



JUDICIAL REFORM INDEX

FOR

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Introduction

The American Bar Association's Central and East European Law Initiative (ABA/CEELI) developed the Judicial Reform Index (JRI) to assess the process of reforming the judiciaries in emerging democracies. The JRI is based on a series of thirty factors, the assessment of which will enable ABA/CEELI, its funders, and the emerging democracies themselves to better target judicial reform programs and monitor progress towards establishing more accountable, effective, and independent judiciaries.

The JRI assessment does *not* provide narrative commentary on the overall status of the judiciary in a country, such as the U.S. State Department's *Human Rights Report* and Freedom House's *Nations in Transit*. Rather, the assessment identifies specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assesses how well these correlate to specific reform criteria at the time of the assessment. In addition, it should be noted that this analytic process is not a statistical survey. The JRI is based on interviews with key informants and on relevant available data, and it is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system at a particular moment in time.

Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criterion may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

Id. at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).

The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated . . . the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615. Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of



polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: “[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy.” Larkins, *supra*, at 616.

ABA/CEELI’s Methodology

ABA/CEELI sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 “On the Independence, Efficiency, and Role of Judges”*; and the Council of Europe’s *The European Charter on the Statute for Judges*. Drawing on these norms, ABA/CEELI compiled a series of 30 statements setting forth factors that indicate the development of an accountable, effective, and independent judiciary. To assist assessors in their evaluation of these factors, ABA/CEELI developed corresponding commentary citing the basis for the statement and discussing its importance. The complete set of commentary is compiled in the *Manual for JRI Assessors*, which is provided to the members of the Assessment Team. A particular effort was made to avoid giving higher regard to American, as opposed to European concepts, of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a “scoring” mechanism was one of the most difficult and controversial aspects of this project, and ABA/CEELI debated internally how to address this issue. During the 1999-2001 time period, ABA/CEELI tested various scoring mechanisms. Following a spirited discussion with members of ABA/CEELI’s Executive and Advisory Boards, as well as outside experts, ABA/CEELI decided to forego any attempt to provide an overall scoring of a country’s reform progress to make absolutely clear the JRI is *not* intended to be a comprehensive assessment of a judicial system.

Despite this general conclusion, ABA/CEELI did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive*, *neutral*, or *negative*. These values only reflect the relationship of that statement to that country’s judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of “positive” for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a “negative.” If the conditions within the country correspond in some ways but not in others, it will be given a “neutral.” Cf. Cohen, *The Chinese Communist Party and ‘Judicial Independence’: 1949-59*, 82 HARV. L. REV. 972 (1969), (suggesting that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient”). Again, as noted above, ABA/CEELI has decided not to provide a cumulative or overall score because, consistent with Larkin’s criticisms, ABA/CEELI determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a brief summary describing the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits users to easily compare and contrast performance of different countries in specific areas and—as JRIs are updated—within a given country over time.



Social scientists could argue that some of the criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, ABA/CEELI decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.

One of the purposes of the assessment is to help ABA/CEELI — and its funders, collegial organizations, and host states — determine the efficacy of their judicial reform programs and help target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot necessarily be directly and effectively addressed by outside providers of technical assistance. ABA/CEELI also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country's judiciary may be tenuous at best. Clearly, building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. ABA/CEELI offers this product as a step in this direction and welcomes constructive feedback.

Acknowledgements

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Bosnia and Herzegovina (BiH) Background

Legal Context

BiH is composed of a national government, two entities (the Federation of Bosnia and Herzegovina, which is divided into ten cantons, and the Republika Srpska), and an independent district (the Brcko District). The only judicial body established to date at the national level is the BiH Constitutional Court, while the two entities and the Brcko District each have completely autonomous judiciaries.

The domestic government institutions in BiH are subject to significant international oversight. The Office of the High Representative was established pursuant to Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina (commonly referred to as the Dayton Agreement) and granted broad powers for implementing the civilian elements of the Agreement. Among other powers, the High Representative may impose legislation, veto legislation adopted by any domestic legislative body, and remove public officials from office.

The BiH JRI 2001 Analysis encompasses the judiciaries of the national government and the two entities, as well as the Brcko District. Where there are significant differences in the laws and practices in these jurisdictions that are relevant to the BiH JRI 2001 Analysis, they are noted in the text.

History of the Judiciary

The judiciary in Bosnia and Herzegovina is largely the product of the legal traditions of the Austro-Hungarian Empire (which gained administrative authority over the country in 1878 and annexed it in 1908) and communist Yugoslavia. During the latter era, BiH was a republic within Yugoslavia, and as such had its own Constitutional Court, Supreme Court, and lower courts within the federal system. As a result of the devastating war of 1992-95, BiH was divided into two entities, the Bosniak (Muslim) and Croat-dominated Federation of Bosnia and Herzegovina and the Serb-dominated Republika Srpska. The Dayton Agreement established a national government above the two entities, albeit with limited powers. Subsequent international arbitration also resulted in the creation of the independent Brcko District, a multi-ethnic enclave that does not fall within the jurisdiction of either entity. Separate court systems and judicial bodies have been established in all four of these jurisdictions.

Structure of the Courts

The structure of the courts in BiH reflects the country's complex political framework. The courts in each of the major jurisdictions are set forth below.

State of BiH

The only court at the state level to date is the **BiH Constitutional Court**. It is composed of nine justices, including three international members and two members from each of the three principle ethnic groups of the country. The Court has exclusive jurisdiction over disputes arising under the BiH Constitution between the entities, the state and an entity, or between state institutions. It also has appellate jurisdiction over issues under the BiH Constitution arising out of a judgment of any court in the country. Upon referral from any court, it shall determine the compatibility of any law with the BiH Constitution and the European Convention on Human Rights and Fundamental Freedoms.



Although it is not technically within the legal system, the **Human Rights Chamber** is a judicial body with statewide jurisdiction. Established by the Dayton Agreement, it is composed of a majority of international judges and equal numbers of Serbs, Croats, and Bosniaks. The court has jurisdiction over all claims arising under the European Convention on Human Rights and Fundamental Freedoms. Claimants must demonstrate exhaustion of domestic remedies or demonstrate that such remedies are ineffective. It is expected that the Human Rights Chamber will be merged into the BiH Constitutional Court within the next few years.

A new **BiH State Court** was legally created by statute in 2000, but it has yet to be physically established. The new court would include divisions for first and second instance proceedings in criminal and civil cases arising under state law and would review the administrative decisions of state bodies.

Federation of BiH

The **Federation Constitutional Court** may review the compatibility of any federation or local law with the Federation Constitution upon the request of selected high government officials or upon referral by the Federation Supreme Court or a cantonal court. It also has jurisdiction over disputes between cantons, between a canton and the Federation, between a municipality and its canton or the Federation, and between Federation institutions. It is composed of nine justices, of whom three are Serbs, three are Croats, and three are Bosniaks.

The **Federation Supreme Court** is the highest court of appeals in the Federation for matters involving questions of Federation law. It also is responsible for reviewing administrative acts of Federation institutions. The Court has a first instance criminal division in which cases involving charges under the Federation criminal code are brought. A separate division of the Court hears appeals from the decisions in such cases.

The vast majority of cases in the Federation are brought before the cantonal and municipal courts. **Municipal courts** are courts of first instance in most civil cases, and in criminal cases, courts where the punishment may be imprisonment for up to ten years. Because Federation criminal procedure provides for criminal investigations to be directed by judges, the municipal courts include both investigative judges and presiding judges. Municipal courts also typically handle employment cases and land registration. **Cantonal courts** handle appeals of municipal court decisions, and they serve as first instance courts in criminal cases punishable by more than ten years' imprisonment, bankruptcy and liquidation disputes, and a number of other specialized areas. They typically also have jurisdiction to review municipal and cantonal administrative decisions.

Republika Srpska (RS)

Like its Federation counterpart, the **RS Constitutional Court** decides whether legislation within the entity comports with its constitution. Pursuant to the RS Constitution, anyone can initiate proceedings before the Court. However, only the President of the RS, the National Assembly, and the government can initiate proceedings without restriction. The Court itself may initiate proceedings to assess the constitutionality of laws. The Court is composed of seven justices.

The **RS Supreme Court** is the highest appellate body in the RS. It has jurisdiction over appeals from all district court rulings and may review final administrative actions of RS-level agencies.

The **basic courts** have a role similar to that of municipal courts in the Federation. They serve as first instance courts in criminal cases punishable by less than 20 years' imprisonment (with a dual investigative and trial function, as in the Federation) and in a variety of civil, property, employment, and commercial cases. The **district courts** hear appeals from basic court decisions, and they serve as first instance courts in criminal cases punishable by 20 years'



imprisonment or more as well as in certain specialized areas of law. They also may review local administrative rulings.

Brcko District

The **Basic Court** is the first instance court of general jurisdiction in the Brcko District, handling civil, criminal, and other cases. The **Appellate Court** handles all appeals from the Basic Court, and it is the highest judicial body in the District. Both courts have jurisdiction to determine whether any provision of District law is incompatible with the BiH Constitution or the quasi-constitutional Statute of the Brcko District.

Conditions of Service

Qualifications

All judges must have formal university level legal training before taking the bench. However, there is no requirement in either entity that new judges have practiced before tribunals, nor are they required to take any specific courses before taking the bench. New municipal or basic court judges in the entities must complete a two-year apprenticeship in the courts before assuming their roles. Higher courts' judges typically are required to have between four and seven years of experience to qualify for appointment.

Appointment and Tenure

Recently created judicial commissions play a central role in the appointment of judges in both entities and the Brcko District. Once appointed, all judges have either life tenure or fixed terms. In the Federation, the Federal Commission for the Election and Appointment of Judges and ten cantonal commissions propose candidates to the relevant officials constitutionally authorized to make judicial appointments. Similarly, the High Judicial Council in the RS proposes candidates for all RS judicial vacancies to the RS National Assembly. The Brcko Judicial Commission has direct authority to appoint all Brcko judges. Members of the BiH Constitutional Court are appointed by the Federation House of Representatives, the RS National Assembly, and the President of the European Court of Human Rights.

