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Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-War Bosnia and Herzegovina

David Pimentel*

I. INTRODUCTION

While judicial reform projects are underway in many countries, particularly in the developing world, it is unusual for the reform efforts to include a complete restructuring of a court system which redefines the number, size, and location of courts, as well as their territorial and subject-matter jurisdiction. A court restructuring initiative in post-war Bosnia and Herzegovina, therefore, broke new ground in its effort to divine the guiding principles for how many courts are needed, where they are needed, and how many judges are required for each of them. The report of that effort—entitled *Restructuring the Court System: Report and Proposal* (“Report”)—has not, until now, been published in a way that makes it available to those considering similar issues. This deficiency is unfortunate, as the principles derived for that restructuring effort, both in terms of the substantive criteria applied and the political issues anticipated and managed, are instructive and worth preserving. This Article summarizes those principles, recounts the Author’s experiences and challenges in restructuring the courts, and also attaches the full Report of the court restructuring team in Bosnia and Herzegovina for the benefit of future efforts along similar lines.

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II. BACKGROUND

The structure of any country's court system—specifically, the number and location of courts—is rarely the product of a comprehensive exercise in central planning. Court systems tend to evolve historically, with courts created on an ad hoc basis, responding to economic growth and shifting demographics.¹ Once created and organized, an existing court configuration will persist long after any coherent justification has disappeared.²

Consider the map of the circuits in the United States Federal Court system. The cluster of geographically small circuits in the northeastern part of the country stand in almost comical contrast to the huge circuits of the West, which consist not only of much larger states but, for the most part, more states in each circuit.³ The population dispersion of the United States in 1891 undoubtedly justified defining the circuits this way,⁴ but population patterns of the twenty-first century no longer map the original circuit distribution. While adjustments in the geographical boundaries of a circuit's jurisdiction have been made—as with the split of the Eighth Circuit to form the new Tenth Circuit in 1929⁵ and the split of the Fifth Circuit to form the new Eleventh Circuit in 1981⁶—such

¹ See generally Kermit Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990* (Carlson 1991) (explaining the division of Florida into three federal districts).

² It has been suggested that the reason Puerto Rico was made part of the First Circuit (otherwise composed of New England states: Massachusetts, Rhode Island, New Hampshire, and Maine) in 1915 is that Puerto Rican business was dominated by Boston merchants, an economic legacy of the infamous “triangle trade” that connected Boston to Africa to the Caribbean. Whether or not this is true, the jurisdictional connection between the two places has outlived any economic or other apparent logical connection that may have existed at the time the jurisdictional lines were drawn. See Manuel Del Valle, *Puerto Rico before the United States Supreme Court*, 19 Rev Jur UPR 1, 13, 21–22 (1984) (describing the importance of international trade between the northeastern United States and Puerto Rico, and its regulation, in the years before Puerto Rico was added to the First Circuit). But even this does not explain Puerto Rico's attachment to Boston and the First Circuit, as it appears that by the end of the nineteenth century Puerto Rico's primary trade was with New York in the Second Circuit. *Id.*

³ A good map of the configuration of federal circuits can be found through the Administrative Office of the US Courts, *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, available online at <<http://www.uscourts.gov/images/CircuitMap.pdf>> (visited Apr 5, 2008).

⁴ Evarts Act (Circuit Court of Appeals Act), 26 Stat 826 (1891) (creating the United States Federal Circuit Courts of Appeals and organizing them into nine circuits).

⁵ An Act to Amend Sections 116, 118, and 126 of the Judicial Code, 45 Stat 1346 (1929).

⁶ Fifth Circuit Court of Appeals Reorganization Act of 1980, 94 Stat 1994, codified at 96 PL 452 (amending 28 USC § 41 by limiting the Fifth Circuit's jurisdiction to Louisiana, Mississippi, Texas, and the District of the Canal Zone and creating a new Eleventh Circuit with jurisdiction over Alabama, Florida, and Georgia).

changes are rare and can be exceedingly difficult to effect. An example of this difficulty is illustrated by the decades-long protracted battle to split the Ninth Circuit.⁷

Only once in a great while is there an opportunity to do a comprehensive reassessment and completely redraw the map on court configurations, right down to the trial court level.⁸ As a result of the rarity of such an exercise, there is no significant body of experience, or other generally-accepted wisdom, to draw upon in approaching it.

