Final Report – Restructuring the Court System: Report and Proposal

TABLE OF CONTENTS

1 Introduction

On 28 February 2002 the Peace Implementation Council Steering Board endorsed the IJC's reinvigorated strategy for judicial reform in BiH, which includes a restructuring of the court system of BiH followed by a selection process for judges. The restructuring is motivated by the concern that there are too many courts and too many judges in BiH, operating with costly inefficiency. At the same time, the ongoing reform of the procedure laws – designed to reduce the time required to process cases – should ease the burdens on courts and judges, lessening the need for so many.

The court restructuring effort, therefore, aims to

· determine the appropriate total number of courts and judges in BiH,[1]

· determine which courts should be merged and where,

· determine the appropriate number of judges for each court, and

· establish other aspects of court structure including subject matter jurisdiction and the development of specialized divisions.

2 Current court structure

BiH has a three-tier court system.[2] It does not have specialized courts. At the lowest level are 53 municipal (Federation) and 25 basic (RS) courts, dealing with the vast majority of civil and criminal cases at first instance. In the middle are 10 cantonal (Federation) and 5 district (RS) courts, with first-instance jurisdiction in a few civil matters and the most serious criminal cases, and appellate jurisdiction from the lower courts for all others. Finally, at the third tier of each entity's judicial system is one Supreme Court, which deals with an assortment of criminal, civil, and administrative matters in the first and second instances, as well as extraordinary legal remedies.

It is not proposed to alter this three-tier system, although there have been a suggestion that the lowest courts should be eliminated, generally on the basis of poor performance. Performance is largely a function of the quality of the judges and court presidents in those courts, however, which should be addressed in the reselection process, supplemented by training.

Another suggestion for small cantons is to create only one court and to give second-instance jurisdiction to panels of that same court. This approach is poorly suited to larger jurisdictions, however, and it seems ill-advised to create different structures in different cantons or districts of BiH. Moreover, such a court, when functioning as an appellate body, may not appear to be truly independent of the first-instance court.

3 Methodology

On May 1, 2002, the IJC's Restructuring Team completed a Preliminary Report explaining the project's purposes and guiding principles. That report made tentative proposals for the closure and consolidation of certain courts and projected a target number of courts and of judges overall. It considered the judiciaries of other European countries and recommended a one-third reduction in the number of BiH courts and judges to reflect such international practices. It also articulated proposed criteria for determining which courts should be closed and where they should be consolidated.

The Preliminary Report was later circulated to all regular courts and to the Ministries of Justice. It formed the basis for discussion and comment over the next two months, focusing attention on issues of true significance in the restructuring process: most significantly the standards to be applied in the court closure and consolidation

decisions.

3.1 Data collection

IJC staff collected, from the courts themselves, complete case-filings for the last 4½ years, as well as information on the capacity and quality of court buildings, the distances between municipalities, road conditions, and availability of public transportation. Most courts were very responsive and helpful in providing the information requested.

Population data were collected from the relevant entity authorities: the Federal Office of Statistics of FBiH and the Office of Statistics of Republika Srpska. The data reflect the most recent estimates available, current as of June 2001 in the Federation and as of March 2001 in the RS. While some court presidents argued that these data were not accurate or up-to-date, no more reliable information exists.[3]

3.2 Court visits

In a period of seven weeks, IJC met with court presidents in over 90 courts in BiH, as well as with Ministers of Justice in both entities and in almost every canton, and with representatives of the Associations of Judges in both entities. During these court visits and other meetings, IJC staff collected information, opinions, ideas and suggestions, following a standard questionnaire to ensure that the same questions were asked of all courts. While on location, they were able to observe local conditions, court facilities, and roads.

3.3 Data evaluation

The case-filing data were particularly important as a measure of total workload of the respective courts, as well as of the total demand for court services in each community. The Preliminary Proposal had relied on 2001 data for P (civil) and K (criminal) case filings, but it became apparent that more comprehensive data could and should be considered.