The commissions operate with substantial oversight by the new Independent Judicial Commission (IJC), established in March 2001 by the High Representative. The IJC has a broad mandate to promote the rule of law and judicial reform, and one of its top priorities is to assist and monitor the performance of the local judicial commissions. IJC officials attend most commission meetings, and they are actively involved in developing uniform operating procedures for the commissions.

Training

There is no formal judicial training program for judges and no requirement that sitting judges in the Federation and the RS undergo continuing legal education courses. There are a number of judicial training courses offered on an ad hoc basis. Brcko District judges are required to participate in training provided by the Brcko Judicial Commission.



Assessment Team

The BiH JRI 2001 Analysis assessment team was led by Nicolas Mansfield and benefited in substantial part from Hazim Ahmic, Iso Maestro, Leila Martinovic, Nebojsa Milanovic, Terry Rogers, Diana Ruzic, and Darija Tomovic. The conclusions and analysis are based on interviews that were conducted in Bosnia and Herzegovina during the summer and fall of 2001 and relevant documents that were reviewed at that time. ABA/CEELI also benefited from the comments and input of USAID Bosnia personnel, Robyn Goodkind and Bill Yaeger. Records of relevant authorities and individuals interviewed are on file with ABA/CEELI.

BiH JRI 2001 Analysis

The BiH JRI 2001 Analysis reveals a fledgling state struggling with a broad array of challenges—not the least of which is the sometimes confusing patchwork of local and international structures. While these correlations may serve to give a sense of the relative status of certain issues present, ABA/CEELI would underscore that these factor correlations possess their greatest utility when viewed in conjunction with the underlying analysis, and ABA/CEELI considers the relative significance of particular correlations to be a topic warranting further study. In this regard, ABA/CEELI invites comments and information that would enable it to develop better or more detailed responses in future JRI assessments. ABA/CEELI views the JRI assessment process to be part of an ongoing effort to monitor and evaluate reform efforts.

Table of Factor Correlations

I. Quality, Education, and Diversity		
Factor 1	Judicial Qualification and Preparation	Negative
Factor 2	Selection/Appointment Process	Neutral
Factor 3	Continuing Legal Education	Negative
Factor 4	Minority and Gender Representation	Negative
II. Judicial Powers		
Factor 5	Judicial Review of Legislation	Negative
Factor 6	Judicial Oversight of Administrative Practice	Neutral
Factor 7	Judicial Jurisdiction over Civil Liberties	Neutral
Factor 8	System of Appellate Review	Positive
Factor 9	Contempt/Subpoena/Enforcement	Negative
III. Financial Resources		
Factor 10	Budgetary Input	Negative
Factor 11	Adequacy of Judicial Salaries	Positive
Factor 12	Judicial Buildings	Negative
Factor 13	Judicial Security	Negative
IV. Structural Safeguards		
Factor 14	Guaranteed Tenure	Positive
Factor 15	Objective Judicial Advancement Criteria	Neutral
Factor 16	Judicial Immunity for Official Actions	Positive
Factor 17	Removal and Discipline of Judges	Neutral
Factor 18	Case Assignment	Negative
Factor 19	Judicial Associations	Neutral
V. Accountability and Transparency		
Factor 20	Judicial Decisions and Improper Influence	Negative
Factor 21	Code of Ethics	Negative
Factor 22	Judicial Conduct Complaint Process	Neutral
Factor 23	Public and Media Access to Proceedings	Neutral
Factor 24	Publication of Judicial Decision	Negative
Factor 25	Maintenance of Trial Records	Negative
VI. Efficiency		
Factor 26	Court Support Staff	Neutral
Factor 27	Judicial Positions	Neutral
Factor 28	Case Filing and Tracking Systems	Negative
Factor 29	Computers and Office Equipment	Negative
Factor 30	Distribution and Indexing of Current Law	Negative

I. Quality, Education, and Diversity

Factor 1: Judicial Qualification and Preparation

Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.

Conclusion	Correlation: Negative
Formal legal education is a requirement of all judicial candidates, but new lower court judges in both entities are not generally required to have practiced before tribunals, nor are they given any formal training courses.	

Analysis/Background:

All judges must have formal university-level legal training before taking the bench. However, there is no requirement in either entity that new judges have actually practiced before tribunals, nor are such judges required to take any specific courses before taking the bench. In general, municipal court judges in the Federation and the equivalent basic court judges in the RS are required to have graduated from law school, passed the bar exam, and spent two years in an apprentice-like capacity within the courts. See, e.g., SARAJEVO CANTON LAW ON COURTS art. 81, O.G. Canton of Sarajevo, No. 3/97 [hereinafter SARAJEVO LAW ON COURTS]; REPUBLIKA SRPSKA LAW ON COURTS AND JUDICIAL SERVICE art. 47, O.G.R.S., Nos. 13/00, 16/00 [hereinafter RS LAW ON COURTS AND JUDICIAL SERVICE]. The two-year apprentice period does not include any formal coursework. In the Brcko District, by contrast, even Basic Court judges must have prior experience either within the judiciary or as a practicing attorney. LAW ON COURTS OF THE BRCKO DISTRICT OF BOSNIA AND HERZEGOVINA art. 23(2)(a), O.G. Brcko, No. 4/00 [hereinafter BRCKO DISTRICT LAW ON COURTS]. In addition, the Office of the High Representative (OHR) did conduct mandatory training courses for all newly-appointed Appellate and Basic Court judges, all of whom took office on April 1, 2001.

While a law degree is required of all judicial candidates, it is widely acknowledged that the graduation standards at BiH law faculties during the war were erratic at best. Therefore, the value of a law degree conferred during this period is questionable. Several respondents spoke derogatorily of the professionalism of so-called “war appointees” to the bench. Moreover, a number of respondents suggested that the overall quality of legal education is lower than during the pre-war period. Many respondents also noted the prevalence of very young and inexperienced judges at the municipal and basic court levels. The lack of any formal training for new judges is, therefore, all the more problematic and has serious consequences for the dispensation of justice.

Factor 2: Selection/Appointment Process

Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.

Conclusion	Correlation: Neutral
New legislation has established a selection process designed to promote greater judicial independence and professionalism. It is too early at present to determine whether the new system will result in a selection process governed by objective criteria.	

Analysis/Background:

The method of selecting judges in both entities has been reformed significantly as a result of the Federation Law on Judicial and Prosecutorial Service and the RS Law on Courts and Judicial Service, both enacted in 2000. See FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE, O.G.F.BiH, Nos. 22/00 and 20/01, *as amended by* DECISION OF THE HIGH REPRESENTATIVE, AUGUST 3, 2001; RS LAW ON COURTS AND JUDICIAL SERVICE. The Federation law established a Federal Commission for the Election and Appointment of Judges and ten cantonal commissions. For appointments to the Federation-level courts, the Federal Commission reviews all applications and proposes candidates for a particular vacancy to the Federation President, who then proposes one candidate to the House of Peoples for confirmation. CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA art. IV(C)(6)(b), O.G.F.BiH, Nos. 1/94, 13/97 [hereinafter FEDERATION CONSTITUTION]; FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 20(a). The Federal Commission proposes candidates based on their fulfillment of ten explicit criteria, including expert knowledge and work, academic record, and demonstrated intellectual and professional excellence, and ranks the candidates proposed to the Federation President. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 18. The Federation President must provide a written explanation to the Federal Commission if it fails to follow the Commission's ranking, and the Federation president may reject a proposed candidate only on the grounds that the candidate fails to meet the statutory criteria. In such a case, the Federal Commission can suggest the same candidate again or propose new ones. *Id.* at art. 20(b). A candidate cannot be appointed without being proposed for the position by the Federal Commission. *Id.* at art. 20(c).

For cantonal and municipal court appointments, the relevant cantonal commission deliberates and votes with the Federal Commission on all applicants. The cantonal commission then forwards one or more proposed candidates to the relevant appointing authority (cantonal presidents for cantonal court judges; cantonal court presidents for municipal court judges). The process is then similar to that established at the Federation level. Applicants for cantonal court positions must have served a specified number of years as a judge, prosecutor, or practicing attorney, although the precise requirements vary by canton. For example, five years of experience is required in the Sarajevo Canton, and four years of judicial or law practice experience or six years in other legal affairs is required in the Gorazde Canton. SARAJEVO CANTON LAW ON COURTS, art. 71; LAW ON COURTS OF THE BOSNA-PODRINJE CANTON GORAZDE art. 84, O.G. Bosna-Podrinje Canton Gorazde, No. 4/97 [hereinafter BOSNA-PODRINJE CANTON GORAZDE LAW ON COURTS].

The Federal Commission is composed of seven members, of whom three are members of the Federation Supreme Court, two are members of the Association of Judges in the Federation, one is a member of the Association of Prosecutors of the Federation, and one is a member of the Bar Association of the Federation. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 7. Cantonal commissions consist of three members in cantons with up to 20 judges and



prosecutors, and five members in larger cantons. Cantonal commission members are appointed by a joint session of the judges of the cantonal court. Three-member commissions contain at least one municipal court judge, and a five-member commission contains at least two municipal court judges. *Id.*

The RS Law on Courts and Judicial Service established the High Judicial Council (HJC). This body proposes candidates to the RS National Assembly for appointment. Only candidates proposed by the HJC are eligible for appointment. RS LAW ON COURTS AND JUDICIAL SERVICE art. 45. Unlike the Federation equivalent, the RS law does not provide specific criteria for selection beyond the minimum required years of experience. Candidates for appointment to the district court must have served seven years as a judge, prosecutor, or practicing attorney. RS LAW ON COURTS AND JUDICIAL SERVICE art. 47(4). The HJC is composed of 13 members: the President of the RS Constitutional Court, the President of the RS Supreme Court, an additional RS Supreme Court judge, the President of the Association of Judges and Prosecutors of the Republic of Srpska (AJPRS), one judge from each of the five districts in the RS (selected by the AJPRS), and three eminent RS lawyers (selected by majority vote of the other HJC members). *Id.* at art. 46.