This was the dilemma that faced the international community in Sarajevo in 2001–2002, as it assisted in the execution of institutional reforms to implement the Dayton Peace Accords that ended the war in the former Yugoslavia. The Independent Judicial Commission (“IJC”), established under the auspices of the Office of the High Representative,⁹ had launched a major initiative to reform the courts of Bosnia and Herzegovina. A key element of that initiative was a comprehensive restructuring of the courts.¹⁰ The problem was where and how to begin such a project.

The European Union had pledged money to hire two experts to lead the restructuring effort, but after circulation of the Terms of Reference on two separate occasions—first in late 2001 and again in the spring of 2002—it became clear that no such experts were available and that, in all probability, they did not

⁷ See generally Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (1998), available online at <<http://www.library.unt.edu/gpo/csafca/final/apstruc.pdf>> (visited Apr 5, 2008); see also Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals, Hearing on HR 62-498 before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 106th Cong, 1st Sess (1999), available online at <http://commdocs.house.gov/committees/judiciary/hju62498.000/hju62498_0.htm> (visited Apr 5, 2008) (“Comm on Structural Alternatives”); US Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts, *Hearing on “Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem”* (2005), available online at <http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4726> (visited Apr 5, 2008) (testimony of Circuit Judge Diarmuid O’Scannlain).

⁸ An examination of the Federal Courts of Appeals has been made within the last decade by the Commission on Structural Alternatives for the Federal Courts of Appeals, but this did not include any consideration of the courts of first instance. See Comm on Structural Alternatives, *Final Report* (cited in note 7).

⁹ The Office of the High Representative (“OHR”) was created by the Peace Implementation Council (“PIC”) created under the Dayton Peace Accords. Office of the High Representative and EU Special Representative, *Decision Providing the Independent Judicial Commission (“IJC”) with a Comprehensive Mandate* (2001), available online at <http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=69> (visited Apr 5, 2008); see also Dayton Peace Accords (1995), annex 10, art I(2)-II, 35 ILM 75, 146–47 (1996).

¹⁰ *Final Report of the Independent Judicial Commission, Restructuring of the Regular Court System* 95 (2004), available online at <http://www.hjpc.ba/reports/pdf/final_report_eng.pdf> (visited Apr 5, 2008) (“IJC Final Report”).

exist. After all, when was the last time anyone had done a comprehensive restructuring of a nation's court system? What opportunity could there be for anyone to become an "expert" in court restructuring?

In the end, the IJC's Court Restructuring team—a small collection of national and international lawyers in Sarajevo—independently developed the principles and criteria for this project,¹¹ without specialized expert advice or input. It was a highly consultative process, however, drawing upon the advice of experts in other aspects of judicial reform¹² and with considerable attention paid to the views of stakeholders in the project. The resulting Report is a remarkably straightforward document, somewhat deceptive in its simplicity. In truth, the project was enormously complex and politically volatile; the simplicity of the Report was part of the strategy for navigating turbulent political waters. Within the Report, it appears that the IJC Court Restructuring team acted without regard to, and perhaps even in ignorance of, the wide range of political factors, political implications, and political repercussions (including ethnic tensions) implicated and generated by the restructuring effort. In fact, the effort was keenly aware of such factors, and after careful consideration and deliberation over these matters, determined to write a report that made no mention of such matters, but based all of its recommendations and conclusions based on simple and straightforward criteria.

The Report was initially posted by the IJC on its website, and later on the website of Bosnia and Herzegovina's High Judicial and Prosecutorial Council. But the Report is no longer available online, and it is important that this work be published where it can be available to others considering similar questions.

¹¹ The team and its supervisors consisted of judges and lawyers from Finland, France, New Zealand, Norway, Sweden, and the United States. It was also ably supported by national lawyers from within Bosnia and Herzegovina. For the names of those involved, see note *.