3.3.1 Estimated quotas

Seeking assistance in evaluating the array of case-filing numbers it compiled from the various courts, the IJC, in mid-July, invited two working groups of judges to come to Sarajevo to consider case-filing statistics. The purpose was to help the project team understand what the data meant in terms of actual judge workload. One working group focused on the first-instance courts; the other addressed the second-instance courts. The groups included representatives from the RS, Federation, and Brčko; they included judges who worked on the civil as well as the criminal side, as well as representatives from the procedure law reform working groups. With the help of these judges, the project team was able to derive a formula for measuring total court workload, adjusted to anticipate procedure law changes and other factors likely to affect workload in the foreseeable future.

The starting point for discussions of the working groups were the quotas currently in use in the various cantons and the RS. Considering the various quota standards, in light of anticipated procedure law changes, the groups estimated how many cases of each type a judge, working full time on those cases, should be able to complete in a year.

The working groups determined to look at “core” caseload, choosing to ignore data for less significant court activities, such as land book entries or the certification of documents. The ultimate conclusions of these working groups are reflected in the “estimated quota” figures set forth below[4]:

Estimated quotas for cases in Municipal and Basic Courts		
K	220	Criminal cases
Km	220	Juvenile criminal cases
Kp	900	Clemency cases

P	300	Civil cases
Ps/Gs	300	Commercial civil cases
PR/Rs	300	Labor disputes
Mal	600	Small-claim civil cases
Mals	600	Small-claim commercial civil cases
O	750	Probate cases
R1[5]	300	Partition of real estate, determination of property boundaries, compensation claims for expropriated real estate, tenancy rights determinations
I	3300	Enforcement cases
Ip	5500	Commercial enforcement cases
Pom	700	Legal aid cases
St	44	Bankruptcy cases
RL / L	110	Regular liquidation cases
Estimated quotas for cases in Cantonal and District Courts		
K	66	Criminal cases
Km	66	Juvenile criminal cases
Ki	800	Criminal investigation cases
Kv	660	Criminal panels
Kp	700	Clemency cases
Kž	165	Criminal appeals
Kžm	165	Criminal juvenile appeals
Pžp	660	Minor offence appeals
P	300	Civil cases
Ps/Gs	300	Commercial civil cases
Gž	200	Civil appeals
Pž	200	Commercial civil appeals
U	300	Administrative cases
R	275	Other court proceedings
St*	44	Bankruptcy cases
RL / L*	110	Regular liquidation cases

*Because jurisdiction for these cases will be moved to the municipal courts in the Federation (they are already in the RS basic courts), these estimated quotas measure future workload for the municipal and basic courts.

These numbers were arrived at in a deliberative process, primarily by consensus of the judges of the two working groups. For some cases, these numbers are higher than currently prevailing quotas, reflecting anticipated procedure law changes that will streamline certain cases. Others have lower values, such as civil appeals, which are expected to be more difficult as second instance judges will have to convene hearings to resolve many of these cases. While reasonable minds may differ on the exact numbers that should be applied, this is largely a speculative process and these judges were acting on the best information available. After the new procedure laws are in force for a while, it should be possible to adjust these numbers to something more reflective of real-world experience.

3.3.2 Caseload Index

Applying the average case-filing statistics[6] to the estimated quotas established by the judge working groups, it was possible to calculate the number of judges required to handle the current caseload in each court. This figure serves as a "Caseload Index," a measure of total workload in each court that can be used for comparison purposes between courts. This figure is generated on each court's case filing spreadsheet (*see* Annex E). This Caseload Index was also helpful in establishing the appropriate number of judges for each court. *See* discussion *infra*.

4 Small courts v. large courts

Given the premise that there are too many courts in BiH, attention is immediately drawn to the smallest of them as candidates for closure. Courts that are too small suffer from a variety of difficulties and inefficiencies, including

· Excessive overhead – particularly staff and buildings – where there is low demand for court services

· Either not enough judges to convene panels when necessary, or too many judges for the regular caseload

· Difficulty in covering court business when judges are absent

· Little opportunity for new judges to be mentored by more experienced judges

· Difficulty in maintaining judicial independence where the community is small and the judges inevitably know the litigants and government officials personally

· Judges' inability to specialize and to develop expertise in particular areas

Some have argued that large courts are inherently inefficient, and there are certainly some examples of large and dysfunctional courts in BiH. But while larger courts face particular challenges for administration and management, they also enjoy great potential for specialization and other economies of scale. Effective court management can tap this potential.[7] Accordingly, the restructuring methodology presupposed the smallest courts as the primary candidates for closure.