The commissions began operating in October 2000. They have received mixed reviews of their performance to date. Some have suggested that the interviewing process of certain of the commissions has not been executed appropriately and that the commissions tend to be dominated by officials who will perpetuate the status quo. Others believe that the commissions are genuinely attempting to follow objective criteria. It is simply too early to draw any significant conclusions about the functioning of the commissions.

The commissions do face serious structural problems. They do not have adequate funding, nor do they have their own staffs or physical premises. Under both the RS and Federation laws, the Federal Commission and the High Judicial Council must rely on their respective Supreme Courts for logistical and staffing support (Cantonal Commissions similarly must rely on the relevant Cantonal Court). Therefore, the commissions are highly dependent on courts they are supposed to regulate. What little discrete funding the commissions have received to date has come from international donors. The head of one Cantonal Commission has suggested that the work of his commission is completely blocked because of the lack of funding and that he intends to resign as a result.

The commissions operate with substantial oversight by the new Independent Judicial Commission (IJC), established in March 2001 by the High Representative. The IJC has a broad mandate to promote the rule of law and judicial reform, and one of its top priorities is to assist and monitor the performance of the local judicial commissions. IJC officials attend most commission meetings, and they are actively involved in developing uniform operating procedures for the commissions. For example, the IJC is preparing standardized application forms for the use of all commissions.

The constitutional Statute of the Brcko District provides that all judges will be appointed by the Judicial Commission, composed of the Presidents of the Basic and Appellate Courts, the Public Prosecutor, the Director of Legal Aid, a member of the BiH Constitutional Court, and two Brcko District residents. STATUTE OF THE BRCKO DISTRICT, O.G. Brcko, No. 1/00 [hereinafter BRCKO DISTRICT STATUTE]. Basic Court candidates must have seven years of legal experience, including a minimum of three years in a judicial, prosecutorial, or attorney's practice, or ten years of other legal practice. BRCKO DISTRICT LAW ON COURTS art. 23(2)(a). Candidates for the Appellate Court must have ten years of legal experience, including a minimum of five years in judicial, prosecutorial, or attorney's practice, or fifteen years of other legal practice. *Id.* at art. 23(2)(b).



The Brcko Judicial Commission met for the first time in late June 2001. The initial Brcko District judges who took office in April 2001 were appointed by the Office of the High Representative. Again, it is premature to draw conclusions as to the Brcko Judicial Commission's operations.

Factor 3: Continuing Legal Education

Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.

Conclusion	Correlation: Negative
In general, a lack of adequate educational programs for new and sitting judges detracts from the professionalism of judges in BiH. The Brcko District does require certain continuing legal education. However, in the Federation and the RS, there is no requirement that sitting judges participate in continuing legal education programs.	

Analysis/Background:

There is no requirement that sitting judges in the Federation and RS undergo continuing legal education courses. The Federation Law on Judicial and Prosecutorial Service does provide that judges "have a right and obligation to participate in educational activities, seminars, or other gatherings of legal experts," but to date there has been no effort to enforce this obligation, and it is not viewed as a real requirement by judges or judicial officials. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 44. The RS Law on Courts and Judicial Service refers to the right of judges to undergo continuing education, but it does not include an obligation to do so. RS LAW ON COURTS AND JUDICIAL SERVICE art. 98.

There are a number of judicial training courses offered on an ad hoc basis. With the support of ABA/CEELI, the judges' associations in both entities conduct some training seminars on new laws, problematic areas of existing law, and other issues. The Council of Europe and other international organizations also provide occasional training programs on international human rights law and other subjects.

Various proposals for permanent judicial training centers in BiH have been under discussion since 1996, but, to date, have not been realized. In early 2000, an OHR-led initiative resulted in the drafting of Federation and RS statutes that would establish judicial training institutes in each entity, but these continue to languish in the entity legislatures.

The Brcko Law on Courts requires all judges to attend continuing legal education and training programs conducted by the Brcko Judicial Commission. The law does not specify a required number of annual course hours. BRCKO LAW ON COURTS art. 57.



Factor 4: Minority and Gender Representation

Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.

Conclusion

Correlation: Negative

For the most part, the ethnic and religious composition of the judiciary reflects the “ethnic cleansing” that took place during the war. With some exceptions, the courts generally do not reflect the ethnic diversity of the country. There is also a lack of gender balance in the courts. While women are in the majority at the lower levels of the courts, men predominate at the higher courts.

Analysis/Background:

The BiH Constitutional Court, the sole judicial organ at the national level, does reflect the ethnic diversity of BiH. Of the Court’s six domestic members (the Court also includes three international judges appointed by the President of the European Court of Human Rights), two are Bosniaks, two are Croats, and two are Serbs.

The Federation Constitution provides that there shall be an equal number of Bosniaks and Croats on the Federation Constitutional and Supreme Courts, and that “[o]thers [e.g., Serbs] shall also be appropriately represented on each such court.” FEDERATION CONSTITUTION art. IV(C)(2). The current ethnic composition of these courts reflects these constitutional standards.

For the most part, however, courts in both entities lack ethnic diversity. This is largely a reflection of the massive “ethnic cleansing” that characterized the 1992-95 war in BiH. The Federation Constitution requires that the ethnic composition of the cantonal judiciaries reflect the overall ethnic composition of the canton. FEDERATION CONSTITUTION art. V(11)(2). With the exception of the Sarajevo Canton, there are very few Serb judges in the cantonal and municipal courts of the Federation, and the judges in both the Bosniak and Croat-dominated areas of the Federation are almost uniformly of the dominant ethnic group. In the Republika Srpska, where the constitution does not mandate an ethnic balance in the judiciary, the situation is even worse. There are almost no non-Serbs at any level of the RS judiciary. The RS Law on Courts and Judicial Service does require that in appointing judges, “[m]easurable and identifiable efforts must be made towards achieving multi-ethnicity and gender balance.” RS LAW ON COURTS AND JUDICIAL SERVICE art. 47. Nevertheless, to date, the High Judicial Council responsible for recommending RS judicial appointments has received extremely few applications from non-Serbs.

Given the population shifts that occurred during the war, it should be noted that the more or less monoethnic courts that exist today often do reflect the actual ethnic composition of their particular jurisdictions. Nevertheless, they do not reflect the ethnic diversity of the country as a whole.

Although not widely viewed as an issue of concern, gender imbalance also plagues the court system. As a rule, women predominate at the municipal and basic court levels. At one of the two municipal courts in Sarajevo, for example, 27 of the 33 judges are women. This ratio is not atypical for lower courts throughout BiH. At the higher level courts, however, the situation is reversed. Of the 47 judges who currently sit on the four highest courts in the two entities (the Supreme Courts and Constitutional Courts of each), only 11 are women. Given the prevalence of women in the lower courts, their absence at higher levels is all the more striking and suggestive of discrimination. Although most respondents surveyed denied that overt discrimination against women exists, it is clear that sexism is deeply ingrained in the system. When asked to explain



the dearth of women at higher levels in the judiciary, one male judge responded that the judicial profession was “very complex”.

II. Judicial Powers

Factor 5: Judicial Review of Legislation

A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.

<u>Conclusion</u>	<u>Correlation: Negative</u>
The judicial organs have the power to determine the constitutionality of laws and to review official acts. Enforcement of constitutional decisions is a significant problem. The lack of a tradition of constitutionalism results in limited constitutional jurisprudence.	

Analysis/Background:

Pursuant to the Constitution of Bosnia and Herzegovina, the BiH Constitutional Court has exclusive jurisdiction to decide disputes arising under the BiH Constitution between the entities, between BiH and an entity or entities, or between institutions of BiH. CONSTITUTION OF BOSNIA AND HERZEGOVINA art. VI(3) [hereinafter the BiH CONSTITUTION]. Only a limited number of individuals and institutions can refer a case to the Court, including the Presidency, the Chair of the Council of Ministers, the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, and one-fourth of either chamber of the entity legislatures. BiH CONSTITUTION, art. VI(2)(a). The Court also has appellate jurisdiction over issues under the BiH Constitution arising out of a judgment of any court in BiH, and it has jurisdiction over issues referred by any court concerning the compatibility of a relevant law with the BiH Constitution. *Id.*, art. VI(2)(b-c). The BiH Constitutional Court has nine members: three are international members selected by the President of the European Court of Human Rights, four are selected by the Federation House of Representatives, and two are selected by the RS Assembly. *Id.*, art. VI(1)(a).

The Federation Constitutional Court has a jurisdictional mandate similar to that of the BiH Constitutional Court. Only selected officials may initiate a case before the Federation Constitutional Court, and the Court may decide constitutional questions referred by other Federation courts. FEDERATION CONSTITUTION, art. IV(C)(10)(2-3). Originally, three of the nine members of the Court were international jurists. With the recent expiration of the terms of these judges, the Federation is planning to fill its current vacancies in such a way as to insure a composition of three Bosniaks, three Croats and three Serbs.

The RS Constitutional Court is responsible for insuring that RS laws comport with the RS Constitution. Pursuant to the Constitution of the Republika Srpska, anyone can initiate proceedings before the Court, although only the President of the RS, the National Assembly and the government can initiate proceedings without restriction. CONSTITUTION OF THE REPUBLIKA SRPSKA art. 120 [hereinafter the RS CONSTITUTION]. The Court itself may initiate proceedings to assess the constitutionality of laws. *Id.*

There is no constitutional court specifically for the Brcko District. Besides the BiH Constitution, the ultimate law governing Brcko is the Brcko District Statute, promulgated by the High



Representative in December 1999 to implement the Final Award of the Arbitration Tribunal for the Dispute over the Inter-Entity Boundary Line in the Brcko Area. Courts in the Brcko District may invalidate District laws deemed not in conformity with the Statute of the Brcko District. BRCKO DISTRICT LAW ON COURTS art. 4.