¹² The team includes veterans of reform efforts in Mongolia, Uzbekistan, and East Timor, as well as principals in the earlier Judicial System Assessment Programme ("JSAP") in Bosnia and Herzegovina, a UN project to monitor and assess the judicial system in Bosnia and Herzegovina, initiated by the Security Council of the United Nations. See Security Council Res No 1184, UN Doc S/RES/1184 (1998); see also Peace and Security Section of the Department of Public Information for the United Nations, *Bosnia and Herzegovina—UNMIBH—Mandate* (2003), available online at <<http://www.un.org/Depts/dpko/missions/unmibh/mandate.html>> (visited Apr 5, 2008) (explaining that the organization referred to in Security Council Resolution 1184 eventually became known as the JSAP). JSAP's series of "thematic reports" set the stage for most of the judicial reform that took place in Bosnia and Herzegovina in the years that followed. See, for example, JSAP, *Thematic Report IX POLITICAL INFLUENCE: The Independence of the Judiciary in Bosnia and Herzegovina*, UN Mission in Bosnia-Herzegovina (2000), available online at <<http://hjpc.ba/docs/jasp/pdf/TR%20IX%20Political%20influence.pdf>> (visited Apr 5, 2008). For a more complete description of JSAP, see the website of Bosnia's High Judicial and Prosecutorial Councils, *JSAP (Judicial System Assessment Programme)*, available online at <<http://hjpc.ba/docs/jasp/?cid=2444,1,1>> (visited Apr 5, 2008).

While the analysis is most relevant in the setting of post-conflict, transitional justice, it may have broader implications in more stable societies, including the recurring question of whether and when to merge or to split courts to accommodate ever-shifting demographics. The Report is, therefore, republished here as Appendix 1. To place the Report in better context, and to understand the political environment from which it sprang, some additional comments and reflections are added below.

III. WHY RESTRUCTURE COURTS?

A legitimate threshold question when considering the restructuring of a court system is why such a thing should be done. Undoubtedly, one of the main reasons that comprehensive court reconfigurations are so rare is that there is hardly ever a compelling reason to make them, and simple inertia makes them nearly impossible to start. As long as the courts are functioning effectively, there is little reason to tamper with them; and if they are not functioning effectively, the best remedy is unlikely to be found in a complete restructuring of the courts' territorial jurisdiction.¹³

The reason for restructuring the courts in Bosnia was usually articulated in terms of efficiency.¹⁴ There were too many courts and too many judges, creating unsustainable cost burdens on already-strapped public budgets.¹⁵ The donor community in Sarajevo, particularly the Americans, shared this consensus that a restructuring involving consolidation of courts and reduction in the number of judges was necessary.¹⁶ The vision was to create a "leaner, meaner" judiciary.

¹³ Even when the configuration of the United States federal courts has in fact been altered, as in splitting circuits, the motivation for doing so has, at times, been dubious. For example, while no one could defend the existing configuration of circuits, at least in terms of demographics, the primary proponents of splitting the Ninth Circuit appear to have been motivated more by their unhappiness with the liberal rulings of the Ninth Circuit than with addressing demographic shifts. Accord Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 *Duke L J* 351, 356 (1997) ("While the Senate broke with its long tradition of delay in circuit-splitting matters with its dramatic appropriations rider, it acted too quickly and for the wrong reasons. The proposal is borne of frustration with the circuit's perceived liberal leanings."). This example also shows that such restructuring is likely to be unsuccessful. Because splitting the Ninth Circuit would do nothing to alter the ideological orientation of the life tenured judges who sit in those nine western states, court restructuring would be a blunt instrument, if it could be effective at all, for addressing the critics' grievances.

¹⁴ See, for example, IJC Final Report at 97 (cited in note 10) (referencing the 2002 "reinvigorated strategy" for judicial reform in BiH, "which referred to restructuring courts and prosecutors' offices in order to reduce inefficiency").

¹⁵ *Id.* at 107–17.

