Progress Report November – December 2001

Following the usual pattern in these activity reports, this report has been drafted following the project goals of the IJC as set out in its Strategy Paper and the project numbers referred to in this report are those of the Strategy Paper.

1. Major achievements and current issues

1. **Judicial Partnership Forum launched**

The IJC inaugurated its Judicial Partnership Forum on 5 December in Sarajevo, which was chaired by the Director and attended by members of various legislative bodies, Ministries and the judiciary. The purpose of establishing the Forum was to bring together members of the three branches of government in one Forum to resolve the most important policy issues facing judicial development and reform. The IJC sees this partnership as essential for the future of the judiciary in BiH. Discussion at the meeting ranged over a wide variety of issues, including how to co-ordinate judicial reform strategies and how to win public trust in the judiciary. The next meeting is expected to be held early in the New Year.

1. **Discussion intensifies on switch to re-appointment process**

Dissatisfaction with the performance of the judiciary in general and the low number of removals under the comprehensive review process in particular have resulted in reconsideration

of IJC strategy, including a possible move from the current review process to one involving re-appointment of judges and prosecutors. The IJC submitted a paper outlining the advantages and disadvantages of changing strategies at this time to OHR and select IC organisations. That paper fully discusses the review and appointment procedures and attempts to offer a balanced assessment of current state of the judiciary and the path ahead if a re-appointment process were to be implemented. The IJC is now working on preparation of a model by which the re-appointment process could be carried out, including necessary resources.

2. Improving the independence of the judiciary

Project 1 – The Comprehensive Review of Judges and Prosecutors

The comprehensive review of judges and prosecutors resulted in a very few removals of judges and prosecutors in 2001 for the various reasons that have been set out in previous reports. In 2001, three judges and no prosecutors were removed from office, although eight cases against both judges and prosecutors are currently pending final review proceedings. In addition, seventeen judges and eight prosecutors resigned from their posts. Some of the resignations occurred at the stage of final review; others were for personal reasons unrelated to the review process. Current statistics on the process are outlined in more detail below.

While there has been some noticeable improvement in the performance of the commissions and councils that are performing the review in recent months, it has not been enough to ensure that the review will meet its goals. The IJC therefore held a joint session with the presidents of the commissions and councils in early December to discuss the review process and other issues concerning appointment of judges and the long term plans of the IJC for the

establishment of a permanent High Judicial Council. It is now expected that the commissions and councils will conduct a thorough review of the performance of all judges and prosecutors, rather than solely following the current complaint-based system. The IJC believes that this will lead to an increase in the current rate of removals in 2002.

Parallel to this, the IJC is taking its own steps to expand the focus of the comprehensive review:

1. Field Office teams will press the commissions and councils to obtain statistics on the performance of each judge and prosecutor in order to assess their ability to perform their job.

2. The IJC now co-ordinates seven Judicial Monitoring Working Groups throughout the country, which investigate judges and prosecutors and will assist in the collection and analysis of performance data on judges and prosecutors.

1. In this period the IJC has initiated some intensive investigations into selected judicial organisations. Dubious practices in Mostar Municipal Court I in respect of land transfers were brought to light as a result of UNIMBH research into ownership of the Stone Building in West Mostar. The IJC therefore conducted a one-week inspection of court files in that court, relating both the land registration and other issues. In Tuzla, the IJC conducted an audit based on credible information that judges in the Cantonal and Muncipal Courts were acting as lawyers for private parties in addition to their proper duties. The material collected in both actions is still being analysed and findings are expected in January. At a less intensive level, the IJC

performed an on-site inspection of the files handled by the president of the Sokolac Basic Court because the Court President was suspected of improperly handling cases. Finally, the IJC inspected files at the Doboj Prosecutor's Office following complaints that serious cases, including murder allegations, were not being diligently investigated. The IJC will determine whether there are grounds to file complaints with the High Councils as a result of the last two inspections.

2. The IJC has now hired four lawyers and two investigators for nine months to assist the Federation Commissions with funding from the Finnish government. Recruitment continues for similar positions in the RS.

1. In November, the IJC sent out a lengthy disclosure form for completion by every judge and prosecutor. The form, which was agreed to by the commissions and councils, seeks detailed information on work history and forms were to be completed by 21 December. They are now being collected from each court and will be copied and the information analysed and used by the commissions and councils.

1. Finally, following further discussions on the IJC's original proposal to extend the period of the review process by six months, it was decided to recommend a one-year extension instead. The IJC sent letters to the Federation and RS governments recommending that the one-year extension be included in amendments to the laws on judicial/prosecutorial service. The amending legislation has now passed in the RS, but is still in the legislative process in the Federation. It is expected to pass early in the New Year.

The current status of the comprehensive review process is as follows:

1. The Federation Judges Commission (FJC) has received over 724 complaints. It has identified 71 cases for subsequent review (further investigation) and six cases for final review proceedings (involving a hearing to determine whether to recommend removal from office). The FJC has conducted three removal proceedings, which led to one judge being removed and two resigning. In addition, three judges resigned from office as a result of scrutiny of their judicial conduct. The work of the FJC has been hindered by the recent loss of three of its members (Supreme Court judges who were not re-appointed).