While all three constitutional courts have the authority to review laws to determine their compatibility with the relevant constitution, none of them has explicit jurisdiction to review the constitutionality of official acts. However, other courts in both entities may review allegations that official administrative acts violate the constitutional rights of citizens. In the Federation, either cantonal courts or the Federation Supreme Court may hear such allegations, and if the relevant court rules the official act is in violation of the constitution, it may enjoin the execution of the act and fine or order the removal of the responsible official. FEDERATION LAW ON ADMINISTRATIVE DISPUTES arts. 69-80, O.G.F.BiH, Nos. 2/98, 8/00 [hereinafter FEDERATION LAW ON ADMINISTRATIVE DISPUTES]. Similar provisions exist under RS law, although the courts responsible for hearing such cases are described only as “competent courts.” RS LAW ON ADMINISTRATIVE DISPUTES arts. 65-77, O.G.R.S., No. 12/94 [hereinafter RS LAW ON ADMINISTRATIVE DISPUTES]. These provisions appear to be rarely invoked in either entity.

Further complicating the situation is that the enforcement of decisions is problematic for all three constitutional courts. The most significant constitutional case since the Dayton Agreement, the July 2000 BiH Constitutional Court’s decision in the so-called “constituent peoples” case (in which the court ruled that all three peoples of BiH are constituent in both entities), remains unenforced one year after it was announced. In the entities, constitutional court decisions not favored by government authorities also go unenforced.

In sum, the constitutional courts are marginalized by a legal culture in which practitioners are not accustomed to invoking the constitution in legal disputes. Although lower courts are authorized to refer constitutional issues to the constitutional courts, they rarely if ever do so. Litigants almost never raise constitutional issues, and judges generally do not want to be bothered with a referral process that delays the closing of cases. As a result, the constitutional courts are too often consumed with relatively trivial cases initiated by authorized political figures. For example, there is a series of Federation Constitutional Court cases deciding whether “zupanje” or “kanton” is the appropriate term for a canton.

Factor 6: Judicial Oversight of Administrative Practice

The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
The courts are authorized by law to review administrative acts and to compel government action, but the cumbersome procedures involved result in ineffective judicial oversight in this area.	

Analysis/Background:

Courts generally have the power to review administrative acts and to compel government action where a legal duty to act exists. Both the Federation and RS have similar laws on administrative disputes that are largely unchanged from the Yugoslav era. Under the Federation Law on Administrative Disputes, appeals of final administrative decisions may be filed in court within 30 days of receipt of the decision. FEDERATION LAW ON ADMINISTRATIVE DISPUTES art. 20.



Challenges to the decisions of Federation agencies are filed in the Federation Supreme Court, which has a separate administrative law division; challenges to municipal and cantonal agency decisions generally are filed in the relevant cantonal court. *Id.* at art. 6. The Federation Supreme Court may review cantonal court decisions in administrative law cases in which a question of Federation law exists. *Id.* at art. 41. The RS Law on Administrative Disputes is essentially the same as its Federation counterpart, with the RS Supreme Court having jurisdiction over appeals of decisions of RS-level bodies and the district courts having jurisdiction over all other appeals of administrative rulings. See RS LAW ON ADMINISTRATIVE DISPUTES; RS LAW ON COURTS AND JUDICIAL SERVICE arts. 20(5) & 19(7).

Under the Federation and RS Law on Administrative Disputes, reviewing courts may vacate an administrative ruling and remand it to the relevant agency or issue its own decision in the matter. If a court remands such a ruling, the relevant agency must act on the court's decision within 15 days. If the agency fails to do so, the challenging party may make an application to the agency, to which the agency has another seven days to respond. If the agency still refuses to act after this period, the party may file another motion with the court, which will ask the agency to explain its failure to act. If the agency fails to respond to the court within seven days, the court may make a final decision in the matter and direct the relevant authority to execute it. FEDERATION LAW ON ADMINISTRATIVE DISPUTES arts. 64-66; RS LAW ON ADMINISTRATIVE DISPUTES arts. 61-63.

These procedures have been criticized by many within the legal community as overly cumbersome and ineffective. The backlog of administrative law cases in the courts is substantial. Each judge in the Federation Supreme Court's administrative law division has over 1,000 cases, and the division's total backlog exceeds 7,300 cases. One respondent judge with substantial experience in this area suggested that there was a lack of sufficient expertise in administrative law among both judges and practicing lawyers, which he attributed to inadequate legal education and training and a general aversion to the practice of administrative law among lawyers.

The new State Court of BiH will have an administrative law division with jurisdiction to review actions of state bodies. Although provided for in a law imposed by the High Representative in 2000, it is unclear when this new court will be established.

The Brcko District Assembly adopted a law that grants the Basic Court jurisdiction to review final administrative decisions by Brcko agencies, through a procedure similar to the one applied in the two entities. BRCKO DISTRICT LAW ON ADMINISTRATIVE DISPUTES art. 1, O.G. Brcko, No. 4/00.

Factor 7: Judicial Jurisdiction over Civil Liberties

The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.

<u>Conclusion</u>	<u>Correlation: Neutral</u>
Ultimate jurisdiction over cases involving civil rights and liberties rests with the Human Rights Chamber, which is outside the regular court system. Although the Chamber has proven effective, the regular courts with original jurisdiction over such cases generally are ill-prepared to handle them.	

Analysis/Background:

Article II of the BiH Constitution enumerates 13 specific human rights and fundamental freedoms that all citizens have the right to enjoy, and it makes the European Convention on Human Rights and Fundamental Freedoms directly applicable. It also requires all courts to apply and conform to these rights and freedoms. Annex VI of the General Framework Agreement for Peace in Bosnia and Herzegovina establishes a Human Rights Chamber within a Human Rights Commission and provides the Chamber with jurisdiction over all human rights cases. DAYTON AGREEMENT, Annex VI, art II [hereinafter DAYTON AGREEMENT]. Any litigant alleging that his or her enumerated rights have been violated and who has exhausted his or her remedies through the regular court system (or demonstrated that such remedies are ineffective in his or her case) may bring such a claim before the Chamber. *Id.* at art. VIII(2)(a). The Chamber is composed of fourteen members: eight international judges (one of whom serves as the President of the Chamber) appointed by the Council of Europe, four domestic judges appointed by the Federation, and two domestic judges appointed by the RS (resulting in a domestic membership of two Bosniaks, two Croats and two Serbs). *Id.* at art. VII. The Chamber also has international and domestic legal staff, and it is funded by international donors.

In general, the regular courts are not equipped to handle cases involving civil rights and liberties. Judges generally are unfamiliar with the relevant standards, and courts rarely, if ever, invoke the European Convention on Human Rights and Fundamental Freedoms. Given the lack of public confidence in the judicial system, many potential litigants simply do not bring civil rights and liberties claims before the courts.

Most respondents were satisfied with the professionalism of the Human Rights Chamber. From its inception in 1996 through the end of 2000, the Chamber issued 669 decisions, and its annual output of decisions has nearly doubled each year. The Chamber holds public hearings and issues written, reasoned opinions when its decisions are announced.

Factor 8: System of Appellate Review

Judicial decisions may be reversed only through the judicial appellate process.

<u>Conclusion</u>	<u>Correlation: Positive</u>
It is well established that judicial decisions may only be reversed through the appellate process.	

Analysis/Background:

Cantonal court laws in the Federation contain provisions establishing that only competent courts can make decisions on appeal or other legal remedies derived from a court ruling. *See, e.g.*, SARAJEVO LAW ON COURTS art. 18; BOSNA-PODRINJE CANTON GORAZDE LAW ON COURTS art. 18. The RS Law on Courts and Judicial Service establishes the appellate jurisdiction of the district courts and Supreme Court, but it does not contain any specific provision prohibiting reversal of court decisions outside the appellate process. No RS respondent believed that non-judicial reversals occurred. The Brcko District Law on Courts states that a court decision may be revoked or changed only through the procedure provided by law. BRCKO DISTRICT LAW ON COURTS art. 11.



Factor 9: Contempt/Subpoena/ Enforcement

Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.

Conclusion

Correlation: Negative

The judiciary does have contempt, subpoena, and enforcement powers, but too often judges fail to invoke them. In addition, existing laws in this area are often inadequate or overly complicated.

Analysis/Background:

Laws in both entities and the Brcko District provide courts with contempt, subpoena, and enforcement powers. Federation and RS law allow judges to order the police to bring in witnesses in civil and criminal cases, and witnesses who fail to appear may also be fined. FEDERATION LAW ON CRIMINAL PROCEDURE art. 232, O.G.F.BiH, No. 43/98; FEDERATION LAW ON CIVIL PROCEDURE art. 230, O.G.F.BiH, No.42/98; RS LAW ON CRIMINAL PROCEDURE art. 237(1), O.G. Federal Republic of Yugoslavia, No. 4/77; RS LAW ON CIVIL PROCEDURE art. 248, O.G. Federal Republic of Yugoslavia, No. 4/77. Both sets of codes also allow judges to sanction lawyers for deliberately delaying court proceedings. The primary problem is that these provisions are rarely invoked.

As noted in the United Nations Judicial System Assessment Program (JSAP), *Thematic Report X: Serving the Public: The Delivery of Justice in Bosnia and Herzegovina* (November 2000) [hereinafter *Thematic Report X*], judges often have a tendency not to be coercive, and they will send multiple summonses rather than force the attendance of a witness. Sanctioning of lawyers by the courts is even more rare. Experienced lawyers have little fear of judges, and they intimidate many younger judges. The result is that lawyers fail to appear at hearings or engage in other delaying tactics with little concern for reprisals by the courts.