¹⁶ This point was emphasized in repeated meetings between the author and Robyn Goodkind, Senior Democracy Adviser, US Agency for International Development Sarajevo (one of which was held at the IJC offices on March 20, 2002 and another in Ms. Goodkind's office on May 15,

A second factor was the commonly held perception that small courts in small towns—places where everyone knows everyone else—were more vulnerable to ethical compromise, or at least to bias.¹⁷ It was hoped that larger courts, located in urban centers, would be more likely to dispense justice even-handedly.

A third concern revolved around the new courts established during and after the war, which effectively institutionalized separation of the ethnic communities, perpetuating the ethnic cleansing pursued and achieved by certain parties to the conflict.¹⁸ During the conflict, Serbs fighting for a greater Serbia could not be expected to go to an area, or a court, controlled by Bosniak Muslims to have their legal disputes resolved. The separatist Serb Democratic Party formed its own government and parliament after leaving the BiH parliament in 1992; that government established its own courts in Serb-controlled areas in part to legitimize the Republika Srpska as a nation with constitutional order.¹⁹ The City of Mostar, deeply divided between ethnic Croats and Bosniak Muslims, had parallel courts just a few hundred meters apart, one serving the Croat side of town and another serving the Bosniak side of town.²⁰ Clearly the restructuring had to undo some of the court configurations that were symbols of ethnic division; this step was critical to developing a viable long-term peaceful coexistence of former combatants in post-war Bosnian and Herzegovinan society.

2002) and with Richard Prosen, Political Officer at the US Embassy in Sarajevo during March–October of 2002 (the first of which was held at the US Embassy in Sarajevo on March 13, 2002). The author also met with Niina Lehtinen, Task Manager for the European Initiative for Democracy and Human Rights (representing the European Commission) on April 8, 2002 in the IJC offices, where this viewpoint was also expressed.

¹⁷ IJC Final Report at 95 (cited in note 10) (“It is difficult for a judge to maintain independence, and the appearance of it, in a small town where all the participants in the judicial process know each other personally. . . . Entrenchment in the local community was perceived by OHR to be a particular problem with respect to sensitive criminal prosecutions.”).

¹⁸ This was a very sensitive subject within OHR, because its purpose was to facilitate the implementation of the Dayton Peace Accords, which by their very terms guaranteed some of the ethnic separation the Serbs had fought for in the war. See Dayton Peace Accords, Annex 2 (cited in note 9). See also note 44. On the other hand, building a foundation for a lasting peace required every effort to ease the ethnic tensions.

¹⁹ Email message from Kari Kiesiläinen, Deputy Director, Chief, Monitoring and Implementation Department, Independent Judicial Commission 2001–02 (Feb 19, 2008) (quoting Tim Hughes, Deputy Chief of the Monitoring and Implementation Department) (on file with author).

²⁰ The city had, on its books at least, a third court covering the “Central Zone” in Mostar, a city of less than 100,000 people, although that court never actually functioned for lack of a building. For further explanation of the issues in Mostar, see IJC Final Report at 89–93 (cited in note 10).

A fourth objective of the court restructuring project was to facilitate the vetting of the judges themselves, providing a basis for reappointment of the entire judiciary. The restructuring was a critical element in this process.

A. THE JUDICIAL VETTING AND REAPPOINTMENT PROJECT

The need to vet judges was driven by the widely-perceived pattern of corruption and incompetence throughout the system, to which several factors contributed.

A threshold issue concerned judges' compensation, which was minimal considering the functions and responsibilities of the position. Judges were paid so little (the equivalent of a few hundred dollars a month) that they needed other sources of income merely to subsist. This, of course, created virtually irresistible incentives for judges to exploit their official position for financial advantage.²¹ Even legitimate business opportunities, pursued on the side, were prone to create conflicts of interest.

