United Nations Mission in Bosnia and Herzegovina

Judicial System Assessment Programme (JSAP)

THEMATIC REPORT X

SERVING THE PUBLIC:

The Delivery of Justice in Bosnia and Herzegovina

November 2000

UNITED NATIONS

CONTENTS

PREFACE

JSAP was set up by UNMIBH in late 1998, under a Security Council Resolution, to "monitor and assess" the court system in Bosnia and Herzegovina (BiH) as part of the overall programme of judicial reform co-ordinated by the Office of the High Representative. It ceased functioning at the end of November 2000. During the course of its work, its teams of international and national lawyers covered the judicial institutions throughout the country, visiting judges, attending hearings and inspecting court files, amongst other things.[1] Unlike UNMIBH as a whole, with a mandate focussed on the police and hence the criminal justice process, JSAP considered all aspects of the judicial system, including civil and administrative cases and the institutional framework and political environment in which the judiciary operates, from a rule of law rather than a purely human rights perspective.

Given its mandate to assess the court system as a whole, JSAP primarily concentrated its attention on the ability of the BiH judiciary to deal with its ordinary caseload. This gave the basis for making an assessment of how the system functions generally and what sort of reforms might be needed. JSAP tried to avoid targeting types of cases peculiar to this transition period, such as war crimes cases. Any court system would have difficulties in dealing with those cases, given similar circumstances, and so an assessment that revolved around those specific areas would not indicate the more general and fundamental issues facing the BiH judiciary.

The most immediate result of JSAP's work must have been the daily interaction with the judiciary and Ministers of Justice, allowing an exchange of ideas and advice between fellow professionals. JSAP owed a great part of its success to exactly this and to the openness that developed between its officers and their local counterparts, sometimes requiring great courage from the latter.

The most concrete result of JSAP's work, on the other hand, must be its various reports. It is these that are really the fulfilment of its mandate obligations and that create a legacy that can continue to be used as part of the ongoing reform process. It is hoped that they also provide a useful tool for the local judiciary to help comprehend their own system from a different perspective. On the whole, the reports have addressed specific issues or problems as they arose. Some have dealt primarily with specific institutions, some with different processes or tasks and one with a specific case and aspect of the judicial system. In its analysis, JSAP always tried to focus on separating the legislative, institutional and political factors causing the problems it identified.

The reports were (in chronological order):

- *Report for the Period November 1998 to January 1999* (April 1999)
- *Thematic Report I Courts for Minor Offences* (July 1999)
- *Thematic Report II Inspection of the Municipal Public Prosecutor's Office in Livno, Canton 10, during 5-16 July 1999* (September 1999)
- *Thematic Report III on Arrest Warrants, Amnesty and Trials in Absentia* (December 1999)
- *Interim Report on Delays and Detention* (February 2000)

[1] Over the two-year period of JSAP, its staff included lawyers from (in alphabetical order): Argentina, Bulgaria, Canada, Columbia, the Czech Republic, Finland, France, Germany, India, the Netherlands, New Zealand, Norway, Poland, Portugal, Senegal, South Africa, Sweden, the United Kingdom and the United States of America.

- *Thematic Report IV A Case Study in Economic Reform – Inspection of the Registry for Companies and Public Institutions in Bihac, Una Sana Canton, 6-13 December 1999* (May 2000)
- *Amnesty and Return – A Report on Implementation of Amnesty Legislation in the RS* (June 2000)
- *Thematic Report V Enforcement: Execution of court judgements in civil cases* (September 2000)
- *Thematic Report VI Expert Evidence: The use and misuse of court experts* (November 2000)
- *Thematic Report VII JSAP and the Judicial Review Process in Bosnia and Herzegovina* (November 2000)
- *Thematic Report VIII Prosecuting Corruption: A Study of the Weaknesses of the Criminal Justice System in Bosnia and Herzegovina* (November 2000)
- *Thematic Report IX Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina* (November 2000)

In addition, each of the regional teams prepared final reports on their different experiences, which have not been publicly distributed, as they were intended primarily as briefing documents for UNMIBH itself and the international community at large.

Lack of time and the sheer enormity of the task meant that there was no final report summarising the entire findings of JSAP. However, this report could, in a sense, be considered to fill that gap. More than the other JSAP reports, it attempts to give a broad analysis of the larger problems facing the judiciary and its role in society. It concentrates on the institutional and legislative factors, in relation to the broad question of efficiency and effectiveness, vital to establishment of the rule of law and implementation of fundamental human rights. It can be read in conjunction with *Thematic Report IX Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina*, which deals with the third cause referred to above, that of political influence on the judiciary.

Fixing the problems of the judiciary will be difficult. There must be a fundamental shift in attitude, not only by many judges, but also by executive government and to some extent the public at large. An effective, efficient and independent judiciary making decisions in accordance with law is fundamental for the rule of law, without which there will be no decent future for Bosnia and Herzegovina. JSAP has seen many changes in the judiciary over its two years. The growing willingness to be frank about the judicial system, and particularly about pernicious external influence, of local judges and prosecutors gives some cause for some optimism about the development of a truly independent judiciary.

0 EXECUTIVE SUMMARY

A properly functioning judicial system is expected to perform its tasks in a fair, impartial and independent manner and without undue delay. From its inception, however, JSAP was made aware that the question of delay is a major source of complaint about the judicial system in Bosnia and Herzegovina (BiH), from both the public and from the judges themselves. Excessive and systemic delay in the resolution of cases brings into question the applicability of the rule of law, as well as the breach of various human rights, such as to justice within a reasonable time and to personal freedom and security.

This report addresses both JSAP research into the causes of delay conducted in early 2000 and the question of judicial effectiveness and efficiency generally, based on the findings of JSAP over its two-year life, and on the premise that the judiciary should answer to the broader demands of the society it serves. It concludes that the prime factor causing delay is the procedural laws governing court proceedings and the way that those laws are interpreted. The judiciary appears to be more attuned to achieving perfection in form rather than justice in substance. The obligation to find the material truth sends first instance courts on a seemingly endless quest for evidence, much of which will clearly contribute little to the resolution of the case. Coupled with the customary non-attendance of parties, witnesses and counsel, cases can be delayed for years. And with no clearly defined standard of proof, it is doubtful that courts actually do find the truth. The problem is exacerbated by the reluctance of second instance courts to hold hearings or make final decisions. Instead, they send cases back to the lower court for retrial or simply to correct minor spelling or other technical errors, even when no party has complained of the error in question.

These problems could be solved with a more party-driven, less judge-driven and less purely inquisitorial approach. Judges should strive, above all, to do justice, which would require a fundamental shift in attitude to their work. It would also require the abolition of the current numbers-based system on which their performance is evaluated and which, in itself, encourages a poor work attitude.

The court system as a whole functions as a self-sufficient body, organising itself and measuring its performance according to methods and criteria that are of no relevance to the public that it serves. This is also shown not only in the quota system, but also, for example, in determining the number of judges in each court, in the working hours of courts and the system of registering cases. While there are a number of institutional causes of delay, that of attitude is perhaps the most serious.

There are other institutional reasons for inefficiency and delay, such as absence of training and textbooks, but the most serious is gross under-funding of the court system. The severely limited resources given to it lead to delay and inefficiency in various ways, including demotivation of staff, delays in obtaining expert reports, inability to operate court buildings in winter, outdated and noisy equipment, etc.

Fixing the problems of the judicial system in BiH will be an expensive and time-consuming process. It will also involve a paradigm shift in the attitude of both the judiciary and, more importantly, of executive government, to acknowledge that the function of the judiciary is to serve society as a whole and not one or two powerful parts of it. Without an efficient and effective judicial system that delivers decisions in accordance with law, it is unlikely that BiH can ever hope to solve the enormous economic, political and social problems it faces.

1 INTRODUCTION

A judicial system has two primary functions – resolving disputes, and determining guilt or innocence in criminal cases. A properly functioning judicial system is expected to perform its tasks in a fair, impartial and independent manner without undue delay. Although the judiciary occupies a special place in society, like any other institution it must be judged by its ability to satisfy its "clients" – individuals, companies, the state and society at large. The interests of these groups will sometimes conflict and, in particular, delay and inefficiency in the judiciary can be beneficial to some of its more powerful clients. The state does not suffer unduly when individuals are held in lengthy detention, criminal forces prefer a system where crime goes unpunished, and those who trample on the rights of others do not object when there is no place for their victims to seek redress. But the judiciary serves a higher goal – justice. Justice is impossible where there is delay and inefficiency and without justice there is no rule of law.

From its inception in late 1998, JSAP was made very aware that the question of delay is a major source of complaint about the judicial system in Bosnia and Herzegovina (BiH). This issue was raised not only by disgruntled parties, but also the judges themselves. Concern over the effect of delays on the length of time spent in detention led to JSAP's *Interim Report on Delays and Detention* of February 2000. More recently, many complaints about individual judges made to the commissions and councils currently reviewing the performance of judges and prosecutors concern delays. At the end of two years of assessment by JSAP, it is clear that the judicial system in BiH is frequently unable to resolve cases – civil or criminal – in a timely fashion. The system of court organisation conveniently serves to hide delays and the procedural laws to facilitate them.

This situation clearly serves the interests of many powerful forces in BiH society. While the failings of the system may not be immediately apparent to the public at large, they are clearly visible to criminals – who take advantage of the system's weaknesses, to investors – who refuse to risk their assets where there are no solid legal guarantees, and to the system's victims – persons detained for years during main trials and those who cannot get the government to recognise their rights.

This report is an attempt to analyse not only the causes of delay but also to address the overall question of judicial effectiveness and efficiency. At a broader level, it raises questions about whether the judiciary actually fulfils its functions in society at all. It is a result of the JSAP's knowledge of the judicial system gained over a two-year period and of a specific inquiry undertaken in the Banja Luka region and Central Bosnia Canton in early 2000. A longer description of the inquiry itself is given on the next page.

The judiciary is a complex organisation and it could not be expected that the blame for excessive delays can be attributed to one factor alone. All actors in the judicial process tend to hold institutions other than their own responsible. There are many aspects that must be considered, especially the effect of the various procedural laws that govern judicial activity and the structure and organisation of the court system itself.

These are all considered in this report, along with some consideration of the various human rights issues that arose during the inquiry. Although not always strictly related to delays, they are too important to be ignored. Some recommendations for further action can be found at the end of the report.

2 SOURCES OF INFORMATION

Over its two-year history, JSAP has accumulated a considerable amount of information on the judiciary in general and on the question of delays in particular. This formed the foundation of the research for this inquiry, which was conducted in the Banja Luka region of the Republika Srpska (RS) and in Central Bosnia Canton in early 2000. JSAP reviewed the annual and other reports prepared by the presidents of courts in that region for the years 1998 and 1999. The judges there kindly provided further information on the amount and the dynamics of the backlog in their courts in 1991 (the last pre-war year) and the period 1995 to the end of 1999. These years were selected to make a comparison possible and to analyse whether delays genuinely resulted from the war, as frequently maintained by the judges, and whether the number of unresolved cases is actually increasing or decreasing.

The information obtained also included data on the time of initial registration of the unresolved cases pending before the courts. This provided a better opportunity to assess the length of proceedings within one judicial instance. A picture of the actual length of entire proceedings could only be given through case studies, as the judicial system does not collect statistical information on this issue. The criminal and civil procedure codes in both entities,[2] and more than 40 civil and criminal cases were studied to analyse the most frequent reasons for lengthy proceedings in the practice of the courts.

JSAP also prepared a questionnaire that was sent to more than 40 judges in the Banja Luka area and in Central Bosnia Canton. Forty-two (28 from the Federation and fourteen from the RS) responded. The results give some insight into their perspective of the reasons for delay in the judiciary. The questions and a summary of the responses are set out in Annex I.

In developing the questionnaire, JSAP's list of reasons for delay was based on assumptions developed from its knowledge of the local judicial system. The form listed many potential material, administrative and legal factors and asked the judges to mark those they believed relevant to the issue of delays. However, some caution is necessary in evaluating the results as it is possible that the listing of reasons may have solicited responses from judges that they would not normally have noted, thus generating biased responses. In an effort to balance the results, and to avoid excluding from the judges' answers reasons that were not included in the suggested list, the questionnaire provided several opportunities to add comments. Many judges did so and some of their remarks are included in the report.

JSAP agrees with many of the responses, but not completely. It should also be noted that the responses only reflect the views of judges. The opinions on the reasons for delay in the judiciary would probably be quite different in the view of the prosecutors, lawyers, police, or politicians. While the report is largely focussed around the survey, it includes much information obtained and conclusions made by JSAP in the course of other inquiries and its work generally.

[2] The RS still uses the Criminal Procedure Code of the former Yugoslavia (SFRY). At the time of writing, the new, relevant legislation for the District of Brcko had not come into force and is not referred to here.

3 THE IMPORTANCE OF DELAYS TO THE ISSUE OF JUSTICE

On 29 February 2000, following the overturning of two verdicts and two returns of the case for retrial, the Banja Luka District Court - acting for the first time as a first instance court in the third re-trial - sentenced Branko Malic to four years of imprisonment and released him pending appeal - after seven years in detention without a final verdict.

It does not sound right, does it?

3.1 General comments

A normally functioning judicial system is expected to guarantee that an end is put to the uncertainty of a person in a civil suit or on account of a criminal charge against him within a reasonable time and by means of an enforceable judicial decision. This purpose serves the interests of the parties involved as well as the necessity for a state to provide legal certainty and to guarantee the rule of law. Inability of the state to secure the efficient functioning of the judicial system is critical for the exercise of the rights of its citizens and renders its guarantees of questionable value.