Enforcement of judgments, particularly in the context of civil cases, is extremely problematic. The law is complex and cumbersome, resulting in an endless shuffling of cases between lower courts, appellate courts, and executing authorities. Because the execution of a civil judgment requires the filing of a separate action, judges in the underlying cases give little heed to enforcement concerns. In politically contentious cases, such as property returns to refugees and displaced persons and the reinstatement of employees illegally terminated on the basis of their ethnicity, court decisions generally are enforced only after intensive and sustained international pressure.

III. Financial Resources

Factor 10: Budgetary Input

The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.

Conclusion	Correlation: Negative
The judiciary's ability to influence the decisions about its funding levels is very limited.	

Analysis/Background:

The judiciary has a very limited ability to influence decisions about the amount of funding it receives. In both entities, court presidents must submit annual budget requests to the relevant ministry of justice. The ministries of justice have no obligation to support the amount requested by the judiciary, and the latter has no real ability to lobby the legislatures directly in support of its requests. The actual amount of funding made available to the judiciary through the ministries of justice typically is less than the total approved by the legislature, and it is dispersed on a monthly or semi-monthly basis. Court presidents never know how much money they will receive in a given month, and they must constantly juggle their finances as a result.

The general calculation of the appropriate level of funding for a particular court is based on the number of court employees. Several respondents noted that this was not a rational basis for assessing the judiciary's budgetary needs, a conclusion that was also reached by the UN's JSAP.

With the exception of Sarajevo and the Brcko District, the level of funding for the courts is woefully inadequate and a significant impediment to judicial efficiency. Courts do not have sufficient funding for supplies, utilities, postage, or expert witness fees and investigation costs – among other expenses. Most courts face substantial debts. The current outstanding court debts reported ranged from 200,000 KM in the Banja Luka District Court, 50,000 KM in Trebinje District Court, 40,000 KM in Mostar Cantonal Court, and 20,000-60,000 KM for each municipal court in Bihac. As a result, some courts have to ration electricity or are unable to mail documents. One judge reported that the processing of new cases in his court was delayed because of insufficient funds to purchase folders for the case files. A lack of adequate funding for expert witnesses makes it extremely difficult for courts to retain their services or insure their attendance at court hearings. The dire financial situation of the courts arguably suggests that the relevant governmental authorities purposefully underfund the courts to insure a weak judiciary. The political arms of government in BiH have little or no understanding of the importance of an independent judiciary, and they have little respect for judges and the courts.

Proposed legislation that would provide the judiciary with a more meaningful opportunity to influence funding decisions and give it greater autonomy in budgetary expenditures is currently under development in both entities, with the assistance of the international community.



Factor 11: Adequacy of Judicial Salaries

Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.

Conclusion	Correlation: Positive
As a result of a recent substantial increase, judicial salaries are adequate for a judge to support his or her family without recourse to outside income. Nevertheless, these salaries are not paid in a timely manner, and their introduction was solely the result of international pressure.	

Analysis/Background:

Recent legislation has dramatically increased salaries for judges in both entities, and the salaries of the newly-appointed judges in the Brcko District are comparable. The Federation Law on Judicial and Prosecutorial Service, imposed last year by the High Representative, establishes a base for calculating judicial salaries that is the equivalent of two and a half times the average net salary of Federation employees. The actual salaries of judges are determined by multiplying the base figure by a coefficient of 1.5 for municipal court judges, 1.8 for cantonal court judges, and 2.1 for Federation-level judges. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 35. The RS Law on Courts and Judicial Service, adopted last year by the RS National Assembly with substantial pressure from OHR, establishes a nearly identical judicial salary framework, except that the salary base is set at three times the average net salary of RS employees. RS LAW ON COURTS AND JUDICIAL SERVICE art. 88.

As a result of these new laws, monthly salaries for municipal or basic court judges in the two entities are approximately 2,000 KM (\$909). Salaries for cantonal or district court judges are between 2,500-3,000 KM (\$1,136-\$1,364), and salaries for entity-level judges are approximately 3,000-4,000 KM (\$1,364-\$1,818). In the Brcko District, the monthly salaries are 3,200 KM (\$1,454) for basic court judges and 3,550 KM (\$1,614) for appellate court judges.

While these new salaries are considered adequate by judges, a few caveats are worth noting. The salaries are not paid in a timely fashion in either entity. As of early July, judges in the RS had only been paid through February, while most Federation judges had only been paid through April. Such delays are a source of anxiety among judges, and they raise doubts about the security of their salaries. Moreover, judges universally (and correctly) attribute their new salaries entirely to the sustained pressure of the international community on domestic authorities. In a comment that typified the overwhelming view of her colleagues, one judge noted that if the Office of the High Representative abandoned Bosnia, “our salaries would be cut in less than 48 hours.” Indeed, many judges refer to the two new judicial service laws as “Petritsch’s Law,” in reference to the High Representative.



Factor 12: Judicial Buildings

Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.

Conclusion	Correlation: Negative
For the most part, judicial buildings are conveniently located and easy to find. As a result of their generally poor condition, however, most of them do not provide a respectable environment for the dispensation of justice.	

Analysis/Background:

Judicial buildings generally are conveniently located and easy to find, in smaller towns as well as in larger cities. With few exceptions, however, they generally do not provide a respectable environment for the dispensation of justice. Lack of space is a major problem. Because of a scarcity of courtrooms, most judges hold hearings in their cramped offices. At the municipal court level, it is not uncommon for two or three judges to share a single office. The interiors of court buildings tend to be dilapidated and in need of repair. A number of respondents suggested that, in general, courts are in worse condition than other public buildings and that the condition of the courts provides an overwhelmingly negative impression of the judiciary to the citizens who enter them.

There are exceptions to this generally dismal state of affairs. The main court building in Sarajevo has been thoroughly renovated, and its imposing Austro-Hungarian-era grandeur provides a dignified setting for the courts. In terms of its appearance and condition, it would not be out of place in many Western European cities. The Mostar cantonal court is also in excellent condition.

Factor 13: Judicial Security

Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.

Conclusion	Correlation: Negative
Threats against judges occur with some regularity, and court security is minimal. Special court police divisions established by law have yet to be fully implemented.	

Analysis/Background:

Most judges view dealing with threats as a reality of their jobs. Four respondent judges reported being the subject of threats, and most others knew of examples of threats to their colleagues. There are several well-known recent instances of assaults and threats, including a judge in Bihac, who was physically attacked and beaten because she executed an employment reinstatement decision, and a judge in Sarajevo, who received verbal threats while presiding over the trial of a notorious reputed gangster.



Security at most courts is minimal. The main Sarajevo court building now has a metal detector and an x-ray conveyer belt through which all entrants must pass, but the vast majority of courts have no effective procedures for screening entrants for weapons. Judges who have received specific threats are eligible for limited police protection.

As the current state of judicial security would suggest, limited resources are allocated to protecting judges and the courts. In the Federation, the Judicial Police, whose duties include court security, have only been established in four of the 10 cantons. The Court Guards called for in the RS have yet to be established in any RS court. See RS LAW ON COURTS AND JUDICIAL SERVICE arts. 101-104.

IV. Structural Safeguards

Factor 14: Guaranteed Tenure

Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.

<u>Conclusion</u>	<u>Correlation: Positive</u>
Once the current one-time review of all sitting judges is completed, all senior judges will serve either life terms or fixed terms that provide a long-term guaranteed tenure.	

Analysis/Background:

Senior judges are given fixed terms that provide a long-term guaranteed tenure, with the caveat that all current judges in both entities are undergoing the current review procedure described below in Factor 17. The BiH Constitution provides that the initially appointed judges of the BiH Constitutional Court, including the international members of the Court, shall serve for five years and shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70. BiH CONSTITUTION art. VI(1)(c). In the Federation, Constitutional Court, Supreme Court, and cantonal court judges shall serve until age 70. FEDERATION CONSTITUTION arts. IV(C)(6)(c) & V(11)(3). The RS Constitution provides that RS Constitutional Court judges serve eight-year terms and are not eligible for reappointment. RS CONSTITUTION art. 116(2). All other RS judges, from the RS Supreme Court to the basic courts, have life tenure. RS LAW ON COURTS AND JUDICIAL SERVICE art. 5. Brcko District judges initially must complete a one-year probationary period. After the successful completion of this term, they serve until age 70. BRCKO DISTRICT LAW ON COURTS art. 6(2).

Factor 15: Objective Judicial Advancement Criteria

Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.

Conclusion	Correlation: <u>Neutral</u>
With the new judicial commissions in place for only nine months, it is too early to evaluate the objectiveness of judicial advancement.	

Analysis/Background:

Pursuant to the Federation Law on Judicial and Prosecutorial Service, the RS Law on Courts and Judicial Service, and the Brcko District Law on Courts, the judicial commissions have primary authority for the advancement of judges within the judicial system through their authority to nominate candidates for all judicial vacancies. The Federation law specifically references “an evaluation of the quality of judge’s [] decisions (sic)” as one of the criteria to be considered, while the RS law refers more generally to “professional and human qualities.” FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE, art. 18; RS LAW ON COURTS AND JUDICIAL SERVICE art. 47. The Brcko District Law on Courts refers simply to the requirement that all candidates for judicial office have “appropriate training and qualification in law.” BRCKO DISTRICT LAW ON COURTS art. 23. Most respondents expressed the hope that the new judicial commissions would develop objective criteria for measuring a judge’s performance, and it is simply too early to evaluate the commissions’ work in this regard.

The courts maintain regular records of the number of cases a judge completes and the number of his or her decisions reversed on appeal. These figures are tracked on a monthly basis. The judicial commissions have all these records at their disposal, and members of the commissions indicate that they will be used to evaluate the performance of judges.