5 Municipal/Basic Court closure and consolidation

5.1 Criteria

The project applied three key criteria in determining which courts to consolidate and where: (1) caseload, (2) population, and (3) geographical location. In each category, the court either meets the criteria for staying open (+), fails it (-), or falls into a grey area (o). Where a court meets a criterion (+), it enjoys a presumption of staying open; where it fails the criterion (-), the presumption is to close it. The results of all three criteria must be considered in light of each other. Very few courts have (+) in all three categories; even fewer have (-) in all categories (indeed, there must have been *some* reason for opening a court there in the first place).

The criteria are explained below. Their application to specific courts results in an overall 33% reduction in first instance courts, as depicted in the Maps at Annex B and summarized in the Court Consolidation Tables at Annex C. Obviously, courts with mostly (+)'s and (o)'s are recommended to remain, while courts with mostly (-)'s and (o)'s are recommended for closure. A few exceptions exist for small courts that fail the criteria themselves, but which will satisfy the criteria after they have absorbed an even smaller court nearby.

5.1.1 Caseloads

The Preliminary Report suggested that courts with caseloads of fewer than 400 P (civil) cases and 150 K (criminal) cases in the year 2001 were too small to warrant continued existence. The Caseload Index, generated with the help of our judicial working groups and the more complete case-filing data collected over the last two months, gives a more reliable and complete picture of the caseloads in the various courts, however. While the ultimate conclusions change little, the decisions should be based on the best data available.

The courts with the smallest caseloads – those with core caseloads insufficient to support the work of more than 3.0 judges – are candidates for closure and consolidation. The "calculated core caseload" for each court is used for this criterion; the actual proposed number of judges for each court is somewhat higher.

Caseload Criteria

Caseload sufficient for	Presumption
> 5.5 judges	(+) court stays open
< 3.0 judges	(-) court closes
3.0 – 5.5 judges	(o) consider other criteria

Of 78 first-instance courts in BiH, 25% fully satisfy this criterion (+), 38% fail it (-), and 38% fall into the grey area (o).

5.1.2 Population

Another factor to consider in the consolidation of courts is the population to be served by each court. This is related to the case-filing criteria already discussed, as well as the geographical criterion discussed below.

Population, of course, can serve as a surrogate for caseload. One would expect case filings to be higher where the population is larger, although the data demonstrate a surprisingly weak correlation. Bijeljina Basic Court has roughly the same number of criminal cases as Banja Luka Basic Court, although it has less than half the population of Banja Luka. Also, Novi Travnik has nearly three times the criminal caseload of Konjic, although their populations are similar. Notwithstanding the vagaries of such correlations, it is appropriate to consider population in this context as well, particularly because caseload statistics alone are subject to fluctuation.

As for geography, courts should be located in larger population centers to minimize the total travel time required of the public; where there are large numbers of people, they should not have to travel significant distances to get to court. Conversely, it is appropriate to expect people in a small community to travel greater distances; such travel burdens are among the costs inherent in living in a rural or remote area. Where a court serves a very small population, closing that court will not inconvenience a large number of people.

The population criteria applied, adjusted downward from the 65,000 to 80,000 target originally proposed, are laid out below.

Population Criteria	
Total served by the court	Presumption
> 55,000 population	(+) court stays open
< 35,000 population	(-) court closes
35-55,000 population	(o) consider other criteria

Of 78 first-instance courts in BiH, 29% fully satisfy this criterion (+), 48% fail it (-), and 23% fall into the grey area (o).

5.1.3 Geography

It is important that courts be accessible to the public they serve, yet it is not necessary to have a separate court in every community. A typical member of the public does not go to the court very frequently; it is not inappropriate to expect him or her to travel some distance to get to court.

By the same token, there is no justification for keeping more than one court open in the same metropolitan area. Any court less than 20 kilometers from a larger court (or a court in a larger city) can be presumed to be unnecessary.