There were also concerns about the competence of judges, as it appeared that some had been appointed due to political connections, quite regardless of qualifications.²² It was perceived that some judges of marginal competence were appointed during the war as well, not necessarily out of corrupt favoritism, but simply because of the scarcity of competent candidates for appointment during the conflict.²³

Even the most qualified, competent, and ethical of the judges in the courts of Bosnia and Herzegovina—for they certainly were not all incompetent or corrupt²⁴—had been working for years in a system characterized by low expectations.²⁵ The reform effort needed a completely new culture of high expectations for judges' conduct, performance, and industry: an independent judiciary that would be a cornerstone of the rule of law in post-war Bosnia and Herzegovina. A reappointment process, by which judges had to compete for newly created judgeships, would help turn the page of history, creating a new

²¹ JSAP, *Thematic Report IX* at sec 4.4, 15–17 (cited in note 12).

²² *Id* at sec 4.3, 14–15 (cited in note 12) (discussing how judges of marginal competence were appointed based on political affiliation and loyalty).

²³ *Id* at 14.

²⁴ See IJC Final Report at 63 (cited in note 10) (“approximately 70% of the incumbent judges and prosecutors *were* reappointed”).

²⁵ There were low expectations on just about every level. Judgeships were characterized by low pay and relatively low prestige. Expectations of judicial fairness and impartiality were also minimal. Many judges worked just hard enough to turn out their “quota” of court decisions each month; it was common for them to come to work late and leave early. See, for example, JSAP, *Thematic Report IX* at sec 3, 10–11 (cited in note 12).

culture in the court system, inaugurating a new judiciary untainted by the flaws or failings of its predecessor.

B. INTERNATIONAL RESISTANCE TO JUDICIAL REAPPOINTMENT PROCESS

The proposed approach was to “sack”²⁶ all the existing judges and require them to apply in order to be reinstated.²⁷ Wholesale removal of judges without cause, without proof of wrongdoing or incompetence, and without due process, raised some concerns in the human rights community, however, which contended that this approach would be inconsistent with Article 6 of the European Convention on Human Rights.²⁸ In April 2002, the Council of Europe, the guardian of that Convention, sent representatives to Sarajevo to urge the High Representative to be less ambitious and to limit the vetting operation to the removal of judges who, after being accorded full procedural due process,²⁹ could be shown to be unworthy of their post.³⁰

Those who were closest to the issues of corruption in the Bosnian judiciary, however, believed that the problems of corruption and incompetence were so widespread and endemic that a far more comprehensive sweep of the system was necessary.³¹ Judges’ salaries had been increased dramatically,³² not only removing the economic pressure to take bribes, but also making these positions very desirable, sufficient perhaps to attract better-qualified candidates. A rigorous screening process for new appointments would allow the appointing authority, a new High Judicial and Prosecutorial Council, to weed out anyone of

²⁶ The term “sack” is British slang, used widely in the international community during this debate. It means dismiss or fire someone from employment. Its origin, by popular understanding, was the traditional practice of giving a discharged employee a sack to pack his personal things in as he was leaving the workplace for the last time.

²⁷ IJC Final Report at 54–58 (cited in note 10).

²⁸ Convention for the Protection of Human Rights and Freedoms, 213 UN Treaty Ser 221 (1950), available online at <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>> (visited Apr 5, 2008).

²⁹ Of course, no one spoke in terms of “procedural due process” as this is a phrase unique to American jurisprudence. The preferred terminology in the international community for this concept is “natural justice”; that is, they urge an approach that can be implemented in a manner “consistent with principles of natural justice.”

³⁰ The author was present at the meeting which took place in OHR offices in Sarajevo on April 15, 2002.

³¹ For example, the Senior Deputy High Representative, Mathias Sonn, met with the Council of Europe representatives on April 15, 2002 and expressed this view which reflected the consensus and advice of IJC staff. *Id.*

³² The salary increases ranged from 2.7 to 4.8 times their previous levels. IJC Final Report at 115 (cited in note 10).

dubious ethics or competence.³³ This approach was considered far superior—both more effective and more efficient—than trying to target the individual judges suspected of wrongdoing or incompetence and attempting to make the case for their removal. The latter approach would place a heavy burden of proof on the vetting authority, would be costly in terms of both time and money, and would be completely ineffective at redressing such problems as nepotism and favoritism in appointments³⁴ and mediocrity in performance.³⁵

The court restructuring project, therefore, provided a very convenient basis for achieving the clean sweep without violating basic principles of human rights. While dismissing a judge without cause and naming a replacement to that post might arguably run afoul of human rights principles, eliminating a judgeship as part of legitimate restructuring is not nearly as problematic.³⁶ Accordingly, the High Representative could simply eliminate all the judgeships—effectively removing all sitting judges—and then make appointments to new and different judgeships with jurisdictions different from those that had previously existed.