1. The Federation Prosecutors Commission (FPC) has received over 102 complaints and designated 27 for subsequent review. The FPC also declined to recommend a number of incumbent prosecutors for reappointment (effectively, a removal from office).

2. The RS High Judicial Council (HJC) has received over 535 complaints and has identified 45 cases for subsequent review and eleven cases for final review. Of those eleven cases, seven were recommended for disciplinary action. In two cases, the HJC recommended the removal of two judges from office and the RS National Assembly so removed them. The remaining two cases are pending final review hearings.

3. The RS High Prosecutorial Council has received 23 complaints, of which it has identified four cases for subsequent review and three for final review.

Project 2 – Appointment Process

The appointment process continues to improve as the commissions and councils follow the standardised procedure set out in the Memorandum of Understanding of 4 July. On the whole, the announcement of vacancies throughout BiH has resulted in larger pools of judicial applicants, although they remain weak in some areas (Cantons 1, 5, and 10). The standard application forms enable the commissions and councils to assess more objectively the qualifications of applicants.

In the RS, there are 65 vacant judicial posts and eleven vacant prosecutor posts (11). The High Councils are expected to follow the appointment procedures in the Book of Rules. In particular, the High Councils should propose more candidates than there are vacant posts to the appointing authority and further educate the appointing authority on appointing qualified candidates to achieve a fair representation of the three constituent peoples and Others throughout the judiciary. As a follow-up to the joint session with the Presidents of the Federation Commissions and RS Councils, the IJC Director wrote the High Council Presidents and urged them to adopt the fair representation guidelines. IJC will closely monitor the High Councils' handling of these appointments.

Project 3 – Reform of Commissions and Councils

The IJC has begun working on a plan to implement this project, as part of its long term strategy to create an appropriate and permanent body to regulate the appointment and discipline of judges and prosecutors and more attention will be devoted to this issue in 2002. The IJC anticipates the preparation of a new law regulating judicial service that would strengthen the judiciary's ability to regulate itself with minimum interference from the executive and legislative branches of government.

As a first alternative, the IJC recommends the creation of one judicial commission/council embracing all judges and prosecutors throughout BiH. As a second alternative, the IJC recommends the creation of one judicial commission in each Entity and another at the state level embracing judges and prosecutors within these respective jurisdictions. The current unruly structure includes 20 cantonal commissions, two Federation commissions, two RS councils, and one state level commission involved in the appointment and/or discipline of judges and prosecutors.

The new law(s) will promote the following measures:

1. a change in the composition of the judicial commission to incorporate broader interests of society, though with a dominant representation of the judiciary

2. paid, full-time membership posts, as necessary

3. direct power of appointment by the commission and direct authority to discipline and dismiss judges and prosecutors

4. sound codes of ethics to serve as the basis for disciplinary measures

5. allocation of sufficient full-time legal, investigative, and administrative staff

6. identification of permanent premises and adequate budget resources

7. oversight and training of judicial commission members and staff.

The Council of Europe has responded favourably to a request for expert assistance on this project and is willing to dedicate two experts to work on the reform of the Commissions/Councils and appointment and disciplinary procedures, including the drafting of codes of ethics. The IJC will further develop its planning on this project early in 2002.

Project 4 – Court funding

Following extensive consideration of whether the proposed draft Federation law on the courts and prosecutor's office budget was compatible with ongoing public sector finance reforms, the IJC reworked the text of the draft to ensure that compatibility and to improve generally the cohesion of the draft. However, given that the new office will no longer be able to maintain any role in monitoring the execution of budgets, the Minister of Justice proposed that further consideration be given to the issue of whether a new office was still an appropriate mechanism to achieve its remaining purpose of giving the judiciary to right to argue for its budget before the legislature. The Ministry, the IJC and ABA/CEELI will work together in early 2002 to consider alternative approaches. While funding of the judiciary is not such an issue at the Federation level, whatever draft is agreed is likely to be used as a model for the cantons, where funding problems for the judiciary are endemic.

The IJC expects further problems with judicial funding in 2002. Resistance to paying the relatively high salaries of judges is growing, with a proposal being mooted in Canton 1 to return judicial salaries to the old, low rate and amendments to the relevant law being proposed in the RS that would reduce the current salaries. Both judges and court staff in different parts of the country have indicated their willingness to take strike action.

Project 5 – Court security

Nothing to report from the IJC.

4. Improving the quality and efficiency of the judicial system

Projects 6 and 7 – Reform of civil procedure and enforcement of civil judgements

The two Federation working groups on each of these draft laws have been meeting regularly and both have made substantial progress as they work their way through the texts being used as models. The IJC has participated in all the meetings and has been doing a considerable part of the between-meeting drafting and other preparation. Both drafts are scheduled for completion by March 2002.

