appropriate time to consider the consolidation of the court police forces into one court police structure for all BiH. Clarification of their responsibilities especially vis-à-vis the regular police forces should be one part of that exercise. Another should be consideration of whether they should be responsible to the president of the Court of BiH, the BiH Minister of Justice, the HJPC or some other authority.

2.2.1.5 *Overlap of responsibilities with other Ministries – Human Rights treaties and reporting obligations*

As noted, the BiH MoJ has certain responsibilities in respect of international treaties, including:

- *ensuring that legislation and implementation by BiH at all levels is in compliance with the obligations of BiH arising from international treaties.*

The BiH Ministry of Human Rights and Refugees (MHRR) (article 12) is responsible for:

- *Monitoring and implementation of international conventions and other documents on human rights and fundamental freedoms*
- *Co-ordination and preparation of reporting to the competent domestic and international human rights treaty bodies and implementation and execution of decisions of human rights treaty bodies.*

There is obviously an overlap of competence here in respect of monitoring the implementation of international human rights treaties and the associated reporting obligations.

2.2.2 RS MoJ

2.2.2.1 *Legal background*

Constitutional provisions

The RS Constitution has a number of provisions on the justice sector. Firstly, there are general provisions on access to justice, the right to a fair trial and equal standing before the courts, and a prohibition on deprivation of liberty except in accordance with legal procedures. Secondly, there are provisions on the court system and on the office of the public prosecutor. Chapter IX deals with the RS Constitutional Court.

Chapter X of the RS Constitution deals with Courts and the Office of the Public Prosecutor. Its provisions are relatively general. The independence of the judiciary is established under Article 121 a. Judges are guaranteed life-time tenure. Prosecutors can be appointed for a fixed term. Some other issues in respect of the organisation of the judiciary and prosecution are specifically required to be dealt with by legislation, including the establishment and jurisdiction of the courts and of public prosecutors' offices, the numbers of judges sitting on a particular case, and the situations in which the public may be excluded from a court hearing. In practice, the drafting of legislation in respect of these issues has all fallen under the competence of the RS MoJ.

Law on Ministries

Article 7 of the Law on Ministries of the Republika Srpska⁹ charges the RS MoJ with carrying out administrative and other professional activities related to the exercise of the following competencies of the RS:

Justice policy

- active participation in the process of implementation, production and adoption of legal projects within its areas of competence;
- the provision of expert opinions on legal projects on the request of the other ministries and authorised bodies;
- the adoption of subordinate legislation necessary for the implementation of laws.

Judicial administration and legal services in general

- operations related to the organisation and operation of the Minor Offence Courts including the preparation of reports and information on the basis of inspection conducted in relation to the implementation of judicial procedures in Minor Offence Courts;
- ensuring the implementation of organisational norms and the collection of statistical data on minor offences;
- professional preparation of proposals for amnesty and the preparation of analysis, information and reports related to amnesty;
- the organisation and operation of the public attorney's office, the practice of law and the provision of other legal assistance services;
- the sitting of the judicial/bar examination;
- judicial institutions and administrative supervision over the work of the administration of justice;
- the provision of assistance in the education of judges and prosecutors;
- minor offence courts.

⁹ OG 70/02.

Prisons and enforcement of sanctions

- monitoring and record-keeping that allows analysis and observation of the functioning of the system for the implementation of criminal and minor offence sanctions and the proposing of measures for their improvement;
- correctional and educational-correctional institutions;
- the implementation of criminal and minor offence sanctions;
- inspection related to the implementation of criminal sanctions;
- the provision of uniform and lawful implementation of criminal sanctions;
- organisation of the operations and functioning of penitentiary and correctional and of educational correctional institutions;
- the monitoring and control of the work of [those] services;
- maintaining security, professional training and the establishment of personnel policy;
- the undertaking of control over the exercise, respect and improvement of the human rights of detainees.

International legal issues and assistance

- the processing of requests from domestic and foreign courts of law and from the other governmental authorities related to the provision of international legal assistance;
- the provision of expert opinions on international treaties in relation to provision of international legal assistance in the civil and criminal spheres;
- the preparation of opinions on draft international treaties and on legislative proposals regulating international issues;
- cooperation with the International Criminal Tribunal in The Hague in accordance with law.

Other

- the provision of information through the media and other public means in accordance with the law and other regulations of the Republika Srpska and Bosnia and Herzegovina.

The Rulebook on Internal Organisation and Systematisation of Posts in the MoJ of the RS

The Rulebook on Internal Organisation and Systematisation of Posts in the Ministry of Justice (the “RS Rulebook”) provides that the RS MoJ is to be divided into four units, as follows:

- Unit for the Organisation and Work of Judicial Bodies;
- Unit for the Functioning of Penal and Correctional/Educational Institutions;
- Unit for Minor Offences;
- Secretariat of the Ministry.

Sector for the organisation and work of judicial bodies

According to Article 20 of the RS Rulebook, this Sector is obliged to carry out the following functions:

- To deal with personnel issues in relation to the work and organization of judicial bodies, which includes both the courts and the prosecutors' offices;
- To carry out administrative supervision over the work of the courts;
- To give assistance in relation to the education of judges and prosecutors;
- To carry out tasks which relate to the work of public defenders, advocacy functions and other services of legal assistance;
- To process the requests of foreign and domestic courts in relation to the giving and receiving of foreign legal assistance;
- To give advice, in light of international treaties;
- To actively participate in the drafting of laws within its competence;
- To carrying out the professional and administrative tasks in relation to the passing of the Bar/Judicial Exam in the RS.

Sector for the Functioning of Penal and Educational/Correctional Institutions

According to Article 21 of the RS Rulebook, this Sector is to carry out the following tasks:

- To ensure that the prisons operate effectively;
- To carry out inspections of the prisons;
- To supervise the work of the economic units at the prisons;
- To make sure that respect for the human rights of prisoners is maintained;
- To supervise the implementation of custody measures, including those at Sokolac psychiatric hospital;
- To collect and process data in relation to the operation of the prisons with a view to improving the manner in which they operate;
- To prepare laws within the competence of the Sector;
- To keep records of the prisoners and the transfers of prisoners which are completed within the system;
- To process requests for conditional release, pardon and amnesty;
- To carry out certain functions in relation to personnel at the prisons;
- To carry out tasks in relation to extradition, the transfer of foreign prisoners and of BiH prisoners from abroad;
- To arrange for the execution of particular court decisions in relation to the serving of sentences;
- To cooperate with certain bodies in the RS and the Federation.

Sector for Minor Offences

According to Article 22 of the RS Rulebook, the Sector for Minor Offences is obliged to carry out the following tasks:

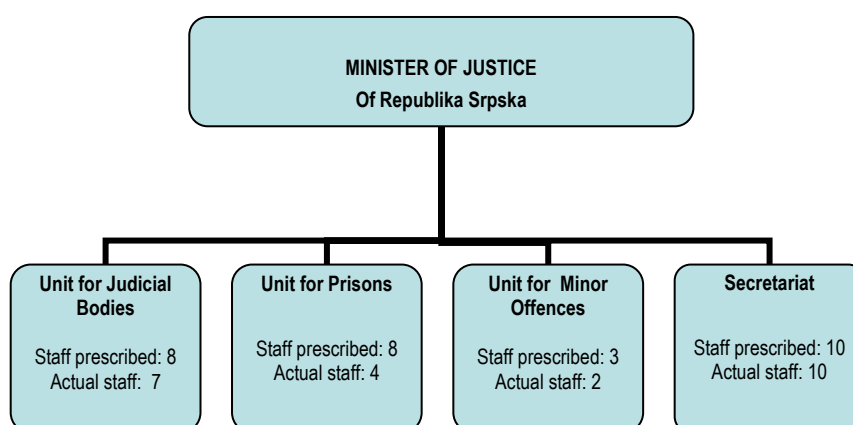
- To deal with personnel issues, in relation to the work and organization of the Minor Offence Courts;
- To carry out inspections of these courts;
- To supervise the organizational structures of these courts;
- To collect data on offence statistics.

Secretariat of the Ministry

According to Article 22 of the RS Rulebook, the Secretariat of the Ministry is obliged to carry out the following tasks:

- To coordinate the internal workings of the Ministry;
- To coordinate the work of the sectors;
- To cooperate with other ministries and institutions;
- To propose the work plan of the Ministry once it has received the work plans of the sectors;
- To deal with personnel issues in the Ministry;
- To organize continuing legal education for its staff.

2.2.2.2 Organizational chart of the RS MoJ



2.2.3 Federation MoJ

2.2.3.1 Legal background

Constitutional provisions

The Federation Constitution has some general provisions guaranteeing equal access to justice, a fair trial and the general protection of human rights. The guaranteeing and enforcement of human rights is a competence shared between the Federation and its cantons. In general, those competences not specifically granted to the Federation under the Constitution, fall to the cantons. A number of areas of policy-making are identified as belonging to the cantons, none of which relate to the justice sector, while the Federation is specifically given competence in the combating of inter-cantonal and organised crime, drug trafficking and terrorism.

The Constitution also establishes the structure of the judiciary within the Federation (discussed further in subsection 3.2). Judicial power is to be exercised independently and autonomously. The procedural rules governing court proceedings and the internal organisation of all courts in the

Federation are to be established by Federation law. However, cantons may adopt supplementary rules for their Cantonal and Municipal Courts.

Law on Ministries

Article 7 of the Law on Federation Ministries and other Bodies of Federation Administration¹⁰ charges the Federation MoJ with carrying out administrative, professional and other tasks provided by law that refer to the exercising of the competences of the Federation, and in particular:

Judicial administration

- judicial institutions and administration;
- administrative supervision over the work of judicial administration;
- assisting in judicial and prosecutorial training.

Prisons and enforcement of sanctions

- administrative supervision and execution of criminal sanctions.

Administration and administrative inspection

- administrative supervision over the work of administrative bodies of the Federation;
- registering political organizations and citizens associations.

Other

- office administration;
- administrative tasks that do not fall within the scope of another administrative body of the Federation.

Within the Federation MoJ, there is a separate institution, known as the Institute for Public Administration. Its role is also governed by law, and is to carry out professional and other tasks within the Federation competences in relation to:

“Establishing the internal organisation of Federation Ministries and other authorities of the Federation administration aimed at improving their work and organising and ensuring efficient management, introducing modern professional methods and means of work in the authorities and bodies of administration (information and documentation systems), regulating the exercise of the rights and duties of employees and officials, salaries and other allowances in the regulations of the Ministries and other administrative bodies of the Federation and co-operation with the competent workers’ unions in dealing with those issues, the organisation of vocational training and upgrading for employees, building systems of local self-government, election systems, political and territorial organisations of the Federation and drafting relevant regulations on those issues, issuing publications on legal issues, developing co-operation with appropriate international organisations in accordance with the BiH Constitution, as well as local authorities and their associations in the issues from within its competencies and other tasks related to the field of public administration”.

¹⁰ OG 58/02. This law was imposed by the High Representative.

Rulebook on Internal Organisation of the MoJ of the Federation

The Rulebook on Internal Organisation of the Federation MoJ, published in July 2001 (the “FBiH Rulebook”) provides that the Federation MoJ is to be divided into six units or sectors as follows:

- Cabinet of the Minister;
- Judicial Unit;
- Administration Unit;
- Unit for the Execution of Criminal Sanctions;
- Administration Inspectorate;
- Department for General and Common Tasks.

Cabinet of the Minister

According to Article 6, subsection 1 of the FBiH Rulebook, the Cabinet of the Minister is to carry out the following functions:

- To operate as a support system for the Minister in that it is to prepare the Minister for the Federation government and parliamentary sessions;
- To organize advisory groups or collegiums so as to prepare the Minister for the government and parliamentary sessions;
- To ensure that there is cohesion between each of the units/sectors of the Ministry;
- To deal with the dynamics between these various units/sectors of the Ministry;
- To act as the PR office of the Minister;
- To handle, distribute and classify all mail which is received by the Ministry;
- To provide translation services for the Ministry.

Judicial Sector

According to Article 6, subsection 2 of the FBiH Rulebook, the Judicial Sector is to carry out the following functions:

- To prepare pre-drafts and drafts of laws and other regulations in the area of the judiciary;
- To be involved in creating studies and analysis, although it is non-specific in relation to the field in which these studies are to be carried out;
- To perform tasks relating to rendering international legal assistance, in relation to amnesty and pardon;
- To cooperate with the ICTY;
- To propose measures for the improvement of the working methods of the judicial administration;
- To supervise judicial administration;
- To monitor the educational status of the judiciary/judicial administration.

Administration Sector

According to Article 6, subsection 3 of the FBiH Rulebook, the Administration Sector of the Ministry is to carry out the following tasks or functions:

- To prepare pre-drafts and drafts of laws and other regulations in the area of Federation administration;
- To prepare decisions and regulations in the area of administration;
- To manage the registries within the ministry's competences;
- To perform other tasks stipulated by Federation laws and other regulations.

Sector for the Execution of Criminal Sanctions

According to Article 6, subsection 4 of the FBiH Rulebook, the Sector for the Enforcement of Criminal Sanctions is to carry out the following functions:

- To prepare draft laws and other legal instruments in the area of the execution of criminal sanctions;
- To supervise the work of all of the prisons, the security at these institutions and the economic activities carried out at these institutions;
- To be involved in the parole of prisoners;
- To be involved in any other tasks relating to the execution of criminal sanctions.

Administration Inspectorate

According to Article 6, subsection 5 of the FBiH Rulebook, the Administration Inspectorate is to carry out the following functions:

- To supervise the work of Federation public administration bodies;
- To draft regulations on the system of administration and on administrative procedure in the Federation.

Department for General and Joint Tasks

According to Article 6, subsection 6 of the FBiH Rulebook the Department for General and Joint Tasks is to carry out the following functions:

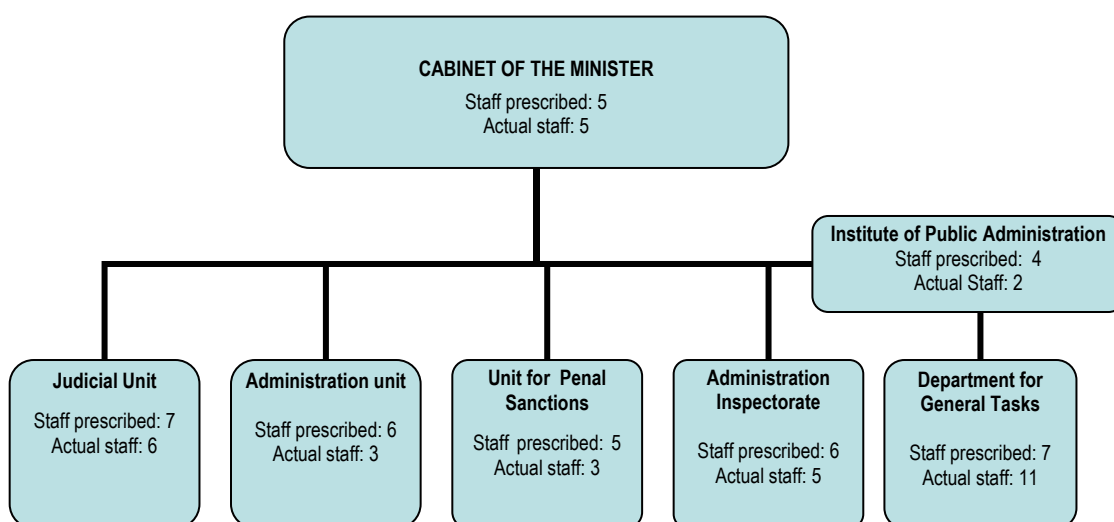
- To oversee the financial aspects of the Ministry;
- To arrange for the storage of files;
- To maintain the archives;
- To deal with mail;
- To make transcripts of official documents;
- To look after personnel issues;
- To carry out administrative tasks such as photocopying, maintenance of equipment and installations on the premises in the Ministry;
- To look after the working conditions of employees in the Ministry.

Institute for Public Administration

Section XI, Article 29 of the FBiH Rulebook provides that the Institute for Public Administration is to carry out the following functions:

- To assist in improving the working methods and organizational structure of the Federation public administration;
- To provide professional, education and other means of improving the employees of Federation administrative bodies;
- To prepare laws in the field of public administration, local administration and self-management, the election system, and the political/territorial organization;
- To develop information systems;
- To compile a database of relevant laws in the field of public administration in the Federation;
- To issue publications in the field of law;
- To develop cooperation on the development and improvement of local public administration with a range of bodies including international organizations and local authorities.

2.2.3.2 *Organisational chart of the Federation MoJ*



2.2.4 **Canton Sarajevo**

2.2.4.1 *Legal background*

Article 4 of the Law on Ministries of Sarajevo Canton¹¹ provides as follows:

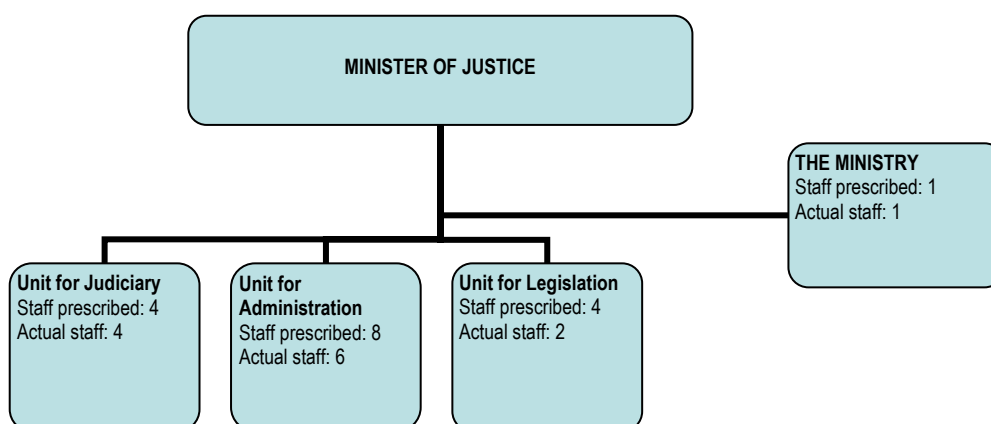
The Ministry of Justice and Administration carries out administrative, professional and other tasks stipulated by the law in respect of the competencies of the Canton in the field of the judiciary, prosecutorial services, public attorney’s offices, minor offence bodies, administration, local self-government and monitoring the situation and proposing measures for improving the realisation and protection of human rights and freedoms.

The Rulebook on Internal Organisation of the Sarajevo Canton MoJ (the “Sarajevo Rulebook”)¹² provides that the Ministry is to be divided into three units:

¹¹ OG 4/01, 13/02, 16/03.

- Unit for the Judiciary and for Monitoring the Execution of Sanctions and Measures
- Unit for Administration
- Unit for Legislation.

2.2.4.2 Organisational chart of the Sarajevo Canton MoJ



2.2.5 Other Cantonal MoJs

The responsibilities and organisation of the MoJs in other cantons appears to be largely similar.

2.2.5.1 Zenica-Doboj Canton

This Ministry is divided into two units:

- Unit for Judiciary;
- Unit for Administration.

A third unit, for legislation, is prescribed in the MoJ rulebook, but has not been established in fact. The Ministry has seven staff, one less than prescribed.

2.2.5.2 Central-Bosnia Canton

This Ministry is organised in three units:

- Unit for Judiciary;
- Unit for Administration;
- Finance Department.

Eleven staff are prescribed, but one position as an administration inspector is vacant.

¹² Published in March 2002, with subsequent amendments published in July 2002.

2.2.5.3 *Herzegovina-Neretva Canton*

This MoJ is divided into three units:

- Unit for Judiciary;
- Unit for Administration and Local Self-Governance;
- Administration Inspectorate.

Fourteen of the seventeen prescribed positions were filled.

2.2.5.4 *West-Herzegovina Canton*

This Ministry is divided into two unit, as is that of Zenica-Doboj Canton, but both are further sub-divided into even smaller departments:

Unit for Judiciary

- Department for Enforcement of Sanctions;
- Department for Legal Assistance and Legislation.

Unit for Administration

- Department for General Issues and Accounting;
- Department for Implementation of Legislation.

The MoJ currently has eleven staff, although the rulebook prescribes 19.

2.2.6 *Brčko District*

The functions of an MoJ within the Brčko District are split between the District Government and the Brčko Judicial Commission.

The Brčko Judicial Commission is established by the Law on the Judicial Commission of Brčko District.¹³ The powers of the Commission are set out in Articles 12-14 as follows:

- Develops criteria for determining the number of judges, legal aid attorneys, prosecutors and court employees;
- Determines the number of judges at courts, the number of prosecutors at the Prosecutor's Office and the number of attorneys at the Legal Aid Office;
- Determines salaries for judges, prosecutors and legal aid attorneys;
- Gives approval on Rules on the Internal Organization of Courts, Prosecutor's Office and Office for Legal Aid;
- Ensures that laws, regulations and measures relating to the organization and functioning of the courts and prosecutor's office are enforced;
- Ensures the drafting of laws and regulations related to the organization and operation of the courts and the Prosecutor's Office and recommends the same to the Assembly for adoption;

¹³ Official Gazette 4/00, 1/01 and 5/01

- Monitors and analyses the organization and operation of the courts and the Prosecutor’s Office to ensure efficiency and effectiveness;
- Monitors the application of the Court Internal Rules;
- Evaluates complaints against the courts and the Prosecutor’s office regarding prolonging of procedure or the behaviour of a judge, prosecutor, translator, expert or other employee of the courts or prosecutor's office;
- Invokes disciplinary measures against judges and prosecutors in accordance with the law;
- Supervises the work of the District judges, prosecutors and legal aid attorneys and undertakes measures prescribed by law;
- Determines the incompatibility of judicial service with other occupations;
- Provides professional training for judges and prosecutors necessary to ensure the proper performance of their duties;
- Ensures the independence of the judiciary, the Prosecutor’s Office and the Agency for Legal Aid;
- Prepares and implements the Judge’s Code of Ethics and the Prosecutor’s Code of Ethics;
- Regulates the employment terms for court interpreters and experts;
- Prescribes the design of the robes of the judges and prosecutors and the form and the procedure for issuing ID cards to judges and prosecutors;
- Evaluates the performance of the execution of sentences passed for criminal offences, economic offences and misdemeanors;
- Ensures that in the appointment of judges and prosecutors the composition of the courts and the Prosecutor’s Office reflects the composition of the District’s population;
- Determines the budget proposal for the courts and the Prosecutor’s Office;
- Reviews reports on the work of the courts, judges and the Prosecutor’s Office and prosecutors;
- Maintains records on judges and prosecutors;
- Enacts the Rules of Internal Organization of the Expert Service;
- Enacts Rules of Procedure for the Commission;
- Exercises other duties as provided by the law;
- Appoints and dismisses judges and prosecutors;
- Regulates the organization and internal procedures of the Basic and Appellate Courts.

Some of these powers in respect of the appointment and discipline of judges and prosecutors are no longer valid since the adoption of the BiH Law on the HJPC.

The Commission has seven members, most of whom are judges or prosecutors. It is supported by its Expert Service, which is divided into two units:

- The Administrative Department
- The Technical/Accounting Department.

The rulebook provides for seven posts, two in the Administrative Department and five in the Technical/Accounting Department.

PART B

SECTION 3 – REVIEW OF FUNCTIONS AND TASKS

Section 3.1 - Justice sector policy development

Section 3.2 - The structure of the judicial and prosecutorial systems

Section 3.3 - The financing of courts and prosecutors' offices

Section 3.4 – The administration of courts and prosecutors' offices

Section 3.5 - Public complaints and administration inspection

Section 3.6 - Administration of the correctional sanctions sector

Section 3.7 - International Cooperation

Subsection 3.1– Justice Sector Policy Development

The development of justice sector policy is among the core tasks of MoJs everywhere. This chapter looks at this issue in the BiH context in two parts:

- The division of competence over justice sector policy development
- The organisation and resources of this function within the different MoJs.

Policy development is taken to include consideration of substantive issues of rights and obligations, the identification of desired outcomes in the justice sector, the development of strategies to achieve those outcomes, and the process of implementation of methods to effect strategies, including legislative drafting.

3.1.1 Judicial sector policy competence

In BiH, policy development is currently undertaken at each level of government within its constitutional competence. The specific duties and functions of each Ministry within its own level are prescribed by the various laws on ministries (as are set out in Section 2). Although the Laws on Ministries tend to concentrate on listing the more specific operational and statistical tasks of the MoJs, in general their competence is assumed to include criminal law and civil obligations, procedural legislation, enforcement of sanctions, and the structure of the court and prosecutorial systems, all of which have policy-development related aspects.

As noted, in Section 2, it was only really with the establishment of the Court of BiH that there were any justice policy issues falling to the BiH level. The BiH MoJ is now responsible for the related policy and legislative issues, such as the structure, competence and organisation of the Court and Prosecutor's Office of BiH and the substantive procedural legislation that will govern their work. Although not specifically recognised in the Law on Ministries, one other matter that should fall within the competence of the BiH MoJ is ensuring that the provisions of BiH legislation that create minor offences are consistent and enforced.¹⁴

Although the BiH level of government clearly has no power to enforce the harmonisation of standards and practices onto the entities, the BiH Law on Ministries gives the BiH MoJ responsibility for:

“Generally acting as central co-ordinating body for ensuring inter-entity legislative and justice system harmony and best practice, whether by providing good offices for discussion or co-ordinating initiatives”.

It is understood that the phrase *“legislative harmony”* refers only to the harmonisation of laws related to the justice system and not to all legislation.

¹⁴ Although many of the BiH level laws (a substantial portion of which were drafted within OHR) had penal provisions, some with considerable fines attached, no court had jurisdiction to deal with these cases until the Law on Minor Offences of Bosnia and Herzegovina was passed in 2004 (OG20/04). That law authorized the entity Minor Offence Courts to deal with those cases. This was originally foreseen as a temporary solution, at least with regard to final instance jurisdiction. Without a single court having final jurisdiction over these cases for the whole of BiH, there is a risk of having different interpretations of standards in each entity.

Most justice sector policy has been, and continues to be, the responsibility of the entity MoJs. This has included the laws governing the structure and organisation of the court system (see subsection 3.2), procedural legislation, the correctional system (see subsection 3.6), the legal profession (advocates, public attorneys and notaries and the bar examination), the Criminal Code and substantive laws on contractual and other obligations, and the registration of land, pledges and business companies.

Within the Federation, it seems to have been generally accepted that, under the Federation Constitution, many of these competencies (such as in respect of legislation governing court procedures) lie with the Federation rather than the cantons, because of the general responsibilities of the Federation in respect of ensuring human rights (including equal access to justice), and under its more specific obligation to establish rules of procedure as necessary to ensure uniformity with regard to due process and the basic principles of justice in all courts of the Federation.

Constitutional amendment in 2002 gave the Federation the right to regulate the “organisation” of all courts, and determining the location and territorial jurisdiction of the courts in the cantons was specifically transferred to the Federation by further amendment in 2004. These changes enabled the drafting of one Federation law regulating most issues relating to the location, jurisdiction and internal organisation of the Municipal and Cantonal Courts and the Federation Supreme Court. This law is currently in the legislative process.

Some issues currently provided for in the cantonal laws on courts, and dealt with operationally by the cantonal MoJs, were not dealt with in the new Federation law. These include the regulation of court experts and interpreters and the establishment of court fees and taxes. While they are arguably Federation-level issues, at least until such time as they are dealt with in a Federation law, they will continue to fall within the competence of the cantons. The High Judicial and Prosecutorial Council is currently analysing the laws in relation to court fees and taxes and is aiming to develop a strategy for all of BiH in this regard.

While regulation of the correctional sanctions sector appears to fall clearly within the responsibilities of the Federation MoJ, prosecutors continue to be regulated at both Federation and cantonal level. However, there is currently a project underway to have one Federation level law for prosecutors as with the draft Law on Courts.

As for the District of Brčko, in accordance with the Law on the Brčko Judicial Commission, the Commission has authority over the drafting of legislation regarding the courts, the prosecutor’s office and legal aid. However, whether its mandate extends to other justice sector legislation, such as substantive or procedural laws, or whether this falls to the Brčko District Government is not clear.

It is not clear to what extent the MoJs have the power, or are required, to review all legislation proposed within their level of government. In the RS, the MoJ receives all draft legislation and the penal provisions are checked for consistency. This appears to function well in practice. On the other hand, this process does not appear to exist or to function in the Federation.

There is considerable overlap in respect of the issues being dealt with by the BiH and entity MoJs and the Brčko government in terms of justice sector legislation. While effort has been made to ensure that many of the current laws are harmonised, in particular the procedural legislation, it is

still foreseeable that amendments in the future will lead to a situation where there are different laws in force in different parts of the country. There are two results from this. Firstly, it is arguable that having different laws regulating civil and criminal liability and procedure leads to unequal justice. Secondly, it appears to be a considerable waste of resources. Given that there is no constitutional basis on which to enforce harmonisation, the position of the BiH MoJ in ensuring the continued harmonisation of justice sector regimes is weak.

Within the Federation, there seems to be some lack of clarity as to which issues fall to the Federation and which to the cantons.

The role of the MoJs in checking legislation prepared by other ministries for consistency in penal or other provisions is unclear and unevenly implemented. This can be a vital function and it is important that it be carried out effectively. Given the responsibilities of the MoJs, such oversight should include not only penal provisions, but also those setting up administrative procedures and giving access to the courts.

3.1.2 Organisation of operation of the policy-making function within MoJs

3.1.2.1 Structure and staffing within MoJs

Legislation must be consistent, effective, well thought-out and formulated in such a way that it can be understood and enforced. Society is constantly changing and legislation also must be reviewed at regular intervals to make sure that it is still relevant and appropriate. All legislation, at whatever level, has to be amended or updated, preferably following a full public discussion of the relevant policy issues.

Legislative Offices of Governments at all levels of authority in BiH have been established.¹⁵ These offices are to play an important role in the law drafting cycle in terms of assessing a number of features of legislative proposals, e.g. providing harmonisation of regulations and general acts, overseeing the process of legislative drafting and making sure that nomotechnical and linguistic standards are respected.

None of the MoJs has a central co-ordinating unit for either justice sector policy making as a whole or for legislative drafting. Instead, the consideration of policy issues in respect of justice is usually separated between those units dealing with the courts and prosecutors' offices and those dealing with the correctional sanctions sector. The RS MoJ has a third policy-making unit, that for minor offence issues. Each unit deals with issues arising within its competence and carries out the necessary legislative drafting with no overall system of co-ordination. Apart from the Federation MoJ's judicial unit, the work of these units is largely concentrated on operational matters rather than policy issues.

While seen as a separate issue, the same comment applies to the public administration role of the MoJs. There are also units in the MoJs with that competence that deal with the related policy-making, drafting and operational issues. While some aspects of public administration, such as the operation of different registers, do not appear to be closely connected with justice, the legislation

¹⁵ Except in Una-Sana and Bosansko-Podrinjski Canton where they have not as of yet established their own legislative offices.

governing administrative procedure and administrative litigation has a more obvious link, both to the concept of justice as a whole and in respect of the operations and efficiency of the court system.

BiH level

The BiH MoJ has a Sector for State Level Judicial Bodies. Under the BiH rulebook, this unit is responsible for the preparation of legislation in relation to BiH judicial bodies, collecting information relating to the judiciary, developing feasibility and other studies and programmes, development of classifications of the judiciary, and ensuring that relevant legislation is enforced. Under the provisions of the proposed new rulebook of the Ministry (submitted to the Council of Ministers in February, 2005) the court police is to come under the control of this Sector.