These highly desirable posts—with greater powers, for the most part, and with a far higher salary—would attract the best and brightest of the Bosnian legal community. Additionally, the appointments could be reserved for those who were above reproach, untainted by the more dubious aspects of the judiciary's history or the war's legacy of ethnic oppression. It was, for example, a common practice during the war, after ethnic cleansing drove people from their homes, for these homes—particularly the nicer ones—to be claimed and occupied by people in the ethnic group that remained in the area.³⁷ It was determined, as a threshold matter in the judicial screening process, that judges or judicial candidates who had profited by the forced evacuations in this way should not be eligible for judicial appointment.³⁸

The comprehensive court restructuring was therefore essential in the creation of new and different judgeships. The old courts and their judicial posts were to be eliminated and replaced with a newly configured judicial system, with different jurisdiction and fewer judgeships. Judges who lost their jobs in the

³³ See id at 54–60 (explaining the reappointment process in detail).

³⁴ See Sections III.B and III.D.1.a.

³⁵ See Sections III.D.1.b and III.D.1.c.

³⁶ This idea was widely accepted in the international community in Sarajevo at the time, but its roots may have been more diplomatic than substantive. By characterizing the project as a restructuring for the purpose of reinventing the judiciary, the dismissal of sitting judges could be viewed as merely a side effect of the larger reform project. It did not, however, alter the fact that life-tenured judges lost their positions.

³⁷ Email message from Kari Kiesilainen, Deputy Director, Chief, Monitoring and Implementation Department, Independent Judicial Commission 2001–02 (Feb 13, 2008) (on file with author).

³⁸ Id.

restructuring could still apply, and many of them, in the end, *were* selected for the new posts; after all, they were the most qualified in terms of judicial experience.³⁹ Thus, the restructuring facilitated a “clean sweep” of the judiciary that retained qualified and ethical judges while ridding the courts of both the weak and the corrupt judges, without having to prove cases against each of them individually.

IV. HOW TO APPROACH THE RESTRUCTURING PROJECT

The mechanics of redrawing might be mistaken as a relatively straightforward—if complex—enterprise, involving examination of distances, populations, economic connections between regions, and existing geographical and political boundaries. Any veteran of even the most simple court restructuring efforts, however, will note that the associated political battles of such a project provide the challenges that are the most daunting.⁴⁰ No local politician or local populace wants to lose “their” court. The rhetoric of the municipal leaders throughout the court restructuring process—particularly from those facing closure of their local court—reflected their sense that the community would be better served by having a “court of its own.” This argument, however, is a problematic one, as a court that is sensitive to local issues and concerns is also a court that might favor local interests over outsiders’ interests, creating an uneven playing field against the visiting party. Diversity jurisdiction in the US federal courts was premised on the fear and recognition that out-of-state interests could be “home-towned” by the local court if they were forced to litigate their cases in the state courts. The expectation that federal courts would not indulge in such local biases was a basic principle in judicial federalism. Consistent with these principles, Bosnian pleas for “a court of our own”—in the aftermath of the ugliest ethnic conflict in Europe since World War II—were unpersuasive.

A. SUBSTANTIVE CONSIDERATIONS

For the reasons set forth below, tremendous efforts were made to adhere to objective criteria and to justify any difficult decisions with a simple and straightforward application of such criteria. The Report itself goes into considerable detail discussing the data used and the methodology adopted for determining which courts should be consolidated and how many judges should be required for each of them.⁴¹ It is not necessary to restate that detail here.

³⁹ IJC Final Report at 63 (cited in note 10) (approximately 70 percent of the incumbent judges and prosecutors *were* reappointed).