A fair judicial system is also expected to pay special attention to and to prioritise cases where the private interests involved may be irrevocably affected by the delay of justice. Examples of the types of case in which the European Court of Human Rights has found special diligence required are those concerning custody and the relationship between parents and children, civil status and capacity, employment disputes, pension disputes, decisions with regard to the determination of compensation for the victims of road accidents and for persons infected with HIV as the result of blood transfusion at hospitals.

Enforcement of human rights will always, to some extent, be a balancing exercise between the right to a decision within a reasonable time and the right to defend oneself and to equality of arms, implementation of which may, in fact, require some delays. Striking the right balance is not always easy and requires a proper understanding of the ambit of human rights. It is possible to conclude that in BiH a false conception of human rights has, in fact, led to the protection of criminality.[3] An excessive regard for the rights of an accused can also be to the detriment of the rights of the victim and of society at large, in part because of its effect on delay.

3.2 The right to justice in a reasonable time

From the point of view of any individual seeking justice, a case pending for many years without a final enforceable decision raises the issue of violation of the right to a final determination within a reasonable time.

Article 6.1 of the European Convention on Human Rights (ECHR)[4] provides:

[3] The question of the influence of both politicians and powerful criminal elements over the court system is dealt with in JSAP's *Thematic Report IX Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina.*

[4] The ECHR is part of BiH domestic law by virtue of article II 2 of the Constitution of BiH.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Court of Human Rights has considered numerous cases involving claims that proceedings have lasted more than "a reasonable time," and has frequently found violations of this standard in civil, criminal and administrative cases. As no two cases are exactly the same, it is impossible to lay down a precise universal standard of unreasonableness. A higher standard is imposed in criminal than in civil cases and failure to comply with it can lead to orders for compensation against the state. Factors such as the complexity of the case and the conduct of the parties must be taken into account in determining what is excessive delay, which will amount to a breach of fundamental rights.

States have an obligation under the ECHR to organise their judicial system accordingly and inadequate staffing, general administrative inconvenience or temporary overburdening of the court system are not valid excuses for failure to meet this obligation. As courts are required to deal with greater numbers of cases and as cases become more complex, increasing the efficiency of the courts has become a major concern of governments world-wide. The Council of Europe has provided member states with detailed recommendations concerning judicial efficiency, in order to reduce delay resulting from overburdening of the judicial system. It is universally recognised that maintaining a modern court system that serves the needs of the parties and the interests of justice requires continual investment and innovation.

In BiH, the Human Rights Chamber has found violations of article 6.1 of the ECHR in 31 out of 36 cases where the issue was raised. Information collected by JSAP showed that in the surveyed courts in both entities, 40% of civil cases and 50% of criminal cases at first instance remain unresolved for more than two years. Two years may not be excessive in an individual case, but these high percentages indicate an overwhelming inability to dispense justice promptly. In Central Bosnia Canton, JSAP found 182 criminal cases registered in 1995 where the accused were still awaiting first instance sentencing in 2000. JSAP also found numerous cases that had been pending for as long as fifteen years.

3.3 The right to personal freedom and security

Under the BiH Criminal Procedure Codes and according to international standards, cases where persons are held in detention should be dealt with special diligence and expediency by the courts. The constant delays in the judicial process, including the frequent and unlimited possibility of returning cases for rehearing, raises two specific problems in relation to the right to personal freedom and security. The first is that there is a breach of the right under article 5.3 of the ECHR to trial within a reasonable time or release from detention. The second is a breach of the right under article 6.1 to final determination of charges within a reasonable time.

A related problem in respect of lengthy detention is that by and large detention is ordered and continued by the courts on the basis of the seriousness of the charges against the accused rather than on the likelihood of escape, recidivism or interference with evidence. Where the charge is a crime punishable by long-term imprisonment, detention is mandatory. These practices and that provision probably run contrary to the admissible restrictions on personal liberty under article 5.1 c and 5.3 of the ECHR.[5] In addition, there are no habeas

[5] Dealt with at greater length in JSAP's *Interim Report on Delays and Detention* (February 2000).

corpus procedures in BiH legislation, meaning that there is no procedural mechanism for persons in detention to challenge their continued stay there while their case is ongoing. This is a breach of the requirements of article 5.4 of the ECHR. Without this guarantee, detention can become a penalty without a sentence.

It took a long time for Branko Malic to persuade a court in the Federation to send his case to the relevant RS court, so that the charges against him could be considered for the third time in a first instance trial. In the meantime, he was kept in detention for nearly seven years and was not eligible for amnesty as he had no final verdict. As there was no appeal, the decision of the third first instance court became final and he was sentenced to four years of imprisonment, time which he had already served and more.

4 BACKLOGS AND THE SYSTEM OF REPORTING CASES

4.1 The present volume of responsibility of the judicial system

The level of case backlog (unsolved cases) is indicative of the ability of any judicial system to process incoming cases over a period of time. Where at a constant level, the backlog may indicate slow proceedings in general. Where it is constantly increasing, it should be a source of concern and attention.

Most BiH courts report a high number of pending unresolved cases at the end of each year. Court presidents and judges frequently complain that the backlog in their courts is ever increasing and threatens their ability to function. JSAP attempted to establish the actual scope and dynamics of the existing backlog in BiH.

The numbers of newly registered cases reported by the courts are impressively high. However, a brief analysis of them shows that not all registered cases require any judicial responsibility. Many of them are actually the responsibility of the court clerks and require only a verifying signature by a judge, such as requests for issue of a certificate.[6]

In 1999 the Banja Luka Basic Court reported 58,808 newly registered cases. Out of them (60%):
16,475 - requests for the issue of different certificates
12,741 - land-book registry requests of which 9,182 concerned title to land
2,506 - execution cases
3,652 - requests for the issue of certificates of criminal record

In 1991 the same court reported 94,660 newly registered cases. Out of them (81%):
54,698 - execution cases
7,624 - land books and other notary public responsibilities
8,903 - requests for the issue of certificates of criminal record
6,040 - requests for the issue of other certificates

In 1999 the Gradiska Basic Court reported 4,535 newly registered cases. Out of them (47%):
513 - execution cases
1,177 - land book registry requests
446 - requests for the issue of certificates of criminal record

In 1999 the Bugojno Court reported 14,528 newly registered cases. Out of them (70%):
5,985 - land books registry
3,096 - requests for the issue of various certificates
998 - execution cases

In 1998 the same court reported 12,318 newly registered cases. Out of them (65%):
4,623 - land book registry requests
899 - execution cases
2,148 - requests for the issue of various certificates
413 - requests for issue of certificates of criminal record

In 1999 the Travnik Municipal Court reported 9 223 newly registered cases. Out of them (70%):
761 - execution cases
2,852 - requests for the issue of various certificates
2,921 - land book registry requests

[6] In some countries, many of these matters are the responsibility of other institutions, such as public notaries or company registrars. This issue is discussed below.

The courts are required to report on the progress in all registered cases, regardless of the type of case. Accordingly, the total number of reported resolved cases is not indicative of the ability of the judicial system to cope with the genuine judicial disputes as, from the figures given, it is clear that only around 30-40% of registered cases involve judicial decision making.

The courts do not keep data in a form from which it can easily be determined whether the actual backlog of unsolved cases is increasing, reducing or constant. Their annual reports only include the numbers of cases pending at the beginning of the year, cases registered in that year, decided cases and cases that remained pending during the year. However, by comparison of the different figures for civil and criminal cases from the annual reports of courts for 1991 and period 1995-1999 it can be concluded that the overall volume of backlog is ever increasing and that there has been an alarming increase in unsolved cases. Comparing the pre-war situation of 1991 and the period 1995-1999, analysis of the figures shows a steady deterioration in the ability of the system to cope with the level of incoming cases. Despite some evidence that the number of filed cases, especially in the RS, has dropped substantially since the war, the judicial system in BiH is not only overloaded, but it is also increasingly overloaded.

In a stable society, where similar factors are active for long periods of time, a reliable analysis of the reasons for an increase in pending court cases would be possible. Such an analysis is more difficult in a country emerging from the turbulence of a civil war and making the transitions to democratic government and to a market-based economy. The judicial system has been split into parts, new courts and court regions have been established and new laws have come into effect. Commercial cases are becoming more complex. Parties to trials have changed their residence and there has been a massive drain of expertise from the judiciary to other parts of the legal system or abroad.

A number of reasons have been postulated for the increase in the backlog. One is an insufficient number of judges and most of the surveyed judges believed this to be the case. However, as the actual number of judges in most of the surveyed courts appears to be similar to the number of judges in previous years, while the number of incoming cases each year is not necessarily increasing, there is insufficient ground to dismiss or support this submission.

A second is a result of post-war division of territory into two entities. Hundreds of cases that arose in regions that are now part of the RS remain with courts in the Federation. The competence in these cases is not clear and the courts in the Federation take no steps in them. It is questionable whether any decisions of these courts would be binding in RS. The over 800 such cases that remained in the court in Jajce were first included in the court statistics as unsolved cases in 1999. However, this does not necessarily mean that that court sees them as an actual responsibility. A similar situation was seen in other courts. Little has been done by the relevant Ministries of Justice to find a proper solution to this issue. In the meantime, accused persons remained in detention, private parties to civil cases still expect the judicial system to notice their problem and these cases remain part of the court backlogs.

From time to time, there are also sudden and significant increases of particular types of case, and so of unresolved cases, in some courts. These increases usually have specific explanations. For example:

- The number of criminal cases registered before the Kotor Varos Basic Court increased by 32% in 1999. This was the result of the appointment of a prosecutor to a position previously vacant.

- There have been sudden rises in the number of newly registered cases resulting from legislative shifts in competence, where cases previously filed before the courts of one instance were transferred to courts of another instance by virtue of law. Most of these cases remained pending only for a limited period of time.
- The courts are sometimes loaded with waves of specific cases. For example, in 1991 the state-owned television company filed thousands of claims for payment of television tax in the RS basic courts. These cases were dealt with quickly and easily. More recently, the RS courts have been flooded with claims for compensation for war invalids and for the families of soldiers killed during the war. At least 15,000 of these claims were filed in the Banja Luka District Court alone. The upcoming expiry of the limitation period was the reason for the sudden rush of claims, which are now being processed by the courts.[7]

However, while factors like these create difficulties for a certain period of time, they do not increase the general level of backlog.

4.2 The system of reporting cases

We have cases that are pending unresolved for more than ten years, but it does not mean that the courts did not deal with them.

A judge in the Federation

The judiciary in BiH is not required to report on the length of proceedings nor on the reasons for delays in individual cases and so court reports contain no information on the actual length of proceedings in pending cases. Both the judicial system as a whole and the work of the individual judges are assessed on a completely different basis. This lack of accountability for providing efficient justice to individuals probably reflects a completely different concept of the role of the judicial system in general. It indicates the system's sense of self-sufficiency and a lack of awareness of the role of the judicial system in providing services and preserving the rights of individuals to justice.

Court registers and statistics are designed, kept and updated not with regard to the time when cases were initially filed and the duration of proceedings necessary to reach a final decision, but with regard to the number of cases dealt with by that court as one instance of the judicial system. Unless one follows each and every individual case, this system makes it impossible to establish the duration of proceedings in individual cases from the moment of initial filing to the time of delivery of a final and enforceable decision.

The reported number of pending cases does not necessarily coincide with the number of actual pending cases in the entire judicial system. A case is first registered on initial filing. On appeal, it is re-registered with a different case number and reported as a new case. If it is returned for retrial, it appears in the registers and reports again as a newly registered case. As the procedure allows for many returns, one and the same case may, and usually does, appear several times in the register books of one and the same court as well as in the annual statistics of both first and second instance courts. Between 35 and 50% of cases are returned for some reason to the first instance court for action. Every time a case is bounced back and forth, it is registered and counted as a decided case, even if there is no final decision.

[7] The law does not permit these claims to be brought in the Federation.

The actual serious problem of backlog should therefore be distinguished from the artificially lower impression of backlog created by the system of registering and reporting cases. JSAP believes that the total number of actual cases pending before the courts would be reduced by at least 30% if court statistics and reporting were organised to deal with the real situation and to focus on the delivery of final resolutions of disputes. As the level of reported backlog is often used to explain delay in proceedings and to substantiate the demand for appointment of more judges, the current system of case registration and statistics encourages the judicial system to report a higher number of filed and pending cases than actually exists.

An individual seeking justice is not interested in the figures produced, but in the timely delivery of a final judicial decision. This is an indicator the judicial system in BiH is not interested in.

4.3 Conclusions

- The system of reporting cases is not designed to produce information that is of any use in evaluating the ability of the courts to deal efficiently with actual cases, such as the length of time taken in the average case. In fact, it serves to hide that sort of information. The concept that the role of the courts is to serve the public and society at large plays no part in this system.

- Given the high proportion of non-judicial cases in the system and the constant renumbering of cases as they go back and forth, the number of actual judicial proceedings dealt with by the system is a lot less than might seem on a first glance at court statistics.

- For the same reasons, the level of backlog is greater than admitted or recognised and the average amount of delay in proceedings is correspondingly more.

5 INSTITUTIONAL REASONS FOR DELAY

5.1 General comments

There is no doubt that justice in BiH is inefficient. The existing problem of significant backlog and extreme delays in proceedings is not contested, although the extent of the problem is either not recognised or not admitted. What are the roots of this problem – are they entirely with the judiciary or are there also responsibilities of the executive and legislative authorities that are not properly addressed? Are underpaid and overworked judges right when they complain of out-dated and inadequate procedure laws and administrative, budgetary and other difficulties in processing the backlog of cases? Are government officials fair in castigating judges for inactivity and inefficiency? Does the blame lie with legislative bodies failing to pass laws that would secure a true division of power and the independence of the judiciary or that would enable the efficient processing of cases? Ultimately, wherever the blame lies, it is unlikely to be with the private parties who seek justice and suffer from its slow administration.