The current Rulebook provides that the Sector is to be staffed by seven people although it is currently only staffed by two people. In the absence of a full staff compliment, the Sector's tasks are being conducted by the cabinets of the Minister and Deputy Minister, especially the latter. The Deputy Minister took upon himself the task of over-seeing legislative drafting. Because of the need to undertake these additional functions, neither cabinet was in a position to take a strong lead in policy formation and co-ordination, although this was expected to change when the Ministry was more fully staffed.

During the course of interviews at the Ministry in early 2004, it appeared that the MoJ was involved in 39 legislative drafting projects in 2003. However, in a considerable proportion of those, most of the work was done by international organisations, especially OHR, and some were related to the system of public administration rather than justice.

The workplan of the BiH MoJ for 2004 included 19 laws, most of which were in the justice rather than the public administration sector. Of the 19 laws, six were amending legislation, and some, but not all, new laws were drafted by the international community, such as the HJPC Law and the mediation laws. However, given the scope of some of those laws, even reviewing them presented a considerable workload. Among the legislation being worked on or completed recently were laws on liens, civil procedure, court police, enforcement of criminal sanctions, witness protection, minor offences, court fees and taxes, and money laundering, and amendments to the legislative framework in respect of the establishment of the War Crimes Chamber within the Court of BiH.

The inter-entity judicial system co-ordinating role of the Ministry is to be undertaken by a different unit, namely the Division on Inter-Entity Co-operation and Co-operation with the Brčko District of Bosnia and Herzegovina, which is part of the Unit for International and Inter-Entity Legal Assistance and Co-operation. The Rulebook does not prescribe any functions for this Division.

It is to be staffed by three professionals and two administrative staff, although as yet there are only two professionals and one administrative staff member.¹⁶ While the Division staff members indicated that they saw inter-entity harmonisation as the key function of the unit, at the time of interview they had not undertaken any tasks in relation to that and appeared to be actually involved in dealing with requests for mutual legal assistance. The type of work involved in inter-entity justice system harmonisation issues bears no resemblance to that involved in the provision of mutual legal assistance.

¹⁶ The proposed new Rulebook of the BiH MoJ provides that this Division is to be staffed by eight people.

It is not known how the BiH MoJ intends to interpret its inter-entity harmonisation role and whether it will take an active or a more passive role. Prior to the establishment of the BiH MoJ, considerable efforts were made by the IJC and OHR to ensure harmonisation of the entity criminal and civil procedure codes and the laws on enforcement proceedings. This was not an easy process and was not always expected to succeed. While the working group members involved and the entity MoJs understood the importance of harmonisation, there was some sensitivity to the perceived loss of control with the entity governments.

RS

The RS MoJ is divided into three units – judiciary, prisons and minor offences. Policy-making, legislative drafting and operational tasks are all carried out within each unit to a greater or lesser extent. A proposal to create a legislative drafting unit put forward by the MoJ, in order to assist in co-ordination and consistency in the output of each unit, was rejected by the government.

The unit for judicial bodies has seven staff, although eight are prescribed. Of these, two are court inspectors, two work on issues of international legal assistance and two are support staff, leaving only the assistant minister who heads the unit to deal with judicial sector policy making and legislative drafting. In fact, it appears that the unit does nothing in respect of policy development and a minimal amount of drafting. As well as undertaking administrative functions in respect of the courts and prosecutors' offices, it is perforce involved in matters such as giving opinions on lawsuits against RS, as no public attorney has been appointed.

It appeared that most legislative drafting in the justice sector was being undertaken by the Minister's advisor (who is not a civil servant). He was particularly involved in laws relating to civil rights and obligations (such as laws on ownership, obligations, and bankruptcy and liquidation), and was a member of the working group that drafted the Civil Procedure Code of 2003.

However, policy issues in respect of minor offences and minor offence courts are dealt with within the Minor Offence unit, which was staffed by only an Assistant Minister and one other person. The RS MoJ also reviews the penal provisions of all laws prepared by other ministries, and this task is done by this Assistant Minister.

Similarly, the setting of policy and the drafting of legislation in relation to prisons and correctional sanctions in general fall to the Unit for the Functioning of Penal and Educational/Correctional Institutions. This unit has four prison inspectors, who report to an Assistant Minister in charge of the sector. It is not clear how these policy and drafting issues are dealt with, but it is most probably by the Assistant Minister.

Shortage of drafting capacity has also led to the phenomenon of using working groups of experts from outside the MoJ, appointed by the Minister, to draft major laws. These might include judges, prosecutors, lawyers in private practice and academics. While a good idea in principle, the MoJ cannot afford to pay these experts and so they do the work as a personal favour to someone inside the Ministry. This can mean that a low priority is given to the work required by the group members, and is said to lead to a less than premium product being produced.

Federation MoJ

The Federation MoJ also has a unit for the judiciary, whose responsibilities include legislative drafting and the creation of studies and analysis. It is also tasked with monitoring the educational status of the judiciary, proposing measures to improve the administration of the judiciary and supervising judicial administration. The judicial unit is headed by an Assistant Minister, with four expert staff and a data processing officer.

Neither this unit nor the Ministry as a whole appear to be engaged in policy development and the unit has not undertaken any comprehensive studies or analysis to assist it in its work. However, two of the four lawyers in the judicial unit are clearly heavily engaged in drafting laws, often from scratch.

The workplan of the Federation MoJ for 2004 included 23 laws and 14 sets of regulations. The majority of these laws and regulations fell into areas that could be considered part of the judicial sector. The officers concerned, however, said that they expected to work on around 28 laws that had been prioritised by the government, including those on liens, land registration and free legal aid. They noted the same use of external working groups and the same problems as in the RS.

Unlike the RS, the Federation MoJ has no separate unit for minor offences and so consideration of issues arising in relation to minor offences, such as the drafting of a new Federation level law on the minor offence regime, fall to the unit for the judiciary. However, the drafting of laws and regulations in the correctional sanctions sector appears to be conducted by the two prison inspectors, presumably reporting to the Assistant Minister for Penal Sanctions.

Sarajevo Canton

The unit for the judiciary and monitoring the execution of criminal sanctions does not appear to engage in any policy-making tasks, and instead its five staff members are primarily occupied in dealing with public complaints about the courts and various administrative tasks.

The MoJ's legislative unit is in charge of all legislative drafting for the Ministry, including in respect of the judiciary. Because of the competence of the Ministry to undertake tasks not specifically falling under another Ministry, the unit also drafts amendments to the Cantonal Constitution, the Law on Ministries and similar issues. It has two professional staff, although four are prescribed. Most of its work appears to relate to public administration rather than justice. Apart from legislative drafting, its two staff members prepare opinions for the Minister on laws drafted by other Ministries and provide advice and comments to the staff of other Ministries who are working on legislative projects.

Zenica-Doboj Canton

As with Sarajevo Canton, this MoJ has one unit for the judiciary and monitoring the execution of sanctions and measures. The unit has two staff: the Assistant Minister and an accounting assistant. Their main tasks appear to be administrative, such as finding premises for the courts. No reference was made in interviews to setting policy or drafting legislation. Although a legislative unit within the Ministry is prescribed, none exists.

Central Bosnia Canton

This Ministry also has two units – for the judiciary and for administration. An Assistant Minister is the only person working in the judicial unit. Most of her work is administrative in nature. It seems that most legislative drafting is now taken care of by the cantonal legislative office.

West Herzegovina Canton

Again, this Ministry has two units, but the unit for the judiciary is further subdivided into enforcement of sanctions and legal assistance and legislation. The unit has three staff altogether, including the Assistant Minister, who said that he spends a lot of time drafting legislation as does the officer for execution of criminal sanctions.

Herzegovina-Neretva Canton

This Ministry has three sectors – judiciary, administration and an administration inspectorate. As there is nobody in charge of legislative drafting, the Minister himself appears to be actively involved in drafting tasks, including the recent preparation of a new law on court fees, as well as some general co-ordination in respect of judicial policy.

3.1.2.2 *Resources and language skills*

In general, the amount of resources available to assist the policy-making and drafting processes appear to be rather limited. Because many staff members engaged in judicial policy issues also undertake various administrative or unrelated tasks, it is not possible to estimate accurately the total number. However, on the assumption that the BiH MoJ will staff its judicial unit as proposed (even taking into account the new staffing requirements in its new Rulebook) and taking into account the engagement of others within that Ministry on these tasks, plus the time spent by the entity and cantonal MoJs on policy issues related to the justice sector including correctional sanctions, the total number of professional staff available to work on these issues in the entire BiH would be no more than 20.

As far as skills are concerned, however, most officers working in the field of the judiciary and legislative drafting appear to be highly qualified, almost all with the bar examination and many with several years experience in government and/or in the judiciary. Others, while lacking formal legal qualifications, have considerable experience in their field, such as the Federation prison inspectors who are from time to time engaged in legislative drafting. However, none of them have had any training on the policy planning process or on legislative drafting.¹⁷

There seems to be some disparity in the legal resources available to the MoJs. While, for example the Federation MoJ has easy access to the Federation Supreme Court library (the two institutions are housed in the same building), the RS Ministry apparently has only a limited library, which is in the Minister's own office. Most MoJs content themselves with getting the Official Gazettes and do not subscribe to any foreign legal periodicals, for example.

¹⁷ The legislative drafting process, including problems arising from lack of training and from lack of standardization of drafting styles within and across ministries, is discussed in more detail as part of the Public Administration Reform process in the reports of the System Review Team on Legislative Drafting for the BiH, RS, Federation and Brcko governments.

Only the Zenica Doboje Cantonal MoJ has an internet connection, in the Minister's office. Most have some limited computer capacity, but are not networked within the office. The usefulness of internet access as a source of comparative study is in any case doubtful, as few MoJs have staff with sufficient knowledge of foreign languages to be able to make use of legal material from abroad. One staff member in the judicial sector in Sarajevo Canton accesses the internet from home for work purposes and her son assists with translations from English. This appears to be the limit of comparative research undertaken. Of those officers working in the field of judiciary and who were interviewed as part of this project, some had knowledge of Russian, German, French, Norwegian, and English, but many to only a basic level.

Unfortunately, these language problems mean that when new legislation is needed, the MoJs tend to rely on the initiatives of neighbouring countries. These are useful, but not always the best. For example, in 2001, the Federation MoJ was proposing a new civil enforcement law based on the Croatian law, which had led to problems in practice. The RS working group on the same issue used the law from the Federal Republic of Yugoslavia as its model, also one not without problems.

As a result of the many transitions being undertaken by BiH, there has clearly been, and continues to be, a slew of legislation required in the justice sector. This has obviously increased the rate of change of legislation beyond what might be expected in a more stable society and so reduced the ability of the MoJs to undertake each new initiative effectively.

Perhaps because of the constant need to deal with urgent requirements for new legislation, no MoJ has undertaken any research projects and so they have no basic information on which to make policy choices. Neither does there appear to be any preliminary discussion of the more general outcomes required of any reform, such as the increasing of judicial independence or efficiency or the reduction in reliance on the court system as a method of solving disputes, or any consideration of the various strategies and steps that could be undertaken to achieve those goals.¹⁸ Legislation is not the only answer, but appears to be the main or only tool used in the BiH justice sector to bring about reform.

The uselessness of the statistical information generated by the courts has been commented on elsewhere.¹⁹ While the courts do transmit regular reports to the relevant MoJs, the information provided is clearly insufficient to build a coherent judicial reform policy, and indeed probably misleading. The Ministries can obtain more information on the prison system because of their greater role in its management.

Empirical studies and evaluations of the effects of legislation are an important part of the policy-making process. In respect of justice, this could include court outcomes, prison operations, citizen satisfaction and case processing times. However, this tool is not used in BiH. The lack of data on the judiciary in BiH results in a lack of capacity to formulate policy choices and implications,

¹⁸ One reason that the IJC was able to quickly develop a strategy for judicial reform in 2001 was that it inherited from JSAP a better overview of, and more information on, the judiciary in BiH as a whole than any MoJ. With that, it could easily identify its desired policy outcomes and the specific outputs needed to achieve them.

¹⁹ See for example JSAP *Thematic Report X Serving the Public: The Delivery of Justice in Bosnia and Herzegovina*, November 2000.

especially for the reform of justice and judiciary, but also for the improvement of all laws falling within the MoJs' competence, such as the laws on obligations.

There is considerable recent interest in many countries in developing methods to evaluate the efficiency of the judiciary. One example is the European Commission for the Efficiency of Justice (CEPEJ), founded in 2002 under the Council of Europe, which in December 2004 published a report comparing the organisation of judicial systems in 40 Council of Europe member states.²⁰ CEPEJ aims to improve the efficiency and functioning of judicial systems in the member States. The collection and processing of data on judicial systems by CEPEJ should allow policy makers in Europe to understand the main trends and evolutions of judicial organisations, to identify difficulties, to propose reforms and to support their implementation. Another example is the OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina (December, 2004)²¹. This report presents the findings and conclusions on the implementation of the new criminal procedure code as monitored in the courts between January and August, 2004. Recommendations were provided in the report in relation to suggested reforms to the code, areas for professional training and other measures to enhance the effective and fair administration of justice in the courts.

Perhaps the closest approximation to any sort of research centre within any of the MoJs is the Federation Institute of Public Administration (whose functions are set out in Section 2). It has a broad mandate in terms of public administration reform, and is said to have once attracted the best legal minds in BiH. Before the war, it had a staff of more than 20. Its current staff of two are now occupied in legislative drafting in the public administration sector on behalf of the Federation MoJ and in producing a legal magazine.

3.1.2.3 Benchmarking

It has not been possible to find out the number of staff working on justice sector policy and planning issues in other European countries.

Within the Netherlands MoJ, there is an independent Research and Documentation Centre (WODC) whose aim is to make a professional contribution to the development and evaluation of justice policy set by the MoJ. The research initiative for any project lies with the MoJ, but any publications do not necessarily reflect the official position or policies of the Minister of Justice. The Centre itself assists in defining the research policy of the MoJ, assesses the need for expertise and information within the Ministry, determines how much and what kind of research is needed to answer policy-related questions, conducts research, and indicates the possible implications of research findings, among other things.

3.1.3 Conclusions

There are a number of reasons for the lack of a coherent justice sector policy.

²⁰ European Commission for the Efficiency of Justice, *European Judicial Systems 2002*, December 2004 (CEPEJ (2004) 30).

²¹ Available at www.oscebih.org under the Human Rights Department.

Firstly, there seems to be a general lack of understanding of the broad scope of the policy planning process. As noted, the workplans of the MoJs are simply a list of legislative measures to be undertaken within the forthcoming year and not a list of strategic objectives. DFID came to a similar conclusion in 2002, stating that the MoJs “face serious challenges in terms of defining their new role in the justice sector chain... [T]he MoJs do not know what they are supposed to do and what they do know, they are not able to plan and execute.”²²

As part of that problem, it is also not apparent that there are effective lines of communication with other ministries or institutions working in the justice sector, such as the police and social services, in order to develop a policy in respect of crime, for example.

Secondly, within the MoJs, there seems to be a limited number of staff dealing with justice sector issues and, as they are spread thinly across different departments, there is little co-ordination within the MoJs, no matter how small. In fact, there seems to be no apparent benefit in separating the policy and planning function into different sectors within one Ministry (judicial, minor offence, sanctions and public administration) and there may even be a benefit in combining them and separating out the operations aspects of each sector.

Because of staff shortages, most issues have to be dealt with as urgent. There is no time for comprehensive comparative research, or information gathering within BiH, although the lack of suitable research tools means that even if time were available, it is unlikely to be used for these purposes. While there is no escape from the need to develop their own research capacity, BiH could benefit from some of the programmes undertaken elsewhere, e.g. by participating in the CEPEJ project. Ongoing data collection, analysis and presentation are, therefore, important functions for both the MoJs and the HJPC. Ideally, proper research and policy-making capacity should be developed at the BiH level, and a research and documentation centre could be established within the BiH MoJ.

In addition, the benefits of practical experience brought to the reform process by external working groups, which can be considerable, is lost without the full back-up support of the Ministries. By contrast, the entity working groups on civil procedure and enforcement (appointed by the Ministers of Justice and including one staff member of the relevant Ministry), had the full support of the IJC. While the members met two or three times each month for day-long sessions to determine the main principles to be incorporated into the new laws, between sessions local lawyers employed by the IJC undertook the actual drafting in accordance with the principles agreed and to be discussed by the group. This was time-consuming and it could be roughly calculated that one IJC lawyer was engaged full-time on civil procedure and one on enforcement procedure for the eight months or so that the drafting process took. This level of effort has not been able to be provided by the MoJs.

It is partly because of these perceived weaknesses that the international community has taken so much of the lead in this field. Unfortunately, one result of this is that the MoJs have been able to take a more passive approach to their role. However, following the termination of the IJC’s mandate in March 2004, and with the expected end of the mandate of OHR at some stage in the medium term, the MoJs must be put into a position to carry out their policy making functions properly. Part

²² DFID/Danish Centre for Human Rights, *Making Justice Work – Scoping for Institutional Support to Ministries of Justice BiH*, October 2002, page 25.

of this, of course, is ensuring that the division of competences between the different levels of MoJ is properly defined, as discussed above.

A second aspect is legislative harmonisation. As noted, considerable effort was put into the development of new procedural laws, which are currently identical in each entity. It is imperative that they remain so and that the relevant laws of Brčko and at BiH level are harmonised with them. Oversight of this process falls to the BiH MoJ, which will need to increase its staffing in order to be able to fulfil that function properly.

3.1.4 Recommendations

In order to alleviate the difficulties outlined above we suggest that consideration should be given to the BiH Ministry taking the lead on justice sector policy making in general. A separate department within the Ministry could be established and this department would create legislation for the state level and proposals for the entity levels. The Entity MoJs could establish smaller policy making units which would coordinate with the MoJ department at BiH level. The harmonization of currently harmonized legislation could be maintained by establishing a harmonization commission with representatives from the BiH MoJ and the Entity MoJs.

The policy making functions of the cantons (such as they are) should be transferred from the cantons to the FBiH. The cantonal MoJs should be replaced with small Cantonal Offices for Legal Affairs established at a cantonal level.

A review of staffing levels in each MoJ for policy planning and drafting should be undertaken. This review should also consider the appropriate levels of skills and qualifications for each post. In general, we would expect to see an overall increase in staffing numbers in this regard. We also suggest that training on policy planning, research and legislative drafting should follow this review and that appropriate facilities (libraries, internet access, etc.) should be provided where necessary.

Key Recommendations – Justice Sector Policy Development

1. The BiH MoJ should take the lead on justice sector policy making and a special department should be established within the ministry for this purpose. A research and documentation centre should be established within this department.
2. Entity policy making departments should also be established. These units should be smaller than the unit at BiH level and their primary task should be liaison with the BiH Department.
3. A Harmonisation Committee for justice sector legislation should be established with representatives from the BiH and Entity MoJs.
4. Cantonal MoJs should be suppressed and replaced by Cantonal Offices for Legal Affairs and any policy making functions should be transferred to the FBiH level.
5. A review of staffing levels and resources should be undertaken particularly at the BiH level and training on policy planning should be provided.

Subsection 3.2– Structure of the Judiciary and Prosecutorial System

Regulating the structure of the judiciary and prosecutorial system is one of the responsibilities of the MoJs. The local distribution of courts and prosecutors' offices and their horizontal and vertical structures influence their output and, to some extent, their ability to operate independently. This section considers the structure of the court system, the numbers of courts and the structure of the prosecutorial system.

3.2.1 Structure of the Court System

3.2.1.1 *General*

The judicial system in BiH is largely the product of the legal traditions of the Austro-Hungarian Empire and the SFRY. As a republic within the latter, BiH had its own Constitutional Court, Supreme Court and two tiers of lower courts, as well as minor offence courts. Prosecutors' offices were established at the level of each regular court (but not Constitutional or Minor Offence Courts). While the basic structure of the court and prosecutorial systems was retained after the war, the new political framework rendered it considerably more complex.

Oversight of the structure of the court system and the preparation of legislation in this regard is the responsibility of the MoJs. While the various constitutions have some basic provisions regarding the structure of the court systems, these are usually amplified by legislation. Prosecutors' offices and minor offence courts are not provided for in the constitutions.²³

Constitutional Courts

BiH has three Constitutional Courts – that of BiH, of the Federation and of the RS. Each is established under the relevant Constitution.

Regular Court system

The division of the country into different political units fragmented the court system, although the three-tier system was retained in each entity. There are now basically four court systems dealing with civil, criminal and administrative cases – that at BiH level, those of the two entities and that of Brčko District.

Apart from Minor Offence Courts, BiH has no specialised courts. Administrative and labour courts, which existed before the war, were abolished several years ago.

BiH level

Apart from the Constitutional Court, there is only one court at BiH-level. This court is not provided for in the BiH Constitution but was legislated for in 2000 and finally established in 2003. Its jurisdiction is limited to particular criminal cases including war crimes, administrative jurisdiction over decisions of BiH level bodies and third instance appeals from Brčko.

²³ Except in Chapter X of the RS Constitution

Federation level

Under the Federation Constitution of 1994, the three-tier court system was retained, but the two lower tiers, now known as Cantonal and Municipal Courts, were put under the jurisdiction of the cantons. There is now only one regular court falling under Federation authority – the Federation Supreme Court. If the Law on Courts does come into effect the Law on the Supreme Court of the FBiH will be repealed.²⁴

Under the Federation Constitution, each canton is required to have its own Cantonal Court with original jurisdiction and appellate jurisdiction over decisions of Municipal Courts. The latter are the general first instance courts and can be established for one or more municipalities. The location and jurisdiction of the Cantonal and Municipal Courts are currently determined by cantonal legislation. Following an amendment to the Federation Constitution in 2004, however, regulation of these issues will now be determined by Federation-level legislation and so falls to the Federation MoJ to deal with. Moving this competence from the cantons was an important step forward in ensuring a rational development of the court structure in the future. In practice, Municipal Courts have all first instance jurisdiction, except over the most serious criminal cases.

RS level

The RS court system is essentially the same as that in the Federation except that, without the further sub-division of the entity into cantons, the RS regulates the entire regular court system in one piece of legislation and through one MoJ.

Brčko

Post-war international arbitration resulted in the creation of the independent Brčko District in 1999, a multi-ethnic enclave that does not fall within the jurisdiction of either entity. It has its own court system – a Basic Court with all first instance jurisdiction (including minor offences) and an Appellate Court. The Court of BiH is the court of last resort for cases from Brčko.

Brčko has no MoJ and the drafting of legislation related to the organisation and operation of the courts is the responsibility of the Brčko Judicial Commission.

Minor Offence Courts

As their name suggests, the role of the Minor Offence Courts is solely to deal with petty penal cases. They are not referred to in any of the Constitutions. There are no minor offence courts at the BiH level or in Brčko and nor at the Federation level. As for the regular courts, they are governed by one law in the RS and by ten cantonal laws in the Federation.

3.2.1.2 Benchmarking

The Netherlands has one of the most modern and rationalised judiciaries in Europe and therefore makes an interesting comparison, although it must be noted that as it does not have a federal

²⁴ OG 2/95, 3/99, 20/01 & 44/01

structure it is able to create a simpler system than BiH. It has three levels of courts: district courts (including subdistrict courts) deal with all cases in the first instance, courts of appeal in the second instance, and the Supreme Court in the third and highest instance.

Other smaller countries, such as Denmark, Norway and Sweden, have a similarly simple system of general jurisdiction, while larger countries such as Germany and France have a more complex structure with first instance jurisdiction residing at several levels of regular court. Lithuania is an example of a country that, like BiH, reserves some limited first instance jurisdiction for a higher level of court, while giving most to the lowest tier.

The Netherlands is also an exception in that almost every country in Europe has some form of specialist courts. Sweden has a large administrative court system. Denmark has a specialist maritime and commercial court. Other countries have separate courts to deal with administrative, commercial, tax, land, labour, social security and insurance cases or cases against juveniles, among others. Greece also has a system of minor offence courts.

3.2.1.3 *Conclusions*

By and large, BiH follows the pattern common to many smaller countries of having a three-tier court system in which all but the most serious cases are dealt with by the lowest courts. Given the recent history of BiH and the vestiges of executive influence over the judiciary, removing serious criminal cases from their local area to the Cantonal and District Courts has been considered important in BiH in order to ensure the independence of the process as well as the appearance of independence. Further “simplification” of the system by putting all first instance jurisdiction in the Municipal and Basic Courts would therefore be a step in the wrong direction, at least in the immediate future. Consideration could be given to bringing the jurisdiction of the Brčko courts into line with that in the entities, although as the territorial jurisdiction of the two Brčko courts is identical, the independence arguments for putting serious cases in the higher court do not apply.

3.2.2 **Numbers of courts**

3.2.2.1 *Restructuring process*

The post-war period saw a significant increase in the number of regular courts in BiH, especially in the Federation. While some were necessary for constitutional reasons, such as the ten Cantonal Courts, others were clearly created for political reasons rather than objective necessity.

Beginning in 2002 and led by the IJC, a comprehensive restructuring of the regular courts took place as part of an overall judicial reform strategy designed to increase judicial independence and to create more financial stability for the judiciary. As part of this process, the number of first instance courts was reduced, as was the number of judicial posts within all levels of the court system, following which all judges were required to reapply for their posts in an open competition. Because of the IJC’s time and resources constraints, Minor Offence Courts were not included in this process.

Restructuring was expected to create a more efficient and independent judiciary by eliminating some of the smallest courts. Larger courts would allow for better management (for example in dealing with absences or recusals) and give judges a chance to specialise. Removing courts from the small towns where participants in the court processes often knew each other personally would lead

to greater independence and the appearance of it. Ultimately, the process was also expected to lead to cost savings, which would be ploughed back into the judiciary and would thus alleviate some of the problems caused by perennially low budgets. At the same time, care had to be taken to ensure that no undue hardship was caused to the public in getting access to their local court, particularly given the general reluctance of parties and witnesses to attend when summoned.

Planning for and implementation of the restructuring process were conducted by the IJC with considerable local input, especially from the MoJs and court presidents. Clear criteria were set out by which the number and location of courts would be determined. These included caseload, distance between courts and local population.²⁵ By and large, these criteria were agreed to by MoJs and other governmental authorities, even if their application in one or two cases was not. Implementation took place on the appointment of judges to the new courts under the reappointment process and was completed in mid-2004.

As a result of the process, the number of first instance courts in the entities was reduced from 78 to 47 with six court branches. This is a reduction of 41%, or 33% if the branches are counted separately. Reduction in the number of Cantonal Courts would have required constitutional amendment to enable inter-Cantonal courts to be created and so was not undertaken as part of the project. Given the unusual shape of the RS, the number of District Courts was not reduced either, in order to ensure that parties had adequate access to those courts.

As noted, Minor Offence Courts were not part of the restructuring process. However, a project, under the sponsorship of the HJPC and funded by the EC entitled “Restructuring of the Minor Offence Courts” is currently underway. Following the statement made by the High Representative at the conference on judicial reform in November, 2004 that the minor offence courts should be made departments of the regular courts and, in addition, given the fact that such a reorganisation would lead to compliance by BiH with European standards in terms of numbers of first instance courts, the project team is currently assessing the logistics and viability of merger. In particular, a merger would lead to financial efficiencies and it would also be easier to implement more global strategies in relation to the courts in particular in the area of computerisation and court administration in general. Finally, the judicial sector would be linked into one system with standardisation in terms of selection of judges, tracking of work results and uniform disciplinary procedures. These advantages, particularly those in relation to costs, cannot be easily ignored.

Under the Law on Courts in the RS (adopted in December, 2004) and the draft Law on Courts in the Federation (in legislative procedure), some of the slight differences between the jurisdiction of different levels of court will be removed as between the Entities. The Federation law will, if adopted, replace the current cantonal laws on courts in respect of the geographical location of the Cantonal and Municipal Courts.

3.2.2.2 *Current numbers of courts*

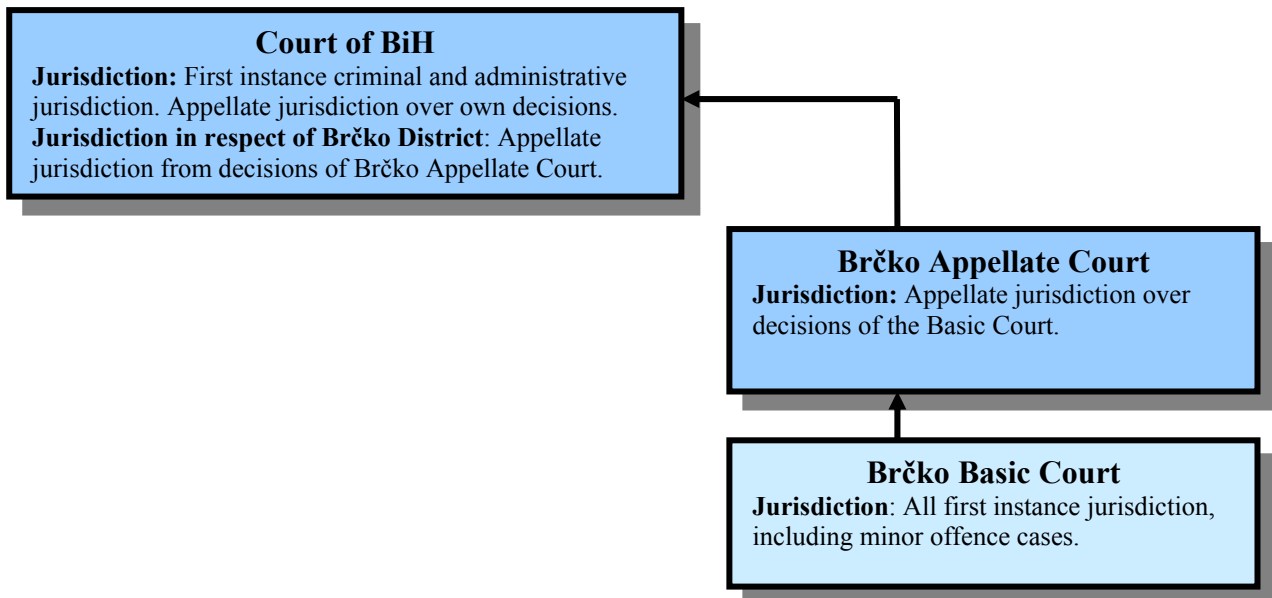
²⁵ Courts with a caseload index of less than 3.0 were presumed too small, while greater than 5.5 was considered large enough. Courts serving communities of less than 35,000 were considered for closure and more than 55,000 presumed large enough to warrant their existence. A distance of 45 km from the next court was considered enough to warrant a court, while 20km or less was too close. Some courts met all criteria, some none, and some balancing was required for those courts that fell into the grey areas.