Our information is still that neither of the RS working groups has yet met.

Project 8 – Court administration reform

The Norwegian-funded court administration project will begin on 7 January. A considerable part of the IJC attention in this reporting period has been focussed on finding the necessary consultants, lawyers and interpreters as well as collecting information from the courts that will participate in the project and dealing with all other logistical issues.

Five courts were finally selected for the project (Banja Luka Basic Court, Konjic and Ljubuski Municipal Courts, Srpsko Sarajevo District Court and Zenica Cantonal Court) and all have expressed their enthusiasm. The three-month project aims

finally to produce recommendations for low-cost, low-tech solutions to improve court administration and management.

Project 9 – Judicial training institutes

Having been sent back to the Ministry of Justice from the Parliament in the middle of this year, a slightly amended Federation draft law on the judicial training institute was finally resubmitted to the Government in late December. This redraft has been reviewed and agreed to by the IJC.

The RS Ministry of Justice has now made additional amendments to its draft law, the net effect of which would be to create a more complex management structure that could give the government considerable control over the work of the institute. The IJC will attempt to co-ordinate its comments with any that the Council of Europe might have on the draft. The IJC is growing concerned about the paucity of progress on this issue, given the amount of time since the first drafts were prepared.

Failure to pass the necessary legislation will also threaten the donor support that the IJC has obtained for the institutes. The Dutch government has agreed to provide assistance to the new institutes in the sum of around 117,000 KM, which will include a donation of equipment, a train the trainers course for the institute's pool of trainers and a study tour to the Dutch equivalent institute. The French government has also pledged its help, as has the US through its ABA/CEELI office.

Project 10 – Criminal procedure training

The inter-agency co-ordinating group for criminal procedure training, set up by the IJC, met twice in December and has made a preliminary identification of who to train and where on

the anticipated new criminal procedure codes. Two organisations funded by the US Department of Justice (ICITAP and OPDAT) have requested $1.1m from the US Government for this training, which would cover police, prosecutors and judiciary. If granted, those funds would be available in October 2002.

Project 11 – Access to legal information

The Swedish government, through SIDA, has agreed to fund a project in this area, having requested an IJC proposal. The project will take the form of a needs assessment on access to and sources of laws and other legal information. It is anticipated that it will begin in spring 2002 and run for three months. The IJC will now begin looking for a suitable consultant. We also expect a follow-on project to implement the recommendations of this first project and SIDA has also indicated interest in funding that second stage.

Project 12 – Legal profession

The IJC met with the RS Bar Association in early December to discuss the IJC-prepared draft law on the legal profession of the RS. Agreement was reached on all issues except that of citizenship. The IJC did not accept the Bar Association's position that the right to open a legal practice in the RS should be restricted to RS citizens or residents only, but considered that the right should be open to all BiH citizens who meet the formal requirements. As no consensus was reached, it was agreed that the issue should be discussed in a higher forum. We now await the Bar Association's redrafted text incorporating the agreed changes.

In the Federation, the Ministry of Justice has sent the draft law to the Government.

Project 13 – Inter-entity judicial co-operation

On 22 November, the entity Ministers of Justice signed an amendment to the Memorandum of Understanding on the regulation of legal assistance between the institutions of the entities. It appears to deal with the question of which court should deal with cases that fell on the "wrong" side of the Inter-Entity Boundary Line after the war. This has been a long-standing problem in some courts and it is good to see it regulated at the initiative of the local authorities.

Project 14 – Minor Offence Courts

In the Federation, the working group that is preparing a draft law on minor offence procedure has almost completed its work and the final meeting of the group is likely to take place in January. The draft would make some significant changes to the current laws and will provide one unified law for the whole Federation, rather than being regulated by each canton. In particular, the provisions of the draft would require appellate courts to finally decide on cases rather than returning them for rehearing (a problem that plagues much of BiH court procedure), simplifies the extraordinary remedies available and gives jurisdiction over them to the Federation Supreme Court for all cantons, requires all minor offence judges to have the full Bar Exam and transfers jurisdiction for economic misdemeanours to the minor offence courts.

In the RS, despite the enthusiasm of the Minor Offence Judges Association to amend the law in a similar way to those changes being proposed in the Federation, the Minister of Justice recently expressed the view that there is not sufficient time for any redrafting to incorporate such far-reaching changes. The RS National Assembly has asked for a draft on the creation of a Republic-level appeal court for minor offences, something that the IJC does not agree with in principle. Given the reluctance in the RS to adopt some of the IJC recommendations, there seems to be a real risk that the Federation will end up

with a substantially better law than the RS.

Project 15 – Herzegovina-Neretva Canton

While there is nothing to report on this issue in terms of judicial reform, amendments were passed in early December to the cantonal Law on Internal Affairs authorising the amalgamation of the six police authorities in Mostar into one. This would make it easier to promote the unification of the three first-instance courts in Mostar into one.