Of course, people in some remote areas may already travel a significant distance to get to court in one municipality. Closing that court would require them to travel even farther. This argument exists everywhere and could be used against the closure of courts anywhere. Typically, the populations in such remote areas are small, however, and it makes more sense to focus on the distances between the population centers.

With this in mind, the geographical standards applied are set forth below:

Geographic Criteria

Distance from larger court	Presumption
> 45 kilometers	(+) court stays open
< 20 kilometers	(-) court closes
20-45 kilometers	(o) consider other criteria

Of 78 first-instance courts in BiH, 53% fully satisfy this criterion (+), 12% fail it (-), and 35% fall into the grey area (o).

5.1.4 Secondary considerations

The adequacy and availability of court buildings is worthy of consideration, but only as a secondary factor. Where the other factors do not dictate an obvious outcome, courts may have their facility evaluated and considered. But over the long term, court buildings can be disposed of, acquired, and renovated. The more important priority for purposes of court restructuring is to configure them to serve the public in the most effective and efficient manner possible.

The history and tradition of particular courts were also considered to be of only minor significance. The Court Restructuring Project is forward-looking and is designed to meet the future needs of BiH. A court that has outlived its usefulness should not be perpetuated simply to honor its long history. That is a luxury the taxpayers of BiH cannot afford. Tradition was considered only when all else was equal.

It is common knowledge that some of the courts opened after the war were opened for purely political reasons. Some have relied on this observation to call for closure of all newly-opened courts. The assertion proves to be a gross oversimplification, however. Although some of these new courts cannot be justified, the objective criteria laid out above reveal which ones they are. Others of the newly founded courts were, in fact, necessary because the inter-entity boundary separated communities from the court that previously served them.[8]

5.2 Factors NOT considered

5.2.1 Efficiency (or inefficiency) of current operations

Some courts are efficiently run while others are very disorganized. The disparity is largely attributable to the leadership and performance of the judges in those various courts. Because the judges will be going through a reselection process, there is no expectation that the same judges and the same court presidents will all be in place when the restructured courts begin operations. Therefore, the fact that a court is currently well-organized is insufficient cause to keep it open; and the fact that a court is presently in disarray is not a ground for closing it.

5.2.2 Backlogs

Courts with large backlogs may need more judges to help clear the backlog, but it is not appropriate to consider present backlogs in setting the number of judges for each court. Otherwise, once the backlog is cleared, the court would be overstaffed. Moreover, there is moral hazard in rewarding inefficient courts by giving them more judges. Backlog problems are appropriately dealt with by “reserve judges” brought in for temporary periods to help clear up the large volume of pending cases.

5.2.3 Political concerns

One of the common complaints giving rise to the Court Restructuring Project is that there were too many courts created for political reasons. The aim of the project was to configure a court system based on principles of efficiency and logic, without political complications. While certain courts may face political difficulties, and while ethnic balance and representation may pose real-world challenges, this project’s conclusions did not give weight to those concerns.[9]

5.3 Court branches / regional departments

A few courts are too small to satisfy the caseload and population criteria, but serve a community that is remotely located. Where the caseloads are very small, there is no need for a full-time court presence. To the extent there is difficulty getting to court in another city, the court can meet the needs of the community with regularly scheduled "court days."[10] But where the community is remote, and the caseloads are more substantial, some full-time court presence may be necessary to serve the public adequately.

5.3.1 Criteria

For these situations, the restructuring plan contemplates court branches or departments, which are part of a larger court, but which function in the remote location. Prime candidates for court departments or branches are locations where the distance is 45 kilometers or more from the main court, and/or when accessibility by road is difficult.

Caseload and population are relevant here as well. Where those are high enough, a separate court is justified. Where they are low, "court days" should be sufficient to meet the community's needs.[11] It is for those communities that fall in between that court branches are most appropriate.