Following the regular court restructuring process, the total number of courts in BiH (excluding Constitutional Courts) is now 189:

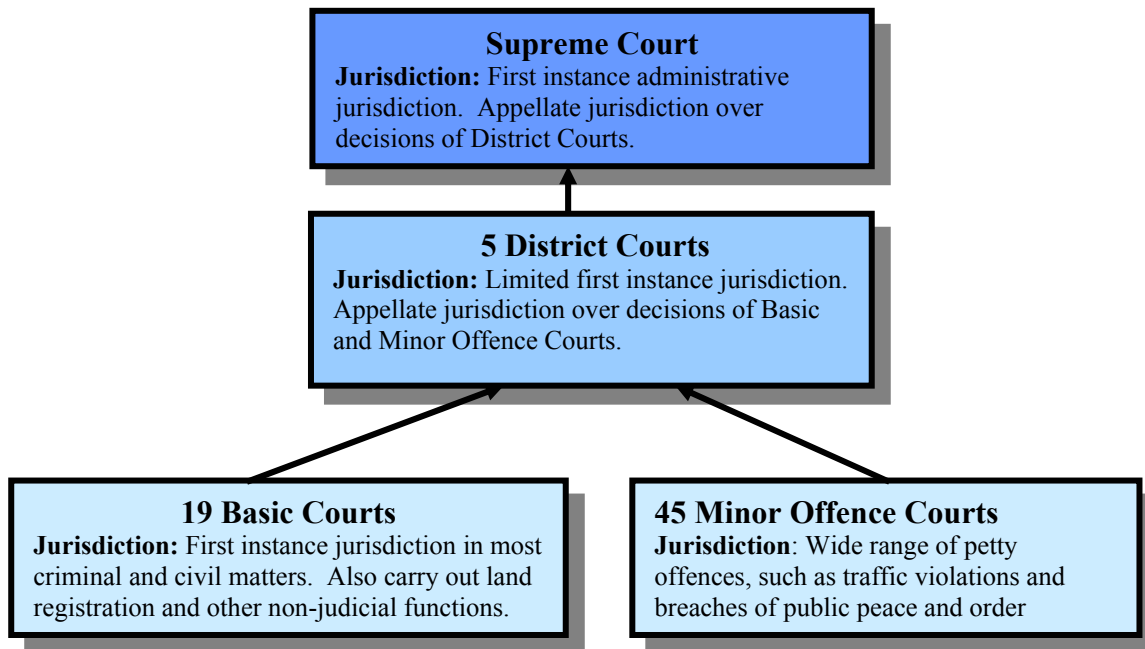
- First instance (including the Municipal and Basic Courts in the Federation, RS and Brčko and the Court of BiH) 49
- Second instance (including the Cantonal and District Courts and the Brčko Appellate Court) 16
- Third instance 2
- Municipal Minor Offence Courts 116
- Cantonal Minor Offence Courts 6

A diagram follows of the court structure in BiH which shows the jurisdiction of the courts at each level.

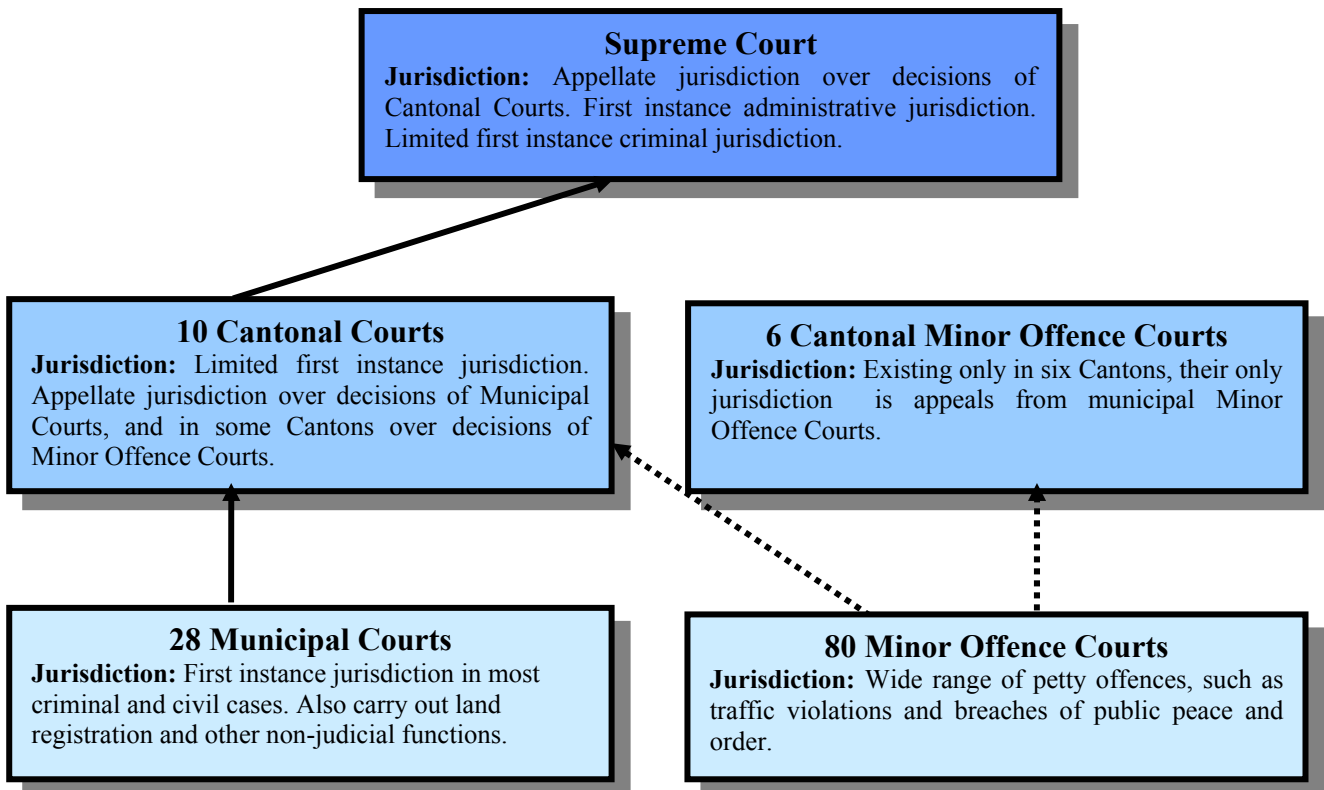
BiH level and Brcko



Republika Srpska



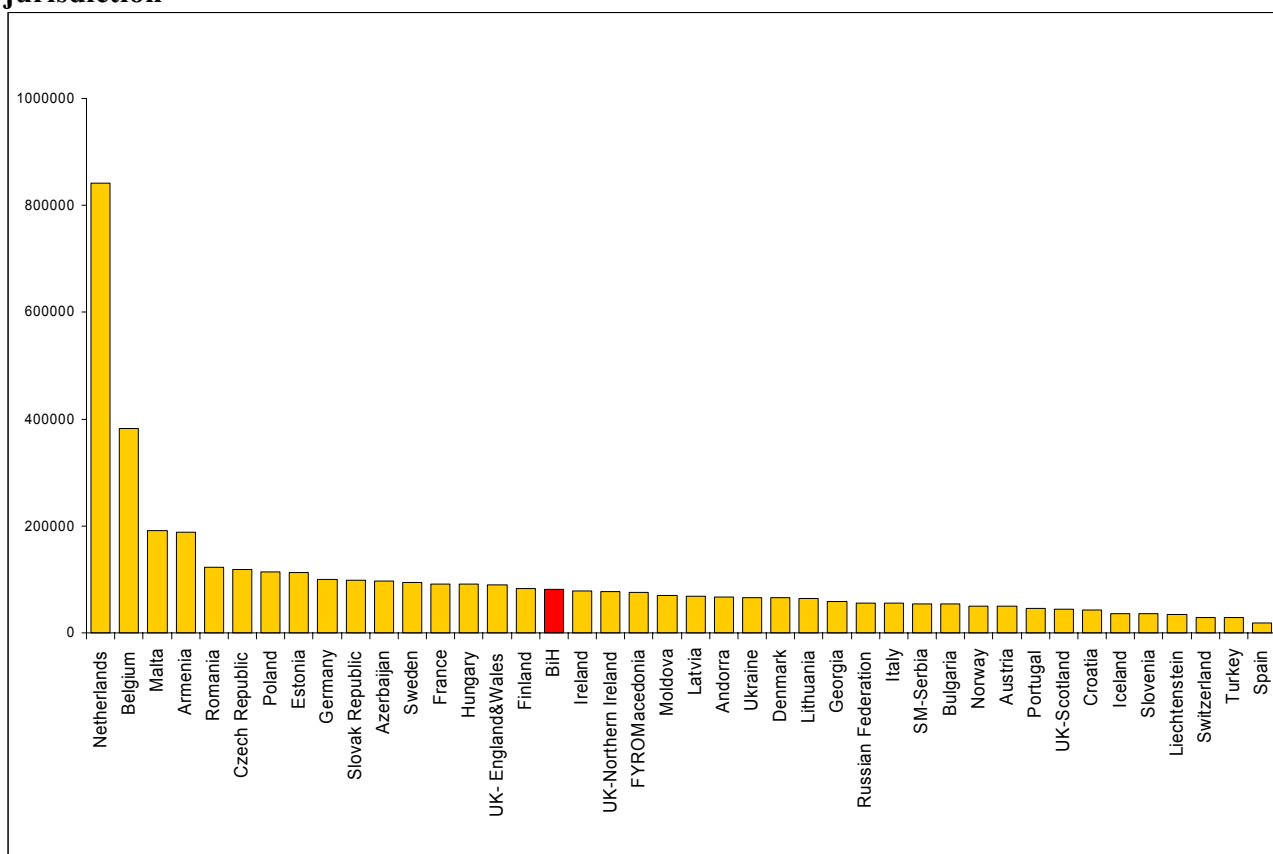
Federation



3.2.2.3 Benchmarking

BiH has 49 first instance courts of general jurisdiction serving a population of 4 million inhabitants, which gives 12.25 courts per million inhabitants. In most European countries, the number of such courts is in the range of 10 to 25, so BiH is at the low end of this range. The average number of inhabitants served by one general jurisdiction court ranges from 18,600 in Spain to 842,000 in the Netherlands. In BiH, it is 81,633, which, as can be seen below, is in keeping with many European countries.

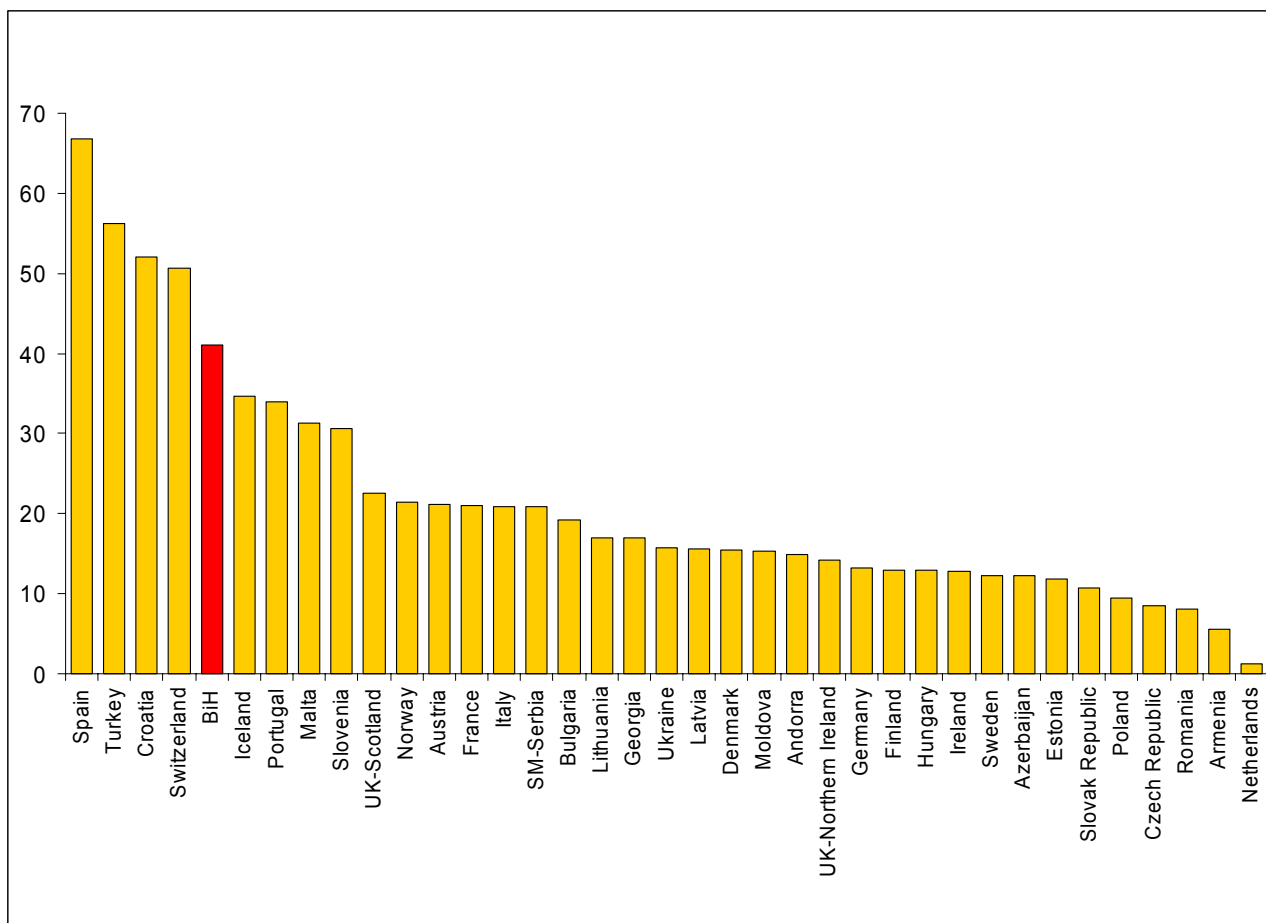
Table showing the average number of inhabitants served by a first instance court of general jurisdiction²⁶



The BiH figures are less favourable when the total number of first instance courts (general and specialised) is considered. Including all first instance Minor Offence Courts, BiH has 165 first instance courts, which gives 41 courts per million inhabitants. Compared with other European countries, this is high, with most countries having between fifteen and 22 such courts per million. If the Minor Offence Courts are merged with the regular courts then this should bring BiH within a more acceptable range.

²⁶ This table, together with the following table, has been reproduced (in large part, apart from the inclusion of BiH) from page 25 of *European Judicial Systems 2002 – Facts and Figures on the basis of a survey conducted in 40 Council of Europe Member States*, European Commission for the Efficiency of Justice (CEPEJ), Strasbourg 10 December, 2004.

Table showing the number of first instance courts, general and specialised per 1,000,000 inhabitants



3.2.2.4 Conclusions

While it can be seen that BiH currently has a relatively high proportion of courts to population, this will reduce significantly if the Minor Offence Courts are merged with the regular courts.

Given the complicated political structure of the country, in which some political units have a very small population but are still required to maintain two levels of court, BiH will be unable to reduce the size of the court system to the levels achieved by countries such as the Netherlands with a non-federal structure. However, given the relatively high number of very small courts in the Federation because of the cantonal structure, the next step in restructuring could be to allow inter-cantonal courts at both municipal and cantonal level, particularly the latter.

3.2.3 The Prosecutorial system

3.2.3.1 General overview

Until recently, following the tradition of the former SFRY, there was one prosecutor's office for every regular court. (There have never been prosecutors for Constitutional or Minor Offence Courts.) Regulating the structure of the system and the establishment and operation of the

prosecutorial offices is the responsibility of the BiH, entity and cantonal MoJs and the Judicial Commission in Brčko. This is done by way of legislation.

On establishment of the judicial system of Brčko District in 2000, one prosecutors' office was created to serve both levels of court. A similar path was followed in the entities on restructuring of their prosecutorial systems in 2002 (at the same time as that of the courts) and the lowest level of prosecutorial offices (those of Municipal and Basic Prosecutors) was abolished. Reducing the number of these offices (while increasing the size of those that remained) must have been seen as an important part of creating a more independent and more efficient prosecutorial system. Many of the former municipal and basic prosecutors' offices had only one or two prosecutors, which must have led to administrative inefficiency and problems for prosecutors in being in several different courts at one time.

There are thus now only nineteen prosecutors' offices in BiH (ten Cantonal Prosecutors' Offices, five District Offices, one at the level of each entity, one in Brčko and one at BiH level).

3.2.3.2 *Benchmarking*

Country	Number of Prosecutors' Offices	Number of Prosecutors' Offices per 100,000 inhabitants	Country size (km ²)	Number of Prosecutors' Offices per 10 km ²
<i>BiH</i>	19	0.48 (4 million inhabitants)	51,130	3.72
<i>The Netherlands</i>	20 ²⁷	0.12 (16.32 million inhabitants)	41,530	3.72
<i>Germany</i>	146 ²⁸	0.18 (82.44 million inhabitants)	357,020	4.82
<i>Belgium</i>	37 ²⁹	0.36 (1.31 million inhabitants)	30,530	12.12

As can be seen, the BiH ratio in terms of population is about 2.5 times higher than Germany and four times higher than the Netherlands, although it is similar in terms of geography. The high ratio of prosecutors' offices to population in Belgium is caused by the different system of prosecution where most of the lower level prosecution is affiliated to the police.

3.2.4 **Recommendations**

With respect to the responsibilities of the different MoJs for determination of the structure of the judiciary in the future, no changes are recommended although obviously should the funding of the judiciary become a BiH-level responsibility in the future, a mechanism for co-ordinating policy and budget considerations (in changing the structure of the system or the number of courts) as between the entity and BiH MoJs will need to be determined. It might also be appropriate even at this stage to introduce a mechanism whereby the consent of the state would be necessary in order to change the Entity Court Structure.

²⁷ The number includes 19 district offices plus the Board of Procurators General.

²⁸ Not including branch offices.

²⁹ This includes the 27 Police Prosecutors' Offices (Parquets de Police).

While the current number of regular courts can be justified, no increase could be recommended unless conditions, such as population or caseload, changed significantly, and perhaps not even then. Given the recent substantial changes at the lowest court level, it is desirable in principle to allow the system to settle for some time before undertaking any new evaluation. If consideration is given to a further streamlining of the court system in the near future attention should be given to the recommendations of the Venice Commission³⁰ in relation to the optimal future territorial organisation of BiH. Any changes in the territorial organisation of BiH may lead to the inevitable conclusion that there is a need for less courts and possibly that inter-cantonal courts at both municipal and cantonal level should be created.

In relation to the prosecutors again given the recent substantial changes, it would be desirable to allow the system to settle for some time before undertaking any new evaluation. The distribution of offices throughout the country is linked to the police jurisdiction and changes should not be made without regard to the results of the Functional Review of the Police Forces and the Police Restructuring Commission (this is also applicable to any proposed changes in the court structure). The independence of prosecutors is quite a good system and in line with European best practice and therefore no particular recommendations are made in this regard. However, as mentioned earlier in relation to the courts, if the territorial organisation of BiH is changed then consideration should be given to a restructuring of the system dependant on the changes which are made.

Finally, the advantages of merging the Minor Offence Courts with the regular courts cannot be ignored. It would lead to efficiencies both in terms of cost and of time and it would make it easier for strategies in relation to the courts, for example in the area of computerisation and court administration, to be introduced.

Key Recommendations – Structure of the Judiciary and Prosecutorial Systems

1. Minor Offence Courts should be established as departments of the regular first instance courts.
2. . In principal no further structural changes should be made to the court or prosecution services systems so as to allow the effects of the recent restructuring process to be allowed to settle. However, the structure should be responsive to external change and should be particularly so in light of any changes in the territorial organisation of BiH. At some stage consideration could be given to the creation of inter-cantonal courts. In addition, any structural changes which are proposed should have regard to the results and recommendations of the Functional Review of the Police Forces and the Police Restructuring Commission.
4. Following a decision to finance the entire judiciary and prosecution at the level of BiH (discussed in detail at subsection 3.3) mechanisms should be put in place to make sure that any structural changes are agreed to at the level of BiH as the cost implications of such decisions will need to be assessed and evaluated at the level at which the courts and POs are financed. Such a mechanism could also be used to make sure that there is consistency in the court structures of the two entities.
5. Consideration could be given to bringing the jurisdiction of the Brčko courts into line with that of the

³⁰ See *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, European Commission for Democracy through Law, CDL-AD(2005) 004

entities.

Subsection 3.3– Finance, Budgeting, Execution of Budget

As part of their general responsibilities in respect of the administration of the courts and prosecutors' offices, most MoJs are involved in the preparation of the budgets of those institutions, a role which is shared with the HJPC. In recent times the input by the MoJs has been reduced and this will be explained further below.

Budget preparation and development is a significant responsibility as the judicial and prosecutorial systems can only operate effectively if properly funded, and it is important that the processes by which that responsibility is undertaken do not compromise judicial independence. It is also important that budgets are well thought out so that each budget item required, together with the amount of such an item, can be backed up and substantiated. It is only in these circumstances that it will be possible for the courts and prosecutors' offices to have the chance of receiving the amounts requested. In the following analysis we outline the processes and procedures which have developed in the area of budget preparation and explain the role undertaken by the IJC (and later the HJPC) in the process. We also explain the difficulties which are encountered as a result of the fragmentation of the system between a variety of levels of government and assess the benefits of the transfer of functions to one funding authority.

Execution of all budgets is now the role of the Treasury Departments within each Ministry of Finance, as part of the Single Treasury Account system introduced at all government levels over the last three years, although the MoJs retain some responsibility in that regard. In the course of the following analysis we foresee possible problems with the processes which govern the execution of the budget and we suggest amendments to the current procedures.

We have divided the system of institutional budgeting in different aspects and we deal with them separately in this subsection, as follows:

- a. The amount of courts and prosecutors' offices budgets
- b. The process of annual budget preparation and adoption
- c. Centralised Funding Authority for Courts and Prosecutors' Offices
- d. Budget execution

3.3.1 Amount of court and prosecutors' offices budgets

3.3.1.1 Judicial and prosecutorial budgets

Actual amounts

The amounts budgeted for the judiciary and prosecution services (not including minor offence courts) in 2003 was 121 million KM and for 2004 was 150 million KM. It should be noted that there were several reasons for the rise in budgets in 2004. One was the necessity to budget for the short-term expenses arising from restructuring, in particular redundancy payments. One was the continuing increase of judicial and prosecutorial salaries (as discussed below) and the third was budgets finally reflected the actual costs of the courts and prosecutors' office much more accurately than they had in the past. We will explain the reasons for this later in this subsection of the report.

We outline below a breakdown of the budgets adopted by the courts and prosecutors' offices at various levels both in 2003 and 2004.

Budget figures for the entire judiciary for 2003

Institution	Budget 2003
BiH Constitutional Court	2,357,088
Court of BiH	2,989,346
BiH Prosecutor	2,000,038
Total state level	7,346,472
RS Constitutional Court	872,300
RS Supreme Court	989,600
RS Prosecutor	433,700
RS District Courts	4,251,000
RS District Prosecutors	5,023,215
RS Basic Courts	16,621,500
Total RS	28,191,315
Federation Constitutional Court	954,310
Federation Supreme Court	3,822,970
Federation Prosecutor	1,107,750
Cantonal Courts	18,043,886
Cantonal Prosecutors	16,283,332
Municipal Courts	45,209,605
Total Federation	85,421,853
Grand total BiH	120,959,640

Budget figures for the entire judiciary for 2004

Institution	Budget 2004
BiH Constitutional Court	3,449,800
Court of BiH	3,274,640
BiH Prosecutor	2,558,022
Total state level	9,282,462
RS Constitutional Court	1,277,860
RS Supreme Court	1,556,490
RS Prosecutor	919,850
RS District Courts	5,450,670
RS District Prosecutors	12,442,850
RS Basic Courts	21,779,780
Total RS	43,427,500
Federation Constitutional Court	1,480,990
Federation Supreme Court	4,445,070
Federation Prosecutor	1,698,660
Cantonal Courts	19,814,390
Cantonal Prosecutors	19,636,672
Municipal Courts	50,030,271
Total Federation	97,106,053
Grand total BiH	149,816,015

As at the end of January 2005, the following data on court³¹ budgets had been collected and collated for 2005.

62 first and second instance Courts in FBH and RS	Adopted Budget 2003 in KM	Adopted Budget 2004 in KM	HJPC 2005 Budget Proposal excluding debts	2005 Budget as adopted or proposed
Canton 1	7,483,250	7,360,970	7,902,800	6,525,235
Canton 2	2,347,010	1,320,740	1,501,950	1,356,130*
Canton 3	12,525,200	12,431,400	11,620,300	11,747,100
Canton 4	8,441,600	10,765,315	10,350,380	8,968,290*
Canton 5	877,529	945,300	1,225,550	947,709
Canton 6	6,044,562	7,080,671	5,947,091	6,519,651*
Canton 7	7,228,650	7,409,000	6,794,950	5,798,000*
Canton 8	2,463,700	2,545,800	1,985,700	2,010,100
Canton 9	14,411,140	18,051,396	17,643,700	18,839,000
Canton 10	1,420,350	1,934,069	1,807,700	1,913,301
Republika Srpska	20,872,500	27,230,450	24,917,386	25,945,811
TOTAL	84,125,491	97,075,111	91,697,507	89,430,336

* Proposed

³¹ The table does not include prosecutors offices.

As can be seen from the table it is anticipated that the allocation of funds to courts will be reduced by 7% from 2004 to 2005.

It should also be noted that the figures above do not include payment of accumulated debts. The HJPC proposed a total budget of 111,380,678KM for all of the above courts if debts are to be included. If this is taken into account the under funding for 2005 amounts to approximately 22 million KM.

With some very limited exceptions, the level of funding for the courts is inadequate and a significant impediment to judicial efficiency. Some courts do not have sufficient funding to pay for basic services such as electricity, heating, telephones or postage, and these services are frequently cut off for failure to pay the bills. Lack of funding to pay for expert witnesses or court appointed defence counsel makes it difficult for courts to retain their services or ensure their attendance at court hearings. As mentioned above, many courts have accumulated substantial debts as a result of the allocation of inadequate funds for basic services in the past.

Another significant impact of the lack of funds is that a very limited number of reserve judges will be hired in 2005 to handle the backlog of cases at many courts. It is not possible or financially sustainable to hire reserve judges in courts which already have accumulated debts and which lack funds to operate with their regular number of judges.

Whilst hardly over-funded, in general, prosecutors' offices have not suffered from under-funding to the same extent as the courts and have also been more likely to have their budgets increased. It is also noticeable that the financial position of higher courts is usually better than that of the lower courts.

Judicial and prosecutorial salaries

One reason that such high debts accumulated is the high salaries of judges and prosecutors. As part of a package aimed at increasing the independence of the judiciary, legislation was enacted in 2000 that increased the salaries of judges and prosecutors significantly. The average basic salary for first instance judges and prosecutors in the RS increased from 400 to 1,800 KM per month and in the Federation from 1,000 to 2,000 KM per month.

Rather than increasing the total budgets to take account of the salary increases, funds to pay the higher salaries were taken from other budget lines of the courts and prosecutors' offices, meaning that the funds available for operational expenses decreased, and debts began to accrue. In the meantime, the highly paid judges and prosecutors cannot do their job efficiently because there has been no investment in premises, services or modern technology (in particular IT).

The basis for calculation of the judicial salaries is a recent net average salary in the relevant entity, which is multiplied by a specified amount according to the instance at which the judge works. This gives a base salary, which is then increased by different percentages to compensate for not being able to undertake additional employment, years of work experience and the holding of management positions. Judicial and prosecutorial salaries, therefore, increase at a significantly higher rate than the average salary and will continue to do so. In the Federation, they rose by 37% and in the RS by

42% between 2000 and 2004, while inflation was almost nil. Salaries (including those of support staff) currently absorb an average of 85% of the total judicial and prosecutorial budgets.

In early 2004, the IJC and OHR drafted legislation to change the method by which judicial salaries were calculated to prevent their constant increase at a rate faster than inflation. As yet, these laws have not been enacted and opposition can be expected. The recent reductions in the size of the judiciary arising from restructuring, coupled with these planned reforms to the salary system, should result in a healthier budgetary situation where (assuming that the total level of funding remains the same) less than 70% of the total budget would be required for salaries and benefits.

In late 2004 the High Representative imposed laws amending the legislation on judicial salaries so as to freeze the basis for calculation of judicial salaries at net average salary levels as at December 2003 in the Federation and as at November, 2004 in the RS. This intervention by the High Representative has the effect of maintaining the status quo until such time as the draft laws, referred to above, have been considered and implemented. In January, 2005 following the freeze of salaries, the High Representative initiated the establishment of a working group consisting of representatives from the HJPC, the BiH and Entity Ministries of Justice and judges and prosecutors from both Entities. This working group has been tasked with coming up with a proposal to regulate judges' and prosecutors' salaries in the future. The deadline for the preparation of this draft proposal is 30 April, 2005.

Minor Offence Courts

The material conditions of the Minor Offence Courts are similar, if not worse, than those of the regular courts and they suffer from the same problems in terms of lack of basic services. However, Minor Offence Court judges did not receive the salary increases of regular court judges in 2000. Their salary levels vary considerably throughout the country, ranging from around 580 KM per month to around 2,000 KM (although most are at the lower end of this scale).

The Minor Offence Courts are currently in the course of a restructuring process. The financial implications of this reform have not been fully outlined as of yet. It is expected that the Minor Offence Court judges will also be part of a reappointment process and that, if selected, may be entitled to a gradual increase in the level of their salaries. The actual level of these salaries has not been decided upon as of yet but this should not result in significantly increased costs as the number of judges will be reduced. In the long term the reform should bring efficiencies. The restructured system with a more efficient procedure for dealing with minor offence cases should also mean that significantly more income will be generated through the imposition of fines.

3.3.2 The process of annual budget preparation and adoption

The process of annual budget preparation has changed quite dramatically in recent years since the IJC began to take an active role in assisting some of the courts in preparing draft budgets for submission to their respective Ministries of Justice. The participation by the IJC meant that an accurate financial picture of the requirements of the courts has been developed and more realistic and well-thought-out figures can, therefore, be submitted by the MoJs to their respective Ministries of Finance/parliaments.

Below we outline the manner in which court and prosecutors' offices budgets were prepared prior to 2003 and the reasons behind the intervention by the IJC in 2003 in relation to court budgets. We also outline the new powers granted to the HJPC under the Law on the HJPC, the Law on Courts in the RS and the draft Law on Courts in the Federation (in legislative process). We highlight the successes achieved by the IJC as a result of its intervention in the budgeting process in 2003. We also outline the successes achieved by the HJPC since it took over from the IJC early last year. Finally, we explain why the legislation, as currently drafted, produces the best results for the judiciary in terms of securing their financing requirements.

3.3.2.1 Budget process for courts and prosecutors' offices

Role of courts and prosecutors' offices and MoJs prior to the intervention by the IJC

Prior to the intervention of the IJC the process by which the budgets of courts and prosecutors' offices were developed was fairly standard. Each institution prepared its own budget request for the following year, usually (in accordance with instructions from the Ministry of Finance) on the basis of the current year's allocated budget, whether or not it bore any relation to the actual or anticipated needs. Courts and prosecutors' offices took a very passive approach to the process, not bothering to provide any written explanation or justification of their requests, even if they included a new line of expenditure. Once the budget proposal was submitted to the relevant institution, courts and prosecutors' offices almost invariably had no further input in the process and did not seek such input, even where their proposal was substantially cut.

For the most part courts and prosecutors' offices submitted their budget proposals to the relevant MoJ with some exceptions. For example, the Federation-level institutions submitted their budgets to the Supreme Court, which in turn submitted them to the Ministry of Finance, and the MoJ was not involved. Determination of the budgets of the courts and prosecutor's office in Brčko was the responsibility of the Brčko Judicial Commission. The budget of the Constitutional Court of BiH was developed by the President of the Court and the Registrar and was submitted by the Court to the Ministry of Finance directly.

MoJs did not have any obligation to support the amount of funds requested by a court or prosecutor's office and frequently reduced it before submitting the proposal to the Ministry of Finance. The Ministries of Finance routinely reduced the court budget proposals further without inquiry, sometimes even deleting entire line items from them (even if they involved costs imposed upon the courts by new legislation). Once the budget proposals were submitted to the Ministry of Finance, there was no further opportunity in the process for input from the courts or prosecutors' offices.