⁴⁰ See, for example, Gribbin, 47 Duke L.J at 396–97 (cited in note 13).

⁴¹ Annex at § 1.4–1.6.

B. POLITICAL CONSIDERATIONS

Judges and politicians throughout Bosnia and Herzegovina were highly suspicious of the court restructuring project before it began. At a forum in Sarajevo in April 2002 arranged by the Judges' Association of the Federation of Bosnia and Herzegovina, court presidents and ministers of justice from throughout the Federation voiced their concerns that the criteria for restructuring had not been articulated.⁴² They feared a nontransparent process, perhaps driven by the invidious sentiments—pitting one ethnic group against another—that dominated public discourse in the region both during and after the war. Such fears were understandable; Bosnia and Bosnians had had little experience with transparency in the making of public policy, or of any such process being conducted without the taint of partisan or ethnic politics.

In any case, whatever court consolidations were proposed would prompt a defensive reaction from those who stood to lose from the proposition, who felt slighted when their local court was closed when one comparable, but in an area dominated by a different ethnic or political group, was being kept open. The potential for the court restructuring project to fan the flames of conflict was enormous; it was essential that the project be approached in a way that did not prompt such reactions. Judicial reform was part of a larger peace implementation agenda and could not be allowed to undermine the larger agenda it was supposed to be supporting. Some feared that it could not be done.⁴³

However, the restructuring was not abandoned. To minimize the risk of the project's foundering over political sensitivities, the project adhered to several key principles and strategies. These are summarized below.

1. Transparency

The only way this process could go forward was by being as open and transparent as possible and by demonstrating how each decision was supported

⁴² This forum, which took place at Federation Ministry of Justice Headquarters in Sarajevo, is referenced in the IJC Final Report at 98 (cited in note 10). In addition to the forum described in the text, the author met separately with no fewer than twenty court presidents and ministers of Justice, most of whom articulated these suspicions and concerns. A "court president" in Bosnia is the presiding judge of a court, much like the "chief judge" in an American court. There were multiple ministers of justice involved because each of the ten cantons of the Federation of Bosnia and Herzegovina had its own minister of justice, as did the Republika Srpska. A "canton" is a political jurisdiction, roughly resembling a "county" in the United States.

⁴³ This concern—the impossibility of navigating the political waters to accomplish the court restructuring—was expressed with vehemence at the April forum referenced above and was echoed in many of the Court Restructuring teams' on-site meetings with local court presidents and ministers of justice all across Bosnia in June and July 2002.

by objective criteria. This was a daunting prospect in a complex society fraught with ethnic and political strife. The Dayton Peace Accord itself only sharpened the tensions, as it formally enshrined some of the ethnic division that the reform was so eager to avoid.⁴⁴ All parties were likely to see ethnic or political motives behind *any* court closure or consolidation decisions. The objective criteria that dictated the decisions had to be clearly and openly disclosed.

2. Drawing Out the Critics with a Preliminary Report

The court restructuring team needed to focus the discussion and inquiry on “the criteria” rather than on the unique circumstances of specific localities. Extensive, open-ended consultation before producing any report would only prolong the period of anxiety and suspicion, setting the stage for a round condemnation of the report when it finally issued.

The court restructuring team, therefore, attempted to forestall that reaction by publishing a preliminary report at the outset, announcing that extensive consultation could follow. The hope was that the preliminary report could be criticized as ill-informed or ill-conceived without damaging the project overall; after all, it was only preliminary, issued with an open admission that further background and consultation would be necessary. Criticism at this stage could therefore be characterized as an aid, rather than a threat, to the project; indeed the project actively *invited* criticism at this stage as a part of its overall methodology.