Respondents expressed different views on the objectivity of judicial advancement under the old system. Some suggested that, with the exception of some political favoritism, advancements were generally merit-based. Others suggested that the old system lacked any objectivity at all.

Factor 16: Judicial Immunity for Official Actions

Judges have immunity for actions taken in their official capacity.

Conclusion	Correlation: <u>Positive</u>
Judges in both entities and the Brcko District enjoy some form of immunity for their official acts.	

Analysis/Background:

The Federation Constitution provides that judges of the Federation Constitutional Court and Supreme Court shall not be held criminally or civilly liable for any act carried out within the scope of their respective authority. FEDERATION CONSTITUTION art. IV(C)(5). Under cantonal court laws, cantonal and municipal court judges in the Federation have indemnity protections, whereby the



canton is deemed responsible for harm inflicted by the judge in the course of his duties, with the exception of intentional harm or extreme negligence. See, e.g., SARAJEVO LAW ON COURTS art. 97; BOSNA-PODRINJE CANTON GORAZDE LAW ON COURTS art. 126.

RS judges also enjoy immunity protection, although its extent is left vague in the law. The RS Constitution provides RS Constitutional Court judges with the same immunity as RS National Assembly deputies. Such officials may not be held criminally liable or punished for an opinion expressed or vote cast in the Assembly, and they may not be arrested without the approval of the Assembly (unless caught in the act of a crime punishable by more than five years). Once an official has invoked his immunity, he may only have criminal proceedings instituted against him with the approval of the Assembly. RS CONSTITUTION art. 117.

Article 5 of the RS Law on Courts and Judicial Service states that “judges shall enjoy immunity,” without defining its nature. The same article also provides that “[t]he immunity shall be decided on by the High Judicial Council.” RS LAW ON COURTS AND JUDICIAL SERVICE art. 5. In addition, of The RS Constitution provides that “no one participating in a trial shall be held responsible for an opinion expressed in the passing of a court decision, nor can anyone be detained in proceedings instituted because of a criminal offense committed in performing the judicial function without the approval of the National Assembly.” RS CONSTITUTION art. 126.

Brcko District judges also enjoy immunity. The Statute of the Brcko District provides that judges “shall not be held criminally or civilly liable for any acts carried out or opinions expressed in the performance of their official duties.” STATUTE OF THE BRCKO DISTRICT art. 68.

The BiH Constitution does not provide any explicit immunity protection to members of the BiH Constitutional Court.

Factor 17: Removal and Discipline of Judges

Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
A one-time vetting process of sitting judges by the new judicial commissions is currently underway, through which the performance of every judge will be reviewed and those deemed unsuitable will be removed. The commissions will also have substantial ongoing responsibility for the discipline and removal of judges. It is too early to evaluate the fairness and effectiveness of this process.	

Analysis/Background:

The new judicial service laws in both entities introduced a one-time comprehensive vetting of all sitting judges. The relevant judicial commissions are responsible for evaluating all judges in both entities to determine whether their performance fulfills the objective criteria set forth in the two laws. The review must be completed within 18 months of the establishment of the commissions. In the Federation, if the relevant commission determines that a judge is unfit to continue on the bench, it will forward this conclusion to the relevant body or official responsible for appointing and removing judges and request that the judge be removed from office. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 70. In the RS, the HJC must recommend the removal of all judges it deems unsuitable to the RS National Assembly. RS LAW ON COURTS AND JUDICIAL SERVICE art. 105.



As of the beginning of July 2001, the commissions had been in place for almost nine months, and no judges had been removed. Some commissions have held hearings, but there is reason to believe that the commissions need to exhibit greater professionalism. Most respondents believed that the commissions would, in fact, remove some judges, although no one anticipated a substantial number of removals. There is no tradition in BiH of removing judges for misconduct, and most respondents could not recall a single instance of a judge being removed or disciplined for such behavior. It is too early to conclusively evaluate the degree of fairness and transparency of the one-time review process or the new permanent disciplinary and removal process. After the review period, both the Federation and RS laws give the new commissions ongoing disciplinary and removal powers.

The Federation Law on Judicial and Prosecutorial Service lists ten violations that may subject a judge to disciplinary procedures, including a violation of the code of judicial ethics. Disciplinary procedures against a judge in the Federation are initiated and conducted by the relevant court president. However, a court president must notify the relevant judicial commission and receive an opinion on the matter from that body before initiating such a procedure. Federation Constitutional Court and Supreme Court judges may only be removed by a consensus of their colleagues, but the Federal Judicial Commission must be notified and issue an opinion before removal procedures can be initiated. Cantonal court judges may only be removed by consensus of the judges of the Federation Supreme Court, and municipal court judges may only be removed by consensus of the judges of the relevant cantonal court; as with Federation-level judges, such removals can only be initiated after review by the relevant commission. See FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 24.

In the RS, the High Judicial Council now has authority over the discipline and removal of judges. The Law on Courts and Judicial Service specifies five grounds for disciplinary action, including a violation of the judicial ethics code. The HJC may initiate a disciplinary procedure itself, or upon referral from the relevant court president or any citizen of BiH. The law provides that a first instance panel of three HJC members will rule on a disciplinary matter, with a judge of the Supreme Court serving in the role of disciplinary prosecutor. The provisions of the RS Criminal Procedure Code shall be applied during the proceeding. Appeals of the decision of the first instance panel may be taken to a second instance disciplinary panel, composed of five different HJC members. See RS LAW ON COURTS AND JUDICIAL SERVICE art. 56.

Factor 18: Case Assignment

Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.

<u>Conclusion</u>	<u>Correlation: Negative</u>
Although there has been a recent shift to random case assignment in select courts, for the most part, court presidents still retain the unfettered authority to assign cases.	

Analysis/Background:

The method of case assignment in both entities and the Brcko District is up to the relevant court president. For the most part, court presidents (or their designated division heads in larger courts) assign cases themselves. Proponents of this system argue that it allows for a greater equality of individual caseloads, since court presidents can insure that each judge has a similar



balance of complex and simple cases and that it allows for more experienced judges to handle the most difficult cases. Several respondents suggested that this system leads to abuses, in which court presidents assign and reassign cases for improper purposes. For example, there is evidence that court presidents have assigned politically disfavored criminal prosecutions to inexperienced judges (to insure acquittals).

Through its JSAP program, the UN Mission in BiH initiated a campaign to urge court presidents to adopt a random case assignment method. Several courts have adopted such a system. Judges in these courts are assigned cases in random numerical succession (for example, a judge in a court with four judges receives every fourth case). Nevertheless, even such a system is subject to abuse. One respondent judge noted that, because of the unsystematic process of logging in new cases, it is easy to manipulate the numerical order of incoming cases.

Factor 19: Judicial Associations

An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
Judicial associations exist in both entities. They hold regular meetings and put on various educational seminars for judges. They have both been given significant new roles in the appointment of judges as a result of recent legislation. Nevertheless, there is a split of opinion regarding the level of effectiveness of the associations.	

Analysis/Background:

Judges' associations exist in both entities, but not in the Brcko District. The Association of Judges in the Federation of BiH (AJF) was founded in mid-1996, and its counterpart in the RS, the Association of Judges and Prosecutors in the RS (AJPRS), was founded in 1998. The AJF has had three presidents, each chosen after a contested selection process, while the AJPRS has had the same leadership throughout its existence. Both associations hold annual assemblies and regular presidency meetings, and both conduct training programs for judges with the support of ABA/CEELI. The AJPRS also produces a regular newsletter that it sends to its membership. In addition, a new cantonal association of judges became active in Mostar in 2000. Although its formal relationship with the AJF is somewhat ambiguous, in all relevant respects it acts as an autonomous association. The Mostar association has conducted several judicial training programs.

The new judicial appointment procedures that went into effect in 2000 gave the AJF and AJPRS a substantial new role in the appointment of judges. The Federation Law on Judicial and Prosecutorial Service provides that two of the seven members of the Federal Commission for the Election and Appointment of Judges be from the AJF. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE art. 6. The RS Law on Courts and Judicial Service provides that the AJPRS president and five District Court judges selected by the AJPRS be members of the 13-member High Judicial Council responsible for recommending all RS judicial appointments. RS LAW ON COURTS AND JUDICIAL SERVICE art. 46.

There is a lack of consensus among judges about the overall effectiveness of the AJF and AJPRS. In each entity, respondents split sharply over the level of activity of the respective associations. Those who felt the associations were active cited their educational seminars and their defense of judges attacked by politicians (the latter comment was limited to respondents in



the Federation; one RS respondent suggested the AJPRS was not sufficiently vigilant in this regard). Critics viewed the association's leadership as too insular, disconnected from its membership, and not adequately engaged in the major legal reform battles of the day. To generalize, the more progressive and reform-minded respondents wished for the associations to be more active as vehicles for change, while other respondents were more satisfied with the associations' focus on educational seminars.

V. Accountability and Transparency

Factor 20: Judicial Decisions and Improper Influence

Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.

<i>Conclusion</i>	<i>Correlation: Negative</i>
Improper influences on judicial decisions are a significant problem, and they include bribes, requests for specific outcomes by friends and colleagues of judges, <i>ex parte</i> communications, and political pressure, most of which is exerted indirectly. More broadly, the judicial system is plagued by an inability to banish ethnic considerations from decision-making, particularly within the highest judicial bodies.	

Analysis/Background:

Improper influence by litigants and other interested parties is a pervasive problem. The perception that one needs to “pull strings” to achieve a desired result in the legal process is deeply ingrained in the public mentality. The tradition of collegiality and informality within the legal profession fosters a permissive environment for such activity.

One respondent judge admitted to being offered bribes on several occasions. He viewed the problem as common enough that he avoids being alone in his office, as such offers are typically made without any witnesses present. Two other respondent judges suggested that attempts by colleagues and friends to influence their decisions in particular cases are routine occurrences.