This and the next two sections deal with the possible institutional, procedural and political reasons for delay and inefficiency in proceedings. Some conclusions can be found at the end of each section.

5.2 Human resources issues

5.2.1 The number of judges

Shortage of judges is one of the most frequently given reasons to explain why courts cannot solve cases promptly. In 1998, around one third of judicial positions in the RS were vacant.[8] However, the current number of judges in BiH, around 1,100 including minor offence courts, is very high compared with that in countries of a similar size, so this can, at best, be a partial explanation.[9] The need for additional judges generally assumes that the current quota of cases for each judge (explained in paragraph 5.4.3) is correct. With this, the number of judges needed is calculated by taking the number of incoming cases each year and dividing it by the number of each type of case that is expected to be handled by one judge in that period. This appears to be the standard management tool in many of the Ministries of Justice and courts. It is also relevant to note that the laws on courts usually specify the number of judges for each court, although it is not clear upon what basis that determination was made. Thus, any consideration of the general statement that BiH needs more judges must take into account the current court management system, the variety of non-judicial tasks performed by judges, and other factors.

The fragmentation of the court system and the fact that appointment as a judge is to a specific court and not to the bench generally, means that the system is inherently inflexible

[8] This information is based on the number of positions decreed by the Law on Courts and does not mean that there was any objective necessity to fill those positions.

[9] BiH is believed to have currently no more than 3.5 million inhabitants. Denmark has approximately 320 judges with 300 assistant judges for 5.2 million inhabitants. Norway has around 460 judges and 160 assistant judges and a population of 4.2 million. Finland, with 5 million people, has around 890 judges and 74 judicial clerks. Bulgaria has approximately 500 judges for 8.5 million inhabitants. On the other hand, Sweden, with a population of around 8.8 million and a tradition of high employment levels in the public service, has approximately 1,730 judges and 741 recording clerks.

and cannot react easily to shifts in demand. Thus, while there may be a shortage of judges in one court, there could be an abundance in another.

Procedural laws also create a need for high numbers of judges in each court compared with the actual workload. For example, to be able to handle all stages of first instance criminal trials, courts need at least five judges, in order to be able to deal with both the investigative and trial phases of criminal procedure and to be able to provide an appeal panel from decisions of the investigative judge. Application of this requirement recently saw a doubling of the number of first instance judges in Herzegovina-Neretva Canton, while the number of actual cases, of course, remained the same. This is another example of systemic inflexibility. The issue of the appeal panel could be solved differently, as it has been, for example by using the next instance court for appeals from decisions of investigating judges. In fact, the wisdom of having appeals dealt with by the same court that is dealing with the case at the investigative and trial phase is questionable.

5.2.2 Low Salaries

The JSAP judicial survey confirmed that judges thought low salaries had some effect on delays, with 26 of 42 judges mentioning it as a contributing factor. Salaries have varied between entities and between cantons. Until mid-2000, in the Federation, the range was around 600-1400KM per month. Lower amounts were paid in the RS, with many judges earning around 400KM per month. In addition, payments were often several months late. While these salaries compared favourably with those of university professors and teachers, they were less than those of qualified police officers and a lot less than many lawyers in private practice were said to be earning. Salaries are the prime source of income for judges. The Codes of Ethics for judges in both entities prohibit judges from earning income from most other forms of outside activity, although some exceptions do apply and judges were known to be paid for sitting on various school and company boards, possibly in contravention of their ethical restrictions. Recent laws on judicial service in both entities now give a legislative basis for these restrictions.

Judges said that it was sometimes hard to concentrate on work because of the pressing monetary matters that arise in normal family life with such low salaries. It appears that some judges were only able to continue in office because a spouse or other family member had a high paying job. Some judges mentioned that they remained in the job only because they truly enjoyed it and were good at it. Low salaries, combined with under-funding of the courts in general, have also contributed to the poor public perception of the importance of the judiciary as an institution in society.

For the last ten years, the combination of low salaries and poor working conditions has driven judges to private practice, work in the international community or in other professions. There has also been distinct lack of interest shown in advertised positions. For example, when six vacancies were announced at the Doboj District Court in 1999 only three people applied, all well below the standard of experience required.

At least for regular court judges, this should significantly change with the recent entry into force of laws on judicial service in both entities, which massively increase the salaries of judges and prosecutors to a level well above average. The range is around 2,500-4,000DM per month. The new rates are finally being paid in all parts of the country except two cantons, where they will be paid from January 2001. Minor offence judges in Tuzla Canton have recently received a substantial salary increase in order to keep pace with regular court judges. It is, however, too early to see whether this new-found wealth will have any effect on judicial

motivation and the efficient disposal of cases. It should also be noted that although the salaries have increased, the problem of late payment continues as before. If there has been a shortage of judges, as discussed above, the new salaries should help ensure that vacancies for regular court judges are filled. On the other hand, it is likely that judges will continue to leave the minor offence courts.

5.2.3 Work habits

While the judges have complained about overwork and underpay, it is abundantly clear to JSAP that the entire judiciary has poor work habits and attitudes. Although the prime task of judges could be considered to be holding hearings in the cases before them, it is rare to find a judge who holds hearings for more than a few hours each week. Most judges schedule hearings only between 9 and 11am for two or three days each week. Many of the hearings that do take place only last a few minutes and are then adjourned for some reason. Only in exceptional cases has JSAP found judges who say that they further their work by background reading or taking files home to work on outside working hours. Many courts also close well before the end of the working day for no obvious reason. JSAP is well aware that it is useless trying to telephone a judge after 3pm.

In fact, there is some recognition of these poor work habits within the judiciary. The quota system provides a method of measuring the performance of judges by comparing the number of cases they solve each month with a prescribed standard. In talking about the quota system, one judge noted "Judges used to exceed their quotas, and be adequately rewarded for it. The principle should be revived that judges are rewarded in part for the number of cases they solve." This observation admits the possibility of working harder, but suggests that interest in doing so would depend on bonuses. The fact that most judges believe that they have an excessive workload does not appear to be a motivating factor to dispose of cases promptly and efficiently.

There are clearly exceptions to the general situation. Investigating judges may be called out in the middle of the night.[10] Hearings in big criminal cases can last all day. Some judges hold hearings for a much greater portion of their time and do them quickly and efficiently. But the overall impression is of a judiciary that does not work when it is at work. Given the recent substantial salary increases for regular court judges, it is time for judges to stop complaining and start working.

5.2.4 Experience of judges and training

As noted above, many experienced judges left the judiciary in the last decade. During the war, vacancies were often filled by experienced lawyers, but with little or no judicial experience. However, JSAP has been told that in the RS 400 new judges were appointed during the war, and a large number of those were novices. Also during the war, law schools did not work at full capacity, resulting in a shortage of qualified graduates. Doubts are often cast on the credibility of some qualifications obtained then. Older judges also tend to criticise the judges appointed during that period for lack of experience, although the problem may be less a lack of experience, given that some of them have now been in office for eight years, and more one of basic competence.

[10] However, they are paid extra for this duty. There are also widespread complaints from the police that both investigating judges and prosecutors frequently fail to attend the scene of even serious crimes outside working hours.

The results of the JSAP survey reveal that around half of the responding judges consider that inexperience is a cause of delay. It is plausible that the inexperienced judges refrained from identifying themselves as a source of delay, thus skewing the results towards a lower response.

This is something that JSAP does not have enough information to comment on as a cause of delay. However, the question of training is of relevance to all judges, senior and junior. Since 1994, the legal system of BiH has undergone significant changes, with the introduction of new constitutions, new substantive laws on many topics, new procedure laws for both civil and criminal matters in the Federation and with the introduction of the ECHR as part of domestic law.

Only limited and ad hoc training has been provided to the judiciary or the legal profession on these matters. When it has been provided, almost always by the international community, it has not always been well attended and not always by judges whose field of work is under discussion.

There is no formalised system of continuing legal education for any legal professionals, which is standard and sometimes even compulsory in other countries. Efforts have been made towards creating judicial training centres in each entity but this proceeds slowly. In considering further developments in this area, it needs to be borne in mind that further training of the judiciary on the ECHR will only have a limited effect as long as defence counsel fail to draw the court's attention to its provisions and that training generally needs to be supplemented by legal texts and commentaries.

5.2.5 The role of non-judicial staff

There is said to be a lack of administrative support staff in the courts in addition to the lack of judges. In the JSAP judicial survey, 18 judges noted the "lack of clerks and support staff" as a factor contributing to delays. However, JSAP does not necessarily agree with this comment. In its own observations, courts appear, if anything, to be overstaffed.

The numbers of non-judicial staff are prescribed in some way, for example in a book of rules. That for Tuzla Canton, which includes both the caseload quota and the ratio of administrative staff per judge, is included as Annex II. It prescribes a ratio of judicial to non-judicial staff of 1:2.8 in the municipal courts and 1:2.4 in the Cantonal Court. In early 1999, JSAP obtained information on the numbers of administrative staff in each court from the courts themselves, and the data for the courts in Tuzla Canton indicate that the actual numbers of non-judicial staff are higher than laid down in the Book of Rules, averaging 3.1 non-judicial staff for each judge. A brief analysis of the numbers in Central Bosnia Canton and the Banja Luka district, the two regions surveyed for this report, gives similar figures for the regular courts. Some courts have as many as five administrative staff for every one judge. Minor offence courts seem to have slightly less support staff than regular courts, with around two for every one judge. By contrast, most Norwegian courts have more judges than other staff. For example, the Oslo City Court has 67 non-judicial staff for 85 judges and the Borgarting Appeals Court has 35 staff for 53 judges.

In BiH, tasks for each administrative staff member are rigidly laid down in other books of rules. Some courts, for example, have several different clerks whose only actual duties appear to be registering incoming cases and taking files to and from judges' offices. In one such court, only one or two cases of each type come in each day and the whole lot could probably be done by one clerk along with other duties. In general, it seems that the tasks

allocated to staff and the number of administrative staff are determined more by historical tradition than actual need.

In addition, the low motivation and poor work habits attributed to the judges largely apply in equal fashion to the non-judicial staff of the courts. In fact, this has probably been exacerbated by the recent substantial salary increases for judges. There was no similar increase for administrative staff, which has caused widespread dissatisfaction, although one purpose of the increase could have been to create a bigger differential between judges and other people paid by the government. In some parts of the country, administrative staff are voicing their disappointment over this issue and working conditions generally by threatening strikes or by taking even larger amounts of sick leave than usual.

With respect to work habits, simple tasks seem to be approached by administrative staff in a complicated manner, with little regard to the goals. While increased computerisation is often touted as the answer to some of these problems, it is unlikely to have any major effect without any overall review of the needs of court administration. The latter, like the attitude of the judiciary in general, needs to orient itself towards public service goals and abolish rigid job descriptions.

5.3 Other resource issues

5.3.1 Funding and physical resources

Court funding basically falls into two parts – salaries and what are known as material expenses, which cover everything other than salaries, some capital costs and depreciation. Material expenses are used for staff allowances, such as warm meals and transport, operating expenses such as stationery, electricity and telephone bills, and other costs imposed on the court such as expert fees in criminal cases and the costs of court-appointed defence counsel. It has been hard to get any definite information on how court material expense budgets are set, but they seem to have some notional relationship, at least in the minds of judges, with the number of staff employed at the court.

One thing that is abundantly clear is that the money allocated for material expenses is insufficient. Like salaries, it is paid monthly, usually several months late. Court presidents are obliged to master the juggling of incoming bills to determine which are more urgent and which can wait another month. Despite this, JSAP is aware that several courts have had their telephones cut off for failure to pay the bills, sometimes years in arrears. Late payment also affects proceedings themselves, for example, it results in court experts not delivering their reports on time. With respect to equipment, many courts, especially minor offence courts, lack even the most basic equipment such as photocopiers, fax machines, modern typewriters, etc., and sometimes court staff purchase stationery from their own pockets.

Shortage of funds leads to desperate measures. Some courts have resorted to asking for loans or donations from local companies and other branches of government, for buying equipment or even for paying salaries. As it is always possible that these bodies will be parties to litigation before the same court, it would be clearly possible to infer impropriety, although JSAP is not aware of any actual case where this has happened. Failure to provide the basic elements for the proper functioning of the courts places judges in an awkward position and threatens the judiciary's independence.

Despite the fact that this is a well-known problem, the local authorities have failed to properly address it and JSAP has noted no long-term significant improvement in the situation in the last two years. Most major changes in the material situation of any courts have been the result of donor attention. However, despite this systematic neglect, it is not clear that poor material conditions have as large an effect in generating delay in judicial proceedings as other factors. As all courts are suffering similarly, it is impossible to determine whether they would be more efficient if they were better funded, although clearly the court president would have more time to devote to other matters. However in extreme circumstances, even dedicated officials must stop work. For example, lack of proper heating forces some courts to work only minimum hours in the winter. The Kiseljak Municipal Court closed for two months during the winter of 1998-99 due to freezing temperatures.