Intervention by the IJC in 2003

In 2003 the IJC produced two reports on court budgeting in each of the entities, as follows:

- *Court Budgeting and Court Funding: Assessment and Recommendations: Republika Srpska 2003*
- *Court Budgeting and Court Funding: Assessment and Recommendations: Federation, 2003.*

The reports concluded that if the courts participated at all in the process of budget development, they tended to participate only in the initial phase and their role was rather formal. Even if the courts entered into negotiations with the Ministry of Justice, it was found that their involvement in the budget process ended once they had submitted the budget request form to the Ministry. The report concluded that written explanations justifying the budgets were completed by the courts only in very rare cases and that, hence, the courts did not explain any changes or additions to the budgets. Most of the courts were instructed to base their budget projections for the next year on the actual expenditure for the previous year and there was little room for factoring in expected changes that would most likely result in increased costs.

In relation to the development and preparation stage of the budget and the participation of the MoJ, the reports concluded that there was a poor understanding by the MoJs of the courts and that there was no convincing analysis completed by the MoJs in order to determine the realistic needs of the various courts based on the influx of cases, the number of square meters occupied, etc. The Report also concluded that there was a lack of staff and poor skills of existing staff within the MoJ to analyse and develop court budgets. Finally, it was also concluded in the reports, in relation to the participation by the Ministries of Justice, that there was a poor use of IT equipment by the Ministry in the process of budget development. These conclusions were confirmed during the interview process which was part of the production of this functional review. Although these interviews were conducted in early 2004 the full effects of the intervention by the IJC had not been realised at that stage. In particular, it was found that MoJs had not developed any analysis of appropriate levels of funding per case, per judge, per head of population etc. or what an efficient court or prosecutor's office is in budgetary terms. It was also found that the MoJs had not developed a relationship with each court or prosecutor's office to understand its particular needs, to enable them to lobby actively on its behalf.

As a result of these reports the IJC began to get involved in assisting the courts in preparing and developing budgets. It was involved in preparing a budget re-balance for each first and second instance court throughout the country in 2003 and it was involved in developing the budget for all of those courts for 2004. In 2003 the adopted budgets for all first and second instance courts throughout the country was 84,125,491 KM. The IJC estimated that the budget for 2004 should amount to 104,656,635 and the budget actually adopted amounted to 97,075,111 which is a 15% increase on the budget adopted in 2003. Whilst some of the increase can be attributed to the intervention of the international community which lobbied extensively to have the budget increased so as to carry the costs associated with the restructuring process, the IJC played no small part in making sure that the courts were given a budget which was more in line with their actual needs. For the first time, the parliaments at all levels knew the actual requirements of the courts. They were presented with detailed and accurate data and, on the basis of this data, they were able to make informed choices about funding the various institutions involved in maintaining the rule of law in BiH.

Role of HJPC

Preparation and Development of court budgets

The OHR included provisions in the HJPC Laws of 2002 to give the HJPCs powers in respect of the court budget process. The role of the single HJPC in budget preparation and development was

expanded upon in the Law on the single HJPC adopted in 2004 and the Law on Courts adopted in the RS last year. Article 17, items 14 to 18 of the HJPC Law provides the following authorities/responsibilities for the HJPC with respect to courts and prosecutors' offices budgets:

- *“Participating, at the Council’s discretion in the drafting process of annual budgets of the courts and prosecutors’ offices”* (item 14)
- *“Making recommendations upon, at the Council’s discretion, the annual budget proposals made by governmental bodies and/or governments for courts and prosecutors’ offices”* (item 15)
- *“Making and presenting recommendations, at the Council’s discretion, for amendments to the proposed budgets made by governmental bodies and/or governmentsbefore the relevant legislative bodies”* (item 16)
- *“Collecting and analysing reports and relevant budget and revenue data for courts and prosecutors’ offices in order to provide statistical data for the effective operation of courts and prosecutors’ offices”* (item 17)
- *“Advocating for adequate and continuous funding of courts and prosecutors’ offices in BiH”* (item 18)

As can be seen the HJPC has significant responsibility with respect to the preparation of budgets for courts and prosecutors' offices. The HJPC will interact with both the courts and prosecutors' offices in relation to the preparation of their budgets as well as with the Ministries of Justice/Finance and parliaments. The interaction between the HJPC, the ministries and the parliaments is described in more detail in the new Law on Courts in the RS.

Article 68 of the RS Law on Courts provides that each court is to submit its budget proposal to the HJPC for comment. After having considered the comments of the HJPC and made any appropriate revision to the budget proposal (or following the expiry of 30 days) the courts can then submit their budget proposals to the Ministry of Justice together with the comments of the HJPC.

At the end of 2004 the HJPC assisted in the preparation of draft budgets for each of the first and second instance courts throughout the country for 2005. In addition to preparing budgets it also monitors the proportion of the draft budget which is actually adopted. It has also collected and collated data on the needs of each of the courts, on their accumulated debt and on future plans for investment. As a result of the collection and compilation of this information the HJPC was able to present an accurate picture of the requirements of the courts and the collected data was compelling in terms of being able to secure additional funds for the judiciary.

The use which the HJPC made of its powers under Article 17 of the HJPC Law is to be welcomed. The secretariat to the HJPC has highly qualified staff in the area of judicial budgets and a number of them have been part of the process since the assistance given by the IJC with the budget rebalance in 2003. In addition, the HJPC has collected and collated valuable information and meaningful analysis has been undertaken on the basis of this information. This effort by the HJPC together with the past efforts of the IJC means that effective lobbying for additional funds has been possible and this has yielded results in terms of additional funding.

Adoption of court budgets

In the future (in accordance with the Entity Laws on Courts (in legislative process in the Federation) and the Law on the HJPC) each court will submit their budget proposal to the MoJ, along with HJPC comments. If the MoJ does not agree with the proposed budget or needs additional information, it will be obliged to contact the Court Secretary/Court President and inform the HJPC. The MoJ will be obliged to always give the court in question and the HJPC a copy of the final budget proposal as presented to the Ministry of Finance or the Government. The competent Ministry of Finance or the Government will be obliged to consult with the HJPC before making any changes to the proposal. If the budget is not adopted in the amount proposed by the court the Ministry of Justice will be obliged to consult with the Court Secretary/President. Each court should now have its own individual budget approved by the legislature.

This procedure means that the HJPC can interact with the relevant MoJ at an early stage of the process and can provide its financial expertise in this area to seek to change the views of the MoJ or to provide the information required to the court in question. It also has influence once the budget is passed to the Ministry of Finance. Throughout the process, therefore, it will operate in a type of supervisory role to monitor the changes proposed by the MoJ/MoF and, therefore, minimise the possibility of political interference in the process. In this way it is hoped that the budget process will be transparent, fair and non-discriminatory.

Illustration of the current procedures for preparation and adoption of judicial budgets

Powers of the HJPC in relation to the budgets of Prosecutors' Offices

New legislation prescribes that the prosecutors' offices are to submit their budget proposals to the HJPC. What happens after that is not specified in the laws. Under these laws the chief prosecutors submit their budget proposals directly to the HJPC and also have the right to defend the final HJPC proposal before the relevant parliament. Unfortunately, the laws do not specify the relationship of the HJPC and the Ministries of Finance and governments in the process.

Notwithstanding this legislation the prosecutors' offices submitted their 2005 budget proposals to the MoJs directly as the HJPC was not in a position to undertake this role. It is anticipated that for the 2006 budgets the HJPC will adopt a similar role in relation to preparation and development of the prosecutors' office budgets to that which it currently undertakes in respect of the courts.

3.3.2.2 *Benchmarking*

Although in most European countries the MoJ is responsible for court budgeting and administration, there are some exceptions and there is a clear overall trend towards increased independence for the courts in this area.³²

The budget of the courts in Hungary is handled and controlled by a special department, the Department for Financial Control (DFC) within the Office of the National Judicial Council (NJC).³³ The President of NJC appoints the Head of DFC. The budget for the courts is an independent chapter of the State Budget – accepted by the majority of the National Assembly every year. The general budget and its allocation are planned basically on the previous year's facts and figures (staff salaries, technical maintenance, telecommunication, administration, property management etc.).

In the Netherlands, court budgeting is one of the four main tasks of the Council for the Judiciary. In particular, it prepares the courts' budget and allocates funds to the different courts. The Council allocates contributions to the courts from the National Budget and it supervises budget implementation.

3.3.2.3 *Conclusions*

This review of the budget development process indicates a number of problems. One is that the process is different for different institutions. At a minimum, all courts, including Minor Offence Courts, and prosecutors' offices should follow the same process. It is recommended that those institutions should follow the procedures set out in the RS Law on Courts of 2004 and the HJPC Law of 2004.

The manner in which the MoJs protected the interests of the courts, prior to the intervention of the IJC in 2003, was not adequate. They have failed to collect accurate information and because of the structure of government have not had a global overview of the situation of the courts. The failure of

³² See *Guidance for Promoting Judicial Independence and Impartiality*, USAID, January 2002 and Open Society Institute, *Judicial Independence in the EU Accession Process*, 2001 part of Monitoring the EU Accession Process: Judicial Independence Series.

³³ The NJC has fifteen members of whom nine are judges, elected by the approximately 2,600 Hungarian judges through an indirect voting process. Its other members are the MoJ, the Chairman of the National Bar Association, the Public Prosecutor, two members of Parliament and the Chairman of the Supreme Court (who is the President of the NJC).

the MoJs is particularly stark when one considers the accumulated debts of the courts which are outlined below. As a result of a lack of information the MoJs have never been in a position to lobby effectively for the allocation of funds to the courts.

This problem has, for the most part, been alleviated by the role which the HJPC has undertaken in assisting in the preparation and development of budgets for the courts and which it will, in the future, undertake in relation to prosecutors' offices. The HJPC has assisted with the development of court budgets based on credible data, it has collected and collated up-to-date data and consequently secured greater, though not sufficient, funds for the courts. In terms of the budget adoption process, the intervention by the HJPC decreases the potential for political influence over the courts in that the HJPC takes on a type of watchdog role to ensure that all processes are adhered to and obeyed and that the possibility of political interference in the process is minimised.

The role of the HJPC to date, and its future role in assisting in the preparation of budgets for courts and prosecutors' offices and in monitoring the adoption process, are essential for the maintenance of the rule of law in Bosnia and Herzegovina. Significant investment has been made into the re-establishment of the rule of law in BiH both in terms of effort and in terms of funding. This effort and financing will be wasted if courts and prosecutors' offices are unable to operate effectively through lack of funding for their operational expenses. The courts and prosecutors' offices require a strong HJPC to lobby effectively for their interests, to prioritise their requirements, to allocate funding efficiently and effectively and to provide financial planning and assistance.

3.3.3 Centralised Funding Authority for all courts and prosecutors offices

3.3.3.1 Experiences of the HJPC in budget preparation

Necessity to liaise with a range of bodies in relation to the adoption of the budgets for the judiciary

The IJC encountered a number of difficulties since its intervention in 2003 in assisting the courts with the preparation of their budgets. The Budget Department of the secretariat of the HJPC has experienced similar problems. These difficulties will be compounded in the future by the fact that the HJPC will have a clear and important role in the adoption of the budget and will be required, at various stages, to interact with a range of different institutions at a variety of different levels. Currently, responsibility for funding the courts and prosecutors' offices has been divided between fourteen funding authorities for the 211 regular, constitutional and minor offence courts and prosecutors' offices, of which half have less than ten institutions to look after. Below is a chart outlining various levels of government and the bodies over which they have jurisdiction in terms of funding the judiciary.

Level of Government and the corresponding budget	Beneficiaries	Budget Units
1. State of BiH	BiH Constitutional Court Court of BiH BiH Prosecutor's Office	3
2. Republika Srpska	RS Constitutional Court RS Supreme Court RS Prosecutor's Office 5 District Courts 5 District Prosecutors' Offices 19 Basic Courts 44 Minor Offence Courts	76
3. Brcko District	Brcko Appellate Court	3

	Brcko Basic Court Brcko Prosecutor's Office	
4. Federation BiH	Federation Constitutional Court Federation Supreme Court Federation Prosecutor's Office	3
5. Una Sana Canton	Cantonal Court Cantonal Prosecutor's Office 5 Municipal Courts 9 Minor Offence Courts	16
6. Posavina Canton	Cantonal Court Cantonal Prosecutor's Office 1 Municipal Court 2 Minor Offence Courts	5
7. Tuzla Canton	Cantonal Court Cantonal Prosecutor's Office 5 Municipal Courts 14 Minor Offence Courts	21
8. Zenica Doboje Canton	Cantonal Court Cantonal Prosecutor's Office 6 Municipal Courts 13 Minor Offence Courts	21
9. Bosanski Podrinje Canton	Cantonal Court Cantonal Prosecutor's Office 1 Municipal Court 1 Minor Offence Court	4
10. Central Bosnia Canton	Cantonal Court Cantonal Prosecutor's Office 3 Municipal Courts 11 Minor Offence Courts	16
11. Herzegovina-Neretva Canton	Cantonal Court Cantonal Prosecutor's Office 3 Municipal Courts 10 Minor Offence Courts	15
12. West Herzegovina Canton	Cantonal Court Cantonal Prosecutor's Office 2 Municipal Courts 4 Minor Offence Courts	8
13. Sarajevo Canton	Cantonal Court Cantonal Prosecutor's Office 1 Municipal Court 10 Minor Offence Courts	13
14. Canton 10 (Livno)	Cantonal Court Cantonal Prosecutor's Office 1 Municipal Court 4 Minor Offence Courts	7
TOTAL		211

This means that the HJPC, according to the current procedures should interact with 211 budget units (courts and prosecutors' offices) in order to prepare a budget for each institution.

Furthermore the HJPC must interact with 14 different ministries of justice, 14 different ministries of finance, 14 governments and 14 parliaments which often have two houses handling judicial budgets.

Whilst liaising with this number of bodies is not an insurmountable problem it does call into question whether the resources of the HJPC secretariat will, in the future, be used efficiently in terms of their role in budget adoption. If the HJPC were to deal with one level of government only in relation to the adoption of the budgets of the judiciary it would make sense that the judiciary would be financed by the one funding authority. There are a number of compelling advantages to such a solution which will be discussed further below, including:

- Equality in terms of funding
- Possibility of long term strategic vision

- Increased independence
- Financial leverage
- Accountability of the judiciary to the legislative/executive

Equality in terms of funding

There are very different financial situations in different parts of the country. As a result, the courts and prosecutors' offices in, for example, Sarajevo Canton or Brčko District are reasonably well-resourced and have budgets paid on time, while there are other parts of the country where the material situation of the courts is dire and where salaries and the operational portion of the court budgets are habitually paid several months in arrears. In other words, the resources allocated to the judiciary are not divided on the basis of a list of priorities based on requirements but rather are divided based on the funding available at their particular level of government and in their funding authority. This presents serious problems in terms of the administration of justice.

The chart below shows the budgets for the courts in each of the cantons and in the RS for 2005 as recommended by the HJPC. It also shows the proposed or adopted budget of each canton and the adopted budget of the RS. The shaded cantons are those in which the budgets have actually been adopted rather than having been proposed only. The chart also shows the percentage difference between the HJPC proposal and the adopted or proposed budgets for each canton and the adopted budget of the RS.

62 first and second instance courts in FBH and RS	Recommended HJPC Budget 2005 (excluding debts)	2005 Draft/Proposal	2005 Draft –v- HJPC recommendation
Una Sana	7,902,800	6,525,235	-17%
Posavina	1,501,950	1,356,130	-10%
Tuzla	11,620,300	11,747,100	1%
Zenica Doboј	10,350,380	8,968,290	-13%
Gorazde	1,225,550	947,709	-23%
Central Bosnia	5,947,091	6,519,651	10%
HNK	6,794,950	5,798,000	-15%
West Herzegovina	1,985,700	2,010,100	1%
Sarajevo	17,643,700	18,839,000	7%
Livno	1,807,700	1,913,301	6%
Total Federation	66,780,121	64,624,516	-3%
Republika Srpska	24,917,386	25,945,811	4%
Total FBH and RS	91,697,507	90,570,327	-1%

The data is interesting in that it shows that some courts in some cantons appear to be reasonably adequately financed (e.g. Sarajevo and Livno) whilst others are grossly under financed (Gorazde, Una Sana and HNK) if one assumes that the HJPC recommendations are accurate. This means that

for citizens using courts in Gorazde, Una Sana and HNK the same level of services as those in Sarajevo and Livno cannot be provided; there is always the threat that these courts may have to be temporarily closed which, in turn, means that the administration of justice at certain levels may be completely stalled. Such a threat is far less real in cantons such as Sarajevo and Livno where the finances are estimated to be adequate to provide minimum service requirements. If funding was centralised this would not be allowed to occur as a global view would mean that the risk of closure/providing less than adequate services would be spread equally over all of the funding recipients.

This chart does not, however, give the overall picture but instead presents a rather distorted image of the financial position of the courts as their accumulated debts are not presented. These accumulated debts have the potential to paralyse court operations in certain areas of the country, particularly in those courts where the debts are significant and where appropriate steps are not being taken to deal with the problem.

The following chart outlines the number of courts and judges in each of the cantons together with the accumulated debt of each canton in respect of the courts. It goes on to show the accumulated debt per court and per judge. Perhaps the most striking example of the inequalities which occur as a result of the decentralised funding of the courts is when a comparison is made between the accumulated debt in Sarajevo Canton as opposed to that in Herzegovina Neretva Canton, i.e. 500 KM accumulated debt per judge in Sarajevo as opposed to 77,000 KM per judge in Herzegovina Neretva.

Canton	Number of courts	Number of judges	Debt in KM as at 31/12/03	Debt in KM per court	Debt in KM per judge
Herzegovina Neretva	3	13	3,547,683	886,921	77,123.54
Posavina	2	9	605,940	302,970	67,362.67
West Herzegovina	3	13	760,237	253,412	58,479.99
Zenica	7	67	3,311,504	473,072	49,425.43
Central Bosnia	4	38	1,616,412	404,103	42,537.16
Livno	2	11	444,197	222,099	40,381.55
Tuzla	6	74	2,615,519	435,920	35,344.85
Una Sana	6	55	1,443,468	240,578	26,244.87
Sarajevo	2	104	54,551	27,276	524.53
Gorazde	2	9	-	-	-

Whilst unequal funding does not necessarily mean unequal justice, in BiH the economy is operating on the margins and it is clear that disparities in court funding do lead to inequality. By travelling only a few kilometres, a citizen of BiH can go from a (relatively) modern and adequately maintained court, where cases are able to be processed in a reasonable amount of time, to a court without heat or electricity, where cases can wait years to be heard and where there are no funds to pay for delivery of documents or for court appointed defence counsel or expert witnesses.

This situation violates the rights of citizens to have equal access to justice and is arguably a breach of the International Covenant on Civil and Political Rights, which requires that "all persons shall be

equal before the courts and tribunals³⁴, and of the Universal Declaration of Human Rights³⁵ and the European Convention on Human Rights³⁶.

In an economy where there are adequate resources to provide optimum facilities across the board the problem of the allocation of resources is less of a difficulty than in an economy such as that of BiH. The allocation of resources in the area of the judiciary is particularly important because of the importance of maintaining an operating and efficient system of courts and prosecutors' offices. Maintaining an operating and efficient system of courts and prosecutors' offices means that court houses should be in an adequate condition, that the judiciary should be treated in a non-discriminatory manner in terms of the payment of salaries and working conditions and that courts and POs should have enough funds to pay all operational expenses including electricity, phones, postage, etc. If there are additional funds remaining these funds should be spent in a manner whereby those with the most urgent need will be attended to prior to those with less urgent requirements. As a result of the range of funding authorities in BiH it is not possible for decisions/priorities to be made in this manner and the result is that there is a serious threat to the effective operation of the rule of law in BiH.

Possibility of national long-term strategic vision

The corollary of not being able to make decisions and priorities on a global basis is that it is almost impossible to implement any national long-term strategy that requires capital investment or that affects court or prosecutorial budgets in any way.

One example where a national long term strategy is indispensable is the ongoing project to computerise the land registries. As this requires the establishment of a centralised register, most planning must also be centralised. It cannot be advanced by each canton or entity developing and implementing its own plan. Similarly, with fourteen different funding authorities with completely different capabilities, any plan to computerise the courts that relied entirely on local funding would be almost certain to be implemented unevenly, and in some places probably not at all. Finally, plans to upgrade the court buildings, and so ensure equal access to justice for all, has to be implemented as part of a global strategy and not on an *ad hoc* basis with each court lobbying for its own interests. It was with this thought in mind that the US government donated funds to be used in the course of 2005 to create an architectural assessment of all court building in BiH, including an outline of any repairs and renovation necessary to bring them up to a defined standard. Based on this a 5-10 year investment plan will be made and national and international funding will be requested in order to bring the premises and the judiciary up to European standards. Such an investment plan will necessarily mean that funds will have to be deposited at the level of BiH and administered and managed at that level.

The importance of global/strategic planning can be illustrated by several important investment projects initiated by the IJC and the HJPC and financed by international donors:

- 2.5mEURO from the European Commission for the installation of local area networks at all courts and prosecutors' offices in BiH, delivery of 1535 computers, 66 servers and a range of other Information and Communications Technology (ICT) equipment.³⁷

³⁴ Article 14

³⁵ Articles 7, 8, 10

³⁶ Article 14

- 500,000EURO from the European Commission for the installation of audio recording equipment at courts and prosecutors' offices in BiH.
- 500,000EURO from the European Commission for the provision of certain furniture items in courts and prosecutors' offices in BiH.
- 500,000 USD from ICITAP for the installation of computers and other ICT equipment in courts and prosecutors' offices in BiH.
- 400,000EURO from the European Commission for ICT training for judges, prosecutors and support staff in BiH in 2005.
- 1 million USD from the Government of the US for renovation of 15 courts and 15 prosecutors' offices in BiH based on a needs assessment survey carried out by the IJC. The project had quite a significant impact in terms of the numbers of courts and prosecutors offices which benefited.³⁸

These investments are based on an objective needs assessments which were carried out by the IJC/HJPC and the investments were made in accordance with a national strategy for the entire judiciary and prosecution service of BiH. Such a strategy makes it possible to standardise the equipment provided and to deal with current inequalities in terms of the provision of equipment. Furthermore, such a national strategy makes it possible to obtain equipment on the basis of best value for money thus getting the most from the limited amount of funds available.

Over time these investments will radically change the BiH judiciary and prosecution services. This investment strategy would not have been possible without a centralised coordinating body such as the IJC/HJPC and a single funding source which disregards internal borders in BiH and which allocates funds on the basis of objective criteria and requirements. In the future, similar strategies will be financed by national rather than international funds and it will be necessary for funds to be allocated from the level of BiH and to be equally distributed across the whole country again on a needs basis only.

Increased independence

The small size of some of the political units funding the courts and prosecutors' offices does not provide the necessary distance and objectivity from local political realities and influence in the budget process. Politicians have traditionally used the budget process as a way of exerting influence over the courts, either to reward "good" courts or to punish "bad" ones.³⁹ For example, in Banja Luka Basic Court the accumulated debt was allowed to grow from 443,000KM to 1.2 million KM during 2003 or by 160%. On the other hand, during the same period the accumulated debt of the Basic Court in Derventa was decreased by 61% and that of the Basic Court in Teslic by 60%. The IJC found examples of uneven funding even within one canton, which is likely to have been a result

³⁷ See attachment 2 – a list of locations and equipment delivered by the EC and ICITAP

³⁸ See Attachment 3, a list of courts and prosecutors' offices with the amount of funds invested in each premises under the project.

³⁹ See for example, JSAP *Thematic Report IX Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina*, November 2000, and ICG *Rule Over Law: Obstacles to the Development of an Independent Judiciary in Bosnia and Herzegovina*, July 1999.

of political favouritism towards the lucky court.⁴⁰ The transfer of funding competence to a centralised funding authority would assist in delivering the necessary distance and objectivity to the system.

Financial Leverage

It is also of concern that each of the individual funding authorities do not have a centralised procurement policy. It appears that each of the courts and prosecutors' offices purchase their requirements at a local level and thus lose the advantage of financial leverage. This necessarily results in higher prices. If procurement procedures were initiated and managed by a centralised authority products, services and works could be purchased on a "best value for money" basis which would lead to lower prices and increased quality and service.

Accountability

Finally, the financing of the judiciary by one authority would inevitably mean that the BiH MoJ would be in a better position to hold the HJPC accountable for the production levels of courts and prosecutors' offices. When we refer to production levels we do not simply refer to the number of cases which are dealt with but also to the quality of the justice which is dispensed. We deal with this question in more detail in the next subsection of this report. In BiH the judiciary does not operate at an optimal level – this is clearly illustrated by the accumulated backlogs which have developed and the number of cases which are dealt with on a monthly basis by a significant number of the members of the judiciary. It is important that the budget authority is able to assess the data in relation to performance indicators and to make budgeting decisions based on these indicators. If there is one centralised funding authority it will be far easier to carry out this task. In the future, once the performance indicators have been developed and are being actively applied, it is likely that the BiH MoJ will not need to link budget decisions to performance evaluations but in the short term it could prove to be a useful tool towards the creation of an efficient and effective judiciary.

3.3.3.2 Benchmarking

In wealthier federal states like Switzerland or the United States, the level of court funding can vary widely from one place to another, but there is no perception that the quality of justice is affected. This is because the basic structures are in place and are maintained. While some courthouses and court facilities may be more than adequate all courthouses and court facilities reach a minimum standard. This means that justice throughout each of these countries is delivered in a manner which, at the very least, reaches a basic minimum standard in terms of infrastructure and facilities.

In Germany, an EU member state with a federal court system, mechanisms are in place to ensure that access to justice is the same throughout the country. Revenue is collected only at the federal level and is distributed among the states in a way that guarantees equality in the delivery of key services, such as justice. Salaries of judges and other court personnel are co-ordinated by federal framework legislation. Any significant disparities in the material situation of courts would be considered a violation of the principle of the rule of law.

3.3.3.3 Conclusions

⁴⁰ See *Final Report of the Independent Judicial Commission*, November 2004, page 111.

The arguments in favour of establishing a centralised funding authority for all of the courts and prosecutors' offices in BiH are compelling. This would include all of the municipal and cantonal courts, the district and basic courts, the Supreme Courts and the Court of BiH. It would also include all of the prosecutors' offices at all levels.

The budget of each court and prosecutors' office would be developed in the same way as it is currently done or soon to be done, i.e. by the court or prosecutors' office with assistance from the HJPC.

- The HJPC would consolidate a global budget for the entire judiciary and prosecution services in BiH and forward it to the BiH MoJ.
- The HJPC budget proposal would be discussed between the HJPC and the BiH MoJ.
- The MoJ of BiH would provide the HJPC with a copy of its final budget proposal as submitted to the Ministry of Finance of BiH/Council of Ministers of BiH.
- The Ministry of Finance would be obliged to consult with the HJPC before making changes to the budget proposal.
- The Council of Ministers would have the final word with respect to the budget forwarded to the BiH Parliament.
- The HJPC would have the right to defend its original budget proposal directly in front of the BiH Parliament.
- The consolidated budget for all courts and prosecutors' offices would be an independent chapter of the BiH State budget.

The entity laws on courts, the HJPC Law and the Law on Ministries of BiH would have to be amended. A new law on the budgeting of court and prosecutors' offices would also probably have to be drafted.

If the judiciary was funded in this manner there would be no necessity for the HJPC to liaise with each of the funding authorities at each of the levels and, in turn, there would be no need for the relevant MoJs and MoFs at each level to communicate with the HJPC. The HJPC would simply communicate with the MoJ of BiH and the MoF of BiH. From a structural point of view this is a more efficient model of funding in that the HJPC has one point of contact and it can develop a relationship and understanding with this one authority. Expertise on budgeting will grow as the various participants build on the institutional knowledge which has already been accumulated by the HJPC.

However, the more compelling reason is far more fundamental. It would mean that, for the first time in recent history in BiH, justice in financial terms could be administered in a non-discriminatory fashion throughout the country. This would ultimately lead to standardisation of court premises and facilities throughout the country and would also mean that all judges, prosecutors and support staff would be treated equally throughout the country. Long term strategic plans could be introduced which would result in a list of priorities being created for funding and

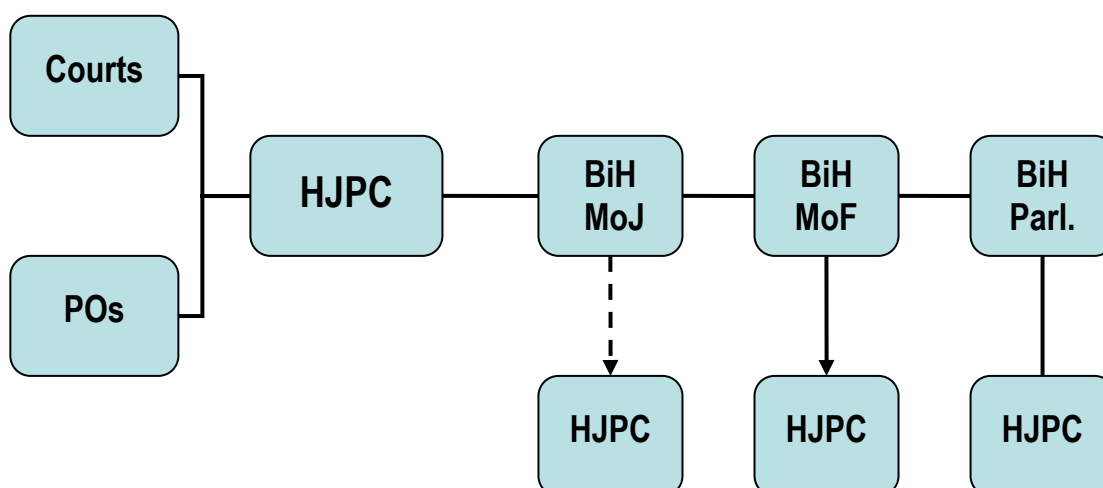
investment. Political favouritism would be more difficult to conceal as the system would be far more transparent given the enhanced role of the HJPC. It would be far easier for the HJPC to carry out this role when it is monitoring one single system as opposed to a fragmented one with a range of different players and participants.

Obviously, such a comprehensive reorganisation of the system of court budgeting and administration will require changes to cantonal, entity and BiH laws. It will also mean that there will no longer be a need for staff dedicated to budgets at cantonal and entity level MoJs. However, it would be necessary to increase the staffing levels in the budget area in the HJPC, the MoJ of BiH and the treasury department of the MoF of BiH.

The transfer of the funding for courts and prosecutors' offices to the level of BiH would require transfer of funds currently allocated to the courts and prosecutors' offices by the Entities and the Cantons. With the creation of an Indirect Taxation Authority at the BiH level much of the income currently received by the cantons in terms of turnover tax will be received at the BiH level. It is estimated that approximately 50% of the cantonal revenues are generated through turnover tax. The incomes generated at an entity level and the amount of these revenues would have to be analysed in order to identify the type and amount of funds, which would have to be transferred to the level of BiH. This analysis could be part of a separate project, which should canvass the views of the OHR, IMF, the MoJ and MOF at BiH level and the Treasury at each level. It has been suggested that the problem may be easily resolved by simply transferring the court fees and fines generated by the courts to the level of BiH but further analysis would have to be undertaken. Similar research would have to be undertaken to implement a similar solution proposed in the Functional Review of the BiH Police Forces.

It is expected that the transfer of funding from the lower levels to the level of BiH would not of itself require more funds for the judiciary and prosecution services in BiH. However, it is also not to be expected that the transfer, by itself, would result in significant savings due to rationalisation/streamlining. The judicial/prosecutorial sector has already been significantly downsized (a reduction of first instance courts by 30%, of judges by 30% and of support staff also by 30%) and the sector needs to operate at this level for some years before further reductions may be considered. See more about this in subsection 3.2. It is anticipated that the judiciary and prosecution could not be financed at the BiH level before the budget year 2007.