Consistent with this, a minimum threshold has been established for each of the three objective criteria; courts that fail the criteria to remain as courts but which meet all three of these standards are recommended to remain as court branches:

Criteria for a Court Branch or Department	
Caseload	> 2.0
Population	> 20,000
Geography	> 45 kilometers

In addition, a couple of courts are so remote that it is unreasonable to send judges and staff there regularly for court days. These are also proposed as court departments, notwithstanding their lower caseloads and populations:

Alternative Criteria for a Court Branch	
Geography	> 100 kilometers

Exceptions to these criteria are the two courts in Kladanj and Olovo. These courts neighbor each other, but are in different cantons. Geography and logic suggest that they should be merged to form a single court (which would meet criteria), but this is impossible unless and until constitutional amendments are made to allow cross-cantonal jurisdiction for a municipal court. Although these two courts fail to meet the criteria for court branches, they are recommended nonetheless to continue as branches of the Živinice and Visoko courts respectively until the constitutional issues can be addressed. If constitutional reform does not go forward, they will both be candidates for closure under the objective criteria.

5.3.2 Structure

In terms of organization, it is envisaged that branches or departments are part of the main court and report to the president of the main court. That also means that appointments of judges should be made from the seat of the main court. Judges applying for positions with the main court should understand that they may be assigned to the court branch for a time.[12] Rotating the judges through these smaller locations will help the court president exercise control of remote branches and will help alleviate judicial independence concerns typical of small insular communities.

The number of judges in the branches will vary and depend on other factors such as population and caseload, but they should err on the side of having fewer judges. The main court can always send additional judges on a part-time or "court day" basis to assist with caseload or to complete a panel when the caseload

requires it. Also, the branches should be supported by the administrative structure of the main court (*e.g.* court president, accounting office, etc.), and therefore should be able to function with only a skeleton staff.

6 Appellate court closure and consolidation

Although it is obvious that, by any measure, there are too many second instance courts in BiH, a specific proposal to consolidate such courts is deferred for the present due to the legal and logistical hurdles that must be cleared first.

6.1 Cantonal Courts

Except as recently amended for the creation of the High Judicial and Prosecutorial Council, the Federation Constitution commits the oversight and funding of the first and second instance courts to the cantons. This understanding is also reflected in many of the Cantonal Constitutions.

Among the new amendments to the Federation Constitution is a provision, imposed by the High Representative in May 2002, allowing cantons to agree voluntarily to share a cantonal court. It became apparent in the course of the Court Restructuring Project that no two cantons shared a desire to do so. Accordingly, without further constitutional amendments, it is impossible to consolidate cantonal courts.[13]

This issue will have to be addressed eventually. The fragmented, canton-based administration of justice in the Federation results not only in too many and too-small cantonal courts, but also in inconsistent procedures, inadequate oversight (by marginally-functional Cantonal Ministries of Justice), and uneven funding of courts throughout the Federation. At some point, the courts of the Federation should be consolidated under an entity-wide umbrella, with oversight by the Federation MoJ and with entity-based funding.

Almost everyone consulted on the Court Restructuring Project, including many Cantonal Ministers of Justice, favors such a change. It is an essential element to bringing consistency, reasonable oversight, and sound administration to the courts of the Federation.

At that time and with that change, a reasonable proposal to consolidate cantonal courts can be considered. Following restructuring, four of the cantons will have only one municipal court, and their cantonal courts will be the most obvious candidates for merger.

6.2 District Courts

As the number of cantonal courts is not affected by the restructuring plan at this stage, it seems appropriate to defer any action to consolidate district courts of the RS as well. The RS second-instance court configuration is not nearly so problematic as that in the Federation anyway, although consideration could be given to consolidating the districts of Srpsko Sarajevo and Trebinje. This possibility and any other proposals for consolidating second instance courts should be considered and addressed at a later date.

6.3 Entity Supreme Courts

There is no proposal to close or consolidate the entity supreme courts. Restructuring for these courts is limited to the number of judges and issues of subject matter jurisdiction (see below).