A related resource problem is that of lack of space. In the JSAP survey, one judge commented that "the court lacks additional space to accommodate more judges, which would otherwise improve the work of the court." This is clearly the case in the Banja Luka Basic Court. The court building is completely full, even though 20 out of 67 judicial positions there have been vacant. Thus, delay in that court might be decreased if the government provided the proper facilities for, and employed, the full number of judges. In many courts around the country, there are few, if any, courtrooms, and judges must hold hearings in their cramped and inadequately furnished offices. Some judges, especially in minor offence courts, have to share offices, which limits the number of hearings that can be conducted at any one time.

Surprisingly, there was a relatively low response in the JSAP survey of judges regarding the conditions of the court buildings, although this probably reflects the fact that Central Bosnia Canton has recently refurbished several municipal court buildings. Only seven out of 42 judges surveyed noted "poor court building conditions" as a reason for delay. However, through field visits, JSAP is aware of many court buildings that could use major repairs and many that are in need of minor repairs such as fixing windows, painting and new furniture. For example, several courts have leaking roofs and need to place buckets on the floor or use umbrellas on rainy days.

5.3.2 Access to Legal Texts

While some progress has been made in the last two years, many judges do not have a full and comprehensive collection of legal materials, including legislation, commentaries and international legal instruments, at their disposal, which is an important limitation on their effectiveness. Some do not even have a complete set of legislation in force and there are no law libraries maintained other than those of the five law faculties. Most courts only receive one copy of the official gazettes, which mean they have to be either copied or shared.

OSCE and JSAP provided over a thousand copies of the BiH Law Book, one to each judge and prosecutor, in all judicial institutions throughout the country. While not a comprehensive source of legislation, this does contain the main sources of law from both entities, thus providing a handy tool and access to the law of the other entity. JSAP field response was enormous, with a lot of competition for additional copies.

OSCE also had a legal commentary project, which developed commentaries on seven major areas of law and procedure[11] and distributed them to all courts. It also produced a

[11] On local self-government in BiH, the Federation Law on Administrative Procedure, the RS Law on Execution of Criminal Sanctions, the Federation Criminal Procedure Code, the Federation Criminal Code, the BiH Law on Travel Documents and civil procedure in the Federation.

second edition of three volumes of international instruments, also distributed to every judge and prosecutor.

Despite these efforts, in the JSAP survey, most judges noted that a source of delay in the judiciary is the "insufficient access to text books". Many new laws have come into force in both entities in the last five years. As well as criminal and procedural legislation, there have been considerable changes in laws on banking, privatisation, accounting, stock markets and related economic matters. Such fundamental shifts in the overall framework require not only access to the legislation but also supplemental texts, commentaries and training.

5.4 Court administration and case management

5.4.1 Allocation of work

As seen above, most incoming cases are non-judicial in nature. It is possible that they could or should be dealt with by clerks or become the responsibility of other institutions. At present JSAP does not have enough information about these cases to know whether judges actually consider them or just rubber-stamp a document prepared by someone else. However, they do require at least some attention, which could otherwise be spent on dealing with real cases. This burden of this work could be shifted by establishing other institutions, e.g. for registration of companies or a public notary system, or by having more of it done by clerks.[12] Such a change would relieve the capacity of judges and would make possible for a more reasonable use of their qualification, especially at a time of social and legislative changes when the complexity of "genuine" cases is increasing. All judges surveyed considered that the present character of the "actual" cases before them is more complex than in previous times, which is another cause for the delayed delivery of decisions.

Judges also perform a wide variety of clerical and administrative tasks within a judicial case that should be handled by others, especially in a low wage economy. Some of them do their own typing and filing and they are responsible for scheduling hearings. This is both inefficient, and also allows judges to hide delays in their cases and deliberate non-scheduling.

5.4.2 Case management

There is no system of case-management as in many other jurisdictions, which are prepared to accept that judges and courts cannot handle their workload without the proper systems in place. Case management is based on five basic premises:

- early judicial control of proceedings
- continuous judicial control
- short time periods between events
- reasonable accommodation of lawyers' schedules
- expectation that events will occur as scheduled.

Proper case management would help eliminate some of the problems seen in the processing of cases in BiH, such as proceedings getting bogged down by inaction, files getting "lost" in judges' offices, and an assumption that events will not occur as scheduled. One prime problem seen in the handling of cases is the complete lack of concentration of

[12] In fact, this work will increase in the near future if recent legislation on collateral lending is implemented. However, in a number of other countries these tasks are also delegated to the courts.

hearings. Rather than trying to deal with a case in a limited period of time in a limited number of hearings, cases take place over many short hearings in a period of months and possibly years. Many hearings take only a few minutes and deal with only one issue or witness. This is both inefficient and ineffective as evidence disappears, witnesses move or forget what happened, files and documents get lost in the court, etc. A quick look around a court registry in BiH will often indicate that only a few files are on the shelves and the rest are presumably in the judges' offices. Judges' desks are usually covered in files, some dusty, and in such numbers that they cannot all be being dealt with that day. This may indicate a lack of prioritisation of tasks. In addition, the fact that the judge, and not the court administration on an automatic basis, has the sole responsibility for scheduling hearings leaves the way open for cases to be forgotten.

Case management often involves some form of computerisation, although the essence of the system is not the technology but the results-oriented approach. One benefit of computerised systems is that they can keep track of a judge's workload to ensure that work is distributed evenly and can monitor compliance with time limits.

It should be noted that trainee lawyers do support the prosecutors and judges in BiH as in some other countries, although it is not clear to JSAP what they actually do. This practice could perhaps be expanded to provide judges further support, such as analysing law and drafting judgements.

5.4.3 Case quota system

Mi trazimo normu.
We look only into the percentage of fulfilled quotas.

The offered translation of this phrase is far from explaining its real absurd meaning, which describes the present criteria for assessment of the work of individual judges. Judges are required to close or otherwise dispose of a fixed number of cases each month (known as the norm or quota) depending on the type of case. The number of cases to be completed is set out in books of rules.[13] Part of the function of the quota is also to determine how many judges are required in each court, which is calculated according to the case load. In relation to its function as a benchmark against which a judge's work is measured, the quota is known as the quantitative standard.

The usual way to close a case is to issue a final judgement. However, less exhausting methods include dismissal of a case on valid reasons, the granting of amnesty or closure due to expiry of the limitation period. In some situations, when a judge issues a ruling on one issue of a case, the case is transferred to another category of case, so the judge can note the case as completed for the quota purposes, even though there is no final decision.[14]

Judges are also evaluated by calculating the number of cases that are returned on appeal. This is known as the qualitative standard. Both standards form the only basis for evaluating a judge's work and for eventual promotion. Generally, all judges manage in one way or another to easily fill 100% of the quantitative standard and fall in around 30% of the qualitative quota.

[13] The relevant Book of Rules for Tuzla Canton is contained in Annex II.
[14] For example, a request for the court to enforce payment of a debt. If the debtor raises an objection, the case is transferred to the commercial litigation register, where another judge must consider the validity of the plaintiff's claim.

The quota system is deeply ingrained in the management and culture of the judiciary. Each month and each year all judges are evaluated according to it and each court president prepares a chart showing the judges' percentage for comparison with colleagues.

The high number of cases before each judge makes it impossible to deal with all of them within a reasonable time and so they can be selective. Newer, less experienced judges, if unable to deal with the complex cases assigned to them, may resort to dealing only with simple cases, such as divorce or debt claims, to fill their norm. Even more senior judges might work on only one complex case and then complete their norm with easy cases. The system provides an incentive to avoid dealing with complex cases at all, if possible. If a judge finishes too many cases before the end of the month, he will stop working for a few days in order not to get too far ahead.

Worse, the existing backlog of cases assigned to a judge, who is expected to deal only with a certain number of them, creates an opportunity to set improper and dubious priorities in deciding when to attend to them. This places the parties and their lawyers in a position to offer bribes and personal favours in exchange for timely consideration of their cases, thus stealing justice from one another.

While many judges surveyed thought that they had too many cases to handle, only half of them considered the quota system itself as a cause of delay.

5.4.4 Court stenography and taking of evidence

There are two major ways in which the method of taking evidence in court proceedings can lead to delays. The first is the equipment available for this task. Generally typewriters, usually electric but sometimes manual, are used rather than computers. These are noisy brutes that can make it hard for anyone to follow the proceedings. They also make it difficult to make changes if necessary and rely on the use of carbon paper to provide all parties with copies. Even though many courts now have computers, these are not usually used in the courtroom, perhaps for lack of training or because there is no appropriate software. Around half of the judges surveyed noted the difficulty of "making records on a type writer" as a cause of delay and some commented on it further.

The second cause of delays is the way in which evidence is recorded. Unlike many countries, it is not by means of verbatim transcript or tape-recorder.[15] Instead, the judges have become masters at summarising the statements of the witnesses and parties and it is this polished summary that is typed into the record. This summarisation takes up a vast amount of time as there are frequent discussions among the judge and parties regarding its precise form, especially in more contentious proceedings where both sides tend to object to the judge's characterisation of the witness's statement. This slows down the entire proceeding.

The summarisation technique leads to other problems than mere delay. A judge may wish to characterise the testimony in a manner that would lead to a simple resolution of the dispute or to use vocabulary that matches the legal elements of the cause of action. A judge could also add weight and emphasis to certain parts of a statement to strengthen or weaken the case. Further, there is the possibility that the lawyer's objection signals to the accused or

[15] Following an OSCE - ABA/CEELI study visit of eight judges to Sweden to learn about court procedures and practices there, including Sweden's practice of audio-taping proceedings, the judges concluded that such proposals to change the method of recording in BiH are important, but less urgent than other reforms, such as establishment of independent court financing.

witness that the initial statement may prove problematic, and so the witness may attempt to disclaim it.

While it can be argued that this procedure saves time because the summary record is shorter than the taped or verbatim transcripts and so facilitates future reference to evidence, the exhausting and lengthy process seems in fact to slow down proceedings. These disadvantages may not be recouped in the subsequent speedy analysis of the case by the judges. The issues relating to fairness in the judicial proceedings cannot be ignored. Judges may also be reluctant to give up this time-honoured tradition at which they have become masters in favour of new technology.

5.5 External reasons

5.5.1 Failure of witnesses, parties and lawyers to attend court

General comments

The efficiency of the judicial system is thwarted by the continual failure of key participants to attend court investigations, hearings and related judicial proceedings. This problem was quickly noticed by JSAP in 1998 and subsequent JSAP research in preparation for this report has only served to confirm that postponement of court activities for lack of participants is a widespread problem. The problem exists throughout BiH and pertains to all forms of court actions. Almost all judges surveyed confirmed failure to attend as a reason for delays in court proceedings, recognising difficulties in notifying parties as part of the problem.

One example of egregious delays caused by non-attendance is the case of Republika Srpska v. Savicic and Milivoje, which was postponed numerous times for failure of some persons to appear, either with an excuse accepted by the court or without. In the first main trial, lasting from August 1994 to July 1995, three hearings were postponed and four others were held, at which seven witnesses, two expert witnesses and one lawyer failed to attend. The lay judges failed to attend twice. Presumably following an appeal and return, between November 1998 and February 2000, there was a second main trial, in which three main hearings were held and nine were postponed. The lay judges failed to appear five times and the lawyers four. It is likely that witnesses may also have failed to attend but this was not stated in the file.

One major reason for the failure of parties and witnesses to attend court relates to the massive displacement of around half the population during the war. The return process also generates a steady stream of address changes. The courts often do not have the correct addresses for the persons they are attempting to contact and there is no comprehensive register of addresses. Summonses are generally sent by mail and judges also complain that the PTT does not understand its obligations and that court documents are often returned undelivered or are improperly served. JSAP is unable to confirm the validity of this observation.

The court's *ex officio* obligation to establish the material truth in each case (discussed further in paragraph 6.4) may also lead to non-attendance. Both parties and counsel will be aware that in many cases the judge will be compelled to adjourn the case if they do not attend or face the risk of having the case returned by the second instance court on appeal.

Non-attendance of witnesses and parties

Even if they are properly served, witnesses and parties, especially the accused, frequently fail to attend court. Most sources believe that the attendance rate in the war and post-war period is much lower than before the war, and that the reason is only partly explained by the address problem. There seems to be a greater public disrespect for the courts, which translates into a low attendance rate at judicial proceedings. There is also believed to be a reluctance to be involved in criminal cases, reflected in lack of enthusiasm in some parts of the country for becoming a court expert or lay judge.

Judges may order the police to bring in witnesses in both criminal and civil proceedings,[16] but JSAP research suggests this is a rare event. Courts prefer to continue to send summonses to non-attending witnesses rather than use more coercive measures. The basic procedure for bringing in a witness via the police is relatively simple. The judge issues an order to bring in a witness and sends it by mail or courier to the police station in the locality where the witness resides or works. The police station will authorise an officer to bring the witness to the court at the appointed time. In some cases, the police will investigate the witness's premises and situation in advance and occasionally inform the witness to be ready on the morning of the hearing. In other circumstances, the police will visit the witness in the early morning hours and detain him at the police station until the time of the hearing. Ideally, when a witness is not available, the police will inform the judge of the circumstances of his absence, and the probable time of return to the jurisdiction, to facilitate scheduling of future hearings. In Banja Luka before the war, there were one or two police officers who worked exclusively on the apprehension of witnesses and accused and there was strong personal co-operation between the court and the police. The current lack of co-operation between the courts and the police is a contributing factor to the present lack of effectiveness of this system.

Non-attendance of lawyers

Lawyers are also responsible for delays in the conduct of effective hearings. This is even more troublesome than the deliberate non-attendance of witnesses because of lawyers' ethical responsibilities to the justice system. The extensive anecdotal evidence that lawyers often fail to attend hearings shows a deep lack of respect by lawyers for the court, their colleagues, and their clients. They have no obligation to ensure that another lawyer attends a hearing in their stead if they are unable to attend and frequently they give very little notice to the court, if at all. This must be seen, in many cases, as part of their delaying tactics, given the court's *ex officio* obligation to deal with all the evidence and the resulting requirement in many cases to adjourn rather than proceed in the absence of counsel.