In general, *ex parte* communications are common and not viewed as problematic by many judges. Such communications are not prohibited by either the judicial service laws or the judicial ethics codes of either entity and are most prevalent at the municipal and basic court levels. The Brcko District's Law on Courts does contain detailed prohibitions of such behavior. BRCKO DISTRICT LAW ON COURTS art. 33. As noted below in Factor 21, these new provisions in Brcko seem to be adhered to by judges.

Quantifying political pressure on the judiciary is inherently difficult. One respondent cited an example of overt political pressure, a letter from a Ministry of Interior official to an investigative judge instructing him not to indict a police chief without performing a “very thorough investigation.” JSAP's *Thematic Report IX: Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina* (November 2000) catalogues several similar examples of overt political influence. For the most part, respondent judges denied knowledge of any such direct pressure but admitted that indirect pressure exists. The most commonly cited form of the latter was comments by political figures reported in the media criticizing judges or the judiciary in general.



There is no question that the highly-charged, ethno-political environment in BiH affects judicial decision-making. As one respondent put it, “you don’t see it, you feel it.” As a result of self-preservation instincts developed under a half-century of communism and a decade of war, judges have learned how to avoid crossing powerful political actors. For example, in one canton in which there are a significant number of court cases involving Bosniak plaintiffs attempting to regain their property in Croat-controlled areas, Croat judges on the cantonal court reportedly delay processing such cases as a matter of course. It is unlikely that they are instructed to do so by political officials, but they surely understand that to handle the cases efficiently would be detrimental to their careers. Several respondents noted that the likelihood of direct and indirect political pressure is greatest in public corruption cases and other matters involving political figures. The Federation Ombudsmen’s Office concluded in its *2000 Annual Report* that political pressure on the judiciary is most prevalent in employment-related rights cases (typically reinstatement cases) and evictions.

A few respondents suggested that political influence over the judiciary has decreased in the Federation in those jurisdictions no longer controlled by the two dominant nationalist political parties. One respondent suggested that attempts by political figures to influence the courts may actually increase in the near future, as intensive international pressure results in the courts handling more prosecutions of public figures for corruption.

A related problem is the inability of many judges to evaluate legal issues before them without inserting their own ethnic biases. At the highest judicial bodies, particularly the BiH Constitutional Court, the Human Rights Chamber, and the Federation and RS Constitutional Courts, the votes of the domestic judges almost uniformly fall along ethnic lines. The best-known example of this is the BiH Constitutional Court’s “constituent peoples” case, in which the two Bosniak justices voted to strike down the laws at issue while the four Serbs and Croats voted to uphold them (the case was decided 5 to 4, with all three international justices siding with their Bosniak colleagues). There are no “conservative” or “liberal” domestic judges on these courts, and there is no evidence to suggest that these judges analyze the issues before them with consistent theories of legal interpretation that are removed from considerations of ethnicity. This problem persists despite the fact that, with the exception of the RS Constitutional Court, all of these courts have had international members working closely with their domestic counterparts for years.

Factor 21: Code of Ethics

A judicial code of ethics exists to address major issues, such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.

Conclusion	Correlation: Negative
Although judicial ethics codes exist in both entities, they are not widely understood or followed, and they have never been enforced. By contrast, new judicial ethics codes in the Brcko District appear to have been implemented successfully, albeit as a result of intensive international scrutiny. Judicial ethics training is not required of new or sitting judges in either entity, while the new Brcko judges did undergo mandatory training in this regard.	



Analysis/Background:

In 1999, the AJF and the AJPRS issued a joint statement through which they committed their members to adhere to a code of judicial ethics. Each association adopted its own code, but the texts are nearly identical. Each code contains five articles, covering the issues of judicial independence, fairness and impartiality, conflicts of interest, professionalism and training, and outside activities. The codes do not provide detailed guidance to judges, but are statements of general principles.

The Federation Law on Judicial and Prosecutorial Service requires that judges respect the standards set forth in the codes adopted by the AJF at all times, and the law identifies conduct that violates the code as one of the specific activities subjecting a judge to disciplinary procedures. FEDERATION LAW ON JUDICIAL AND PROSECUTORIAL SERVICE arts. 2 & 24. Similarly, the RS Law on Courts and Judicial Service incorporates the code adopted by the AJPRS, and the law identifies a violation of the code as an activity subjecting a judge to disciplinary procedures. RS LAW ON COURTS AND JUDICIAL SERVICE art. 56.

Despite the adoption of judicial ethics codes by the judges' associations and their recent incorporation into the judicial service laws of both entities, the codes remain dead letters in both the Federation and the RS. It is unclear whether every judge has a copy of the code, and it appears that most judges have at best only a vague familiarity with its provisions. Some respondents were not aware of the codes at all, and some others were unclear whether they had been adopted. Respondent judges familiar with the codes typically viewed the ban on political party membership – arguably, the least important code provision -- as the code's defining element, as opposed to those provisions governing the specific behavior of judges. No respondent could recall an instance in which a judge had been disciplined for violating the codes.

The situation in the Brcko District is significantly better. The Brcko District Law on Courts includes 21 articles with specific judicial ethics provisions, including detailed prohibitions of *ex parte* communications, conflicts of interest, acceptance of gifts, and other activities. BRCKO DISTRICT LAW ON COURTS arts. 27-47. Aware of the intensive oversight of OHR officials, the newly-appointed Brcko judges reportedly are adhering to these provisions vigilantly. Judges pay close attention to appearances of conflicts of interest, allegedly not daring to enter cafes in which litigants are sitting. This behavior is recognized as a dramatic departure from customary practice. Brcko judges have reduced the frequency of oral communication with parties, requiring much more written communication with the court. One respondent suggested that citizens have noticed a change in behavior of Brcko judges since the new system was put in place and have commented that judges are now leaving their offices at 4:30 PM rather than 1:30 PM as in the past. Whether or not the new judicial ethics practices of Brcko judges will take root over the long term remains to be seen. For the moment, there is no question that the difference in adherence to ethics provisions between Brcko and the entities is a result of the vigilant international oversight in the former.

Judges in both entities are not required to undergo any training on judicial ethics, either before or after taking office. The Brcko District judges who took office in April 2001 were all required to receive training on judicial ethics conducted by OHR.



Factor 22: Judicial Conduct Complaint Process

A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.

<u>Conclusion</u>	<u>Correlation: Neutral</u>
A new effort to solicit public comments about judges was initiated by OHR in 2000, and it has resulted in a substantial number of complaints filed by citizens with the new judicial commissions. It is too early to assess whether the complaints are being handled appropriately.	

Analysis/Background:

In conjunction with the vetting of all current judges mandated by the new judicial service laws, OHR launched a campaign in 2000 to solicit complaints by the public against sitting judges. Notices explaining the complaint procedure were aired on television stations and in newspapers. Citizens in both entities were encouraged to file written complaints with either the Federal Judicial Commission (FJC) or the RS High Judicial Council (HJC). Statistics released in June 2000 suggested that the FJC had received 512 complaints, while the HJC had received 151 (there are 572 judges in the Federation and 282 in the RS).

Under the preexisting system, citizens were able to file complaints about a specific judge with the relevant court president (complaints filed with the Ministry of Justice would be forwarded to the court president), who was responsible for disciplining judges in his or her court. This system continues in the Federation under the new law, except that before a court president initiates any disciplinary action, he or she must request an opinion from the Federal Commission or the relevant Cantonal Commission. Under the RS Law on Courts and Judicial Service, public complaints may be referred directly to the HJC, and citizens may still file complaints with court presidents. RS LAW ON COURTS AND JUDICIAL SERVICE, art. 55(2).

The majority of public complaints involve claims of unjustified delays in resolving pending cases. It is too early to evaluate the handling of public complaints by the new commissions, although a number of respondents complained that the commissions have been slow to process them. However, because the review of public complaints is being conducted as part of the one-time, comprehensive vetting process of all sitting judges, it is perhaps not surprising that such complaints have been handled in a methodical manner.

Factor 23: Public and Media Access to Proceedings

Courtroom proceedings are open to, and can accommodate, the public and the media.

<u>Conclusion</u>	<u>Correlation: Neutral</u>
While court proceedings generally are open to the public and media, exceptions to this principle are broadly worded and ill-defined. Lack of courtroom space also hinders public access.	



Analysis/Background:

The Federation Constitution states that all court proceedings shall be open “unless otherwise provided by legislation for certain exceptional situations.” FEDERATION CONSTITUTION art. IV(C)(4). Cantonal court laws generally provide that the public may only be excluded from court proceedings to protect a “secret,” “public morality,” “special state interests,” or the interests of minors. See, e.g., SARAJEVO LAW ON COURTS art. 9; BOSNA-PODRINJE CANTON GORAZDE LAW ON COURTS art. 9. The Sarajevo and Gorazde laws on courts also provide that the courts are to enable public awareness of their work through the media.

Similar provisions apply in the RS and the Brcko District. The RS Constitution establishes that court hearings shall be public, but that “[t]he public may be excluded from a court hearing in the cases specified by the law for the purpose of protecting the special interests of the Republic, preserving a secret, protecting moral and interest of juvenile, private life of the parties to the proceedings and protecting other public interest (*sic*).” RS CONSTITUTION art. 124. The RS Law on Courts and Judicial Service contains similar provisions, with additional exceptions for the protection of “public order” and in cases “where publicity would prejudice the interests of justice, consistent with the standards set forth in Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.” RS LAW ON COURTS AND JUDICIAL SERVICE art. 9. The Brcko District Law on Courts provides that all court proceedings are open to the public “unless otherwise provided by law.” BRCKO DISTRICT LAW ON COURTS art. 9.

Other substantive laws in both entities and the Brcko District also contain restrictions on the openness of court proceedings. The criminal procedure codes provide that the public is excluded from juvenile cases, and the family laws provide for exclusion in certain divorce and custody cases.