Illustration of the proposed new funding procedures for the BiH judiciary and prosecution services



3.3.4 Execution of the budget

3.3.4.1 Current situation

With respect to implementation, approved funds have often been paid late and sometimes instalments of both salaries and operational expenses have been missed altogether. This does not just apply to courts and prosecutors' offices, but to all government budget users, although courts and prosecutors' offices are often low in the list of priorities.

Prior to the recent introduction of the Single Treasury Account system, it fell to court presidents to determine which bills to pay each month out of whatever funds they received and they became experts in juggling the demands of creditors. This position changed quite radically since the introduction of the single treasury accounts (STA). This system has been introduced at state, entity and cantonal level.

Under this new system all budget users do not have their own bank accounts, one single bank account for all budget users in a particular government (either entity, cantonal or state) is opened. All revenues are paid into a single treasury account and all expenditures are paid out of it. A treasury department is set up within the relevant Ministry of Finance which executes the budget, performs accounting activities, budget monitoring, cash management and maintains the single treasury account. Regional Treasury Offices have been established throughout the RS and may be established throughout the cantons.

Through a network linkage the Ministry of Justices can access all invoices, receipts submitted by the courts, prosecutors' offices, etc. Through this system the Ministry of Justice can monitor the execution of the budget. The Ministry of Finance completes the financial reports.

In practice the payment process is executed through the following procedure:

- A court/prosecutors' office completes a request to purchase an item and submits it to the relevant treasury department.
- The treasury department enters this request into the system.
- The Ministry of Justice approves the purchase.
- Once the court/prosecutors' office is informed that the purchase can be made, it submits the bill to the treasury department after the item has been purchased.
- Once again the treasury department enters the bill into the system, the Ministry of Justice approves it and sends it to the Treasury for payment.
- The bill then enters a queue for payment along with all other bills from other budget users.

There is not really a problem with this system unless there is a shortfall in terms of revenue and expenses. There are laws at BiH and Entity level which list the order in which expenses are to be paid – a new law is enacted each year at BiH and entity level. The Law on the Execution of the Budget in the Federation for 2004 stipulates that the following order is to be applied in terms of the payment of bills/debts:

- Foreign debt and interest
- Disability compensation
- Salaries
- Benefits
- Expenses of parliamentary representatives
- Transfers to cantons and lower levels of administration
- Transfers for refugees
- Transfer for financing the state level
- Transfers for the funding of the military
- Current transfers for public enterprises
- Salaries, contributions and expenses of employees of public enterprises
- Other expenses.

In terms of the judiciary, it is the MoJs which are in a position to decide which bills are paid first in the category of other expenses. This includes operational expenses which also includes *per diem* expenses for judges for travel expenses. The Laws on Budget Execution and the Regulations on Accountancy at State and Entity level stipulate that the MoJs are meant to decide which bills to prioritise based on monthly and quarterly financial plans produced by the courts and prosecutors' offices. However, it is difficult for the courts and prosecutors' offices to produce these plans as they do not have access to the treasury system and they do not, therefore, know which parts of their budget from the previous year have actually been executed. In practical terms this leaves the MoJs free to decide on the prioritisation of payments based on little or no data being supplied by the courts/prosecutors' offices and provides the opportunity for inappropriate behaviour linked to subjective factors.

Currently, the HJPC has no role in the budget execution process, other than its general power to advocate for the continuous and adequate funding of the courts and prosecutors' offices and to analyse budget data.

3.3.4.2 Political interference

As outlined above, the MoJs have been placed in a position of significant power and influence. The concern is that this power may be used inappropriately. It is very possible that in any given year the amount of revenue being generated will fall short of that anticipated. In these circumstances, it will not be possible to pay all of the outstanding debts which will have been incurred by the various budget users, including the courts and prosecutors' offices. The costs will have been incurred and will be "queued" for payment.

There is always the danger that the MoJs, if not properly checked, may not objectively decide on bill payment but may instead be motivated by more subjective factors. The HJPC through its compilation of data on the courts has identified some particular practices by the MoJs in relation to budget execution which appear to defy logic. For example, the following table gives a general overview of how debts were managed in the RS in 2003 and there does not appear to have been any overall strategy in terms of debt management. The accumulated debts of some courts were decreased significantly while those of others were allowed to increase to an uncontrollable level.

District	City	Total Arrears 2002	Total Arrears 2003	Change (%)
District 1 – Basic Court (BC)	Novi Grad	197,895	128,253	-35%
District 1 – BC	Mrkonjic Grad	161,902	N/A	N/A
District 1 – BC	Bosanska Gradiska	239,624	149,665	-38%
District 1 - BC	Srbac	38,915	48,106	24%
District 1 - BC	Prijedor	271,895	314,302	16%
District 1 - BC	Banja Luka	443,523	1,154,025	160%
District 1 - BC	Prnjavor	169,136	129,765	-23%
District 1 – District Court (DC)	Banja Luka	568,219	487,254	-14%
District 1 - BC	Kotor Varos	50,954	52,490	3%
District 2 - BC	Bijeljina	612,558	549,697	-10%
District 2 - BC	Srebrenica	47,541	84,671	78%
District 2 - BC	Zvornik	193,720	206,290	6%
District 2 – BC	Lopare	83,640	76,807	-8%
District 2 - DC	Bijeljina	284,169	188,966	-34%
District 3 - BC	Derventa	145,893	56,894	-61%
District 3 - BC	Teslic	95,224	38,376	-60%
District 3 - BC	Modrica	91,002	112,964	24%
District 3 - BC	Doboj	272,076	299,532	10%
District 3 - DC	Doboj	233,981	178,876	-24%
District 4 - BC	Visegrad	66,413	54,913	-17%
District 4 - BC	Vlasenica	148,350	69,557	-53%
District 4 - BC	Srpsko Sarajevo	77,065	89,809	17%
District 4 - BC	Rogatica	66,413	98,420	48%
District 4 - BC	Sokalac	146,193	156,874	7%
District 4 - DC	Srpsko Sarajevo	80,631	N/A	N/A
District 5 - DC	Trebinje	123,710	152,785	24%
District 5 - BC	Nevesinje	69,108	Included in Trebinje Basic Court	
District 5 - BC	Foca/Srbinje	52,907	71,263	35%
District 5 - BC	Trebinje	155,542	241,895	56%

In order to avoid the application of subjective factors to budget execution it is necessary to have an independent body which is immune to political interference monitor the payment of bills incurred by the courts and prosecutors' offices. Given the role of the HJPC in court budgeting it would appear to be in an optimum position to assume such a role. In addition, the HJPC has begun to develop the software so that, if given a link to the Treasury in respect of the courts and prosecutors' offices, it would be able to monitor payments in a very efficient and effective manner and on a macro level and in a global sense. It is also ideally placed to monitor payments given the information and data which it has in relation to the courts which it has collected and collated over the last number of years. Its objectivity and its database of information make it an ideal body to monitor the payment of bills and to make prudent and informed choices in terms of their prioritisation.

Scientific rules in relation to the prioritisation of payments in respect of the courts and prosecutors' offices cannot be used by the MoJs as it is really quite a complex task to decide which payments should be prioritised over others. It involves a comparison of the needs, requirements and debts of each court and an analysis of the risks of failure to pay particular bills. The HJPC is ideally placed to make the necessary comparisons in an objective manner and, therefore, to make the right decisions of terms of bill payment.

3.3.4.3 *Benchmarking*

In Hungary, the use of the central budget is under control by the DFC. Its staff and its head are the key decision makers in the matter. Obviously there is a detailed yearly budget allocation plan that serves as main guideline for this unit. Because of its special nature (the formal parliamentary decision level is too high) it covers the exact, real needs only in a wider sense. In a case of any unforeseen gap, the responsible DFC unit has to right provide the necessary 'emergency funds' or 'reserves' for the court in question.

3.3.4.4 *Conclusions*

For the reasons outlined in the course of this section, we suggest that the HJPC rather than the MoJ should be involved in monitoring budget execution. As explained above, the MoJ may be compromised in terms of the decisions and priorities which it would be forced to make. In addition, it does not have the information and data of the HJPC and, in these circumstances, cannot make decisions based on "best information". In a country where it is necessary to make priorities in relation to the payment for basic services it is important that all of the relevant factors are considered (risk of termination of service, amount of accumulated debt, debts for other services, etc.) and it is the HJPC, rather than the MoJ, which is in possession of the information in relation to each of these factors.

The HJPC could monitor the execution of the budget in the following manner: A court or prosecutors' office would complete a request to purchase an item and would submit it to the treasury department of the BiH MoF. It may be necessary, in this regard, to carry out a survey of the courts and POs which are linked to the treasury system and to provide network linkages for those which are not connected. The treasury department would enter this request into the system. If there are enough funds on the relevant budget line the treasury would approve the purchase. Once the court or prosecutors' office is informed that the purchase can be made it would submit the bill to the treasury department after the item has been purchased. Once again the treasury

department would enter the bill into the system. The bill would then enter a queue for payment along with other bills of budget users. If there is a shortfall in terms of revenues and expenses the HJPC would intervene in order to highlight the bills which should be prioritised. It would do this after having considered the financial circumstances of the relevant courts/prosecutors' offices and after having spoken to the relevant Court Presidents/Chief Prosecutors.

The capacity of the Budget Department of the HJPC would have to be strengthened in order to deal with this new function and possibly also the capacity of the treasury department of the MoF of BiH. In addition, changes would have to be made to the laws on the treasury and on budget execution at BiH and Entity levels.

Key Recommendations – Finance, Budgeting, Execution of Budget

1. Court and Prosecutors' Offices in BiH should be financed at the level of BiH from the budget year 2007.
2. The HJPC should prepare a consolidated budget for all courts and prosecutors' offices and forward it to the BiH MoJ.
3. The MoJ and the MoF should consult with the HJPC before the submission of the budget to the Council of Ministers of BiH.
4. The HJPC should have the right to defend its budget proposal directly in front of the BiH Parliament.
5. The consolidated budget for courts and prosecutors' offices in BiH should be an independent part of the BiH budget.
6. The BiH Treasury should execute the budget and the HJPC should monitor budget execution and make choices in terms of the prioritisation of bills if there is inadequate revenue.
7. An analysis should be conducted into the sources of funding for courts and prosecutors' offices at the level of BiH.
8. The cantons and Entities should no longer have a direct role to play in the preparation, adoption or execution of the budget for the courts and prosecutors' offices in BiH.
9. Staffing levels would have to be increased at the BiH MoJ, BiH MoF (Treasury Department) and the HJPC. The staff levels could be decreased at Entity and Cantonal level.

Subsection 3.4 – The Administration of Courts and Prosecutors’ Offices

According to current legislation, the MoJs have the general power to oversee the administration of the courts and prosecutors’ offices and are politically responsible for their effective operation. Particularly in respect of the courts, this can be a difficult and sensitive mission. The court system is at the same time an independent power within government and the MoJs should not exercise this competence in a manner that influences the way in which the courts handle or decide in individual cases.

It has been difficult for the MoJs in BiH to know the extent to which they could justifiably demand information from the courts or take steps to deal with obvious administrative problems within them, such as excessive delays in dealing with cases. The courts, on the other hand, have tended to exercise their independence to the full and have, in general, failed to accept any responsibility for their own internal operations or institutional effectiveness.

As discussed in Section 2 of this Report, most MoJs have a unit for the judiciary that carries out their administrative tasks in respect of the courts and prosecutors’ offices as well as justice sector policy development. The RS MoJ has two such units, one dealing with regular courts and all prosecutors’ offices and one dealing with Minor Offence Courts. As of yet, the relevant unit in the BiH MoJ is severely understaffed. This is becoming more pressing with the advent of the War Crimes Chamber in the Court of BiH and its associated logistical needs.

Since 2004, the HJPC has also had significant (and overlapping) powers in respect of court administration, which are outlined below. The primary motivation in giving the HJPC these powers was to ensure uniformity in judicial and prosecutorial administration across the country, something not guaranteed while those powers were exercised by different MoJs. Transferring these powers from the executive to the HJPC should also increase judicial independence and lessen the opportunities for political interference with the judiciary. However, care must be taken to ensure that the judiciary does not become isolated and unaccountable as a result. In particular, the funding authority – regardless from what level the judiciary and prosecution is financed – must be positioned to require certain general production outputs for the funds it provides.

Judicial and prosecutorial administration, which is the topic of this chapter, is a broad field, but can be considered to encompass:

- determination of the required numbers of judges and prosecutors
- the appointment of judges and prosecutors
- the provision of initial and ongoing training for judges and prosecutors
- the establishment and operation of systems of performance evaluation in respect of judges and prosecutors
- the disciplinary process in respect of judges and prosecutors
- the provision of administrative/support staff for courts and prosecutorial offices
- the determination of prosecution policy
- the establishment of general rules for the administration of courts and prosecutors’ offices
- the provision of physical infrastructure (such as buildings and equipment)
- the establishment of systems to measure and compare the performance of the judicial and prosecutorial systems.

Some of the responsibilities of the MoJs in respect of these functions have been reduced in recent years, or taken over by new institutions. Because of the separate position and framework governing the three Constitutional Courts, they are not included in this discussion. Neither is the appointment of lay judges (whose role is currently being abolished) nor the question of the certification of court experts and interpreters, a task that falls to the judicial units within most or all MoJs.

3.4.1 Determination of the required numbers of judges and prosecutors

3.4.1.1 *Method of calculation*

Until 2002, the number of judges was calculated by dividing the number of new cases filed in a given year (usually the last year or the year before) by the quota of cases that one judge was required to complete during the year. The quotas were set out in regulations promulgated by the relevant MoJ and were said to have been lowered significantly since the war. They also varied widely across the country. It was never clear how these quotas were determined, how the system worked in practice or how it dealt with changes in caseload from year to year. In fact, the actual number of judicial positions established was often inconsistent with the number that there would have been if the regulations had been correctly applied. However, it is clear that any increase in the workload of a court or the accumulation of case backlogs was dealt with by requesting more judges, rather than considering methods to increase efficiency.

In general one must be careful when linking a production measurement system for judges directly to a decision on how many judges a particular court needs. First of all, it is obvious that the availability of funds do not necessarily increase even if the number of cases increases. Secondly, there are usually other less costly methods of dealing with an increased number of cases, such as new and speedier working methods, the introduction of Information and Communication Technology, more innovative ways of using mediation and, finally, the employment of more judicial associates. Furthermore, short-term increases in caseloads may be handled by the engagement of reserve judges until it is clarified that a permanent increase is necessary.

In 2002, the power to determine the number of judges in each court and the number of prosecutors in each prosecutors' office was given to the HJPCs, which were required to solicit the opinion of the relevant court president or chief prosecutor and consult with the relevant budgetary authority.⁴¹ In determining the number of posts in each court in early 2003, the HJPC relied to a large extent on the recommendations of the IJC, which had proposed a substantial overall reduction, but had also based its assessment on the amount of cases one judge could reasonably be expected to solve in one year. Two groups of local experts had worked with the IJC to derive a formula for measuring the total court workload, adjusted to anticipate procedural law changes and other factors likely to affect the workload in the future. In most cases, the quotas used to determine the recommended number of judges were higher than previously, although in certain cases (such as for civil appeals) the quotas were lowered as this was considered necessary in light of the new procedural legislation.

With respect to prosecutors, a working group of HJPC members and OHR staff recommended a general ratio of prosecutors to population of 1:25,000. Other factors, such as the relative caseload of

⁴¹ The HJPC Law of 2004 amended slightly the previous provisions regarding its powers to determine the numbers of judges and prosecutors by including an additional requirement for prior consultation with the relevant Ministry of Justice.

the existing prosecutors' offices with respect to the numbers of known and unknown perpetrators and particular types of crime were also taken into account in making the final determinations. It was recognised that a wide variety of factors would impinge on the prosecutorial process. One was changes to the criminal procedural laws that would put the responsibility for investigation on the prosecutors rather than on the court system but which would also, on the other hand, potentially reduce the work of prosecutors by introducing plea bargaining. Secondly, any improvements in the work of the police would also reduce the need for intensive prosecutorial supervision of all aspects of the investigation.

The Minor Offence Courts were not subject to the restructuring process. Work on a radically new law governing minor offence procedure is about to be finalized and this proposal has the potential to greatly reduce the amount of time (and therefore judges) needed to deal with these cases. The HJPC will decide in the course of 2005 on the number of Minor Offence Court judges which will be needed in the restructured system.

Following a move of the financing of the judiciary and prosecution to the level of BiH, it should be considered whether the financing authority – namely the BiH Ministry of Justice – should play a more significant role in deciding the number of judges and prosecutors in each court and prosecutors' office as such decisions have a significant and direct impact on the budgets and the HJPC – consisting of mainly judges and prosecutors – may have a tendency to increase the number instead of searching for other less costly solutions to handle the work load of the judiciary.

3.4.1.2 *Actual numbers*

Overall the current numbers of judicial posts in the regular court system and in prosecutors' offices in BiH are:

LEVEL OF GOVERNMENT	NUMBER OF JUDGES	NUMBER OF PROSECUTORS
BiH		
Court of BiH/PO of BiH	15	10
RS		
Supreme Court/PO	15	4
District Courts/Pos	61	69
Basic Courts	144	
Federation		
Supreme Court/Federation PO	22	9
Una Sana Canton	55	22
Posavina Canton	9	3
Tuzla Canton	74	35
Zenica Dobož Canton	67	25
Bosanski Podrinje Canton	9	2
Central Bosnia Canton	38	15
Herzegovina Neretva Canton	46	20
West Herzegovina Canton	13	4
Sarajevo Canton	104	41
Canton 10	11	5
Brcko		
Brcko Appellate Court/PO	6	7

Brcko Basic Court	11	
Total	700	271
Minor Offence Court judges	318	
GRAND TOTAL	1018	

With 1,018 regular judges and a population of 4 million, BiH has 25.4 judges per 100,000 inhabitants. The ratio is 17.5 judges per 100,000 inhabitants if Minor Offence Court judges are not included. There are 6.8 prosecutors per 100,000 inhabitants or 1.355 per 20,000 inhabitants.

3.4.1.3 *Benchmarking*

The chart below indicates the number of judges per 100,000 inhabitants in different European countries.⁴²

Country	Total number of judges	Number of judges per 100,000 inhabitants
Croatia	1,819	40.99
Slovenia	774	39.41
Hungary	2,757	27.18
Czech Republic	2,716	26.62
BiH (Including Minor Offence Courts)	1,108	25,40
Germany	20,901	25.30
Slovak Republic	1,232	22.90
Austria	1,732	21.47
Belgium	2,117	20.80
Poland	7,771	20.10
Italy	11,793	20.30
Bulgaria	1,550	19.76
Sweden	1,693	18.90
Estonia	237	17.48
Latvia	396	17.08
Finland	875	16.92
Portugal	1,551	14.90
Netherlands	1,896	11.60
France	6,240	10.37
Denmark	328	6.20

As can be seen, there is a wide range in the proportion of judges to population across these countries, but many countries fit into the range of between fifteen to 25 judges per 100,000 inhabitants. Thus, the number of judges in BiH is not disproportionate and a reduction in the number of Minor Offence Court judges could bring it in line European practice.

In fact, there seems to have been no rational approach to calculating the required number of judges in many countries during recent years. For financial reasons, the number of judges cannot normally be increased without limit. Case overloads therefore need to be dealt with by finding other, more

⁴² The information in this chart is taken from CEPEJ, *European Judicial Systems 2002*, at page 27. Some countries at the extreme ends of the spectrum have been omitted from the chart for reasons of brevity.

creative solutions other than simply appointing more judges, such as through increasing administrative capacity or by establishing more informal mechanisms to solve cases. These issues are discussed below.

With respect to prosecutors, the following chart indicates the numbers of prosecutors in different countries per 20,000 inhabitants.⁴³

Country	Number of prosecutors per 20,000 inhabitants
Latvia	5.6
Poland	2.9
Hungary	2.8
Bulgaria	2.8
Slovak Republic	2.7
Estonia	2.4
Portugal	2.3
Croatia	2.2
Czech Republic	2.1
Denmark	2.1
Slovenia	1.7
Sweden	1.5
BiH	1,4
Finland	1.3
Germany	1.5
Italy	0.8
Netherlands	0.7
Austria	0.5
France	0.5
Norway	0.2

With 1.355 prosecutors per 20,000 inhabitants, BiH has a relatively low number compared with most of these countries, many of which have more than two per 20,000 inhabitants.

3.4.1.4 Reserve judges

According to Article 48 of the HJPC law the HJPC may, in specific circumstances, appoint reserve judges on a temporary basis, i.e. in order to reduce backlogs at a court or if the prolonged absence of a judge of a particular court necessitates it. It is done on a recommendation of a court president.

So far the HJPC has appointed 14 reserve judges that are not included in the numbers above.

According to projections made by the IJC around 60 reserve judges were supposed to be appointed to handle accumulated backlogs at courts. The limited number of appointed reserve judges so far does not indicate that the problem of backlogs has been resolved, but rather that funding for necessary reserve judges has not been provided by the executive and legislative authorities. Due to

⁴³ These figures were also taken from the CEPEJ report.

this the backlogs continue to negatively affect the performance of the courts and significantly impact on the standing of the judiciary in the eyes of the public.

3.4.1.5 *Conclusions/Recommendations*

Although this benchmarking shows that BiH falls within European standards, it is at the high end with respect to judges.

It might also be noted that no information was available on which institution makes the determination of the numbers of judges and prosecutors in other countries and so no comparison can be made with the BiH system. However, even with the requirements of consultation, given the historical tendency of the judiciary and prosecution to request more judges and prosecutors rather than to consider better ways of using existing resources, and given that the HJPC is a body made up primarily of judges and prosecutors, there is clearly a potential conflict of interest for the HJPC to make the final determination on numbers. The role of the Ministry of Justice at the level of BiH (following a move of the financing of courts and prosecutors' offices to the level of BiH) should therefore be increased in this respect.

3.4.2 **Appointment of judges and prosecutors**

3.4.2.1 *BiH system*

The system of appointment of judges and prosecutors is an important means of ensuring the independence of the judicial and prosecutorial systems from control by the executive. From 2000 onwards, a series of measures were taken in BiH to reduce political influence over the appointment process for regular court judges and prosecutors and to develop appropriate procedures to ensure that candidates had their professional skills appropriately tested before appointment. Even before these changes, the role of the MoJs in the appointment process was very limited, primarily confined to advertising vacancies and compiling lists of applicants for the legislatures that made the appointments.

The establishment of the HJPCs in 2002 can be regarded as the culmination of this de-politicisation process. It also brought other benefits. Uniform educational and experience requirements for each level of post were established across the country. The HJPCs were also given the power to appoint court presidents and chief prosecutors from among the judges and prosecutors in each institution. With the merger of the three Councils in 2004, these issues are now handled by one body for the entire country.

The HJPC does not have the power to appoint Constitutional Court judges. These appointments are made by the entity Parliaments, although the HJPC has recommendatory power in respect of the two entity Constitutional Courts. Minor Offence Court appointments do not yet come under the auspices of the HJPC, however, and their appointments are usually made by the bodies of executive government.

3.4.2.2 *Benchmarking*

The CEPEJ report, referred to earlier, indicates that in most European countries, appointment to the judiciary is by a body made up of both members of the judiciary and non-judicial members. Of the responding countries, only Austria, Latvia and Sweden have appointments made by a body made up of judicial members only. Only FRYOM, Georgia, Malta, Switzerland, Turkey and the Ukraine make appointments through a body without judicial representation.

This situation is slightly different for prosecutors. In six of the responding countries (Austria, Finland, Hungary, Latvia, Moldova and Sweden) the appointment of prosecutors is done by a body consisting only of prosecutors, and in two (Azerbaijan and Lithuania) appointment is done by a body with no prosecutorial representation. The other fourteen responding countries make appointments through a mixed body.

3.4.2.3 *Conclusions*

The system of appointments in BiH, by a HJPC made up mostly of judges, prosecutors and private lawyers, is consistent with European best practice.

3.4.3 **Induction and ongoing training for judges and prosecutors**

3.4.3.1 *BiH system*

As noted, the minimum qualifications and experience for appointment to the judiciary are set out in the HJPC laws. Basically, following graduation from law school, anybody wanting to become a judge, prosecutor or attorney must gain two years' work experience and then take the bar/judicial examination (administered by the entity MoJs). For a Basic or Municipal Court judge, a further three years' relevant work experience is required before appointment to the bench. Higher-level posts require more experience.

The courts and prosecutors' offices have traditionally provided some sort of vocational training for those wanting to enter the judiciary or prosecution by employing persons with the bar examination as expert or judicial associates. There was, at least in theory, some loose supervision of this training through the MoJs. Consideration is now being given to establishing a more formal system of induction training through the entity Judicial and Prosecutorial Training Centres, which were established by law in 2002. The Training Centres have forwarded to the HJPC, in cooperation with the Council of Europe, a proposal as to the formal induction training which should be undertaken prior to entry to the judiciary. This proposal has not as of yet been discussed by the HJPC. Several issues need to be addressed in this regard. In particular, it will be necessary to assess how a more formal system for the training of future judges and prosecutors could be accommodated within the existing system for recruitment of judicial associates. It is likely that the HJPC will propose that all judicial associates be required to go through a certain training programme organised by the Training Centres before they are eligible to apply for positions as judges and prosecutors. It is also likely, with the increased responsibilities given to judicial associates in the Entity laws on courts (in legislative process in the Federation), that the HJPC will propose that it takes over the selection of judicial associates.

The Entity Training Centres are also tasked with providing advanced professional training for judges (including Minor Offence Court judges) and prosecutors. Because of perceived problems with the skills of sitting judges and because of the huge amount of new procedural legislation being

drafted at the time that the Centres was created, in their start-up phases, they have accepted the need to concentrate on this aspect of their mandate, rather than on that of induction training.

Judges and prosecutors are to be provided with instruction on interpreting and applying laws and procedures, on ethical standards, on the latest scientific and professional developments in the field of law, the practices of judges and prosecutors from other countries and other topics. The HJPC, in consultation with the Steering Board of the Centres, determines the minimum amount of training each judge and prosecutor must undertake annually and this is currently set at four days. Under the general supervision of the HJPC, the Centres have established curricula and have undertaken some training, particularly on the new procedural laws. Brčko District judges are required to participate in training provided by the Brčko Judicial Commission.

The training centre legislation was drafted in close consultation with the Council of Europe, in order to ensure that it met the appropriate standards and that, in particular, the centres were sufficiently independent and that the government could not exercise inappropriate levels of control over their management or curricula. The only role of the MoJ in the operation of the Centres is the appointment by the Minister of Justice of two distinguished legal professionals to the nine-member Centre Steering Board. More direct supervision of the work of the Centres is undertaken by the HJPC.

3.4.3.2 *Benchmarking*

Most respondents in the CEPEJ report said that there is a system for both induction and continuing training of judges and of prosecutors in their country. In some cases, training is compulsory and others not, although even when it is compulsory it appears that not all judges or prosecutors follow it.⁴⁴

With respect to the induction training of judges, in several countries, in practice, the courts provide the bulk of this, sometimes under the supervision of, or advised by, a (central) training institute. France is the only European country with a single training institute with a legally embedded monopoly position for the training of the judiciary. In the Netherlands, by contrast, there are neither regulations nor guidelines on training lawyers to become judges, and any training is financed from the general resources of the courts. While one central body supervises the training, there seem to be regional differences in the way in which the courts offer the practical part of the course.

3.4.3.3 *Conclusions*

The system of having mandatory continuing training provided through a statutory training centre governed largely by judges and prosecutors fits within European practices and Council of Europe guidelines. Systems for induction training vary widely. While the current BiH system of providing all such training through the courts and prosecutors' offices complies with European practice, so would having a more controlled approach through the training centres.

Creation of a single HJPC at the level of BiH makes it pertinent to question whether the Entity Training Centres should be unified and consolidated under the direct authority and the budget of the HJPC. The BiH level institutions (the Prosecutor's Office and Court of BiH) and the Brčko

⁴⁴ CEPEJ report, pages 30 and 48.

judiciary and prosecution could also be included under the HJPC's direct authority. This would better reflect the current state of affairs in the judiciary and it would make it easier for the HJPC to implement its training policy. It would also facilitate the HJPC in terms of disbursing its limited funding in accordance with its range of responsibilities. Unification of the training centres under the HJPC should not effect the geographical location and practical operation of the existing training centres. Two training facilities, one in Banja Luka and one in Sarajevo, would still be needed.

3.4.4 Performance evaluation for judges and prosecutors

3.4.4.1 Background

The regulations referred to above stating how many cases a judge was expected to solve each year for the purposes of assessing the number of judges in each court also came to form a system of performance measurement for judges. Most judges managed to easily complete their numerical quota of cases each month. This quantitative measure of a judge's work was supplemented by a qualitative measure related to the number of cases of that judge overturned on appeal.

This practice of assessing a judge's performance by the number of cases completed is deeply ingrained in the BiH judicial culture, but can set improper priorities for judges in dealing with cases and perpetuates a mentality that undermines the administration of justice. A judge who has met his quota of concluded cases before the end of a particular month may put off the conclusion of a case until the following month to help ensure the meeting of next month's quota as well. Judges are thereby encouraged to postpone the handling of complex cases and to process cases that are easier to conclude. In most or all cases, a listing of the number of cases solved by each judge and how that related to the quota has been the only information held by courts on the performance of each judge. It is not possible to tell, from these statistics, whether a judge is solving only easy cases, whether older or more difficult cases are being processed or allowed to fester, or how a judge's average case disposition time compares with his or her colleagues.

Technically, as the number of judges is now set by the HJPC, the regulations setting out the monthly quotas are of no effect. However, it is understood that courts are still using some type of quota system as a performance measurement tool, and that some new court presidents have set higher quotas.

The HJPC is now charged with setting the standards for performance evaluation of both judges and court staff, but as yet, has not done so. Under the new Laws on Courts, all judges must have their performance evaluated at least once each year, usually by the relevant court president.

Assessment of performance of prosecutors is less complicated due to the hierarchical structure of the prosecutorial service and thereby a more direct involvement of the chief prosecutor into the substance and amount of work of each subordinate prosecutor.

3.4.4.2 Benchmarking

Over recent years, mechanisms to assess judicial performance have been the subject of study in a number of countries and the actual establishment of assessment systems is still under development in many European countries. Assessing the performance of an individual judge is frequently closely linked with assessment of the performance of the court as a whole.

The Finnish judicial system measures the productivity of judges by the number of judicial decisions per judge divided by the number of personnel working in the court. The Czech Republic measures the quality of judicial decision-making by the percentage of successful appeals or by the length of proceedings. Slovenia uses the number of resolved cases, the structure of resolved cases, the number of cases where an appeal is filed and judgements are confirmed, overturned or amended, and absences that influenced the effectiveness of a judge's work. Lithuania only considers the performance of judges seeking promotion. Their work is evaluated by judges at a higher instance who hear appeals from the decisions of the judge in question. Other criteria, such as personal and professional qualities and participation in continuing training, are also evaluated. Germany appears to use some sort of numbers based system.

In most cases, the development of performance management indicators appears to be the responsibility of the MoJ, although in some cases, such as Italy, this is done in consultation with the equivalent of the HJPC.

3.4.4.4 Conclusions

3.4.4.5

Given the comments above on the problems associated with the quota system as a means of performance measurement, developing new methods will be an important task for the HJPC. In undertaking this, it will be able to take advantage of the recent experience of different countries.