Sanctions for non-attendance

The Criminal and Civil Procedure Codes provide numerous and adequate procedures to allow judges to speed trials and other proceedings along, including encouraging the attendance of parties, counsel and witnesses, but these are rarely made use of.

In criminal cases, the Federation Criminal Procedure Code provides for a fine of up to 500KM against a lawyer when "his actions are obviously aimed at prolonging criminal proceedings."[17] It also provides for informing the Bar Association of the penalty, leaving the

[16] Federation Criminal Procedure Code art. 298; SFRY Criminal Procedure Code art. 237; Federation Civil Procedure Code, art. 230; RS Civil Procedure Code, art. 248.
[17] Article 136.

way open for disciplinary action.[18] A lawyer's failure to attend a hearing could also jeopardise the victim's case if it is a private criminal prosecution, although the court may continue to act *ex officio*.[19] There are similar provisions in force in the RS.[20]

With respect to civil cases, the Civil Procedure Codes also provide judges with the opportunity to sanction lawyers who interfere with proceedings in progress, such as by warning, fine or ejection from the court room, but do not specifically provide for sanctions when the lawyers fail to attend a hearing. The court may decide to hear the case without the presence of a party or lawyer under some circumstances. The court may also use other remedies such as default judgements or dismissal of the case (discussed in paragraph 6.3). Despite their appreciation of the fact that failure of lawyers to attend delays proceedings, judges throughout BiH have seldom, if ever, imposed any sanction for this.

An additional problem with respect to counsel is the failure of many government bodies and companies to appoint anyone to represent them in court. JSAP has also observed that Federation ministry attorneys often fail to appoint someone to act on their behalf in court proceedings outside Sarajevo. Some public attorneys are also said to have adopted the practice of not attending court but sending in written submissions. In the opinion of judges having to deal with this, while not prejudicial to the plaintiff, it does cause delays as things that could be agreed in the courtroom become subject to sometimes lengthy correspondence. The courts are reluctant to take any action on cases where an authority figure is the defendant and so if there is no legal representative appointed, the cases go nowhere, effectively depriving citizens of a remedy.

A witness who does not justify his absence properly to the court in criminal proceedings may be fined up to 500KM in the Federation and 1,000 dinars in the RS. The Federation Civil Procedure Code also allows a judge to detain a witness who fails to testify without good cause for up to 30 days and to impose a fine of up to 500KM.

With respect to an accused, both Criminal Procedure Codes provide that a judge may compel his presence if he fails to attend or justify his absence and the judge may then detain him for up to 30 days.

5.5.2 Court Experts

The relationship between court experts and delay is not as simple as often portrayed. Expert evidence is widely used in BiH and experts are involved in many criminal and civil cases.[21] Experts are chosen, and in criminal cases paid for, by the court.

Around half of the judges surveyed cited the failure of experts to respond promptly to the courts' requests as a cause of delay and that was one of the higher responses. However, the reason may not be simply laziness or lack of interest on the part of experts. Many of them are chosen by the courts because of their relatively timely reporting. JSAP is aware of cases of inexplicable delay in furnishing reports from both individual experts and institutions, but the problem is equally likely to be financial. Expert fees come from the material expense portion of the court budget, which is low and paid late. Experts must compete for payment against

[18] Recent JSAP discussions with various Bar Associations on another topic indicated that courts rarely complain to the Associations about the behaviour of counsel and never about this type of issue.
[19] Federation Criminal Procedure Code, art. 276 (5). The injured party as prosecutor and the private prosecutor shall be warned in the summons that if they do not appear at the main trial or send their attorney, it shall be assumed that they have dropped the charge.
[20] SFRY Criminal Procedure Code, art. 144 (fine of up to 1,000 dinars).
[21] See JSAP's *Thematic Report VI Expert Evidence: The Use and Misuse of Court Experts* (November 2000).

other creditors such as the PTT and staff. Their fees may not always be considered a priority. Some experts require payment before they will release their report and JSAP has been advised that some more complex and so more expensive reports have been held up for years because of this. While this may create difficulties for the prompt disposal of proceedings, the blame for this does not fall on the experts.

There is a more subtle way in which the use of experts may delay proceedings and this is deliberate on the part of the court. Experts are called in many cases where expertise is completely irrelevant and unnecessary. Judges say that they are required to do this as part of the search for material truth, but it is also clear that they prefer to refer to an expert rather than basing a decision on their own common sense and judgement. This applies even to matters of simple calculation and becomes more acute in cases of some political sensitivity. Thus, the abdication of responsibility to an expert for whatever motivation will delay the case, but again that is not the fault of the expert.

Judges have also complained that there is a problem with shortage of experts and that that also causes delay. This is largely unjustifiable. The country is overrun with experts. The problem is sometimes that courts would rather use an expert from the majority ethnic group than one available locally, and so instruct experts from Croatia or Yugoslavia. Sometimes local experts will not do the task for the money available. There is also reluctance on the part of professionals in some parts of the country to become involved in criminal proceedings.

5.5.3 Relations with Police, other Government agencies and other courts

JSAP postulated that one possible cause for delay in judicial proceedings related to the slowness of other state actors to deliver evidence that would form the basis for legal proceedings. JSAP has significant anecdotal evidence that such delays do exist. However the judges surveyed suggested that this is a minor problem in comparison with the other causes of delay discussed above. Examples of lack of co-operation are the prosecutors' frequent complaints that requests for investigation or information from the police fall on deaf ears if the case is not simple or could contain some sensitive information. Some even suggest that the police wait for six months to deliver evidence collected, and if the prosecution still has insufficient evidence to proceed, then the police get another six months to investigate.

Minor offence court judges in Central Bosnia Canton claimed in a meeting in early 2000 that a source of frustration and delay in proceedings is the failure of courts in other cantons to provide assistance to their courts. This assistance generally involves the collection of fines for traffic violations.

The general inefficiency of the current Memorandum of Understanding on the Regulation of Legal Assistance between the Institutions of the Federation and the RS, agreed between the entity Ministries of Justice in May 1998, may also be a factor inhibiting proper communication among judicial and related agencies in different entities. In 1998/9, JSAP found that many judges were unaware of the existence of the Memorandum. Others doubted its constitutionality. It requires communications to be routed through the entity Ministries of Justice, which is slow and cumbersome. Some courts routinely co-operate directly with their counterparts in the other entity, while other have no contact at all.

5.5 Conclusions

- It is unlikely that more judges are needed or that a shortage of judges is causing delays in dealing with cases. The ways of determining how many judges are required and of appointing them to specific courts have no relationship with actual need and do not allow the system to respond to demand. Ultimately, the whole question of the number and location of courts and the judges in them could be reviewed. In general, appeals should not be dealt with by the same court that is hearing the case at first instance.

- Although low salaries were obviously a deterrent to entering the judiciary, and have affected the self-esteem of judges, as well as public perceptions of the judiciary as a less important institution in society, it is not clear that they have had any major effect on judicial efficiency. Given the limited amount of time that judges spend in hearings, poor work habits are likely to be a more important factor in creating delays. The fact that judges consider that they have an excessive number of pending files does not seem to have been an incentive to work harder.

- While it is also not clear to what extent lack of knowledge of new legislation causes delays, the issue of continuing legal education for the judiciary is one that needs to be properly and promptly addressed. It also needs to be extended across the legal profession as a whole and to the realm of textbooks as well as training seminars.

- There is no foundation for the belief that a shortage of administrative staff is a cause of delay. Poor work habits, a rigid approach to work allocation and an approach to tasks that is rooted in historical tradition rather innovative measures based on actual need and efficiency are more likely explanations. Reorganisation of court administration and the allocation of tasks could contribute a great deal to greater efficiency and reduce the possibilities for files being lost in the system. In particular, the introduction of case-management techniques is long overdue. This would reduce delays, encourage greater concentration of hearings and allow courts to measure their success by more useful criteria.

- While not necessarily an immediate factor in creating delay, the shortage of funding for the judicial system generally, is a serious impediment to the independence and credibility of the judiciary.

- The absence of access to legislation must have some effect on delays and efficiency, although it may not be major. However, it is of fundamental importance for all legislation to be easily available and also for judges to have access to commentaries, especially in areas where the legal framework is undergoing fundamental change.

- The quota system for assessing the work of judges permits delay and inefficiency, discourages judges from taking up complex or difficult cases, discourages the development of better work habits and leaves the way open to setting priorities on dubious grounds.

- The current system of recording evidence is of doubtful efficiency and has no merits in terms of accurate record keeping.

- Non-attendance of parties, witnesses and counsel, which arises from lack of respect for the judicial system, is a serious problem that leads to many delays in proceedings, despite the

fact that there are provisions in force in both entities that would allow judges to compel the presence of witnesses and accused. Judges do not use these tools to encourage attendance. Nor do they impose sanctions on offending lawyers, which might also serve as a deterrent to other lawyers, who now view attendance at trial as a low priority compared with other pressing appointments.

- Timely reporting by experts is less a cause of delay than the exaggerated tendency of judges to rely on expert evidence where it is not necessary in order to avoid making a decision.

- The relations between the courts and other agencies is one factor that contributes to delay, but it appears that the problem is not as great as initially postulated.

6 LEGISLATIVE REASONS FOR DELAY – PROCEDURAL LAWS

6.1 General comments

Our study of some of the more seriously delayed cases shows that the existing procedure laws are a major factor for the slow administration of justice. The judges surveyed agreed with this, most finding the inactivity of parties contributing, twelve including the role of the prosecutor among these factors and fifteen of the opinion that the *ex officio* obligation of the judges to establish the facts is a deterrent to efficient administration of justice.

Several surveyed judges also considered that the fact that there are no guarantees for compliance with the recommended time limits for delivery of decisions in any instance, as well as the lack of provisions on strict time limits for all prescribed procedural steps, contributes to delay.

JSAP's own conclusion is that the procedural laws are the most significant factor in creating delays in the judicial system. This section is an attempt to analyse some of their defects. From time to time, the problems identified also touch on breaches of fundamental human rights and reference to these is included because of their importance, even if not directly relevant to the question of delays and efficiency.

6.2 The institution of the investigating judge

In BiH, investigating judges perform many of the functions that in other countries are carried out by the police or the prosecutor. Once the police have established a basic suspicion that a crime has been committed, the case is turned over to the prosecutor to request an investigation by the court. At the end of the investigation it is up to the prosecutor to decide whether to lay an indictment or not.

The institution of the investigating judge was created, amongst other reasons, to protect the accused from abuse of process by the police. However, it causes its own problems. One is that when a judge carries out an investigation, the results of which are presented to one of the judge's own colleagues, there is a danger that the presumption of innocence might be eroded. It also causes delays. The investigating judge must start the investigation from the beginning and cannot use the evidence collected by the police to prepare the case against the defendant. Rather than determining simply whether there is a *prima facie* case to answer, the investigating judge conducts what amounts to a trial of the case. If the accused is in detention, an investigation is more likely to be completed quickly, as there is a six-month time limit on detention at this stage of proceedings. If the accused is at large, cases can easily drag on for a much longer period.

The merits of the institution of the investigating judge could be debated endlessly and different European countries take different approaches to this question. There is a widespread feeling within the international community that the role of the investigating judge should be performed in a different manner. This debate is too complex and too important to be dealt with in this report, which simply notes the institution of the investigating judge as a cause of delay and inefficiency. The matter is dealt with at greater length in JSAP's *Thematic Report VIII: Prosecuting Corruption – A Study of the Weaknesses of the Criminal Justice System*, which recommends the abolition of the institution of the investigating judge.

6.3 Default judgements and dismissals

The propensity for parties, witnesses and counsel not to attend court hearings has been noted. In civil cases, the procedure codes of both entities permit the court to end a case because one party fails to attend. If a defendant fails to attend a hearing after being properly summoned and if other conditions are met, the plaintiff may request a default judgement.[22] Similarly, the court may dismiss a claim if the plaintiff renounces it and if some other specified circumstances exist.[23] However, it is not completely clear whether a court may decide that a plaintiff who fails to attend a hearing, either in person or through a legal representative, has effectively renounced his claim.

A similar procedure exists when a victim or other person initiates a private prosecution in a criminal case. Victims of crimes not automatically prosecuted may bring a private prosecution by themselves or with the assistance of a lawyer. If the private prosecutor fails to attend the main trial of his proceeding, the court may decide that he has withdrawn his complaint.[24] However, the court has significant discretion to continue the proceeding even when the injured party or the private prosecutor fails to attend a hearing.[25]

6.4 Justice *ex officio*: the inactivity of the parties in a trial

> ***Courts and governmental agencies participating in criminal proceedings must truthfully and completely establish the facts that are important to the rendering of a lawful decision.***
>
> **Criminal Procedure Codes**

A trial in BiH is very different from court scenes in many countries. The parties, prosecutors and counsel are quiet most of the time, seldom posing any questions or making any objections. It is the court that calls for evidence and appoints experts, even where no party requested it. In the courtroom, the judge is responsible for establishing the facts and taking care of all steps in doing so. The judge must question the accused and the witnesses and summarise their statements for the record. The court must further actively guide the parties on the procedural motions they should take and may instruct the prosecutor on any changes of the indictment that might be necessary in regard to the evidence gathered by the court itself.