7 Number of judges in each court

In setting the number of judges in each court, it is essential to speculate somewhat, as no one yet knows the full impact of the forthcoming changes to the procedure laws. In these circumstances it appears best to guess low. Later, when the full impact of procedure reform is apparent, it may be necessary to make some adjustments to the number of judges in each court, and it will be far easier to add judgeships to these courts than to remove

them. For this reason, the allocation of judgeships suggested in this report errs on the low side.[14]

In each court, one judge serves as the court president. Consistent with the recommendations of the Court Administration Project, however, every court president should carry at least a partial caseload; he or she can do this by delegating administrative responsibility to a competent court secretary or court administrator.[15] Recognizing that the administrative duties of a court president will require some time, however, and that larger courts will demand more of a court president, this proposal includes an additional judgeship allocation to each court as follows (before rounding):

Additional judgeships for the administrative duties of court president	
Court size (adjusted caseload index)	Additional judgeships
less than 8 judges	0.25
8 to 16 judges	0.5
more than 16 judges	0.75

7.1 First instance courts

The Caseload Index is the obvious starting point for determining the number of judges for each court. It is a direct function of the historical caseload of each court, measured against the estimated quota for each judge. On its face, it is the "number of judges" required to handle the court's caseload. The estimated quotas used to calculate the Caseload Index, however, do not account for all the miscellaneous work required of municipal and basic court judges in addition to their "core" cases. Accordingly, the number is "rounded up" to the next higher whole number to give each court a little extra. The proposed number of judges is summarized in the tables of Annex A, and laid out in court-by-court detail in the Number of Judges Tables at Annex D.

Even with the upward rounding, these recommendations constitute a significant – 25% – reduction in first-instance court judgeships. This reduction is somewhat smaller than the targets identified in the Preliminary Report, but it constitutes a reduction in the number of judges currently serving without reference to the many judicial vacancies that presently exist.

7.2 Second instance courts

The same approach can be taken for the cantonal and district courts. The proposed number of judges for each of them is set forth in the tables at Annex D. Because procedure law reforms will substantially increase the burdens on second instance courts – by removing their power to remand cases and requiring them to decide cases finally, even if it requires conducting hearings – the reduction in judgeships in the second instance courts – 15% – is more modest. In the RS, the numbers actually increase.

7.3 Entity Supreme Courts

The Court Restructuring Project has determined that the entity supreme courts would need to remain as presently constituted, but may be able to function effectively with fewer judges. The Supreme Courts will lose second-instance civil jurisdiction,[16] and could have their subject matter jurisdiction over administrative cases shifted to lower courts (see below). It appears that 4 of 16 judges on the RS Supreme Court and 5 of 16 judges now sitting on the Federation Supreme Court are occupied with administrative cases now. Moreover, the Federation Supreme Court's internal regulations contemplate 10 of 30 judges handling administrative cases.

Accordingly, it is recommended that the High Judicial and Prosecutorial Council refrain from appointing, at this time, the full complement of 20 judges to the RS Supreme Court and of 30 judges to the Federation Supreme Court. Until issues over the jurisdiction of administrative cases is settled, only 75% (15) of the RS Supreme Court judgeships, and 70% (21) of the Federation Supreme Court judgeships should be filled.

8 Subject matter jurisdiction

8.1 Criminal jurisdiction

In the Federation, the municipal courts have jurisdiction over criminal cases only for crimes carrying a penalty of up to 10 years. More serious crimes are tried in the cantonal courts. In the RS, the threshold is 20 years. This discrepancy should be addressed, and the jurisdiction normalized between the entities. However, because prosecution restructuring and the drafting of new criminal codes and procedures are still in process, there are unresolved questions about how and where these cases should be appropriately handled. Accordingly, this issue is reserved for future consideration.

8.2 Civil jurisdiction

At present, a smattering of civil cases – such as copyright cases and cases pertaining to protection of patents and trademarks – get first instance attention in the district and cantonal courts. In two cantons of the Federation, commercial disputes valued at more than 30,000 KM are tried in the cantonal courts while commercial disputes arising from unfair competition and monopoly are also tried primarily in cantonal courts. There appears to be no reason why all civil cases including all types of commercial cases, however, cannot be competently and efficiently handled by lower level courts. This is particularly true after the judicial reselection process empanels a stronger bench (better judges) in each court, and after judicial training centers are functioning to give the judges the substantive knowledge they need.

Accordingly, first instance jurisdiction in *all* civil cases, including commercial, should be shifted to the basic/municipal courts. The new draft laws on civil procedure in each entity should be tailored to reflect this approach.