Having the HJPC rather than the MoJ set such standards appears to be relatively unusual. Certainly, having the judiciary set its own standards through the HJPC could perpetuate the public image of the judiciary as an institution lacking accountability and not serving the needs of the public.

Following a decision to finance the entire judiciary and prosecution at the level of BiH and thereby establishing a unified and single counterpart to the HJPC, the BiH Ministry of Justice should have a say with respect to the generally required production by courts/prosecutors' offices and judges/prosecutors. The Ministry of Justice and the HJPC should decide the quotas together and fulfilment or non-fulfilment of the quotas should be an important factor during the yearly budget process of the judiciary.

Continuation of the current system whereby the HJPC alone is to decide production quotas is not satisfactory and could undermine the accountability of the judiciary in terms of public perception.

3.4.5 The disciplinary process in respect of judges and prosecutors

3.4.5.1 BiH system

A judge or prosecutor who breaches his or her official duties as a judge or prosecutor or who is alleged to have committed other disciplinary offences may be subject to disciplinary proceedings. Proceedings are brought by the Office of the Disciplinary Counsel within the HJPC and are heard

before panels of HJPC members. The HJPC Law lists around 20 offences and provides for a range of sanctions, from a warning to dismissal from office.

So far, 924 complaints were closed between 1 June, 2004 and 31 January, 2005⁴⁵. Several cases were resolved through joint consent agreements, under which the judge or prosecutor admits the offence and agrees with the HJPC on the penalty. The Office of the Disciplinary Counsel currently receives more than 100 complaints per month, although many of them do not disclose any disciplinary offence.

3.4.5.2 *Benchmarking*

Not all European countries give disciplinary powers to their high judicial councils. In general, it appears that those countries that give the high councils either the power to appoint judges and prosecutors or a strong recommendatory role in the process also give those councils disciplinary powers, e.g. France and Italy. Those councils that do not have a role in the appointment process similarly have no disciplinary role, e.g. Denmark.⁴⁶

3.4.5.3 *Conclusions*

The disciplinary system in respect of judges and prosecutors in BiH is similar to that in other European countries where high judicial councils also have appointment powers.

3.4.6 *The provision of support staff in courts and prosecutors' offices*

3.4.6.1 *Calculation of numbers*

The number of staff in each court is limited by regulations promulgated by the relevant MoJ. These do not deal specifically with each institution, but set general ratios of support staff to judges. Until the restructuring of the regular court system from 2002 onwards, the number of staff in many courts bore no relation to the regulations and in some cases was as high as five or six staff members to one judge. On the other hand, some courts were understaffed in comparison to the regulations, because of shortages of space or other considerations.

As from 2003, this power to regulate staff numbers is exercised in the Federation by the Federation Minister of Justice and no longer by the cantonal Ministers. Both entity Ministries promulgated new regulations in 2003, with which all regular courts in the entities should now be in compliance. The ratio is 3 staff to 1 judge in the Basic and Municipal Courts and 2.5 to 1 in the higher courts. Unlike previous regulations, the new ratios are not broken down into particular staff types. They also do not include certain positions, such as the court secretary, land registry staff or the court police. The ratio was not determined by a lengthy scientific examination of actual needs, but was based on a realistic appreciation of what would be possible in the circumstances.

The number of staff in the Minor Offence Courts is also set by regulations in the same way as the regular courts. In the RS, the current regulations permit 1.9 staff members per judge (1 typist per

⁴⁵ This includes complaints received both before and after 1st June, 2004. The number of complaints received after 1 June and which were closed during 1 June 2004 and 31 January 2005 was 705.

⁴⁶ See *Councils for the Judiciary* in EU Countries, Dr Wim Voermans, June 1999. The CEPEJ report contains some statistics on the numbers of disciplinary cases brought against judges and prosecutors in different European countries.

judge and 0.9 administrative staff, with some additional allowance for judicial associates in courts with more than five judges).

3.4.6.2 *Actual staff numbers*

The new regulations for the regular courts were expected to result in the total staffing of around 2,076 from January 2005.

In 2004, the Minor Offence Courts had approximately 790 staff in total. This is approximately 2.5 staff members to every judge and may therefore be higher than the prescribed ratios.

For benchmarking purposes, it can be assumed that the total staff in all regular and Minor Offence Courts is no more than 3,000. This includes an allowance for court secretaries, but not for land registry staff or court police, as these functions are not part of the court system in most other countries.

3.4.6.3 *Staffing structure*

While the limits on staff numbers are set by the MoJs, the staffing plan for each court (including the qualifications required for each post and a job description) is set by the court president by means of an internal book of rules. Under the new Laws on Courts, this must be agreed to by the relevant MoJ.

There is no centralised court staffing system whereby staff are appointed by the MoJ, for example, and can be transferred between institutions. Rather, the hiring process is conducted within each court and appointments made to that institution and any disciplinary issues are dealt with within that institution. The recruitment of staff is hampered by the fact that salaries are low.

One of the major problems in the efficiency of the courts is that judges are carrying out a lot of administrative tasks that could and should be done by someone else, leaving them to deal with issues that must be dealt with by a judge.

The eventual computerisation of the courts will reduce the currently perceived need for so many staff in the case registry offices, allowing courts to employ a greater number of more qualified staff while keeping within the determined staffing ratios. In particular, the use of legally qualified judicial associates to assist judges with research and drafting decisions, as well as possibly deciding minor cases (as anticipated by the Laws on Courts) should facilitate greater efficiency and better use of judges' time. As mentioned earlier, the HJPC is currently considering the question of its involvement in the selection process for judicial associates, given that this could be a career path to becoming a judge or prosecutor.

3.4.6.4 *Benchmarking*

Courts⁴⁷

⁴⁷ The figures in this table are taken from the CEPEJ Report. However, it should be noted that they are in most cases different from those indicated in *Benchmarking in an International Perspective – An international Comparison of the Mechanisms and Performance of the Judiciary System*, a report produced in May 2004 for the Netherlands Council for

Country	Number of judges	Number of staff	Number of staff per judge	Number of staff per 100,000 inhabitants
Croatia	1,819	6,020	3.31	135.66
Slovenia	774	2,171	2.80	110.54
Estonia	237	1,300	5.49	95.87
Portugal	1,551	9,730	6.27	93.49
Czech Rep.	2,716	8,591	3.16	84.22
BiH	1,018	3,000	2.95	75.00
Hungary	2,757	7,557	2.74	74.51
Germany	20,901	60,087	2.87	72.74
Slovak Rep.	1,232	3,612	2.93	67.15
Austria	1,732	5,401	3.12	66.95
Italy	11,793	32,223	2.73	56.21
Poland	7,771	22,655	2.92	59.26
Bulgaria	1,550	4,028	2.60	51.34
Finland	875	2,586	2.96	50.01
Denmark	328	2,201	6.71	41.00
Netherlands	1,896	5,016	2.65	31.35
Latvia	396	700	1.76	30.18
Sweden	1,693	2,493	1.47	27.88
France	6,240	16,076	2.58	26.71
Norway	652	1,025	1.57	22.65

As can be seen, while there is considerable variation in the number of staff per judge, many countries have between 2.5 and a little over 3, and BiH also falls into that category. Similarly, with regard to the number of court staff per inhabitant, that in BiH is similar to many other countries, with a broad grouping falling between 55 and 75.

The need for court staff in Germany is usually calculated by reference to the number of cases processed by the judges or courts every year and most of the federal states use a standardised system to calculate the necessary personnel.

3.4.6.5 *Conclusions*

While it is clear that BiH fits within, though at the upper end of, European practice with regard to the number of staff in the courts, no conclusions can be drawn regarding structure and qualifications of the staff within each court. As noted, there has been a heavy reliance on clerical rather than legally qualified staff and reluctance on the part of judges to delegate work. The prospective computerisation of the courts should provide an opportunity to discuss this issue further.

The overall number of support staff should not be increased in BiH. Rather one should look into and maybe copy the internal procedures in the courts of those countries that operate with a significantly lower number of staff per judge.

the Judiciary. On the whole, the ratio of staff to judges given in that report is higher than the figures indicated in the chart above.

3.4.7 Prosecution policy

3.4.7.1 Background

As in many countries in the region, prosecutors in BiH are considered part of the judiciary. Prosecutors' offices are defined by law as autonomous bodies and the MoJs have no input into or control over prosecution policy or over the conduct of individual cases. Neither do they have any role in the appointment of prosecutors, which is done by the HJPC. While on the whole the Cantonal and District Prosecutor's Offices are under the control of their chiefs, the entity prosecutors have the power to issue general or individual mandatory instructions to the lower offices and may also take over the processes of investigation and prosecution if the local office is unable to do so efficiently or has failed to do so.

In the Federation the prosecutorial service is regulated by cantonal legislation, as opposed to courts that should soon be regulated in an Entity law on courts. It is important that the legislation regulating the prosecutorial services stay harmonized and this would be better taken care of if an Entity level law on prosecutorial services is passed in the Federation. Such a law should also be harmonized with the HJPC law of 2004.

3.4.7.2 Benchmarking

There are different European models in terms of the political independence of the prosecution and determination of prosecution policy. A brief note on various countries systems is provided in the CEPEJ report (page 51).

In Germany, the Chief Prosecutor is a political appointee and can be dismissed by the Minister of Justice without reason. His most important task is the exercise of supervisory authority over the Prosecutors' Offices and all prosecutorial staff.

In the Netherlands, while the public prosecution service (under the Board of Prosecutors General) is affiliated to the MoJ, it operates largely independently. It is, however, accountable to the Minister of Justice who is responsible for its performance to Parliament. The Minister is concerned with general policy in respect of investigation and prosecution and may issue instructions after consulting the Board of Prosecutors General, which generally establishes policy on investigation and prosecution. The Minister may also intervene in individual cases, but this power is exercised only rarely and in very limited circumstances.

In Estonia, by contrast, the Chief Prosecutor is not subject to any direction and so he can design and establish guidelines and directives on prosecution policy independently. The MoJ has the right to make proposals only.

3.4.7.3 Conclusions

The prosecutorial service in BiH appears to be considerably more independent, at least formally, from executive government than in other European countries, where, in some cases, the prosecution is seen as part of the executive rather than judicial function.

However, while an argument could therefore be made to give the government greater input in the development of prosecution policy in BiH, it must be recognised that different historical and political considerations are important. Informally, there has been considerable inappropriate political influence over the criminal justice system in BiH and the institutional independence of the prosecution services is an important mechanism to limit that influence. Therefore, no immediate change of the status of the prosecutors in BiH vis-à-vis the executive powers is recommended at this stage.

New harmonized Entity laws on prosecutorial services should be drafted and passed by both Entity Parliaments and these laws should also be harmonized with the HJPC law of 2004.

3.4.8 Court administrative rules

3.4.8.1 Background

The internal operations of courts are determined to a large extent by books of rules promulgated by the MoJs. Currently, this is done at cantonal level in the Federation, although it will become a Federation-level responsibility with the enactment of the new Law on Courts. These books of rules deal with issues in which uniformity is required throughout the court system, such as systems of case registration, filing of documents, and handling of money and evidence.

The books of rules in use are clearly modelled on the SFRY book of rules of 1976. They regulate issues in greater detail than is probably necessary, rather than setting general principles. This diminishes the ability of individual courts to exercise flexibility in determining their methods of operation and consequently their ability to find more efficient means of undertaking the necessary tasks. A particular concern with the current books of rules is that the method of registering cases within a court creates statistics that exaggerate the court's workload and make it almost impossible to determine the actual number of cases or specific or average disposition times. As a result of these concerns, the IJC, in conjunction with a working group of local experts, prepared draft books of rules in 2003.

The HJPC has been given various powers in respect of court administration in the HJPC law including, the following:

- Participating in the drafting of, and approving, Books of Rules for the operation of courts and prosecutors' offices in BiH
- Monitoring and advising courts and prosecutors' offices on appropriate and effective budget, administration and management techniques and procedures and initiating training in this regard;
- Initiating, overseeing and co-ordinating projects related to improving all aspects of the administration of courts and prosecutors' offices, including seeking national and international funding therefore.

Furthermore, the Entity laws on courts (in legislative process in the Federation) give the HJPC the following responsibility with respect to Book of Rules for courts:

- The High Judicial and Prosecutorial Council in cooperation with Ministry of Justice of the Republika Srpska/Federation shall draft, and afterwards, the HJPC shall issue a book of rules on internal court operations.

The Book of Rules for internal court administration will be a key tool for the HJPC, together with the Ministries of Justice, to secure harmonised procedures across the country in respect of procedures that, for various reasons, should not be different from court to court. A typical example is the introduction, through the Book of Rules, of a uniform case numbering system.

Furthermore, the Book of Rules will be an important tool to implement “best practice” developed in one court but not practiced in all courts.

On the other hand it is important to avoid over regulating the internal operation of the courts so as to avoid leaving no room for creative court presidents to further develop best practises.

3.4.8.2 *Benchmarking*

Of the new EU member states, Hungary and Lithuania have given their judicial councils the power to regulate court operations.

3.4.8.3 *Conclusions*

The Book of Rules for Internal Court Operations will be an important tool for the HJPC – together with the Ministries of Justice – to reform courts operations and to secure implementation of necessary uniform standards across the country. This is particularly important at a time when the judiciary is about to be computerized and a case management system for the judiciary will be developed and implemented by the HJPC. Such a system can only work properly if all users adhere to standards set by the HJPC. A similar case management system should be implemented for prosecutors’ offices even though the need for standardised procedures may be more limited for prosecutors’ offices than for courts.

3.4.9 *Provision of adequate physical infrastructure*

3.4.9.1 *Buildings*

Among the few remaining responsibilities of the MoJs in respect of the operation of the court and prosecutorial systems is that of finding suitable premises.

Providing suitable premises has been a particularly pertinent issue recently with the restructuring of both those systems and the consequent need for new premises for some institutions. This problem was referred to in several interviews with the cantonal MoJ staff and buildings appear to occupy the time and attention of both MoJ staff and the Ministers themselves. The poor state of repair of court buildings was also said to create work, as staff become engaged in discussions over roof repairs, etc. Some MoJ staff visit the courts from time to time to check on the state of the premises and evaluate conditions in general.

While finding premises is the role of the MoJ, general maintenance costs have to be paid out of the budget of the individual court, although it appears that particularly substantial repairs may be given a separate allocation.

In general, the premises allocated to courts and prosecutors' offices are far from ideal and do not create an impression that these are important institutions for society. In particular, courts usually have only one courtroom, regardless of the number of judges (Sarajevo Municipal Court with 75 judges has ONE court room for hearings!), and judges do not have offices separated from public access in which they can work when not conducting a hearing.

The low standard and bad design of court premises in BiH has consequences both for the appearance of independence and for efficiency. Most hearings are held at the office of the judge and the necessary distance between the various involved actors is difficult to maintain in such an environment. There is no room for spectators and the telephone and visitors frequently disturb the judge at hearing.

In most European countries court hearings are a formal event and the environment in which they take place underlines the importance of them as well as the status of the court/judge. The courtroom does not have to be large, but it is often organized in a way that creates a distance between the judge and the parties involved (separate door, non accessible podium etc). Usually it also includes some kind of official insignia to underline the seriousness of the proceedings.

Holding hearings in small and crowded judges offices does, on the other hand, diminish the role of the judge and the importance of a court hearing and it is a fact that court hearings in BiH, both by judges themselves and by the parties, are regarded more as meetings than "hearings". Meetings are something one may easily reschedule, one does not need to be overly prepared, one can dress in an informal manner and one may interrupt and speak when it suits oneself.

The HJPC is about to carry out an assessment of all judicial and prosecutorial premises in BiH. The US Government finances the project. The objective is to have a complete database finished by August 2005. The database will contain detailed information on each location, with drawings, measurements, number of rooms, general standards, specific problems related to heating, electricity, leakages, furniture etc. The database will also include specific recommendations for renovation of each premises and a cost estimate for such interventions. Based on this a 5 to 10 year plan for renovation of premises all over BiH will be made and approved by the HJPC and the BiH Ministry of Justice. It is expected that both national and international funds will be needed to catch up with the backlog of required investments that have accumulated during 20 years of neglect.

3.4.9.2 Technology

Although this was within their powers, the MoJs have not undertaken any significant role in the development of a computerisation strategy for the judiciary and prosecution. As a result, the adoption of modern technology has not evolved pursuant to any strategic plan, but has rather been haphazard, depending on initiatives within a particular institution or donations from international organisations. While there were around 800 computers in the courts and prosecutors' offices in 2003, at least half were obsolete and only 18 courts had a local area network.

In 2003, an IJC court administration project took the lead in developing an Information and Communications Technology (ICT) strategy proposal for the judiciary. It recommended that one body be given the overall co-ordinating responsibility in respect of computerising the judiciary and prosecution for the whole country. The only obvious choice for this body was the HJPC, and so a provision was included in the HJPC Law that effectively established the HJPC as the central decision-making body for ICT development in the judiciary and prosecution. In particular, the HJPC was given the power to supervise the use of ICT in the courts and prosecutors' offices and to prohibit the adoption of computerised case processing systems without HJPC approval.

A unit was established within the HJPC secretariat in late 2003 to finalise the ICT strategy plan for approval by the HJPC, assist in its implementation, and focus in particular on the co-ordination of existing and planned donor ICT projects in order to ensure optimal use of resources. It has also been assisting the judiciary and prosecution make use of the computer facilities that they already have by the setting up of a Help Desk, by developing existing software, and by initiating and co-ordinating user training. In the long term, it will be up to the local authorities, through the annual budget allocation, to ensure that the courts and prosecutors' offices have the equipment and technology to allow them to function effectively.

3.4.9.3 *Conclusions*

The inability of the MoJs to adopt or implement any coherent ICT strategy, or to provide proper space and facilities for court operations appears to have been caused both by financial problems and lack of will.

Premises problems, in particular, are likely to continue to take up MoJ staff time. While all premises or equipment could be put under the control of one institution, such as the BiH MoJ or HJPC, this will not solve the underlying problem of lack of money for the long-term capital investment needed to bring the courts and prosecutors' offices up to an acceptable standard.

3.4.10 *Assessing the performance of the judiciary*

3.4.10.1 *Background*

Evaluating the effectiveness of the judiciary can lead to better decision-making in terms of resource allocation. In BiH, the courts report at regular intervals to the relevant MoJ. While these reports have taken a variety of forms, they generally consist of statistical information on the number of cases of each type current in the period in question and the numbers resolved, and the numbers of cases solved by each judge. The MoJs sometimes compile these reports for onward distribution but, other than that, appear to do little with them. There is no system in place for a comparative evaluation of the work of the courts or the system in general and no repository of information on the BiH court system that would allow such an analysis to take place. For example, there are no general statistics on the caseload of the court system for the entire country.

The HJPC Law gives the HJPC the power to set criteria for the performance of courts and of prosecutors' offices. As yet, it has not exercised this competence.

3.4.10.2 *Benchmarking*

As for assessing the performance of individual judges, developing methods to assess the performance of individual courts and the judicial system as a whole have been the subject of some recent studies in Europe and the two aspects of performance are closely linked.

Delays in the processing of cases are a major problem in nearly every European country, not only BiH. There are various reasons, including lack of resources, bad court governance, or a culture where delay is acceptable. Measuring the production of the judiciary should, therefore, be an important task and there are different ways that it can be done.

One method is by the number of cases concluded per employee, per 1,000 inhabitants or per Euro spent on the judicial system. While such comparisons are interesting, whether or not they give reliable information on the real productivity of the judiciary is debatable. Lack of comparable data mean that no comparison can be made with BiH practice.

Cases solved per inhabitant or per employee

There are substantial differences between countries and between types of cases in terms of the number of cases concluded per inhabitant per year in different countries. These differences are likely to reflect the types of cases that enter the judicial system and other system characteristics, but also arise from the difficulties in getting consistent data.

In general, it can be expected that judicial systems will solve fewer complex cases than easier cases and so in systems where only complex cases enter the process, the output of cases can be expected to be lower. Thus, assuming that the system functions at all, a low number of cases solved per employee, per Euro or per inhabitant is more of an indication of a system with high entry barriers than of an inefficient system.

Sweden, Germany, the Netherlands, Finland and Austria have less than fifteen concluded criminal cases per 1,000 inhabitants, while England and Wales, Poland and Italy conclude over 40 criminal cases per 1,000 inhabitants per year, with many minor disputes and offences being dealt with by the courts. There is also a wide variation across Europe in terms of the number of concluded cases per employee. Denmark manages to solve almost five times as many criminal cases, calculated in this way, than Germany. Looking at the number of concluded criminal cases per judge, this is up to 900 cases per year in England, whereas it is fewer than 200 in Germany, which is what would be expected from the other figures given above.⁴⁸

There is a different pattern in civil law. Austria and Germany solve a large number of civil cases per inhabitant. Poland has the highest number as real estate registration is considered to be a civil case. Sweden has the highest number of administrative cases solved per 1,000 inhabitants, as these cases enter the system easily as do administrative appeals.

The CEPEJ report has looked at this issue in terms of particular types of case (robbery, homicide, general non-criminal, divorce and dismissal) and provides statistics on the number of those types of cases coming to court and the number of decisions issued. While the data on decisions issued is generally in line with that on the number of cases brought, there are wide varieties between countries.

⁴⁸ The information in this and the following paragraph is taken from “Benchmarking in an International Perspective”.

Cases concluded per Euro spent

Another way of benchmarking the work of the judiciary is by calculating the number of cases concluded per Euro spent (CCE). The aim of this approach is to reflect the ratio of service provision and total resource utilisation. For this purpose, expenditures in each country need to be converted into a common one and the method chosen is the Purchasing Power Parities index published by the OECD. In general, CCE is a more complete quantification as it also takes material supplies and capital services into account. In particular, differences in the use of computers may contribute to differences in the numbers of concluded cases per employee, but that calculation ignores the expenditure related to computers.

CCE is expressed in terms of the number of cases per 1,000 Euro. The number of criminal law cases concluded per Euro varies between 0.5 and 4.0 over ten of the eleven countries surveyed and for civil law between 1.0 and 4.0. Poland, which scored 8.0 in each category, is clearly an extreme example, due to the low staff costs and the high number of concluded cases per employee. The Netherlands, Sweden and Italy fall at the other extreme. In The Netherlands and Sweden, only more serious cases are brought before the courts.⁴⁹

Other performance measurements

Those systems described above are probably best used in the context of the judicial system as a whole. For individual courts (as well as for individual judges and for the judicial system as a whole) the processing time of cases brought to court has become a key indicator of efficiency. Again, the CEPEJ report indicates that there are substantial variations in practice between countries and between different types of case within one country. This is, of course, completely to be expected, as each country has developed its own procedural rules and practices.

Many countries have developed or are in the process of developing target times for different types of case. In Finland, these are set by Parliament when confirming the annual budget for the courts. In most other countries, target times constitute a less formal mechanism to encourage efficiency.

3.4.10.3 Conclusion

With the high cost of judicial salaries in BiH, it is important that the best use is made of judges, i.e. they should be involved in tasks that only judges can do, such as conducting hearings, and should not be calculating court fees payable, sending out summonses, etc. One way of ensuring this is through the promulgation of performance targets, such as target times for dealing with cases, comparative information on court performance, etc. This should not only encourage efficiency within each institution, but could also lead to the development of mechanisms to have cases dealt with outside the court system as much as possible, such as by mediation in civil cases and by administrative mechanisms in criminal cases. BiH, as other European countries, should develop relevant production measurement systems for individual judges/prosecutors and for courts/prosecutors' offices.

⁴⁹ The information in this paragraph is taken from *Benchmarking in an International Perspective*. The countries compared were Austria, Belgium, Denmark, England and Wales, Finland, France, Germany, Italy, the Netherlands, Poland and Sweden.

3.4.11 Remuneration of judges, prosecutors and support staff of the courts and prosecutors' offices

3.4.11.1 Background

The method of calculating the salaries of judges and prosecutors has been outlined in subsection 3.3. As highlighted in that section the method for such calculation is outlined in entity legislation and at state level by a decision of the Council of Ministers.

The salaries and benefits of court and PO support staff are regulated at state level by the Law on Civil Service and the Law on Labor Relations in the Institutions of BiH depending on whether the support staff member is classified as a "civil servant" or an "employee" - such a classification depends on whether a staff member has completed a university diploma/degree. At Federation level salaries and benefits are regulated by the Law on Civil Service of the Federation⁵⁰ and the Law on Employees which it is expected will be adopted in early course. The Federation Law on Civil Service regulates the employment status of civil servants in Civil Service authorities of the Federation, the cantons, the cities and the municipal authorities. In the RS court and PO support staff are not classified as civil servants and, therefore, their salaries and benefits are regulated outside of the Law on Civil Service in the RS in the Law on Labor.

To further complicate matters the Federation Law on Civil Servants, for example, provides that various decisions have to be made and/or various agreements arranged with unions by the Federation government on matters such as basic salary, the coefficients to be applied to the basic salary and other forms of remuneration. Thus far, the Federation government has issued a decision (called a decree) in June, 2004 on other forms of remuneration for civil servants and employees at Federation level only, in November, 2004⁵¹ a decision on salary grades and coefficients for civil servants again for the Federation level only and in December, 2004 a so-called temporary decision on salary grades and coefficients for employees again at Federation level only.

3.4.11.2 Conclusions

The current system for the calculation of salaries of judges, prosecutors and support staff of the courts and POs is unnecessarily complicated. It also leads to inequalities across the system as members of the judiciary and the staff which support them are dealt with in a discriminatory manner. In addition, because of the complicated rules and procedures the system is not transparent and in order for it to operate effectively quite a significant amount of manpower is wasted on unnecessary calculations and administrative tasks. Under these circumstances salaries and other compensations for judges, prosecutors and support staff should be harmonised and regulated by BiH level legislation.

3.4.12 Summary – General Overview

The chart below indicates on the left the main functions that must be carried out in order to ensure the functioning of the judicial and prosecutorial systems and these functions have been discussed above. The chart then indicates which body exercises what particular competence in respect of that function. Those in respect of the MoJs are as anticipated in the new Laws on Courts (in legislative

⁵⁰ OG of FBiH 29/03, 23/04, 39/04

⁵¹ this Decision was subsequently withdraw

process in the Federation). The transfer of some powers to the HJPC is relatively recent, and as of yet it has not been able to exercise all of them fully.

Issue	HJPC	MoJ	Court/ Prosecutor's Office
Determination of numbers of judges and prosecutors	Makes final determination	Relevant MoJ consulted with by HJPC	
Appointment of judges and prosecutors	Full power to appoint. Also power to transfer or grant leave of absence.		
Training	Supervises work of Judicial and Prosecutorial Training Centres and advises on curricula. Establishes mandatory minimum for continuing training Determines programme of induction training.	Entity Ministers of Justice appoint two members of Steering Board of Judicial and Prosecutorial Training Centres.	
Conduct of disciplinary proceedings	Full power to conduct proceedings and to impose sanctions, including dismissal.		
Performance evaluation – judges and prosecutors	Sets criteria for evaluation.		In general, court presidents responsible for evaluation of judges in their court.
Provision of support staff	No influence.	Entity MoJs set regulations by which the number of staff in each court is determined. Also must agree to individual staffing structures proposed by court presidents.	Court presidents determine staffing structure in own court within the set parameters, which must be agreed with MoJ. Courts hire and fire own staff. Performance evaluation of court staff done internally in each court.
Regulation of internal operations	Issue Book of Rules for courts. Approve Book of Rules of prosecutors' offices. Monitors and advises courts and prosecutors' offices on appropriate administrative and management techniques.		In Federation, each prosecutor's office makes own book of rules on internal organisation. RS Chief Prosecutor issues book of rules for each office in RS.

	Initiates, oversees and coordinates projects to improve the administration of courts and prosecutors' offices.		
Material infrastructure	Central decision-making body in respect of ICT policy.	General responsibility to provide material conditions for the work of courts. In the Federation, this responsibility falls to both the Federation and cantonal Ministries.	
Evaluating performance of court and prosecutorial systems	Sets criteria.	No specific competence, but general powers to monitor application of Law on Courts and of court administration in general.	
ID cards and judicial robes	Regulates design and use	Procures and issues them.	
Collection of statistics	Power to collect and analyse reports and budget and revenue data from courts and prosecutors' offices.	Power to collect statistical information relevant to the work of the courts and to instruct the courts on the keeping and submitting of this information.	
Court experts and interpreters		Regulate appointment of permanent court experts. Entity MoJs issue regulations on certification of interpreters. In most cases, the Ministries also carry out the appointment or certification process.	

Key Recommendations - The Administration of Courts and Prosecutors' Offices

1. Following a decision to finance the entire judiciary and prosecution at the level of BiH, the BiH Ministry of Justice and the HJPC should together decide the number of judges and prosecutors and support staff in each court and prosecutors office.
2. Following a decision to finance the entire judiciary and prosecution at the level of BiH, the BiH Ministry of Justice and the HJPC should together decide the yearly production requirements (quota) for judges/prosecutors and courts/prosecutors offices. BiH should develop relevant production measurement systems for individual judges/prosecutors and courts/prosecutors' offices.

3. Salaries and other compensations for judges, prosecutors and support staff should be harmonized and regulated by BiH level legislation.
4. The numbers of judges and prosecutors as well as support staff in BiH are high and should not be increased before other measures are implemented with respect to increasing the production levels of the judiciary (improved internal procedures, introduction of Information and Communication Technology, development of a production measurement system etc).
5. New and harmonized legislation for the prosecutorial services should be passed in both Entities.
6. The Entity Training Centres should be consolidated under the authority and the budget of the single HJPC and a long-term strategic plan for induction and continuous training should be developed.
7. Immediate steps should be taken to limit the inflow of cases to courts that do not require “judicial consideration”, such as enforcement of unpaid utility bills.
8. It should be considered whether mediation should be made obligatory for most civil cases.
9. For the budget year of 2006 specific funds should, in accordance with the original and agreed strategy for judicial restructuring in BiH, be provided for the hiring of reserve judges to handle accumulated case backlogs.

Subsection 3.5– Administration Inspection and Public Complaints

3.5.1 Role of Administration Inspectorates – Inspections of Administrative Bodies

An administration inspectorate forms part of the BiH MoJ, the Federation MoJ and the cantonal MoJs. In the RS it is the Ministry of Administration and Local Self Government which conducts parallel tasks and in Brčko it is the District Government. The task of these inspectorates is to ensure that the laws which fall within the competence of those Ministries are complied with by public administration bodies. These laws fall into two main categories:

- Laws relating to the procedures adopted by public administrative bodies;
- Laws in relation to the rules of employment of current and prospective employees of the public administration.

The inspectorates may also consider other laws within the competence of the Ministry. However, it appears that to the extent that it is done at all, inspection related to the laws on courts and on prisons is conducted within the relevant unit of the MoJ and not by the administration inspectorate. Inspection of the work of the courts is discussed below. Inspection of the prisons is referred to in subsection 3.6.

3.5.1.1 *BiH level*

There is currently one administration inspector working in the Sector of the Administration Inspectorate of the BiH MoJ and he was recently appointed to the position and was, therefore, not part of the interview process. As mentioned previously in Section 2.2.1, the Rulebook of the BiH MoJ prescribes that the inspectors in this sector are to carry out public administration inspection, including implementation of the legal provisions applicable to civil servants and administrative employees, and the administrative procedure and special administrative procedure.

3.5.1.2 *Federation*

There are five administration inspectors working in the Administration Inspectorate of the Ministry of Justice of the Federation, one Chief Inspector and four Inspectors.

There are 80 municipalities over which the Administration Inspectorate has jurisdiction together with each of the cantons and the Federation public administration bodies which include the bodies attached to the military and the State Security Services. The inspectorate also has the competence to inspect all of the inspectorates of all public bodies in the Federation to which inspectorates are attached.