This striking shift of roles and responsibilities in judicial proceedings from what is the case elsewhere is the result of the courts' *ex officio* obligation to establish the "material truth" and to secure the procedural rights of the parties in an entirely inquisitorial system. The law declares the court itself responsible for requesting and adducing evidence. This is an enormous burden for the courts, imposed by old legal philosophy and the basic principles of procedure, reinforced for first instance courts by the habit of appeal courts to overturn decisions and return for retrial on the basis of failure to comply with this obligation.

In order to establish the material truth, the courts call and gather all possible evidence – including evidence on facts that might not necessarily be decisive for the outcome in the case. They call for witnesses, order written evidence to be given to the court, request expert

[22] E.g. Federation Civil Procedure Code, art. 314.
[23] E.g. Federation Civil Procedure Code, art. 313.
[24] E.g. Federation Criminal Procedure Code, art. 54.
[25] E.g. Federation Criminal Procedure Code, art. 424.

opinions, order and carry out reconstruction of events, etc., on their own motion. They appoint experts even where this is not absolutely necessary. A reconstruction of the events on the spot is carried out even where the state of facts may be determined without it. Evidence is called on facts that are not decisive and were not contested by the parties. There is no possibility for the parties to agree on certain facts beforehand in order to limit the extent of the trial, as is common in civil cases in other countries. Where evidence called is not presented on time, the courts endlessly postpone the hearings, as, in order to declare the state of facts clarified, they must wait until all evidence called was finally gathered, even if it is not going to be decisive or even if the facts in issue have been established by other witnesses. The judges determine what facts are relevant to the case, adduce and gather evidence in support of these facts and finally assess whether the gathered evidence supports these facts.

Where acting in good faith, a judge should try to bring evidence on all facts that may possibly be relevant for the parties. Where reluctant to deliver a decision in a sensitive case, or if simply unwilling to work, a judge may be in a position to misuse the obligation to establish the material truth by endlessly requesting new evidence and not insisting on its timely presentation, so as to postpone delivery of the decision.

BiH civil and criminal procedure is not based on the concept of equal parties taking active roles and responsibilities before an impartial tribunal. It is based on the socialist presumption that there are no conflicts between the interests of individuals and those of the state. The state is envisaged in the court itself and it must take care of both the lawfulness and the interests of its citizens at the same time. These principles declare that the authorities and the individuals share the same interests and there is, therefore, no conflict in entrusting the court with functions of representing all parties, even of the prosecution and defence in criminal cases.

While the philosophy of merger of individual and state interests was never justified, it was reflected in legal procedures. However, in its final form, it serves to protect the interests of the state, providing no guarantees to individuals for the efficient administration of justice by an independent and impartial tribunal. The judges are expected to act instead of the parties, significantly slowing down the process of justice and leading to delays. Given the problems described in this report, as well as other JSAP reports and information held by JSAP, it is also more than doubtful that the process actually leads to the truth.

6.5 The contribution of appeals to delays

I am satisfied with the work of the judges in my own court, but not so - with the work of the judges in my upper court.

The president of a basic court in the RS

6.5.1 General comments

The BiH appeal system is a good example of the fact that in order to understand how the judiciary works, it is necessary not only to read the law but also to consider the general practices. The law in books and the law in practice can vary substantially and do so in BiH. In some cases, what is legislated for as an exception is used as the norm. To take two examples not related to the appeal process, the police in the RS rarely, if ever, obtain search warrants and instead rely on the exceptions in the law to enable them, in what should be specific, limited circumstances, to search premises without a warrant. Or, although police custody in

the RS should normally be limited to 24 hours, the exceptional 72 hours has become so much the norm that it is assumed to be the law. On the other hand, in the case of appeals, the provisions permitting second instance courts to hear evidence in some cases are never used at all. While the provisions on appeal may appear to contain usual and expected provisions, the practice is, in fact, not usual at all. The appeal process has probably received too little attention from the international community in formulating its assessments of the judicial system and in monitoring cases.

The underlying problem is that the second instance courts systematically adopt solutions that relieve them from any responsibility of actually making a decision and instead send cases back for retrial at first instance. The decision to do so cannot be challenged in a third instance court as a decision to send back is not a type of decision that can be appealed. As will be seen below, the failure of second instance courts to hold hearings exacerbates this problem.

While it might be expected that a decision on appeal provides some finality, this is often not the case. Both despite and because of the obligation on first instance courts to establish the material truth, around 20-30% of their decisions are overturned on appeal and sent back for retrial. In looking at the application of such a broad-based notion as material truth, it will always be possible to find mistakes. A further 15-20% of cases are returned by way of summary procedure to correct minor technical errors and omissions, following which the case is sent back to the second instance court. Although these decisions are not complicated, the time necessary to transfer the case back and forth may take months. Cases referred back under either of these processes form part of the decided cases of each court for the purposes of court statistics.

Appeal proceedings themselves often take an extremely long time. JSAP found cases where the second instance court took twice as long as the first instance court and then reached a decision to return the case for retrial. The greatest part of this time is used for "technical" steps: the files are not transferred to the appeal courts in time, the presidents of those courts do not assign the cases to reporting judges for months on end, etc.

6.5.2 The ex officio duty of second instance courts to establish the facts

Second instance courts are obliged not only to have regard to the complaints of the parties but also, *ex officio*, to carry out a full review of appealed decisions on the facts, the law and the lawfulness of the applied procedure at first instance. They may confirm a first instance decision or overturn it and return it to the lower court for rehearing. There is no limit to the number of such returns. One third of the surveyed judges believe that unnecessary returns are a cause of delay in the judicial process.

While in theory this practice may seem to offer a better chance of justice to the parties in having every fact and conclusion checked, in practice the returns lead to a situation where second instance judges act like tutors in perfection for first instance judges, at the same time leaving themselves free from the responsibility of making a judicial decision.

Some of the criminal cases studied were returned to first instance courts with explicit instructions for obtaining further evidence in support of the accusations or for interpreting the existing evidence in a different way. These decisions reveal a clear reluctance to take responsibility for reaching or confirming an acquittal. In overturned acquittals, where the first instance courts found insufficient evidence to support the accusations, the second instance courts gave clear instructions for the first instance court to question again the same or new

witnesses and to "re-evaluate" or to give a "more critical approach" to their statements. In others, where the court overturned the case on the basis of expert opinions contested only by the prosecutor on appeal, the first instance court was instructed to gather the original documents on which the experts relied.[26] In fact, the "more critical approach" to the evidence demanded by second instance courts could actually be a further argument to acquit. The fact that it is not interpreted as such throws into question whether the courts fully understand the presumption of innocence.

One problem may be there is no clearly defined standard of proof by which the courts evaluate the evidence before them. This is in contrast to other countries, where, for example, the prosecution has to prove its case "beyond reasonable doubt." In BiH courts, the judge has the right to freely evaluate the evidence, but this does not create a standard against which the evidence should be evaluated and against which one party's case must be judged.[27] In fact, in JSAP's experience, judges do not always critically evaluate the evidence in the sense of determining which evidence is to be preferred in the case of conflict or stating the reasons for the choice. In the case of expert evidence, this role is even taken away from them by the necessity of obtaining further expert reports if one party is not satisfied or if two experts do not agree.

The position in appeals in civil cases is similar to criminal cases. First instance courts are required to call for evidence and to establish actively the foundation of the cases of private parties. A private party may rely on wrong or incomplete establishment of its own case on appeal. If a second instance court finds the complaint founded, or if it came to the same conclusion by itself, the decision is repealed and the case returned. For example, in a case first registered in 1977, concerning the right to passage over a private field, the different levels of courts had different views on the relevant facts. While the lower court established one set of facts, the upper court returned the case with instructions to establish other facts that it thought relevant. This *ex officio* discussion went as far as the Supreme Court. The case was bounced up and down between the different instances several times and is still unresolved.

The reasons given by some second instance judges for returns of cases are sometimes strikingly insufficient to justify a full re-trial. Some of these decisions may be seen as a mere excuse for not making a final decision. First instance judges frequently have serious objections to this practice, as it is effectively demotivating and unnecessarily burdensome. The obvious practical result of such returns is a significant delay.

Many of the cases actually returned are done so as the result of the *ex officio* check. Only a few decisions in second instance criminal proceedings are based on actual complaints of the accused that the first instance court did not admit and hear evidence asked for in the first instance trial. In the other cases, the second instance court acts on the complaint of the prosecutor regarding insufficient or wrong establishment of the facts.

In many countries, a prosecutor has the burden of proof and is expected to support the accusations with evidence sufficient to establish the guilt of the accused to the required standard of proof. If he fails to do so, the accused must be acquitted. A prosecutor may not rely on his omissions and failures in order to request an appeal. This is not the case in BiH.

[26] As experts are generally limited in their inquiries to the documents contained in the court file, and therefore available to the second instance court, this instruction also appears unnecessary.
[27] See Federation Criminal Procedure Code articles 13,14 and 342 and SFRY Criminal Procedure Code articles 15, 16 and 347.

In practice, the *ex officio* check that facts were correctly established may be twisted into a never-ending search for evidence in support of the accusations and detracts from the presumption of innocence. The president of a second instance criminal panel gave the following reasons for a second decision for return in a case where several accused persons had been detained for more than five years:

> ***Unlike the first instance court, we found the evidence in the case insufficient to establish the guilt of the accused persons. We had to return the case to first instance as there might be more evidence.***

The *ex officio* duties thus turn the criminal court into a body working on behalf of the prosecution and the passive role of the parties in trials encourages this. In appealing to the second instance court, parties in both civil and criminal cases rely on the *ex officio* duty of the court and insufficient evidence is often given as the ground for appeal. In several cases where an expert was called by the first instance court, the prosecutor did not challenge the expert opinion at that time. Instead, he later relied on its alleged inconsistencies to found his appeal against the acquittal by the first instance court.

In exercising the *ex officio* duty to establish the material truth in its extreme, the courts may go as far as to practically change the original accusations into graver ones. Thus, in one case, the prosecution brought accusations of theft, which were later dropped and amended to the less serious crime of minor theft. The first instance court found the accused guilty. The prosecutor's appeal against this first instance verdict was limited to a request to impose a more severe punishment. Acting *ex officio*, the second instance court repealed the first instance sentence because the first instance court did not give valid reasons for allowing the change of legal qualification. In particular, it was concerned about the intention of the accused and whether his intention was to get a larger or smaller amount of money and whether he knew how much money the victim had in his pocket. The second instance court instructed the first instance court to repeat the gathering of all evidence and, if necessary, to gather new evidence to this end. In this way, the initiative to gather *ex officio* evidence on intent could lead to amending the initial accusation back to the more serious crime of theft, on the request of the court itself. In this way, the court is overtaking the role of the prosecution, which may result in accusations and sentencing for the commission of a more serious crime than initially charged.

This practice may not be reprehensible in itself if the process is used only in exceptional cases. The problem lies in the fact that in BiH this process is used extensively.

As a result of the newly gathered evidence, the prosecutor is further free to amend the indictment at any point of the proceedings. The risk of doing this very late in the proceedings is obviously in violation of the right of the accused to be fully informed of the accusations as early as possible and may result in serious violation of his right to defence under article 6 of the ECHR.

The provision for return for re-trial was designed for cases where some essential facts of decisive significance were incompletely or wrongly established and where the second instance court might infringe the rights of the parties to defence by dealing with the matter. A second instance court is in a difficult situation. The law requires it to find that "the state of facts has been incompletely established when new facts or new evidence so indicate". But new evidence may only be gathered in a hearing.

6.5.3 Lack of hearings in second instance courts

In deciding on appeal, second instance courts never hold hearings and so the parties cannot argue their positions. This is, in itself, a breach of ECHR rights to a public hearing and to be present. Judges with ten or 20 years experience in the Sarajevo region have reported to JSAP that they are unable to recall any occasion on which a second instance court has held a hearing in either a civil or criminal case. According to the President of the Banja Luka District Court, the criminal chamber of his court has only held one hearing in the last fifteen years and that was a result of strong political pressure.

In the RS in criminal cases, the panel of judges at second instance sits together with the prosecutor behind closed doors. Under the Criminal Procedure Code, the court is not obliged to even inform the accused or his lawyer of a session of the panel and they are not present. On the other hand, the prosecutor is invited, although in the words of one judge "the sole decision a prosecutor makes during this sitting is whether to have tea or coffee". The panel decides on all issues of the appeal as well as on the necessity to continue detention. This situation is obviously contrary to the principles of fair trial and equality of arms and violates the right to defence, rendering all decisions delivered by a second instance criminal court in the absence of notification of the accused in breach of the guarantees under article 6 of the ECHR. The resulting inability of the accused to raise the question of continuing detention is also in breach of article 5.4.

In the Federation, the situation is similar. The Criminal Procedure Code only appears to require the court to advise the accused or his counsel of the date of the session of the panel if they have requested notification. The only time an accused will actually be called is if his presence is necessary in order to clarify something. Thus, attendance by an accused or his counsel at a panel session is a rare event.

Although JSAP did not find one case where additional evidence was obtained by a second instance court, the law does not prevent it from doing so. It states that "a hearing shall be held before the second instance court only if … there are legitimate reasons for not returning the case for retrial by the court in the first instance"[28] but, as will be seen below, there are many cases where the court could easily take evidence. It could well be argued that the resulting delay in not doing so could be considered a legitimate reason for not sending the case back.