8.3 Administrative disputes

At present, the entities' respective Supreme Courts carry a large share of the caseload of administrative disputes. These may be styled as "appeals" from the decisions of administrative bodies, but the case filings constitute the first instance of review by a court. For example, in 2001 alone, the FBiH Supreme Court received 4,813 administrative cases, contributing to the present backlog of more than 9,000 such cases. The RS Supreme Court suffers similar difficulties, and now carries a backlog of more than 3,500 administrative cases. There is no doubt that most of these cases could be easily and successfully tried in lower level courts, effectively disburdening the supreme courts of a substantial caseload that dominates their dockets. Both Supreme Court Presidents have expressed great interest in making such a change.

In the Federation, the Ministry of Justice has already appointed a working group to formulate a proposal along these lines, shifting jurisdiction for administrative disputes to lower courts. The IJC supports this initiative and at the request of the Ministry has designated a member of its staff to assist and support this Federation working group. The IJC, recognizing the complexity of the issue (with numerous laws implicated), and respecting the expertise of the Federation working group, defers to that effort. It urges a cooperative, or at least a parallel effort, from the RS to address this common problem.

8.4 Other categories of cases

Cantonal courts are also currently handling cases that do not fall under any category specified above, such as bankruptcy and liquidation proceedings, registration of legal entities and related disputes that are, in fact, already handled by basic courts in the RS. Cantonal and district courts are also handling proceedings related to recognition and enforcement of foreign judgments. It is believed that all of these types of cases can be easily tried at municipal/basic court level.

First instance jurisdiction for these and other non-criminal cases should be shifted from cantonal/district

courts to municipal/basic courts.

9 Specialized court divisions

Although there is some interest in the creation of specialized courts, practical realities in BiH dictate against their formation. Local governments have often found it difficult to provide adequate premises and equipment for the existing courts. If specialized courts were authorized by statute, it is doubtful that they would ever be created, and if they were, that they could be supported. A more realistic alternative is the creation of specialized divisions.

Large courts, of course, already have the power to have judges specialize, and most take advantage of it, if only through the case-assignment system adopted by the court president each year. Smaller courts, however, are generally unable to specialize at all, although most courts manage to divide their civil and criminal dockets.

Centralizing the specialty divisions, giving them multi-court jurisdiction, would allow the accumulation of greater expertise, with corresponding improvements in efficiency. However, it would also require the parties to travel farther to get to the court with the specialized division. The closure of courts will already burden many of the courts' clients significantly in terms of travel time and expense; the IJC is reluctant to exacerbate these costs with a large-scale proposal for specialized divisions.

9.1 Commercial division

It does make sense to pursue such specialization for commercial cases, however. The parties to commercial disputes, currently defined as disputes between two legal entities, are less likely to suffer undue hardship in having their cases tried in larger cities. Many enterprises have offices or representatives, if not their headquarters, in the larger cities already, and the commerce that they engage in may bring them to the city.

The general interest in fostering economic development in BiH also supports the concept of specialized commercial divisions. The business community should be able to develop confidence in the court system if their cases go before judges experienced and knowledgeable in the field of commercial disputes.

Accordingly, all commercial cases arising within a canton or district should be handled in a single, special division of a centrally-located court. This would allow smaller courts to enjoy some of the benefits of specialization, with these potentially complicated cases going to specialists elsewhere. This is consistent with the way enterprise registry is handled in the RS, *i.e.* in one basic court in each district. The enterprise registry, commercial civil cases ("Ps" cases), bankruptcy, and liquidation cases should all be handled by a special commercial division of a single first-instance in each canton or district.

The commercial division will typically be in the first-instance court co-located with the cantonal/district court. Exceptions include the following:

Sokolac – Although Sprsko Sarajevo is the district seat, there will be no basic court there, only a branch. The commercial division for the Srpsko Sarajevo district should be created at Sokolac, the largest and most significant municipality in the district.

Orašje – In Posavina Canton, the cantonal court is in Odžak, but the municipal courts are being merged into one court in Orašje, the cantonal capital. Consequently, the commercial division will be in the Orašje court.

Travnik – In Central Bosnia Canton, the commercial division should be in the Travnik Municipal Court, even though the cantonal court is being relocated to Novi Travnik.