The inspectors undertake both *ad hoc* inspections based on information which they collect through the media and personal contacts and on the basis of complaints received by the public. In 2003 the inspectorate handled 1100 complaints, the majority of which were based on the fact that members of the public had not received any response to queries/requests that they had made to and of the Federation Administration bodies which are competent in the area of housing and property. As an example of a complaint driven inspection a municipal mayor lodged a complaint about the inefficient manner in which the Federation Ministry of Urban Planning dealt with appeals from

decisions of cantonal officials. In the course of the subsequent inspection it was discovered that the Ministry of Urban Planning had a backlog of such appeals dating back to early 2003. However, this arose from serious staff shortages presumed to be caused by the low salaries on offer and so it was difficult for the Federation MoJ to come to a decision on the complaint as the obvious recommendation to increase staff could not be fulfilled.

3.5.1.3 Cantonal Administration Inspectorates

Each of the cantons has an administration inspectorate attached to its Ministry of Justice. The number of inspectors varies as between the cantons – for example, there are two inspectors in Sarajevo Canton, one in West-Herzegovina Canton and currently none in Zenica Dobož Canton and Central-Bosnia Canton although a position for such an inspector is prescribed in both rulebooks.

The cantonal inspectorates have competence to inspect their respective cantonal administration bodies, cantonal administration institutions and bodies which carry out services in relation to local self governance and administration. They also have the power to inspect legal entities which have been given public powers by their respective canton and, as in the Federation, the cantonal inspectorates can also inspect inspectorates attached to their respective cantonal public bodies.

Similar to the inspectors at a Federation level the cantonal inspectors conduct *ad hoc* inspections based on information which they receive from the media/personal contacts and they also conduct inspections based on complaints which they receive. The majority of the complaints with which they deal are in relation to the failure of a certain body in their respective cantonal administrations to reply to correspondence sent by a member of the public. It appears that the inspectors have no formal training in relation to the managing and conducting of inspections.

3.5.1.4 RS

There are nine inspectors employed at the Ministry of Administration and Local Self Government. Each of the inspectors is assigned a particular region and the RS is divided as follows: Banja Luka; Prijedor; Dobož; Bijeljina; Pale; Zvornik and Trebinje.

Similar to the situation in the Federation, the inspectorate has competence over all public administration bodies in the RS including each of the Ministries, the Health Care Fund, the Welfare Centre Fund and the Pension Fund. The administration inspectorate also has the competence to inspect all local bodies of public administration and the inspectorates attached to all public bodies.

In 2003 the Inspectorate conducted 1164 inspections and issued 752 decisions. The most common complaint submitted by members of the public is in relation to silence of the administration and complaints relating to property issues. There are also a significant number of complaints alleging that certain ministries are working outside their competence.

3.5.2 Enforcement by the Administration Inspectorate

In the Federation once an inspection is complete the inspectorate arrives at a decision and recommends either that a fine be paid or that someone in the body inspected be replaced. If the decision is not complied with the file in relation to the matter is sent to the Specialist for Leading the Minor Offence Procedure who is employed within the structure of the Ministry of Justice. The

Specialist for Leading Minor Offence Proceedings issues a decision based on the file and in most instances directs that the fine be paid. If the fine is not paid the Specialist for Leading Minor Offence Proceedings has the power to seek an enforcement order from the cantonal court. It appears that this power is not often exercised.

At a cantonal level the cantonal inspectorates make recommendations based on inspections which they carry out on their own initiative and these are sent to the cantonal government which can either accept or reject them. If the inspectorate discovers that there are deficiencies in the system as a result of an inspection carried out either on the basis of a complaint or on their own initiative they advise the relevant staff of the administration body accordingly. The inspectorate prescribes a deadline in which the irregularity is to be dealt with and if it is not dealt with within that time period the inspectorate has the power to file a charge with the Minor Offence Court.

In the RS if a person refuses to comply with a decision of the administration inspectorate the inspectorate has the power to initiate minor offence proceedings or file a report with the prosecutor's office. It appears that the level of compliance with decisions of the inspectorate is high and that the inspectorate has a policy of filing minor offence proceedings when there is non-compliance.

3.5.3 Benchmarking

In most European countries, inspection of the administration is carried out in the context of a comprehensive system of audit and review. In general, the inspectorates are not competent to receive complaints directly from the public. This means that, rather than concentrating on dealing with and replying to specific inquiries, they can focus on identifying problems and drafting proposals in order to achieve solutions.

For example, Greece created a central audit institution in the late 1990s. This body was established within the Ministry of the Interior, Public Administration and Decentralisation and it aims to increase internal controls in the civil service. It inspects, controls and investigates public sector organisations such as government departments and local government organisations with a view to ensuring administrative effectiveness and service quality by means of performance measures. Administration inspectors have the authority to investigate the way that all agencies operate and to make proposals for their improvement. In particular, the audit institution is responsible for dealing with mal-administration, lack of transparency and low service productivity and quality by making proposals and recommendations that the service in question must take into account and put into practice.

France operates a General Government Inspectorate, which has three functions. The first is to inspect and supervise the departments of the Ministries of Interior, Internal Security and Local Rights and the Ministry for Overseas Territories. It supervises organisations receiving subsidies or public contributions (foundations, associations, semi-state companies) and conducts disciplinary investigations into those bodies. Its jurisdiction also extends to other ministries. The second of its functions is to carry out inspections in those other ministries on the authority of the Prime Minister or any other minister within the system. One third or so of the 100 reports filed each year by the IGA relate to ministries other than the Ministries of Interior and Overseas Territories. The third of its functions is to research and give general advice in relation to efficiency in public administration bodies.

In countries without a centralised system of administrative inspection, there are usually a number of internal and external mechanisms for ensuring that the work of public administration is carried out effectively. Such mechanisms include disciplinary controls, efficient use by the public of the system of judicial review together with the consequent discovery process and the use of freedom of access to information legislation. They also include legislation that penalises a public body for failing to deal with requests and applications promptly. For example, the planning legislation of many countries prescribe that if an applicant for planning permission does not receive a decision from the competent body within a prescribed period, the answer is deemed to be positive. If a staff member of the public administration has failed to issue a decision on time, or if a decision results in a successful judicial review application, there are internal disciplinary procedures to deal with such matters. If a court application or freedom of information request results in the discovery of a more sinister motive than incompetence or inefficiency, the matter is publicised, which could lead to disciplinary action or even criminal proceedings. These mechanisms, taken together, ensure that the public is dealt with in a speedy and efficient manner by bodies of public administration. The role of the legal profession in this regard cannot be over-emphasised. Its role in using freedom of information legislation and the discovery process are a key ingredient in ensuring that the public administration operates in a fair and efficient manner.

From the benchmarking it can be concluded that it is considered necessary to put in place some sort of system to make sure that the bodies of public administration deal with the public in an effective and efficient manner and within the guidelines laid down by the laws and regulations in the areas in question. In many countries this is carried out through a system of inspection whilst in others it is carried out through a variety of mechanisms which, perhaps, in a more subtle manner ensure that the public administration delivers results effectively. There is a tradition of administration inspectorates in BiH and moving to a system which involves the interplay of many different mechanisms and the appropriate balancing of these mechanisms may at this stage represent too significant a challenge for a country which is currently attempting to build up its administration and litigation systems.

3.5.4 Difficulties with the operation of the current system

The first difficulty with the manner in which the current system operates is the fact that the broad mandate which has been assigned to the inspectorate (in terms of geographic area, the numbers of bodies to be inspected and the laws which fall within their competence) means that it is difficult for the inspectorate to decide which inspections should be prioritized over others. This could lead to a situation where the inspectorates penalize the less serious violations of the law and fail to identify those which are far more serious.

In section 3.5.1 above we outlined the territorial jurisdiction of each of the inspectorates and the bodies which they have competence to inspect.

However, the laws over which the inspectorates have competence also mean that their workload is also significant in terms of the scope of the subject matter. As mentioned earlier, each of the inspectorates have the competence to inspect in relation to their respective laws on the procedures adopted by public administration bodies when dealing with the public. In the Federation, for example, the relevant law is the Law on Administrative Procedures (OG of FBiH 2/98). This law

regulates, *inter alia*, the manner in which the public authorities are obliged to deal with the public (although in certain areas there are substantive laws which may provide for different procedures).

The aforementioned law provides that the bodies of public administration are obliged to deal with requests from the public in a fair and efficient manner. They are also obliged to have regard to all of the laws and regulations which are relevant to the request which is being made by the member of the public, to be independent and impartial, to allow a right of appeal and to issue a decision to a member of the public as speedily as possible and at a minimal loss of time and cost to other parties which are affected by the decision. The cantonal administration inspectorates are obliged to apply the Federation law on Administrative Procedures and there is an equivalent law in the RS.

As a result of the broad mandate of the inspectorate, in terms of the territory and bodies over which they have competence and the broad subject matter scope of the laws with which they deal, we suggest that the inspectorate is unable to meaningfully audit the system of public administration. Under these circumstances, we suggest that consideration should be given to either narrowing the scope of the mandate of the inspectorates or putting in place meaningful processes and procedures to ensure that the more detrimental violations of the law are discovered by the inspectorate and that the necessary action is taken in respect of these violations.

This leads us to the question of the system of enforcement which does not appear to operate very effectively, particularly in the Federation where very few minor offence proceedings ever reach the filing stage. This generates a culture within the administration bodies where they know that, although they may fall foul of the law on administrative procedures, this will not result in any adverse consequences for them or for the sector in which they work.

Finally, we might mention the fact that it is very difficult for the inspectorate to operate in a system where public administration as a whole is in need of reform and where a reform process is currently at a fact finding and investigative rather than implementation phase. Systems of inspection in other countries produce results because they are simply fine-tuning a system which functions, for the most part, in an efficient manner and where employees of the public administration bodies know that a negative finding by the inspectorate will lead to adverse consequences. In addition, once operating inspectorates in other European countries have identified problems in the system they can also remedy the problems with appropriate solutions as they have the necessary funding and the necessary systems in place in order to do so. This is not so with the administration inspectorate in BiH.

In BiH deficiencies in the system identified by the inspectorates are often as a result of fundamental problems in the system as a whole, such as, inadequate staffing levels, inadequate funding and, possibly, the development of “bad practice” as opposed to “best practice” by those applying the laws on administrative procedures.. In other words, there are problems endemic to the system of public administration which will need to be reformed before the inspectorates can operate in an efficient and effective manner.

The System Review Team of the Public Administration Reform project is looking in more detail at administrative procedure in general and at the administration inspectorate in the context of this review. It is important to look at administration inspection in this wider context. Looking at it in isolation may result in the production of false conclusions. In fact looking at it in isolation we are forced to conclude that, with its current mandate, the inspectorates cannot possibly operate

effectively and that they should, therefore, be replaced by some form of independent audit which would not operate on the basis of complaints submitted by the public. We would also suggest that internal disciplinary controls should be introduced/strengthened and that effective enforcement mechanisms should be adopted and applied.

3.5.5 Proposals of the System Review

The System Review Team recently produced their final report on administrative procedures. The team has made a number of suggestions in relation to improving the operation of the administration inspectorate both from a structural point of view and from a procedural viewpoint. In terms of structure, the System Review Team has suggested that the inspectorate in the Federation should be organized on a territorial basis similar to the system in the RS. This would mean that the administration inspectors currently working at a cantonal level would become part of the Federation Level Inspectorate and be assigned a particular territory which may or may not cover the boundaries of one particular canton. This would depend on the number of inspectors employed at Federation level. In particular, the Review Team has recommended, as follows:

“In order to improve the efficiency of administrative inspection in the FBiH, it is recommended that the FBiH and Cantonal governments consider a coordinated plan for the reorganization of administrative inspections, focusing on a single inspectorate at the FBiH level. The actual inspection tasks should be carried out by de-concentrated units in the field, coordinated from headquarters”.

In terms of procedural reforms, the System Review has made a number of proposals in order to enable the administration inspectorate to be able to carry out its tasks efficiently and in an effective manner. In particular, it has been suggested that administration inspectorates at all levels should introduce a Standard Operating Procedure in order to be able to follow a single procedure while carrying out inspections. The inspectorates should be trained in this common methodology. It has also suggested that the administration inspectorate should focus on administrative procedure issues rather than employment matters which, since the introduction of the civil service laws, are looked after separately. In addition, it has suggested that it would be useful for inspectors to activate themselves not only on the basis of individual complaints but also of planned checks on all aspects of the procedure including the standard of services to parties (šalterska praksa).

During discussions with the System Review Team it was also suggested, in terms of standardizing procedures, that a comprehensive review should be completed of all substantive laws where time limits and procedures for dealing with the public are prescribed. As mentioned above, in general, the procedures and time limits are those set out in the relevant Law on Administrative Procedure. However, in certain instances, substantive laws provide for different procedures. The System Review Team suggested that these substantive laws should be reviewed and considered and standardised procedures across the entire of the public administration should be introduced. This would make the task of the inspectorate far easier in that it could review all procedures against the same standard which would mean that it would not have to familiarise itself with a range of laws across a range of areas. This should increase the efficiency of the inspectorates and ensure that their tasks are carried out in a speedier fashion.

Finally, in terms of standardisation the System Review Team suggested that each body which is subject to inspection should be obliged to prepare a report of its activities on an annual and

standardised basis which should be made available to the inspectorate. In this way each body would be forced to internally audit its own activities and to produce an account of itself at the end of each year. The inspectorate, under these circumstances, would be able to make informed choices about the bodies which they should inspect and those that they should prioritise for inspection.

In terms of enforcement, the System Review Team has suggested that the Laws on Administrative Procedures at all levels should expressly set forth the monetary and other sanctions which can be imposed for the violation of its key provisions not only for the institution itself but also for the employees carrying out the administrative procedure, employees undertaking activities prior to the taking of decisions and/or the head of the administrative authority.

These suggestions should go a long way towards improving the current system and making it operational. It would mean that there is no possibility of duplication between the Federation and the cantonal administration inspectorates and that the system in the Federation operates more efficiently. The compilation of standardized annual reports “tailor made” for the inspectorates, the adoption of common methodologies by the inspectorates and the standardization of administrative procedures would mean that the inspectorates would be in a better position to prioritize their inspections and to weed out the more significant violations of the administrative laws. Although the mandate of the inspectorate would continue to be expansive, it would be managed more effectively if there were mechanisms in place which reduce the likelihood that excessive time is spent inspecting bodies where less significant violations of the law have been committed and where more serious violations are prioritized.

Finally, once the reform of the public administration is completed the more fundamental problems in the system, referred to earlier, should be remedied and the administration inspectorate, under these circumstances, will be tasked with, as in other European countries, fine-tuning a system which, for the most part, is operational.

3.5.6 Inspection of the courts

3.5.6.1 *Role of the court inspectors*

In the RS the Sector for the Organization and Work of Judicial Bodies is tasked with dealing with complaints in relation to the administration of the courts. There are two court inspectors employed in this sector who deal with complaints in relation to the operation of the courts. The inspectors deal with complaints lodged with the RS National Assembly. They also carry out inspections on their own initiative. The majority of complaints are, in fact, queries as to the status of a particular case. The inspectorate produces an annual report of its activities which is submitted to the Minister. There are no enforcement mechanisms in relation to the decisions of the inspectors and they can simply make recommendations.

In the Federation the Judicial Sector undertakes a range of tasks in relation to monitoring the operation of the courts. However, inspections of the courts are not carried out by employees of the sector. Instead the sector (and, in particular, one judicial associate) is tasked with dealing with complaints from the public in relation to the operation of the courts and putting together statistical data on the courts. In terms of complaints it appears that many of these are, in fact, requests for information in relation to the status of a particular case.

In the cantons the sectors for the judiciary in the respective cantons are involved in processing complaints in relation to the courts. Again, many of the complaints submitted are in relation to the lack of progress of a particular case. The Ministry provides the complainant with details of the status of the case in relation to which they have submitted a complaint but can do nothing to ensure that a case is dealt with in a more speedy manner. The judicial sectors of the cantonal ministries also compile an annual report of the courts within their jurisdiction, i.e. one cantonal court, the Municipal and Minor Offence Courts.

At BiH level the MoJ does not carry out any court inspection functions.

3.5.6.2 *Relevant applicable laws*

There are a number of laws which regulate the manner in which complaints in relation to the courts and the judiciary must be dealt. However, the laws are not particularly clear in this area.

In relation to the judiciary, the HJPC is given the power to receive complaints against judges and prosecutors, conduct disciplinary proceedings, determine disciplinary liability and decide upon appeals (Article 17, items 4 and 5 of the HJPC Law). The Office of the Disciplinary Counsel, an Office within the Council, is specifically tasked with evaluating complaints for legal sufficiency, investigating allegations of misconduct against judges and prosecutors and initiating and presenting cases of disciplinary violations before the disciplinary panels of the Council (Article 64 of the HJPC Law).

In relation to the courts, as discussed in subsection 3.4, Article 23 of the HJPC Law gives the Council competence to set criteria for the performance of courts and prosecutors' offices and to initiate enquiries concerning administrative or financial conduct of the courts.

Article 8 of the Law on Courts of the RS provides that the transparency of the work of the courts is to be achieved, *inter alia*, through providing information about the course of court proceedings.

Article 37 of the Law on Courts of the RS provides that the Ministry of Justice is to carry out the following tasks:

- Monitor the application of the Law on Courts and other regulations relating to the organisation and method of operation of the courts;
- Monitor the performance of matters of court administration;
- Work with the court president in resolving complaints received by the Ministry of Justice relating to court administration;
- Make recommendations to and cooperate with the Court President in improving the organisation and work of the court.

In carrying out its competencies in Article 37, referred to above, the Ministry of Justice may inspect the operations of the court and undertake audits. If the Ministry of Justice observes in courts irregularities in the application of this law or other regulations related to the organisation and method of operation of the courts, it is, in accordance with Article 41 of the Law on Courts, to report this irregularity to the Court President or the HJPC. Article 42 provides that the Ministry of Justice is not competent to handle complaints against judges and that any such complaint received by the Ministry is to be forwarded to the HJPC for handling.

Article 67 of the Law on Courts of the RS provides that each court is to maintain a system for receiving and processing complaints against the court, judges or court staff. The President of the Court is to handle the complaints against the court and the court staff and is to forward all complaints against judges to the HJPC.

There are similar provisions in the draft Law on Courts of the Federation which is currently in legislative procedure.

This system is quite confusing for the public but it appears that it is to work in the following manner: the courts are to give out information in relation to the status of cases and they are also competent to deal with complaints against the court or staff; the MoJs are also competent to deal with complaints about court administration; the MoJs and the courts are to consult in relation to dealing with complaints about court administration, courts and court staff. Any complaint about a judge is to be sent to the HJPC. The Ministries have the power to monitor the performance of matters of court administration and the HJPC has the power to initiate enquiries concerning administrative or financial conduct of the courts.

3.5.6.3 *Recommendations in relation to the role of the MoJs*

The current situation leads to confusion, in particular because of the overlap of competences between the courts, the MoJs and the HJPC. The courts, the MoJs and the HJPC are all competent to receive complaints from the public (the courts and the MoJs in relation to court administration and the HJPC in relation to the judiciary). This causes problems in that it is difficult to categorise complaints - a complaint in relation to court administration may in fact be a complaint in relation to a particular judge and vica versa.

The MoJs have the power to inspect and monitor the courts and this competence also appears to be within the purview of the HJPC as it has the power "to initiate enquiries concerning administrative or financial conduct [of the courts]". This overlap of competence is of concern as it may ultimately mean that these functions are not coherently dealt with by either the MoJs or the HJPC. The solution is either to have coordination between the MoJs and the HJPC in relation to complaints and in relation to monitoring of the courts or to have either the MoJs or the HJPC assume sole responsibility for these functions.

The Office of the Disciplinary Counsel has already begun to develop quite an expertise in classifying and dealing with complaints. For approximately three years, the ODC has developed a methodology for dealing with complaints submitted to it by members of the public and, consequently, for processing them in an efficient and effective manner. Notwithstanding this, it is sometimes difficult, even for the ODC, to know whether a complaint should be classified as one against the judiciary or one in respect of court administration without at least some preliminary investigations and enquiries.

There are a number of additional reasons as to why the ODC should have the power to deal with complaints in relation to the manner in which the courts are managed and operate. In the first place, the ODC has a variety of mechanisms at its disposal to deal with judges and prosecutors who are found to have committed a violation. These mechanisms could be extended and adapted so as to deal with complaints in relation to court administration. In addition, the members of the judiciary

who are the subject of the complaints received would be dealt with and sanctioned by their peers who have an interest in maintaining the dignity of their profession and the integrity of the court and prosecutorial systems in general. These mechanisms could be extended and adapted so as to deal with complaints in relation to court administration.

If all complaints are to be dealt with by the ODC it necessarily follows that all inspections should also be carried out by it. Both through its association with the secretariat of the HJPC and through its practice of dealing with complaints against the judiciary, it is in possession of all of the necessary information to allow it to know the inspections which should be undertaken and those which should be prioritized.

This recommendation would necessitate some amendments to the HJPC Law and the Laws on Courts. The capacity of the ODC would also have to be strengthened.

Key Recommendations

1. The current manner in which administration inspection operates is not optimum and fundamental reforms have to be introduced both to the structure of the system and the procedures which operate in the system.
2. The recommendations of the team which conducted the System Review of Public Administration in BiH should improve the manner in which administration inspectorate operates, i.e. restructuring of the inspectorates in the Federation, standardised procedure, etc..
3. Complaints in relation to court administration should be dealt with by the Office of the Disciplinary Counsel as it is best placed (given its current responsibilities) to assume this role. The division of responsibilities between the HJPC, the MoJs and the courts should be clarified in this regard.
4. Court inspections should be also be dealt with by the Office of the Disciplinary Counsel. The necessary amendments should be made to the Law on Courts and the Law on the HJPC. The capacity of the ODC would also have to be increased – the level of strengthening will depend on the number and type of complaints received going forward. The staff dealing with court inspections in the Entities and cantons should be given other tasks or be made redundant.

Subsection 3.6 – Correctional Sanctions

The correctional system has a vital role to play in an effective justice system. It should contribute to the reduction of offending and of re-offending, protection of the community, and the maintenance of public confidence in the judiciary. However, prisons in particular are expensive to maintain. This increases the importance of efficient management, including the consideration of less costly alternatives, such as the effective use of parole and the development of sanctions such as community service.

Oversight of the correctional sanctions sector is the responsibility of the MoJs. This chapter gives an overview of the current prison situation and then looks at the role of the MoJs within it. It is concerned only with the structural organisation of the correctional sanctions sector and the different levels of responsibility and not with the individual prisons or the way in which the prison system treats prisoners.

3.6.1 Overview of the current correctional sanctions sector

3.6.1.1 *Sentencing*

The courts determine sentences for convicted persons in accordance with the provisions of the Criminal Codes and with the multitude of laws creating minor offences. Fines and imprisonment are the only correctional sanction available.⁵² While community service is provided for in some cases, neither entity has been able to design, fund and implement a community service programme. Thus, this sanction is not available to the courts, and, as a result, prisons have to cater for inmates who have been convicted of a wide range of offences from minor breaches to assault and murder. Although there have been some moves to extend the use of conditional early release as part of the imprisonment regime, at present its use is very limited as there is no means of supervision within the community to support the extension of parole.

3.6.1.2 *Prison system*

As a constituent republic of SFRY, BiH had a single prison system. With the division of the country into two entities, this system was split into two parts. The distribution of the prisons between the two entities is, therefore, completely accidental and, unfortunately, uneven. To all intents and purposes the two systems operate independently of each other, each serving the courts based in their own entities. There are thirteen prison establishments in BiH: seven in the Federation and six in the RS, and their capacity varies considerably.

There is no prison in Brčko District and instead prisoners sentenced there are sent to prisons in the RS or Federation under the provisions of a Memorandum of Understanding between the District and the Entities.

Persons sentenced by the Court of BiH are currently incarcerated in the entity prisons. A temporary detention facility is in the process of completion to house detainees awaiting trial at the War Crimes Chamber being established within the Court of BiH. This has led to the discussion of a proposal to

⁵² This chapter does not discuss the imposition and collection of fines.

construct, through the use of international funds, a high-security prison facility for up to 500 prisoners that would cater for the needs of the War Crimes Chamber and the Court of BiH and would also provide places for convicted persons from the courts throughout BiH.

Within the Federation, while the prisons belong to the Federation, the court systems by which most persons are sentenced are cantonal. Each Canton is, therefore, required to pay the Federation for the incarceration of persons detained by its courts, at a set daily rate.

3.6.1.3 Prison capacity

Over recent years there has been a steady upward trend in the number of prisoners being held in both the Federation and the RS. The following table summarises the position (including both sentenced prisoners and detainees):

Prisoner numbers	2003	2004	2005	2006
Federation	1418	1764	2196	2732
RS	806	850	1011	1203
Total	2224	2614	3207	3935

When the generally accepted minimum accommodation standards (4m² per prisoner) are applied, the current prisons in both entities have a combined capacity of 1,953 prisoners. A robust local estimate of the possible combined capacity is 2,725 prisoners. Clearly, there is an urgent need to confirm that these trends are accurate, as 2005 will see even the locally determined capacity exceeded. By Council of Europe standards the prison population is already 10% above capacity. As the Court of BiH is able to bring more cases to conclusion, the pressure on facilities will increase further.

There is no system for inter-Entity transfer of prisoners. This means that relative overcrowding in the Federation prisons has not been able to be solved by use of excess capacity in the RS. Neither can one entity make use of more specialised facilities in the other to deal with individual cases.

Adequacy of prisons

However, of possibly greater concern than overcrowding in the immediate future is the inadequate condition of the physical estate. Many of the prisons are unsuitable to provide a safe and a secure environment for their inmates. Some of the buildings date from the nineteenth century and are not suitable for a modern prison service. Dormitory accommodation continues to be dominant, while facilities for prisoner activities are limited, reflecting the lack of investment. Comprehensive renovation as well as additional capacity must be provided (or a means of reducing the prison population established) if prison conditions are to avoid falling further below minimum standards over the next few years. This will require significant investment, to get the full return on which will also require ensuring that the management and staff have the skills and policies to make effective use of any improved facilities. This situation has been highlighted in a number of reports to the MoJs in recent years but as yet neither entity has adopted a plan to deal with the problem.

3.6.1.4 Prison staffing

The prisons currently employ approximately 1,320 staff, as indicated in the chart below:

	Federation	RS	BiH Total
Number of prisoners, including detainees	1,415	930	2,380
Number of staff employed in prisons	734	592	1,326

The ratio of prisoners to staff is thus 1.91 in the Federation and 1.75 in the RS. However, within those figures, the absence of systematic staffing policies in either entity has meant that the ratio of different types of staff per prisoner vary markedly among prisons, as indicated in the following chart:

	BiH highest ratio	BiH lowest ratio
Prisoners per security staff	3.9	1.4
Prisoners per psycho/social staff	71.0	17.0
Prisoners per instructor	57.0	4.3
Prisoners per administrative staff	57.0	3.6
Prisoners per healthcare staff	194.0	43.0

Some of the variation arises from the differing roles of each prison and its physical layout. However, it is accepted that staffing levels do need serious attention to enable a more even standard of service to be provided. More fundamentally, the approach to staffing derives from archaic descriptions of staffing roles, inadequate human resource systems and no development over the years of staff roles and responsibilities. With this in mind, the Council of Europe is in the process of conducting an analysis of prison staffing policies with a view to recommending a more coherent approach to meeting prison needs. The figures also illustrate the imbalances arising from having two prison systems and the lack of opportunity to rationalise staffing levels across all prisons.

Prison funding

It is not easy to assess the costs of the prison system as the budgets for each institution are not listed in the official budget publications of each entity. In addition, inconsistent accounting and budget practices make the interpretation of financial figures extremely difficult. However, a comparison of the published budgets at entity level further supports the view that prisons across the country operate under very different financial circumstances, as shown in the following table (2004 figures):

BASIC NUMBERS	Federation	RS	BiH Total
Number of prisons	7	6	13
Number of staff employed in prisons	734	592	1326

BUDGET (Million KM)			
Staffing costs	13.1	6.5	19.6
Materials costs	6.0	2.0	8.0
Capital costs	1.6	0.2	1.8
Other costs	1.7	0.0	1.7
Total costs	22.4	9.1	31.5

AVERAGE COSTS			
Average cost per occupied prisoner place per year	15,830 KM	9,785 KM	12,647 KM

Average costs per employee	17,871 KM	10,980 KM	14,781 KM
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There is obviously a marked contrast in the level of spending between the two entities. The Federation spends more than twice as much as the RS, although it has only around 50% more prisoners and the ratio of prisoners to staff is similar. Per prisoner, it spends at least 50% more. One reason is lower salary levels in the RS, but it is also clear that the RS spends considerably less, proportionately, on operational expenses and capital investment.

One effect of this is that the prison systems in each entity operate according to different standards, meaning that not all prisoners are treated equally. While two systems need not necessarily result in different standards, it does in this case because of the different levels of funding and resources provided for each system. Although there are now harmonised Criminal and Criminal Procedure Codes in each entity, enforcement of custodial sentences via the prison system will continue to be variable in provision and performance.

A further point to note is that the budget preparation process for prisons is similar to that for the courts. Neither entity MoJ is able to provide clear guidelines and priorities for budget preparation and allocation to the prisons, a weakness that has been identified in audit reports. The day-to-day financial situation of the prisons is further aggravated by the late or non-payment of the amounts owed by the cantons (in the Federation) and courts in respect of inmates.

3.6.2 Functions of the MoJs in relation to correctional sanctions

Currently, only the two entity MoJs carry out any significant functions in respect of the correctional sanctions sector and each has a unit devoted to the execution of criminal sanctions. In practice, these units are only engaged with prisons.

3.6.2.1 *BiH*

The responsibilities given to the BiH MoJ under the Law on Ministries do not specifically refer to correctional sanctions (although this could be considered to fall under the catch-all provision giving the BiH MoJ any responsibilities not undertaken by other ministries) and there has been no unit in the Ministry responsible for that area. The new Rulebook provides that a Sector for the Enforcement of Criminal Sanctions and the Work of Penalty Institutions is to be set up within the Ministry. This Sector will be divided into two divisions – the Division for the Enforcement of Criminal Sanctions and the Division for Prison Police at State level. The former division is to be staffed by 5 people and the latter by 47. The sector will act as an operational manager with the creation of the detention facility at the Court of BiH and it will also become responsible for the management of the proposed high-security prison facility referred to above. Once the high-security prison is set up, it will be used to house persons convicted by any court in BiH who are considered to require such a facility. It is expected that the Sector for the Enforcement of Sanctions will also facilitate transfer of prisoners between the BiH and entity prisons.

3.6.2.2 *RS*

Within the RS MoJ, there is a Unit for the Functioning of Penal and Educational/Correctional Institutions. The specific tasks of the sector are outlined at article 21 of the RS Rulebook and are set out in Section 2 of this Report.

The Sector is staffed by five people: an Assistant Minister and four inspectors (for the Rights of Prisoners, Security, Work of Economic Units and Rehabilitation). Under the RS Rulebook, it should also have two senior expert associates and one expert associate.

The four inspectors are all located in Bijeljina. Together they regularly inspect each prison. They appear to be closely involved in the day-to-day work of the prisons and in the treatment of individual prisoners. For example, the Inspector for Rehabilitation is required to ensure that each prisoner completes the sentence handed down by the court and that he follows the rehabilitation programme designed for him. The Inspectors also monitors all rewards given to prisoners for good behaviour, such as home visits. Early release can only be ordered on the recommendation of the Inspector.