A practical impediment to public access to court proceedings is the limited space available. Most hearings are held in a judge’s office, which generally can hold no more than five or six people at best. When there is a trial that generates considerable public interest, such as a homicide or war crimes case, courts generally hold proceedings in the largest courtroom in the particular jurisdiction, but even these may not be big enough for the demand. Journalists typically do not have problems attending court proceedings, although the video or audio taping of court proceedings is prohibited. In general, judges are unaccustomed to handling public and media interest in the judicial process.

Factor 24: Publication of Judicial Decisions

Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.

<i>Conclusion</i>	<i>Correlation: Negative</i>
Judicial decisions are rarely published and not readily available.	

Analysis/Background:

The vast majority of judicial decisions are never published. BiH, Federation, and RS Constitutional Court decisions are published in the relevant official government gazettes, but the date of publication is usually months after the decision is announced, and the gazettes are not



widely available. Most BiH Constitutional Court decisions are published in a separate bulletin of the Court, but the frequency of its publication is dependent on international donor support.

The Federation and RS Supreme Courts publish bi-annual bulletins, which include some commentaries on decisions but rarely include actual decisions themselves. The only other court in BiH that has a bulletin is the Sarajevo Cantonal Court; similarly, it publishes mostly commentaries and extracts of decisions. The AJPRS publishes a bi-annual magazine entitled *Glasnik Pravde* ("The Herald of Justice"), which does include extracts from RS and Federation court decisions and a few decisions from Yugoslavia and Croatia.

The Human Rights Chamber has by far the most comprehensive publishing system of any judicial body in BiH. All Chamber decisions are issued in writing (in local languages and English) on the day they are announced, and they are subsequently published in volumes semi-annually.

In terms of access to unpublished decisions, a litigant typically receives a copy of the decision, but, as in the case of court records, a scholarly researcher or interested third party would have to get approval from the court president. If it is a case involving privacy concerns--juvenile, divorce or family law--specific restrictions may apply.

Several respondents suggested that the quality of academic discourse relating to the judiciary has diminished significantly since the pre-war period, to the detriment of the country's jurisprudence.

Factor 25: Maintenance of Trial Records

A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.

<i>Conclusion</i>	<i>Correlation: Negative</i>
Courts do not create verbatim transcripts of proceedings, and the court records that are maintained are not easily obtained by the public.	

Analysis/Background:

Courts do not produce verbatim transcripts of proceedings. The official record of any court proceeding consists solely of the judge's oral summary of the testimony of witnesses and the argument of counsel, which is transcribed by a court staff person. In addition to consuming considerable time, this process results in a record that reflects the judge's perception of the evidence and arguments.

Public access to these records is very limited and falls within the discretion of court presidents. Anyone other than a party to a particular case must justify his or her reason for obtaining the records, and several respondents suggested that a specific academic or journalistic purpose usually is required. Even if the records are made available, the requester often may only review them at the court and in the presence of court staff. In sum, courts are not accustomed to handling such requests, and there is no systematic method of dealing with them.

Newly-enacted freedom of information laws provide specific public access rights to court records and other government documents, but they have yet to be implemented. At present, the courts are ill-prepared to handle any significant volume of requests that may arise under the new laws.



VI. Efficiency

Factor 26: Court Support Staff

Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.

Conclusion	Correlation: <i>Neutral</i>
Adequate staffing exists for the most part, but staff morale has become a problem as a result of increased pay discrepancies between judges and staff.	

Analysis/Background:

In general, most courts have adequate numbers of support staff. The number of authorized staff positions in a particular court usually is prescribed in internal court rules through a fixed ratio of judicial to non-judicial staff. In Tuzla Canton, for example, 1.4 typists and 1.4 administrative-accounting staff are authorized for each municipal court judge. In its *Thematic Report X*, JSAP suggested that the courts it studied generally had more staff per judge than authorized in the court rules, with some courts having as many as five employees per judge.

The morale of support staff has been seriously affected recently by the new pay discrepancies between judges and staff. As a result of the new judicial pay raises that went into effect in 2000, most judges received a six-fold increase in their monthly salaries, while judicial support staff received no increase at all. This has fueled some resentment among staff. In addition, with the exception of basic computer training for staff in courts that have computers, there are few, if any, training opportunities for judicial staff.

Factor 27: Judicial Positions

A system exists so that new judicial positions are created as needed.

Conclusion	Correlation: <i>Neutral</i>
The laws allow for the creation of new judicial positions as needed. However, the number of judges deemed appropriate is based on established judicial performance quotas, a mechanism that itself fosters inefficiency.	



Analysis/Background:

In the Federation, the cantonal ministers of justice determine standards for the required number of judges in their cantons, in consultation with the courts. The precise number of Federation Supreme Court judges is left to be determined by Federation legislation, but it must be at least nine. FEDERATION CONSTITUTION art. IV(C)(14). The RS Law on Courts and Judicial Service provides that the number of judges in each court will be determined by the High Judicial Council upon the proposal of the Minister of Justice. RS LAW ON COURTS AND JUDICIAL SERVICE art. 40. In the Brcko District, the Brcko District Judicial Commission determines the number of judges at each court upon the proposal of the court presidents. BRCKO DISTRICT LAW ON COURTS art. 5.

The number of judges allocated to each court in principle is calculated by dividing the number of new cases filed in a given year by the quota of cases a judge is required to complete during the year, with consideration also given to the population of the relevant jurisdiction. The quota is set forth in local court rules, which establish monthly “norms” of completed cases that each judge must meet. While this method of calculation appears to be commonly used by relevant officials, several respondent judges stated that the actual number of judicial positions established in a jurisdiction is often inconsistent with the number suggested by its application.

The notion of calculating a judge’s performance by the number of cases completed is deeply ingrained in the judicial culture, and it perpetuates a quota mentality that undermines the administration of justice. A number of judges complained about the inappropriateness of specific norms, the disparity of norms among jurisdictions, and the fact that the norms are set by the relevant ministries of justice instead of the judges, but no judge questioned the premise of a judicial system driven by case quotas.

The judicial quota mentality naturally affects the manner in which a judge approaches his or her caseload. As one respondent suggested, a judge who has met his quota of concluded cases before the end of a particular month may put off the conclusion of a case until the following month to help insure that he will meet that month’s norm as well. As noted in JSAP’s *Thematic Report X*, this system encourages judges to postpone the handling of complex cases and process cases that are easier to conclude.

Factor 28: Case Filing and Tracking Systems

The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.

<i>Conclusion</i>	<i>Correlation: Negative</i>
The current system of case filing and tracking is rudimentary, and it is very difficult to calculate the time between the initial filing of a case and its ultimate conclusion.	

Analysis/Background:

The standard case filing system is more or less the same throughout all jurisdictions, and it is set forth in the internal court rules for each court. Each new case is entered into a register maintained by the court registry office. The file is then forwarded to the court president or the chief of the relevant court division (criminal, civil, etc). The division chief or president then



assigns the case to a particular judge. In principle, all case files are to be kept in the registry office, but many judges end up keeping them in their own offices. One judge reported that he keeps all his case files in his office out of fear that they otherwise would be manipulated. There are no prescribed time limits for the forwarding of new case files described above. One judge reported that her court president keeps new cases for months before assigning them. In most courts, the registry of cases is done manually, and it is not computerized.

As JSAP observed in its *Thematic Report X*, the number of registered cases pending in all courts does not necessarily coincide with the total number of actual cases in the system. This is because, when an appeal is filed, a case is re-registered as a new case with a new case number. If the case is remanded to the original court (as is typical), it is again re-registered as yet another new case. As a result, it is extremely difficult for the judicial system to track the time between the original filing of a case and the issuance of a final decision.

Many judges fail to see any significant problem with the current case filing system, but this is most likely the result of its familiarity and the judges' lack of exposure to other methods. JSAP identified a number of problems resulting from the current system, including diffuse and inefficient hearings, lost files, periods of significant inaction, and an assumption that events will not occur as scheduled.

Factor 29: Computers and Office Equipment

The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.

Conclusion	Correlation: Negative
Although certain courts are well-furnished with computers, most jurisdictions have an insufficient number.	

Analysis/Background:

In general, the courts lack adequate computers. In some jurisdictions (Sarajevo, Mostar, Tuzla and Brcko, for example), virtually all high-level judges have their own computers, and the courts generally are well-furnished with word processing equipment. In most jurisdictions, however, particularly at the lower court levels, there are very few computers. In these courts, judges and staff must rely on old typewriters for their word-processing needs.

Factor 30: Distribution and Indexing of Current Law

A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.

Conclusion	Correlation: Negative
For the most part, judges do not have adequate access to new legislation and to legal literature generally, and there is no widely used system for identifying and organizing changes in the law.	



Analysis/Background:

New laws are not readily available to most judges. Most laws are only published in the official gazettes of the entities, and the vast majority of courts are unable to provide subscriptions for each judge. In most courts, only the court presidents and department heads receive copies (one exception is Brcko, where all judges receive the Brcko District Official Gazette). In some courts, there is only a single set of existing legal codes for all judges to share. In general, judges have little access to legal literature. There is a distinct lack of legislative commentaries, which are particularly necessary given the substantial changes in the law that have taken place in recent years, e.g., in the area of commercial law. Several RS judges noted that the only reliable source of judicial practice is the bi-annual journal produced and distributed by the AJPRS (with international donor support).

There is no widely used system in place for identifying and organizing changes in the law. In the Federation, there does exist a publication entitled "Legal Guide," published in cooperation with the Federation Official Gazette. Published annually with monthly supplements, it is organized by subject area and identifies the volume number of the relevant official gazette edition in which all laws and amendments for each area can be located. It does not include the texts of laws and amendments themselves. The guide encompasses state, entity (both Federation and RS) and cantonal laws. It is unclear how widely available the Legal Guide is to judges, but it would appear that most judges do not have access to it (particularly in the RS). As an annual subscription is 135 KM (approximately \$68), the Legal Guide most likely is beyond the means of the majority of courts.