Ljubuški – In West Herzegovina Canton, the municipal court in Ljubuški should house the commercial division, as no municipal court will exist in Široki Brijeg.

To ensure maximum flexibility and efficiency, judges should be appointed to the municipal court in general, and then designated to sit in the commercial division by the court president. The expectation is that the commercial division can be made larger or smaller as case filings fluctuate, and any judge in the commercial division who is not fully occupied can be put to work on other cases in the court. Nonetheless, the High Judicial

and Prosecutorial Councils should consider applicants' expertise in commercial matters when appointing judges to courts that have special commercial divisions.

9.2 Other specialized divisions

In the future, it may be appropriate to consider developing other specialized divisions, depending on whether these commercial divisions are a success. When the reform of the law on administrative disputes is complete, for example, such cases may be ideally suited to a centralized and specialized "administrative division" in the first-instance courts.

10 Restructuring implementation

The mechanics of closing and merging courts will need to be addressed in the near future. Substantial issues remain, such as how the newly restructured courts should be staffed, and how the recruitment and selection of such staff will take place. There is particular concern about how incumbent court staff will be treated.

There is significant potential for long-term cost savings in the restructuring plan – particularly in those areas with large reductions in judgeships – even though those savings will have to be reinvested in modernizing the judiciary for the next few years. The judges appointed to these courts will have to be much more productive than judges have ever been, working harder than ever before. They need to be supported in these new efforts with resources – facilities, equipment, and training – sufficient to meet the new, high expectations. These resources are long overdue; the restructuring finally affords a means of providing them.

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[1] The project is limited to the municipal and cantonal courts in the Federation, the basic and district courts of the RS, and the supreme courts of both entities. The new Court of BiH, the constitutional courts, and the minor offence courts are not dealt with in this project, nor is the court system in Brčko District.

[2] Again, this excludes the minor offence courts and other courts mentioned in footnote 1.

[3] The last official census was done in 1991, before the war, when population distribution was decidedly different.

[4] The word "quota" is potentially misleading here. There is no intention to represent these numbers as goals or standards for measuring judicial performance. This is simply an estimate of a judge's working capacity, for purposes of allocating judgeships to the various courts.

[5] Some courts report only R cases, without distinguishing the more substantial R1 cases from the easier R2 cases, which were not included in the formula. In these courts, we used a quota of 1800, reflecting the general average of one out of every six R cases were R1 cases (*i.e.* for every one R1 case reported, the courts reported about five R2 cases).

[6] The IJC collected and reviewed data from the last 4½ years, but ultimately relied on the average from the last 1½ years in its formulations. Because the general trend is toward an increase in case filings, the averages for the longer period of time appeared to underestimate the present (and presumably future) caseload burdens.

[7] There are numerous examples of large and highly-efficient courts in other countries; the municipal court in Zagreb, for example, functions extremely well with over 100 judges.

[8] Odžak, for example, could no longer be served by the court in Modriča which is now a part of the RS. It was necessary to create at least one court in Posavina Canton to serve the public in that canton.

[9] The exception here is Žepče, already the subject of a High Representative Decision. Any new decision affecting the Žepče court must be reconciled with the earlier one. *See* discussion of court consolidations in Zenica-Doboj Canton at Annex C.

[10] Each court can and should decide for itself whether, where, and how often to hold such court days.

[11] And where caseload and population are very low, it is reasonable to expect the residents to travel to get to court.

[12] This should be stated explicitly in the advertising and job postings for judicial vacancies in courts that have departments.

[13] Although the number of cantonal courts does not change, the restructuring plan would move the seat of the cantonal court for Central Bosnia Canton from Travnik to Novi Travnik. This recommendation is explained in Annex C, on court consolidations.

[14]This report speaks of the number of professional judges. Lay judges do not play a meaningful role in the courts from the perspective of restructuring.

[15] See *Justice in Due Time*, report of the IJC Court Administration Project, April 2002, p. 36

[16] Shifting first-instance civil jurisdiction from the district and cantonal courts to the basic and municipal courts, discussed *infra,* will relieve the Supreme Courts of second-instance jurisdiction in these cases