Two examples illustrate the position:

- The case of Kovacic v. Kovacic shows how the exaggerated reluctance of the second instance courts to consider evidence defeats the efficient resolution of the case. The case concerned the division of property after a divorce and involved determination of the ownership of real property. In the first instance hearing, only an excerpt from the cadastral record was given as proof of ownership. The second instance court correctly found that, while the extract was proof of use, only the landbooks are proof of ownership. However, the second instance court could have easily verified that the landbooks confirmed the evidence in the cadastral records, and then affirmed the first instance decision on this issue. Thus, with little effort, the second instance court could have contributed to the speedy resolution of the case, but instead it sent the case back, prolonging resolution.

[28] Federation Criminal Procedure Code article 367, RS Criminal Procedure Code article 373.

- In the Cevan case, the second instance court delayed a final decision by months because of two minor details. First, the second instance court remanded the case to the trial court only to determine the correct spelling of one party's name, a problem it could easily have solved itself. After the first instance court corrected this minor error, the second instance court noticed that the one of the lay jurors on the panel had forgotten to sign the decision and sent the case back a second time. This technical violation had also existed the first time the case was returned, but the second instance court did not notify the first instance court so that it could rectify both mistakes at the same time. This added months to the resolution of the case. Neither of the parties made any specific mention of these minor issues when filing appeals - the second instance court identified the violations itself. It may also be relevant to highlight that the plaintiff that was successful in the first instance was a member of a minority group, raising the spectre of ethnic motivation for the delay.

As second instance courts do not hold hearings in order to gather new evidence, it is not quite clear how they can conclude that facts were incompletely established if no party complained about that. This may be an indication that the courts use this provision to avoid the responsibility of making a final decision, allowing them to deal with the case without solving it.

6.5.4 Procedural reasons for returns

The procedure codes prescribe other grounds for return of a case for retrial that relate to omissions in and infringement of procedural rules. These provisions should guarantee the rights to defence and a fair trial. In many cases where a party was not able to exercise its fundamental rights as a result of a procedural breach, a retrial may be necessary to guarantee those rights. This would normally be the case where a party was not informed of the pending proceedings or was for some other reason unable to be present or to exercise his rights, which led or could have led to prejudice of his right to a fair trial.

In other countries, the parties are expected to raise their complaints about breach of procedure on appeal, while the courts review the appropriateness of procedure on their own volition only in exceptional cases. By contrast, in the same way as for factual evidence, BiH procedure laws require second instance courts to carry out a full *ex officio* check of the lawfulness of first instance decisions, including the procedure, unrestricted by the complaints of the parties. If they find procedural violations, they may overturn the decision and return the case to the first instance court for retrial.

This is done in many cases where the procedural error was insignificant and did not affect the parties' rights and interests and despite the fact that no party complained of any omission. Again, the law is open to misuse by second instance courts as a way of dealing with a case while getting rid of the responsibility of deciding on it.

The most striking examples of this practice are the return on the grounds of unclear reasoning. Initially, this ground was designed to require judicial decisions to deal properly with the evidence and to be easily understood. In reading decisions of second instance courts on return of cases on this and other grounds, one is often left with the impression that the second instance judges act more like instructors of the first instance judges in reaching perfection, rather than as experienced judges who accept their responsibility to reach finality.[29]

[29] In fact, JSAP's impression is that court decisions are rarely clear. In general, for both first and second instance courts, they are obscure, too long and incomprehensible even to trained lawyers.

In one case reviewed by JSAP, the second instance court returned the case on the basis of unclear reasoning in the first instance judgement. According to the second instance court, the reasons were unclear because the injuries caused to the victim were not fully described, compared with the longer description given by the forensic expert. In finding this ground sufficient for returning the case for retrial, the second instance court explicitly stated that "no other grounds for complaint were considered at this instance". Accordingly, on a second appeal, the case might be returned on another ground once again.

Given the length of second instance proceedings and their possible result, rights of appeal can clearly be abused in order to achieve a delay. While this is so in many jurisdictions, where appeals are limited to the evidence of the first trial, appeals can be and are dealt with elsewhere quickly and efficiently and systems for awarding costs against unsuccessful appellants discourage frivolous appeals.

6.6 The provision of free legal aid

The present *ex officio* duties of the court were designed to secure access to justice for all. The philosophy behind this assumes that parties to court proceedings may be uneducated and rely on the court to ensure that their rights are fully protected. In theory, therefore, judges are obliged to take care and protect the rights of those who are unable to do this themselves and who do not have independent legal advice. Judges perform legal aid functions by preparing documents and claims, as well as assisting parties in the proceedings themselves, resulting in inefficiency and doubtful impartiality.

If changes are made to the procedural laws to reduce the effect of the *ex officio* duties of the court and place more onus on the parties themselves, there will be a corresponding need to ensure that indigent parties to both civil and criminal cases have access to legal advice. At present, provision of free legal representation by the state is limited to certain more serious criminal cases and JSAP has doubts about the quality of representation given by many court-appointed counsel. In creating a broader legal aid scheme, special attention must be given to the selection of qualified and motivated lawyers of high moral integrity as well as clearly defining the conditions under which free legal aid would be available to the public.[30]

6.7 Conclusions

- Problems in procedural legislation are the most serious cause of delay in the judicial system.

- It is questionable whether the judicial process actually leads to the material truth.

- The courts do not take a robust approach to dismissing cases where the key party (plaintiff or private prosecutor) fails to attend and neither do they issue default judgements in the absence of a civil defendant as promptly as possible. The relevant legislation could be more specific in permitting this to be done.

- However, by far the most serious problem is the *ex officio* obligation of the courts to determine the material truth. This puts first instance courts at a severe disadvantage in

[30] Following the demise of the OSCE Benefits Commission at the end of 1999, some steps have been taken towards the creation of a new scheme, to be funded by the European Union and based on a state-level law, but nothing is yet in place.

terms of efficiency, sending them on an endless quest for every piece of possibly relevant evidence. Coupled with the poor attendance by witnesses, first instance hearings can stretch out over months or years even in simple cases.

- The absence of an accepted benchmark by which evidence is to be evaluated and cases decided, namely a well-defined standard of proof, does not facilitate rejection of incredible or doubtful evidence or the quick disposal of cases.

- Second instance courts are unable to act as a true appeal court and substitute their own judgements for those of the lower court. Instead, if they find any relevant errors, they automatically return the case for retrial, rather than holding a hearing.

- Second instance courts are bound, like first instance courts, to act *ex officio* and will overturn judgements on grounds not complained of by the parties. These courts have a marked tendency to send cases back for retrial for purported failures to properly establish evidence, resulting in a large proportion of cases being further delayed for long periods of time.

- As another aspect of their *ex officio* duties, second instance courts must consider all procedural aspects of the first trial and frequently resort to sending cases back for minor technical errors that they could easily resolve themselves or for other breaches of procedural rules that would not have affected the outcome of the case. In their demand for perfection from lower courts, second instance courts are sacrificing substance for form and are forgetting that the judicial system is about providing justice above all.

- A further problem is that second instance courts never hold hearings, thus depriving parties of their right to a public hearing. In criminal cases, the accused is not invited to attend, though the prosecutor is. This deprives the accused of various rights, including that of challenging detention. These appellate practices breach various provisions of the ECHR.

- Many of the problems identified could be solved by moving away from the pure inquisitorial approach towards a more party-driven, less judge-driven procedure.

- Initially called to provide *ex officio* protection for the rights of all individuals, the way in which the system actually functions deprives these individuals of their right to timely justice. The system acts in a completely formal and self-sufficient way, which may postpone the reaching of a final resolution in a dispute indefinitely. Worse, in criminal cases, the search for material truth has rendered the courts agencies for the prosecution.

- If any changes are made to the *ex officio* duties of the court, there will be a corresponding necessity to create a free legal aid system to ensure that indigent parties in both civil and criminal cases have access to legal advice in order to protect their rights.

7 POLITICAL REASONS FOR DELAY

An assessment of the possible causes of delay in judicial proceedings would not be entirely complete without a reference to the possibility of political influence. Members of the judiciary are able to use procedural ambiguities to delay sensitive cases, either on their own initiative or as the result of external influence. Cases of corruption or other charges against local political leaders, any charges against local organised crime figures and cases involving a minority victim or plaintiff of a minority ethnicity are all prone to interference. There are genuine security risks related to the adjudication of sensitive cases in BiH, which also discourage judges from dealing with them promptly.

Several other JSAP inquiries have noted the potential political and ethnic bias in the judiciary and mention delaying tactics as a means of undermining justice. In *JSAP Thematic Report II Inspection of the Municipal Prosecutor's Office in Livno*, issued in September 1999, JSAP provided evidence of the general breakdown in the rule of law in Canton 10. Delays in all stages of processing cases were the principal failure, sometimes amounting to failure to do anything at all. Effectively, there was no prosecution system.[31] Political influence in the judiciary is also specifically dealt with in JSAP's *Thematic Report IX*.

Investigations by JSAP found that the judiciary uses delaying tactics to thwart various types of sensitive cases. For example, the broad discretion of second instance courts to return cases for retrial, rather than making a final decision, can be used as a means of discrimination. This was done consistently by the Doboj District Court in reinstatement in employment cases from 1998. In almost every case coming to it on appeal, it decided to return cases where plaintiffs had won at first instance to the lower court for a second retrial, whereas almost all judgements in which the defendant company won at first instance were upheld on appeal. The net result of this is that state-owned companies were relieved from having to re-employ the plaintiffs and may have also been relieved from other obligations towards them.

Despite the known problems of delays and backlogs, the legislature has also not normally chosen to relieve the judiciary of some types of cases that could be solved in other ways, such as by administrative process. One example is the RS war compensation cases referred to earlier. These could have been dealt with by an administrative body set up to adjudicate all such claims, or could even have been recognised during the privatisation process. The former option would have several advantages to claimants such as speed and consistency of results. However, from a political standpoint, speed may not be an advantage, given the government's poor financial situation, as seen in its recent efforts to avoid paying the court judgements in these cases. Leaving the court system to deal with these cases also transfers some responsibility to it and creates a distance between the government and the plaintiffs, in which the courts will undoubtedly receive some public blame for the government's failure to meet judgements. Thus, while it would be nice to speculate that the judicial system has kept these responsibilities because it is perceived as an independent and just institution, the motives are more likely to be political.

However, in respect of the need to deal with war-time dismissal and waiting list issues under recent new labour legislation in both entities, the creation of local commissions to take that work away from the court system was the initiative of the Federation government, now mirrored in the RS. Public reaction to this development was interesting, as, knowing public

[31] Not only the judiciary was to blame – all actors in the criminal process bore responsibility for this. The report alleges that the police, investigation judge and prosecutor may have conspired to postpone the criminal proceedings against ethnic minorities.

doubts about the effectiveness of the judiciary, it seems that there is an even greater apprehension about the ability of administrative organs to deal with these cases fairly and efficiently.

Conclusion

- There are many benign reasons for delay in the judiciary that stem from material inadequacies, administrative inefficiency, etc. However, in cases where judges, as a result of external influence or on their own volition, want to delay making a decision, the complexity of procedural laws allows plenty of scope for doing so, while seeming to follow the law.

8 RECOMMENDATIONS

One overall conclusion that can be made is that the judiciary does not fully see its prime function as the dispensing of justice in a timely fashion and it does not see that it should be answerable to the public as well as to executive and legislative authorities. Rather the goal of individual judges and of courts is to dispose of a fixed number of cases each month, regardless of whether those cases have a final decision or not. The fact that individual cases may take an extremely long time to reach finality is not of interest to this self-regarding way of assessing the system. For various reasons and encouraged by procedural legislation, judges are also not prepared to stand on their own feet and make decisions, knowing that they cannot please everybody. Instead they indulge in an endless search for evidence and expert reports, effectively abdicating responsibility for doing their job.

Thus, it can be stated that one of the prime reasons for delay is attitudinal. Some BiH legislation is not unlike that of other countries, especially that on appeals, but it is used in a completely different manner and results in more delay and not in final decisions. The paradigm shift in attitude that is required to effect change will be hard to bring about, will depend on more than one factor, and will take place only over a longer period of time. The recommendations made below will solve only some of the problems causing undue delay in the judicial process. The rest is in the hands of the judges themselves.

- The burden of creating public respect for the judiciary falls in a large part on the judges themselves. At present the public does not believe that they will get efficient justice from the courts and they are correct. The judiciary should to take up this challenge and serve the public.

- The prime concern of the judiciary should be in the substance and not the form of justice.

- Court procedure should move towards a more party-driven, less judge-driven approach. The court should primarily rely on the parties to prepare their case and present the evidence to support it. Only in exceptional cases should the court itself ask for supplementary evidence.

- A proper standard of proof should be developed by which courts evaluate evidence and reach decisions, such as “beyond reasonable doubt, for criminal cases. The standard should be higher for criminal than civil cases.

- In criminal cases, the courts must have regard to the presumption of innocence and dismiss cases where the prosecution cannot prove guilt to an acceptable standard of proof.

- Second instance courts should make final decisions and only refer cases back in rare cases, such as, for example, where procedural rights were seriously breached, affecting the outcome of the case and this cannot be remedied on appeal.

- In all cases, all parties must have the right to be present at the appeal hearing.

- Courts should use all tools at their disposal to ensure attendance at hearings by parties, witnesses and lawyers. Unless they are vigilant in doing so, one aspect of the delays problem will continue to exist.

- In order to compensate parties for the fact that the court will no longer take care of their interests, it will be imperative to have a comprehensive legal aid scheme introduced, for civil and administrative as well as criminal cases.

- Greater flexibility needs to be introduced into the manner of organising the court system, so that it can respond to needs as they arise. This could include moving judges from court to court, having a fewer number of courts or fewer judges at some courts in smaller towns. Merger of minor offence courts into regular courts could become part of this discussion at a broader level.