The Inspectors are also involved in trying to get each of the prisons to meet European standards. In addition, they may make recommendations to the Ministry in relation to matters that arise outside the context of an actual inspection, such as the need for building works at one of the prisons.

The Accountant of the Ministry Secretariat is responsible for all financial matters in relation to the prisons and processes the draft budgets prepared by each of the prisons. The Unit for the Functioning of Penal and Educational/Correctional Institutions does not have any involvement in this process.

3.6.2.3 Federation

Federation MoJ

Within the Federation MoJ, article 6 (4) of the Federation Rulebook tasks the Sector for the Execution of Criminal Sanctions with a number of functions and its provisions are set out in Section 2 of this Report.

The sector is staffed by four people: an Assistant Minister, an Expert Associate for Financial and Commercial Issues and two Inspectors for the Enforcement of Criminal Sanctions. Under the Federation Rulebook, there should be one additional staff member: a specialist for regulatory-legal and research-analytical issues. The Assistant Minister oversees the operation of the sector and, in particular, has been engaged in drafting a new law on criminal sanctions for the Federation.

The two Inspectors are primarily responsible for inspecting the prisons, but they also deal with requests for transfers, parole and complaints by prisoners and disputes between prisoners and the prisons. In particular, there appear to be a lot of complaints from prisoners and dealing with these takes most of the Inspectors' time. Although not lawyers, both Inspectors are also involved in the drafting of laws and regulations in respect of the enforcement of criminal sanctions and in giving advice to the prison authorities in relation to their implementation.

Prison budgets are the responsibility of the Finance Unit for Prisons within the sector, which is comprised of representatives from each of the prisons and the Expert Associate for Financial and Commercial Issues. Similar to the system that has been used for court budgeting, each prison prepares its own annual budget proposal and submits it to the MoJ, which compiles them and forwards them to the Ministry of Finance. The prisons do not co-ordinate amongst themselves in

respect of budget preparation. The amounts requested by the prisons are normally reduced during the budget process.

Cantonal MoJs

The role of the cantonal MoJs in the correctional sanctions sector is limited. As noted above, the cost of imprisonment of those who are sentenced or detained by the Cantonal, Municipal and Minor Offence Courts in the Federation falls on the cantons. The cantonal MoJs are responsible for paying these amounts in respect of each convicted prisoner. In the case of Sarejevo Canton, this was said to amount to around 140,000KM per year. (The relevant court bears this cost in the case of detainees.) As far as the prisons are concerned, it is understood that this amount is deducted from the amount of the prison budget as allocated by the Federation, rather than being additional. However, due to a shortage of funds, some cantons have given up paying these costs and the Federation MoJ has no mechanism to enforce payment.

Although the West Herzegovina MoJ has a department for the execution of criminal and offence sanctions, it appears to be engaged only in supervision of the Minor Offence Courts and ensuring that the police initiate minor offence proceedings in a timely fashion and does not have any actual involvement in the sanctions sector. The Zenica-Doboj MoJ takes a slightly greater role. Its Assistant Minister for the Judiciary (who is the only person working in the MoJ's unit for the judiciary) indicated that she is required to work with other Ministries on issues arising to do with correctional sanctions, such as with the Ministry of Social Affairs in respect of juvenile offenders as there are some overlapping competencies.

The only engagement of the Unit for the Judiciary and for the Tracking and Execution of Sanctions and Measures of the Sarajevo Canton MoJ in the correctional sanctions sector appears to be the payment of prison costs. However, the Legislative Unit of that MoJ noted that it had considerable engagement in assisting the cantonal Ministry of Labour and Social Policy in the drafting of a cantonal law establishing a centre for juvenile offenders (those who get the lowest sentence of 20 days). It was said that the requirement to establish such a centre was created by the cantonal Law on Enforcement of Criminal Sanctions, which was in turn based on the Federation Law on Enforcement of Criminal Sanctions.

3.6.3 General comments on the organisation of the correctional sanctions issues

Not including administrative staff, inspectors or actual prison staff, there are only two people in the entity MoJs devoted to the correctional sanctions sector (the two Assistant Ministers). This imposes considerable restraints on the management of criminal justice sanctions in both entities and, in practice, the MoJs contribute little to the management of the prison system. While the Director of each prison is accountable to the relevant MoJ, in practice, individual prisons have a significant degree of independence in both staffing and operations under the control of the prison director. The prisons are often left to their own devices to solve specific problems, such as creating regimes for prisoners with specific needs, e.g. juveniles, women and problematic prisoners.

The six prison inspectors appear to be actually involved in the day-to-day prison operations, including in decisions on the treatment of individual prisoners, and in dealing with complaints. There is thus no real inspection in terms of independent, in-depth performance audits.

As a result, problems within the prison system are tackled only as they become urgent, usually at individual prisons and often relating to single or small groups of prisoners. There is little scope for the development of policies to improve administration, provide leadership on penal issues, design new approaches, coordinate between prisons or conduct analyses to evaluate performance. It is clear from interviews with the MoJs and prisons officials that there is a strong awareness of these shortcomings, but time, sometimes the expertise and almost always the resources are not available to begin to take comprehensive action on the major issues. Among other things, this results in the continuing focus of the sector on prisons and imprisonment, rather than the development of alternative correctional sanctions.

To give an example of the types of problems arising from lack of resources and planning, in 2004, the European Commission and the Council of Europe funded a review of healthcare in the prisons sector. While acknowledging the efforts of individual prison managements to provide access to healthcare services, the review drew attention to the absence of ministry healthcare policies, service monitoring, professional training and modern medical equipment.

There have been a number of other reviews of the BiH sanctions system over recent years, many of which have explicitly or indirectly highlighted the need for a strategic approach to the improvement of specific aspects of the sanctions regime as well as to the system overall. The Council of Europe established a Joint Steering Group for prison reform and through its work a number of possible developments have been discussed by both entities and the prison directors and some progress is being made. However, as separate jurisdictions, the two entities continue to attempt to make improvements within their own particular systems despite the fact that they are in very similar situations.

The DFID-sponsored Security, Safety and Access to Justice Project has been working with each entity and its prisons to develop strategic plans to speed up progress towards the desired goal of meeting European standards. Drawing on their work with others, including the Council of Europe, the two entities are now embarked on parallel programmes of improvement with the aid of external consultants. Operational plans are being produced for 2005 but their impact will be weakened due to the low level of resources available to the prison managers, especially in the RS and the insufficient resources of the MoJs to enable them to develop the necessary planning and policy-making capability required to offer leadership and guidance to the prisons.

A further weakness in the sector is the lack of a formal collaborative mechanism to enable the prisons, police and courts to discuss problems of mutual interest, for example the conditions for and length of detention, and to arrive at agreed solutions. Under current arrangements, it is unlikely that any existing body will undertake the role of providing such a mechanism.

3.6.4 Benchmarking

3.6.4.1 *Prison staffing*

The following table lists the extremes of the prisoner to staff ratios across the prisons in both entities, compared with the figures for Germany and the United Kingdom (1999).

	BiH highest ratio	BiH lowest ratio	Germany (1999)	UK (1999)
Prisoners per security staff	3.9	1.4	2	2.5 ⁵³
Prisoners per psycho/social staff	71.0	17.0	30	-
Prisoners per instructor	57.0	4.3	-	-
Prisoners per administrative staff	57.0	3.6	20	-
Prisoners per healthcare staff	194.0	43.0	278	-

Unfortunately the paucity of international comparative data makes it impossible to draw useful conclusions.

3.6.4.2 *Prison budgeting*

The following table compares the actual cost in each entity per prisoner and per employee with Ireland, Germany and the USA and also the BiH costs using parity of purchasing power.

	Cost per prisoner per year (Euro)	Cost per prisoner per day (Euro)	Cost per employee
Ireland (2001) ⁵⁴	94,220	258	
Germany (2003)	29,000 - 36,000	80 – 100	
USA (2001)		60 – 70	
Federation (actual cost)	8,117	22	9,164
RS (actual cost)	5,018	14	5,630
Federation (using parity of purchasing power)	32,000 (approx)	90 (approx)	37,000 (approx)
RS (using parity of purchasing power)	20,000 (approx)	60 (approx)	22,500 (approx)

While hard and fast conclusions cannot be drawn from such disparate examples, it is clear from this table that operating the BiH prison system is, comparatively, not cheap in absolute terms.

3.6.5 **Conclusions**

With respect to the responsibilities of the different MoJs, there seems to be some overlap of competencies between the Federation and the cantons and between some of the cantonal MoJs and other cantonal ministries. Some cantons appear to be undertaking functions in this sector that are not envisaged in other cantons. These issues should be clarified, preferably by ensuring that all competence is at Federation or higher level. The same issues regarding the equal application of justice apply just as much to juvenile correctional institutions, for example, as to regular prisons. There may need to be some change to the cantonal Law on Ministries and to the cantonal MoJ rulebooks as a result.

Given the relatively few prisoners overall and the imbalances in capacity between the entities, maintaining two parallel prison systems is inefficient. The absence of co-ordination mechanisms between the entities also means that the system is inflexible in ensuring the most appropriate

⁵³ <http://www.publications.parliament.uk/pa/ld199899/ldhansrd/vo990616/text/90616w03.htm>

⁵⁴ The total budget for the prison system was 292,743,000 Euro.

treatment for each prisoner. Ultimately, these factors lead to the unequal provision of justice between the entities.

The small number of officers within the entity MoJs dedicated to the corrections system has also resulted in a lack of long term planning, for example to develop a strategy to deal with expected increases in the prison population, a co-ordinated prison policy within both entities and throughout BiH as a whole, or the development of alternative correctional sanctions.

This raises two issues:

- The need for a countrywide strategy planning policy making process for the correctional sanctions sector as a whole.
- Management of the operations of that sector (currently only prisons but later to include community service and other sentences).

It is clear that these responsibilities must be developed and co-ordinated at BiH rather than entity level. Either or both of these responsibilities could either be undertaken by a Ministry (presumably the MoJ rather than a separate Ministry) or by a separate agency outside the formal government structure but reporting to the MoJ or other Ministry.

Making the correctional sanctions sector a BiH responsibility would appear to have following advantages:

- It would avoid duplication of effort and allow greater co-ordination of international assistance.
- It would enable exchange of prisoners between all prisons, raising standards and reducing risks.
- The significant variations among prisons in terms of staffing, state of premises, etc., could be evened out, which would assist in ensuring the equal treatment of all prisoners in each prison within BiH.
- It would facilitate the introduction of new approaches, such as community service and extended parole.
- Working relationships with other parts of the justice sector would be enhanced, providing the opportunity for co-ordinated developments.
- There could be cost-savings and efficiency gains arising from having a single system for procurement, staff training, establishment and operation of commercial units within prisons, etc.

3.6.6 Recommendations

Given the complexity of issues that would arise from the transfer of authority over the correctional sanctions sector to BiH level and the different considerations that arise in deciding whether to manage that sector through a Ministry or a separate agency, no specific recommendations are made here as to which approach is better.

Rather it is recommended that a feasibility study be conducted on merger of the two prison systems. This should deal with the issue of which organisational structure would be the better solution in terms of efficiency and political acceptability and on the costs of creating a single organisation for

correctional sanctions at BiH level, including an assessment of the costs and feasibility of delivering the same developments through the existing arrangements.

Regardless of which solution is chosen for the long term, there are immediate short-term measures that could be undertaken, for example the creation of a system to permit and establish the procedure for the inter-entity transfer of prisoners. Eventually, this should become a routine matter.

Key Recommendations – Correctional Sanctions

1. The authority over the correctional sanctions sector should be transferred to the level of BiH. This should be managed either through the ministry or through a separate agency.
2. A feasibility study should be conducted on the merger of the two existing systems. The feasibility study should deal with the following: the costs of creating a single organization for correctional institutions at BiH level; which organizational structure would be the better solution in terms of efficiency and political acceptability and the costs and feasibility of delivering optimum results through the current system.
3. In the short term a number of measures should be taken to make the system more efficient, e.g. a system to permit and establish a procedure for the inter-entity transfer of prisoners.

Subsection 3.7– International Co-operation

The MoJs must be in a position to enable the country to comply with its international obligations and, in particular, in the first instance with the Council of Europe Conventions. Furthermore, they need to co-operate and communicate in their fields of interest with foreign MoJs in order to ensure the rule of law generally, and in a European context, and in particular to assist the fight against organised and international crime. Problems do not stop at the border and solutions must increasingly be sought in an international context.

3.7.1 Mutual Legal Assistance

BiH must develop the capacity to carry out the key tasks related to justice that are necessary for implementation of the EU *acquis*. These have been defined by the European Commission as follows:

Judicial co-operation in criminal and civil matters: Appropriate administrative structures must be in place to co-operate with other Member States on the basis of Community instruments and the international conventions on judicial co-operation in criminal and civil matters included in the acquis. This includes the capacity to deal with such matters as the direct transmission of requests, the appointment of contact authorities, administrative offences, spontaneous information, requests for extradition, recognition and enforcement of civil judgments, and the transfer and enforcement of criminal judgments.

BiH must also comply with its obligations under Council of Europe Conventions to which it is a signatory.

Under the BiH Constitution, international criminal law enforcement is the responsibility of the institutions of BiH. This competence now falls partly to the BiH MoJ. (The BiH Ministry of Security has competence with respect to the prevention of crimes with an international aspect and the tracing of perpetrators, as well as co-operation with Interpol). The BiH Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina gives the following competences to the BiH MoJ in this area:

- *International and inter-entity judicial co-operation (mutual legal assistance and contacts with international tribunals)*
- *Ensuring that legislation and implementation by BiH at all levels is in compliance with the obligations of BiH derived from international treaties*
- *Co-operating with both the Ministry of Foreign Affairs and with the entities in the drafting of bilateral and multi-lateral international treaties*
- *Extradition (specific provisions on extradition procedure are contained in the BiH Criminal Procedure Code).*

However, in a holdover from the period before the BiH MoJ was created, the two entity MoJs continue to deal with some functions related to international legal assistance.

In the RS, the Law on Ministries still includes among the tasks of the MoJ, the processing of requests from foreign courts related to the provision of international legal assistance and this task

falls to the Sector for international co-operation and legal aid. There is one officer assigned to this task, who received around 2,500 requests in 2003. However, all those in respect of mutual legal assistance, extradition, and transfer of proceedings or of prisoners are passed immediately to the BiH MoJ, unless they come from Serbia and Montenegro, in which case they are dealt with by the RS MoJ itself. The MoJ will arrange for the hearing of witnesses in prison, but other requests for the hearing of witnesses are referred to the court with territorial jurisdiction. Other matters dealt with by the sector were in fact more domestic in nature, mostly requests from the public in relation to their relatives living abroad and in relation to residency and the validity of driving licences.

Within the Federation MoJ, the tasks of the judicial sector in the Ministry rulebook include those related to international legal assistance and co-operation with ICTY. The four legal associates working within this sector share these functions, of which the primary one appears to be acting as a post-box for subpoenas. If the local courts wish to contact or subpoena a BiH citizen living abroad, they can do this through the Federation MoJ. These staff members also provide opinions on issues of international law, such as which court has jurisdiction to decide on issues of reciprocity and issues relating to the realisation of ownership of foreign citizens in BiH. Finally, they also deal with the recognition of orders of foreign courts in both criminal and civil matters. Other tasks with an international component, such as liaison with Interpol and the issue of arrest warrants against BiH citizens living abroad, are no longer dealt with by this Ministry as the BiH level now has competence.

The BiH MoJ has a division for international and inter-entity legal assistance and co-operation, which has three sub-divisions (international legal assistance and co-operation, inter-entity co-operation and co-operation with the Brčko District, and international treaties). The current Rulebook prescribes that the division is to be staffed by twenty people, nine in the first, 5 in the second, 5 in the third and one staff member as coordinator. The entire division is in fact staffed by 14 people of whom six are lawyers and all staff members tend to be involved in the work of all three divisions. The proposed new Rulebook of the BiH MoJ provides that the entire division is to be staffed by twenty five people, 11 in the first, eight in the second and five in the third with one additional staff member acting as coordinator.

In 2001, the workload of the BiH Ministry of Civil Affairs and Communications (which was responsible for international judicial co-operation prior to the creation of the MoJ) was around 1,000 requests. In 2003, the BiH MoJ received 17,000 requests. Of these, the MoJ staff considered that around 30% were complex. Most related to the states of the former SFRY. For the rest of Europe, Germany, Austria and Switzerland are the main partners, followed by the Netherlands and Sweden. Only the first group causes problems as proper procedures have not always been established. For example, the Croatian MoJ sends around 100 requests at one time, which is difficult to handle.

Extradition and cases involving the transfer of prisoners are handled solely on the BiH level in co-operation with the Court and Prosecutor's Office of BiH. Requests for mutual legal assistance are sent to the entity MoJs, which forward them to the appropriate court. Replies follow the same channels as do outgoing requests of a similar nature. Co-operation with the entity MoJs on these matters was said to be adequate, but with scope for improvement.

Some efforts are being put into the preparation of bilateral treaties in this area, primarily with states of the former SFRY. For example on legal assistance in criminal and civil matters, on court decisions in criminal matters and extradition.

One officer is involved in proposing regulations to ensure implementation of the ECHR and other international conventions and ensuring that BiH meets the obligations arising from COE membership.

3.7.2 Human Rights Treaties and reporting obligations

The BiH MoJ has certain responsibilities in respect of international treaties. In particular the BiH Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina (article 13) gives the MoJ competence for:

ensuring that legislation and implementation by BiH at all levels is in compliance with the obligations of BiH arising from international treaties.

The BiH Ministry of Human Rights and Refugees (article 12) is responsible for:

- *Monitoring and implementation of international conventions and other documents on human rights and fundamental freedoms*
- *Co-ordination and preparation of reporting to the competent domestic and international human rights treaty bodies and implementation and execution of decisions of human rights treaty bodies.*

There is obviously an overlap of competence here in respect of monitoring the implementation of international human rights treaties and the associated reporting obligations.

There are also other overlaps. The MHRR was given responsibility for overseeing the implementation of Annex 7 of GFAP, which concerns human rights and establishes the Human Rights Chamber (now part of the Constitutional Court) and the Human Rights Ombudsman. It makes no sense to have one part of the Constitution Court falling under MHRR, while overall responsibility for the justice system belongs to the MoJ. Similarly, the Ombudsmen would also appear to be more naturally an MoJ responsibility.

3.7.3 Benchmarking

The tasks involved in the giving and receipt of mutual legal assistance are relatively clear cut and most foreign MoJs appear to dedicate a department or section within their organisation to this aspect. For example the Netherlands MoJ has a Directorate General for International Affairs and Immigration, as one of four Directorates General dealing with the substantive areas of the Ministry's work. That Directorate includes sections involved with International Affairs, International Criminal Law and Drugs Policy, Immigration Policy, Minorities Integration Policy Coordination, the secretarial office of the advisory committee on Alien Affairs and the Immigration and Naturalisation Service.

The Danish MoJ has a Civil and Police Department, in which the International Division deals with international criminal law and police co-operation, general and specific issues of mutual legal

assistance in criminal matters, transfer of prosecution, extradition, transfer of sentenced persons and international enforcement of criminal judgements, national and international measures concerning illegal drug trafficking, Schengen co-operation and EU co-operation in the police and criminal law area.

The international policy division of the Irish MoJ has responsibility for the provision of mutual legal assistance. The types of request dealt with include requests for assistance in the service of judicial documents, search for and seizure of evidence, taking of evidence in court, police to police co-operation, production orders, the restraint and confiscation of criminal assets, exchange of information from criminal records and the temporary transfer of prisoners. In 2002, 288 requests for mutual legal assistance were received from abroad and 66 requests were sent. In addition, 26 extradition requests were received from the UK and seven from other countries.

3.7.4 Conclusions

The BiH MoJ needs the personnel and capacity to tackle all these aspects of everyday international co-operation in the justice sector and more. The current system whereby tasks are carried out based on urgency and staff are not specialised to deal with particular areas cannot be sustained for any period of time. BiH is required to deal with many more requests for mutual legal assistance than most EU countries because of its particular situation and this is likely to continue for the foreseeable future. Once the staff as planned in the new Rulebook are recruited it should be able to deal with all of its responsibilities.

Given the need to ensure proper and transparent structures and partners for international communication and cooperation, and given the other responsibilities of the MoJ in respect of international mutual assistance, it would make sense for the MoJ to take over the responsibilities of the Ministry of Human Rights and Refugees in respect of:

- human rights treaty monitoring
- the Human Rights Chamber
- the Ombudsman.

Key Recommendations – International Cooperation

1. The BiH MoJ should be adequately staffed to deal with all of its obligations in relation to international legal assistance and cooperation, international treaties and its harmonisation obligations. If it is not possible to recruit adequately qualified staff new staff members will need to receive training as soon as possible. It is vital that this Division of the Ministry becomes operational as a matter of urgency.

2. The BiH MoJ should take over the responsibilities of the Ministry of Human Rights and Refugees in a number of areas: human rights treaty monitoring; the Human Rights Chamber and the Ombudsman.

PART C

Attachment 1 – Diagram showing the organisational structure of the HJPC

Attachment 2 – List of locations to which IT equipment was provided by the EC and ICITAP

	Donor	Database Server TYPE IV	Desktops TYPE III	Scanner (A4) TYPE III	Network Laser Printer TYPE IV	Personal printer	Air conditioner s
Banja Luka I ins. Court	EC	2	102	1	3	45	1
Banja Luka II ins. court	EC	2	76	1	2	35	1
Banja Luka Pros. office	EC	2	58	1	2	27	1
RS Supreme Court	EC	1	42	1	1	13	0
RS Prosecutor	EC	1	6	1	1	2	0
RS Const. Court Banja Luka	ICITAP	1	17		1		1
Bihac I ins. court	EC	1	57	1	2	28	1
Bihac II ins. court	EC	1	29	1	1	13	0
Bihac Pros. office	EC	1	44	1	2	18	1
Bijeljina I ins. court	EC	1	47	1	2	23	1
Bijeljina II ins. court	EC	1	28	1	1	11	0
Bijeljina Pros. office	EC	1	20	1	1	9	0
Bosanska Krupa I ins. Court	EC	1	18	1	1	7	1
Bugojno I ins. Court	EC	1	19	1	1	7	1
Capljina I ins. Court	EC	1	11	1	1	3	0
Cazin I ins. Court	EC	1	19	1	1	7	1
Derventa I ins. Court	EC	1	11	1	1	6	1
Doboj I ins. court	EC	1	12	1	1	5	1
Doboj II ins. court	EC	1	25	1	1	11	0
Doboj Pros. office	EC	1	23	1	1	10	1
Foca/Srbinje I ins. court	EC	1	10	1	1	2	1
Gorazde II ins. court	ICITAP	1	5				1
Gorazde I ins. court	ICITAP	1	6				1
Gorazde Pros. office	ICITAP	1	2				0
Gracanica I ins. Court	EC	1	7	1	1	2	1
Gradacac I ins. Court	EC	1	17	1	1	7	1
Gradiska I ins. Court	EC	1	19	1	1	7	1
HJPC Sarajevo	EC		60				
Kakanj I ins. Court	EC	1	12	1	1	5	1
Kalesija I ins. Court	EC	1	9	1	1	2	1
Kiseljak I ins. Court	EC	1	8	1	1	5	1
Kotor Varos I ins. Court	EC	1	12	1	1	5	1

Konjic	EC	1	10				1
Livno I ins. court	EC	1	10	1	1	2	1
Livno II ins. court	EC	1	7	1	1	5	0
Livno Pros. office	EC	1	7	1	1	2	0
Ljubuski I ins. Court	EC	1	14				1
Modrica I ins. Court	EC	1	12	1	1	6	1
Mostar I ins. Court	ICITAP	1	20				1
Mostar Pros. Office	ICITAP	1	22				1
Mostar II ins. Court	ICITAP	1	14				
Mrkonjic Grad I ins. Court	EC	1	13	1	1	5	1
Novi Grad I ins. Court	EC	1	12	1	1	5	1
Novi Travnik II ins. Court	ICITAP	1	12				1
Orasje I ins. Court	ICITAP	1	6				1
Odžak II ins. Court	ICITAP	1	6				1
Orasje Pros. Office	ICITAP	1	1				1
Prijedor I ins. Court	EC	1	28	1	1	11	1
Prnjavor I ins. Court	EC	1	10	1	1	5	1
I. Sarajevo II ins. Court	EC	1	21				1
I. Sarajevo Pros. Office	ICITAP	1	15				1
Sanski Most I ins. Court	EC	1	14	1	1	7	1
Sarajevo I ins. court	EC	3	120	1	3	53	1
Sarajevo II ins. court	EC	2	52	1	2	22	0
Sarajevo Pros. Office	EC	2	80	1	2	34	1
Sarajevo, Fed. Const. Court	EC	1	14	1	1	6	1
Sarajevo, Supreme Court FBiH	ICITAP	1	17				
Sarajevo, State Court	ICITAP	1	21				0
Sarajevo, State Prosecutor	ICITAP	1	29				
Sarajevo, FBiH Prosecutor	ICITAP	1	10	1			1
Sarajevo, Const. Court BiH	ICITAP	1	10				1
Siroki Brijeg I ins. court	EC	1	13	1	1	6	1
Siroki Brijeg Pros. office	EC	1	6	1	1	1	0
Siroki Brijeg II ins. court	EC	1	11	1	1	3	1
Sokolac I ins. Court	ICITAP	1	13				1
Srebrenica I ins. Court	EC	1	12	1	1	5	1
Tesanj I ins. Court	EC	1	7	1	1	2	1
Teslic I ins. Court	EC	1	12	1	1	5	1
Travnik I ins. court	ICITAP	1	21				1
Travnik Pros. office	ICITAP	1	18				0
Trebinje I ins. court	EC	1	17	1	1	7	1

Trebinje Pros. office	EC	1	7	1	1	1	0
Trebinje II ins. court	EC	1	9	1	1	1	1
Tuzla I ins. court	EC	2	86	1	2	40	1
Tuzla II ins. court	EC	1	52	1	2	20	0
Tuzla Pros. Office	EC	2	67	1	2	31	1
Velika Kladusa I ins. Court	EC	1	16	1	1	6	1
Visegrad I ins. Court	ICITAP	1	6				1
Visoko I ins. Court	ICITAP	1	15				1
Vlasenica I ins. Court	EC	1	12	1	1	5	1
Zavidovici I ins. Court	ICITAP	1	11				1
Zenica I ins. court	ICITAP	1	30				1
Zenica II ins. court	ICITAP	1	22				1
Zenica Pros. office	ICITAP	1	22				0
Zepce I ins. Court	ICITAP	1	11				1
Zivinice I ins. court	EC	2	16		1		0
Zvornik I ins. court	EC	1	12	1	1	5	1

TOTAL FIGURES:

Donor	Datbase Server Type IV	Desktop Type III	Scanner (A4) TYPE III	Network Laser Printer Type IV	Personal Printer	Air Conditioner
EC	69	1572	55	70	606	39
ICITAP	27	275	0	1	0	20
TOTAL	96	1847	55	71	606	59

Attachment 3 - A list of courts and prosecutors' offices with the amount of funds invested in each premises under the project – "US support to Courts and POs in BiH"

Prosecutors' Offices

LOCATION	DESCRIPTION	ESTIMATED PRICE IN EURO	CONTRACT ED PRICE IN EURO
DPO DOBOJ	Installation of doors, reception box, new bar, sound protection, sanitation equipment, new electrical cables, reparation of existing heating, fire protection and security equipment	38.961,46	39.926,75
DPO TREBINJE	Reparation of floors, new walls, new sanitation blocks, new interview rooms and holding cells, doors and windows will be repaired, fire protection and security equipment, new archive area	26.311,59	24.651,43
DPO LUKAVICA	Refurbishing of very damaged and large premises, reparation of doors, damaged floors, windows, heating system and electricity, installation of sanitation block, fire protection and security equipment.	161.916,93	160.667,91
Sub-Office (S-O) FOCA/SRBINJE	Reconstruction of all Sub-Offices will include reparations of windows and doors, and provision of basic conditions for normal functioning of the offices, as well as necessary sanitations repairs and archive space.	10.625,67	10.662,55
S-O VLAZENICA		11.131,85	10.918,67
S-O VISEGRAD		8.095,80	7.833,37
S-O PRIJEDOR		9.107,64	8.548,05
S-O MRKONJIC GRAD		7.083,95	6.118,88
S-O SANSKI MOST		5.059,74	5.279,40
S-O KONJIC		12.649,87	12.339,15
CPO BIHAC	Building needs small reconstruction as painting, sun and sound protection for windows and doors as new space and equipment for archive and holding cell.	14.167,90	13.324,50
CPO TUZLA	New holding cell, sound protection on doors and metal protection for ground floor windows. Fire protection and security equipment, new archive shelves.	6.577,77	6.186,60
CPO ZENICA	Windows, doors and floors will be repaired to be in function, installation of water, sewage and electrical system will be revised. Fire protection and security equipment, new archive shelves.	17.709,62	22.138,39
CPO GORAZDE	New security door, new walls where need and shelves for the archive, fire protection equipment, corridor benches	6.577,77	6.200,40
CPO MOSTAR	Reparations of all floors, doors and windows, new partition walls, new sanitation blocks, new interview rooms and holding cells. Fire protection and security equipment, new archive shelves.	43.009,36	46.567,45
EURO		378.987,43	381.363,50

Court Buildings

LOCATION	DESCRIPTION	ESTIMATED PRICE IN EURO	CONTRACT ED PRICE IN EURO
District Court BANJA LUKA	Small reparation of joinery, roof elements and electricity.	20.239,49	20.773,50
Municipality Court BIHAC	Reparation of damaged wall and ceiling, joinery, floors, new partitions and equipment for archive area	19.227,64	21.007,88
Municipality Court BOSANSKA	Install new heating in the building, small reparation of offices which was previously used by prosecutor's	40.985,16	39.147,05

KRUPA			
Municipality Court BUGOJNO	Install new partitions, adaptation works for new archive, reparation of walls, joinery and installation	13.661,72	16.884,38
Basic Court GRADISKA	Reparation damaged wall and ceiling, joinery, floors, painting wall and ceiling, checking and repair old installations in the building	36.431,59	35.385,00
Municipality Court KISELJAK	Checking and repair damages on roof, floors, joinery and installation and reconstruction sanitation block	13.914,81	18.224,29
Municipality Court KONJIC	Reconstruction complete roof, reparation of joinery, damaged walls and ceilings and sanitation block	37.949,11	31.512,10
Cantonal Court NOVI TRAVNIK	Partly reconstruction of roof and damaged walls and ceiling	5.565,92	4.898,29
Basic Court PRIJEDOR	Reconstruction of complete roof, reparation joinery, floors, sanitation block and installation	45.539,23	46.201,58
Municipality Court SANSKI MOST	Checking and small reparation of joinery, floors and installation	17.456,53	17.011,58
Basic Court SOKOLAC	Small reparation of joinery, floors and installation on the floor and install new premises in the ground floor	24.287,39	26.608,24
Municipality Court TRAVNIK	Reparation of joinery, floors, installation and partitions	31.371,34	28.795,95
Basic Court TREBINJE	Reparation damaged elements of roof, floors, joinery and installation, adaptation works for new archive	20.239,49	19.122,22
Municipality Court TUZLA	Reparation damaged elements of roof, floors, joinery and sanitation blocks	31.877,51	32.377,80
Basic Court VISEGRAD	Change roof tin elements, reparation of joinery, floors, walls and installation.	20.239,49	18.645,76
EURO		378.987,43	376.595,62