- The internal organisation of courts should also be made more flexible, rejecting the rigid adherence to historical methods of organisation and embracing more modern, customer-driven approaches including, especially, the introduction of case-management systems. For example, courts should have much longer hours for receiving documents from parties and the public.

- The government must take immediate steps to ensure that the courts are properly funded and equipped. The present situation is lamentable. Courts need adequate buildings, with courtrooms, proper and modern equipment, and enough money to pay all necessary outgoings. Judges also need full sets of legislation, textbooks and access to all relevant training activities. Without proper funding, the courts' ability to gain the respect of the public will be limited.

- The salaries of minor offence courts judges should be raised in the same manner as those of regular court judges.

- The quota system must be abolished and replaced by a more appropriate performance appraisal system.

- Similarly, the current system of annual reporting needs to be replaced by a system which indicates how many cases are really dealt with by the courts and how long they take to do so, amongst other things. It should become impossible for shirkers and delayers to hide.

ANNEX I

This is the questionnaire referred to in the text. The number of judges who marked each category and any additional comments are included in bold type. A total of 42 judges responded. Various questions included at the end of the questionnaire, on court case statistics, have been omitted from this annex.

To: All judges of basic/municipal, cantonal/district, and supreme courts

From: JSAP, BL RHQ

Date: 21 February 2000

Re: Questionnaire on delays in judicial proceedings

Name:
Date:
Post:
Location:
Number of years as judge:
Area of specialization:

Monitoring the BiH judicial system, JSAP Banja Luka has established that there are courts with a significant number of exceptionally stalled proceedings, which creates difficulties in the work of courts and is in contrast with the interests of the citizens and requirements of the EC on Human Rights.

JSAP invites you to share information as well as opinions on the average time for determination of the first and second instance civil and criminal disputes by a final decision and your views on the reasons for the delays in proceedings.

The results found in the completed questionnaires will serve as a basis for the preparation of a report on the existing delays in proceedings and proposals for overcoming the present inefficiency of the judicial system.

JSAP has divided the possible causes of delay in the judicial proceedings into three categories
Material, Administrative, and Legal reasons.

Please rank the following possible reasons in order of importance.

Material Reasons for Delays

Lack of judges	**34**
Inexperience of judges	**19 (one first instance judge)**
Low salaries	**26**
Lack of clerks and other support staff	**18**
Insufficient access to text books	**30**
Poor court building conditions	**8**
Lack of automobiles	**5**
Low taxes – unable to cover court expenses	**6**

Poor supplies, office equipment and other budgetary problems – if any, give examples **2**
Other: **poor material status of judges and other judicial functionaries; there are no material reasons that influence delayed proceedings; unsolved accommodation issues of judges; very old type-writers should be replaced with computers (3 responses); the judges' code unfeasible due to a well-known situation in BiH; court taxes are not the court revenue but they are paid into the Cantonal budget (Fojnica); no codes with comments; lack of further training through seminars, lectures especially in the criminal field; insufficient introduction of new methods of expertise.**

Administrative Reasons for Delays
Failure of parties and lawyers to appear at hearings **30**

Difficulty to notify parties properly	**36**
Quota system of cases per month for each judge	**18**
Slow responses from police	**11**
Slow responses from other government agencies	**11**
Poor communications with other courts	**4**
Slow reports from experts	**26**
Records making on a type writer	**23**
Excessive number of cases per judge	**25**
Work discipline	**3**

Other: **The court lacks additional space to accommodate more judges, which would otherwise improve the work of court; monthly quota should be increased, since judges easily fill the quota but the court receives more cases than is anticipated by the quota; slow reports from experts are the result of lack of experts (esp. medical experts); changed competence; almost impossible to execute legally binding court decisions; parties difficult to notify due to migration of people affected by the war; non-functioning of the court police although they exist.**

Legal Reasons for Delays

Low activity of parties	**33**
Role of prosecutor in criminal cases	**12**
Lack of strict time limits for all procedural steps and guarantees for respecting them	**5**
Requirement for the court to initiate *ex officio* search for evidence	**16**
Insufficient access to ex officio and pro bono legal aid	**10**
Unnecessary appeal of decisions	**17**
Decisions not written down within time limits stipulated by the law	**8**
Postponing hearings for indefinite period of time	**17**
Unnecessary return of cases from higher instance courts after appeal	**15**
Increasing complexity of cases	**33**
Unnecessary involvement of courts in new subject matters under the jurisdiction of other organs	**8**
Weakness of procedural laws - if any, give examples_____	**1**

Other: **There are a number of low-brow parties not represented by defence lawyers, so often their charges are improper; frequent amendments of regulations; very few changed/revised decisions; labour disputes – majority of annulled decisions without clear viewpoint or instructions on rights of workers especially during the war and postwar period; municipal court still not able to adequately try in the criminal field due to expansion of competence (commercial offences, possibility of pronouncing prison sentence up to 15 years at first instance); Central Bosnia Canton Law on Courts anticipates excessively high competence of the first instance court; immediate reform of regulations from the criminal department necessary; court investigation should be done by the prosecutor; legal interpretations of higher courts not available to municipal court judges.**

Please provide any other additional information you believe may be relevant to an analysis of delays.
Comments:

1) **In earlier times, judges used to exceed their quotas and were adequately rewarded. The principle should be revived – judges should be rewarded according to the number of closed cases.**
2) **It is well known that the seat of the RS Supreme Court was moved from Pale to Banja Luka only in July 1999. Until then all cases were sent to Pale to be recorded and then returned to Banja Luka and distributed among the judges. This procedure hindered the proceedings. This reason is removed and no longer hinders court proceedings.**
3) **To make equal distribution of cases among judges, to classify the cases according to the type of dispute and thus facilitate and expedite solving cases; to improve the material position of judicial personnel and afterwards do a selection according to the working results.**
4) **Pay more attention to the training and further education of judges (most of judges are new in courts, especially in criminal department); lack of assets for poor and low-brow parties; lack of court experts in the area under the jurisdiction of the court, resulting in slow responses from them;**
5) **It is necessary to equate the competence of municipal courts in whole Federation especially in penal department; investigation should be performed by the prosecutors since it is a long procedure and therefore hinders the work of courts.**
6) **Modernise judiciary in every sense, meaning technically (computerise all court protocols: incoming and outgoing); simplify civil procedure, curtail time limits for pressing charges or appeal.**

Annex II

Friday, 6 February 1998, No. 1 – Page 53

OFFICIAL GAZETTE OF TUZLA PODRINJE CANTON

615

In accordance with item 2 of paragraph 1 and paragraph 2 of article 66 of the Law on Courts (*Tuzla-Podrinje Canton Official Gazette*, No. 3/96, 2/97 and 9/97), the Minister of Justice of Tuzla-Podrinje Canton, on the opinion previously obtained from the courts, passes the following

BOOK OF RULES
ON THE FRAMEWORK OF STANDARDS RELATING TO THE NECESSARY NUMBER OF JUDGES AND OTHER EMPLOYEES IN TUZLA PODRINJE CANTON

I GENERAL PROVISIONS

Article 1

This Book of Rules stipulates the framework of standards for deciding upon the necessary number of judges and other employees in the courts of Tuzla-Podrinje Canton.

Article 2

The grounds for deciding upon the number of judges in each court is the caseload to be dealt with in one year, which is expressed in the number of cases.

Article 3

The number of other employees is decided according to the stipulated number of judges and associates, unless this Book of Rules provides otherwise.

II JUDGES

1. Municipal Courts

Article 4

The caseload quota for a judge of a municipal court in one year is as follows:

- Criminal cases (K) 132 or (12 per month)
- Investigation cases (I) 143 or (13 per month)
- Criminal juvenile cases (Km) 132 or (12 per month
- Specific investigative actions (Kri) 264 or (12 per month)
- Economy offences (Pk) 764 or (24 per month)
- Civil cases (P) 187 or (17 per month)
- Economy cases (Ps) 220 or (20 per month)
- Civil or economic cases of low value (Mal and Mals) 330 or (30 per month)
- Probate cases (O) 506 or (46 per month)
- Non-litigious (extrajudicial cases) related to the dissolution of the jointly owned real estate
- Defining boundaries or deciding upon expropriated real estate and designating occupancy right holders, R 176 or (16 per month)
- Other non-litigious cases, R 286 or (26 per month)

- Enforcement cases where there is no objection and hearings (Ip) — 3579 or (327 per month)
- Enforcement cases without hearings on the scene (I, Ip) — 2156 or (196 per month)
- Enforcement cases with hearings on the scene (I, Ip) where there is an objection — 352 or (32 per month)

The caseload quota from this paragraph is increased by 30% for the judges that are assisted by an associate.

Article 5

In one year, in addition to performing the task of managing the court, a President of a Court has to solve as follows:

- 30% of the work required of a judge in courts in which the number of judges is no more than five
- 20% of the work required of a judge in courts in which the number of judges is 5 – 10
- 10% of the work designated to a judge in courts in which the number of judges is 10 – 15

In a court for which the number of judges in accordance with the framework standards is more than fifteen, the president of the court is only required to perform the work of managing the court.

Article 6

Two chiefs of sections are also employed in municipal courts that, under the framework standards, have between 10 – 20 judges, whereas three chiefs of the sections are employed in courts that have more than 20 judges.

The case load of the chief of a section that employs 5 – 10 judges is 70% whereas the case load of the chief of a section that employs more than 10 judges is 50% of the judge's case load.

Article 7

In order to monitor social affairs and events, the required number of judges in a municipal court is increased by 5% under the standards contained in article 4 of this Book of Rules.

For other jobs, such as work on cash payment orders, pardons, motions for renewed proceedings, motions for exceptional alleviation of penalty in extra-judicial panels, land property affairs, rendering legal assistance and other similar jobs, the necessary number of judges established according to the standards contained in article 4 of this Book of Rules is increased by 5%.

2. Cantonal Court

Article 8

A judge of the Cantonal Court is to solve the following number of cases in one year:

- Criminal first instance cases (K) — 44 or (4 per month)
- Investigative cases (Ki) — 66 or (6 per month)
- Criminal juvenile cases (Km) — 66 or (6 per month)
- Specific investigation actions (Kri) — 198 or (18 per month)
- Economic crimes (Pk) — 187 or (187 per month
- Civil suits at first instance (P) — 110 or (10 per month)
- Economy suits (Ps) — 176 or (16 per month)
- Administrative – accounting suits (Ups) — 121 or (11 per month)
- Criminal investigative cases (Kz, Kzm) — 165 or (15 per month)
- Criminal second instance cases (Kz with held public sessions — 132 or (12 per month)
- Civil suits at second instance (Gz, Pz) — 165 or (15 per month)
- Administrative cases (U) — 176 or (16 per month)
- Recognition of foreign decisions — 198 or (18 per month)
- Registration of legal subjects — 660 or 60 per month)

The caseload quota under this paragraph for a judge of the Cantonal Court who is assisted by an associate is increased by 30%.

The framework standards under paragraph 1 and 2 of this article do not relate to the President of the Cantonal Court.

Article 9

In the Cantonal Court, under the standards contained in article 7 of this Book of Rules, three chiefs of sections are added to the necessary number of judges, the case load quota of the chief of a section that employs 5 – 10 judges being 70%, whereas the case load quota of the chief of a section employing more than 10 judges is 50% of the case load quota for the judges.

Article 10

For the work of monitoring and studying social affairs and events as well as the problems of court practice, the required number of the judges in the Cantonal Court calculated in accordance with the standards of article 7 of this Book of Rules is increased by 10%.

For other tasks, such as work on cases of pardons, motions for exceptional alleviation of punishment, motions for renewal of proceedings, cases of forced settlement, bankruptcy or liquidation, participation in second instance and grand panels, deciding upon non-litigious panels, monitoring of the work of municipal courts and rendering professional assistance to these courts and other similar jobs, the required number of judges ascertained in accordance with the standards of article 7 of this Book of Rules is increased by 10%.

III ASSOCIATES AND INTERNS

Article 11

The number of associates in a court is determined in accordance with the number of judges so that, as a rule, in courts with 10 judges, 3 associates are selected whereas in a court with more than 10 judges, for each additional judge, one associate is selected.

The number of interns is as stipulated as in the paragraph above.

IV OTHER EMPLOYEES

Article 12

Under these standards, other employees, whose number is determined in accordance with the number of judges, are those that carry out administrative–technical jobs (registrars, land property clerks, clerks in charge of incoming and outgoing mail, accountants, clerks in charge of supplies, filing clerks, employees in charge of enforcement and typists).

The number of employees under the paragraph above is determined in accordance with the number of judges and associates as follows:

a) For every judge or associate of a municipal court:
   - Administrative-accounting employees, not exceeding 1.40
   - Typists, not exceeding 1.40

   are assigned

b) For every judge or associate of the Cantonal Court
   - Administrative-accounting employees, not exceeding 1.20
   - Typists, not exceeding 1.20

   are assigned

Article 13

The number of technical employees is determined according to the needs.

Article 14

The salary calculated under the standards stipulated by this Book of Rules will be reduced for judges who, in the most recent month past and previous months, have pending court rulings that are not drafted or not dispatched, in accordance with the incomplete case load quota.

Article 15

This Book of Rules comes into force on the day of its publication in The Tuzla-Podrinje Canton Official Gazette.

Bosnia and Herzegovina
Federation of Bosnia and Herzegovina
Government of the Tuzla-Podrinje Canton
MINISTRY OF JUSTICE
No. 06/1-021-86/98
Tuzla, 22 January 1998

Minister
Semso Siftic, signed