The preliminary report was assembled in a matter of a few weeks by a small team of judicial reform officers at the IJC, all of whom had experience dealing with the problems and issues in the Bosnian judiciary,⁴⁵ and then widely circulated. It drew on commonsense notions for how to approach the question of court restructuring, set forth the basic proposed criteria, and projected probable outcomes for the courts and localities that would be closed and

⁴⁴ Under the terms of the Dayton Peace Accords, Bosnia was partitioned into two entities, largely along ethnic lines. General Framework Agreement for Peace in Bosnia and Herzegovina (1995), 35 ILM 89 (1996) (“Dayton Peace Accord”); see also Department of State, *Summary of the Dayton Peace Agreement on Bosnia-Herzegovina*, annex 2, (Nov 30, 1995), available online at <http://www.pbs.org/newshour/bb/bosnia/dayton_peace.html> (visited Apr 5, 2008) (offering a more concise and comprehensive statement of the content and import of the Dayton Peace Accord). The “Republika Srpska,” as suggested by its name, was an entity designed to be governed by and for Serbs. This level of Serb autonomy in Bosnia is what the Bosnian Serbs had fought for in the war and won in the peace agreement. It could not be dismissed or disregarded in the peace implementation process, of which court restructuring was but one element.

⁴⁵ One of the members of the team, Stephanie McPhail, had been an author of the JSAP *Thematic Report IX* (cited in note 12), and was intimately acquainted with the problems and weaknesses of the Bosnian judiciary. For composition of the IJC’s court restructuring team, see notes *, 11–12.

consolidated under the application of these criteria. This report put everyone on notice immediately about which courts were vulnerable to elimination and why.

3. Active Consultation with Affected Parties, with Emphasis on the Criteria

Unsurprisingly, many parties were angered and frustrated by the proposals for court closures and consolidations. In responding to this reception, the team made a concerted effort to meet with every court president and minister of justice to seek their input and comment and to visit every court proposed to be eliminated, as well as every court that would be required to absorb the caseload from a court slated for closure. Whenever angry protests were raised, the team could respond calmly that the preliminary report was just a proposal, and they were happy to be persuaded that the Final Report should be different, as long as the ultimate action could be justified in terms of objective criteria. The team could thus redirect the discussion away from sensitive political issues and back towards the criteria themselves.

Because the consultations were done on the basis of the preliminary report, and because they emphasized the criteria to be applied, they were focused and productive. More protracted discussions took place over the fate of certain courts whose failure to meet the criteria was disputed.⁴⁶ These included meetings and follow-up meetings, with mayors, court presidents, and other officials, both at the locations in question and at IJC Headquarters in Sarajevo. The end result of this procedure was that when the Report was finally issued, less than three months after the preliminary report was circulated, it contained no surprises. The criteria themselves—objective and quantifiable—had been fully aired, and the conclusions drawn by the team could be clearly justified by their application.

While some disagreed with some of the conclusions—that, for example, cultural, historical, or political realities should have been considered in such a way as to keep a court open despite its failing to meet objective criteria—the

⁴⁶ There were many arguments raised for why the proposed consolidations did not make sense in certain communities. In one case in Herzegovina, for example, one municipality, Ljubuški, had been the traditional and historical center of the region, while a newer community not far away, Široki Brijeg, had grown rapidly in recent years and was a larger area in terms of population and caseload. It appeared at first that there was insufficient caseload and population overall to support courts in both areas, and it was interesting to observe that when it came to deciding between the two, the Bosnian members of the court restructuring team felt that the historical center court should be preserved, whereas the international members of the team—lacking that sense of historic tradition that comes with growing up in a place—were all inclined to keep the court in the newer, larger community. In the end, after extensive consultations with judges and other local government officials in the affected areas, a compromise was reached, redrawing other boundaries to create districts with a sufficient population and caseload base to justify the retention of both courts. IJC Final Report at 99 (cited in note 10).

restructuring project successfully avoided any significant criticism that it was biased in any way or pursuing a political agenda of its own.⁴⁷ It was probably for this reason that there was so little backlash when the High Representative—after only the slightest adjustments to the recommendations,⁴⁸ which were made in consultation with the court restructuring team—imposed the restructuring plan as a matter of law in a series of decisions shortly thereafter.⁴⁹

V. LESSONS LEARNED

The fact that the project succeeded—that is, that the court closures and consolidation were ultimately implemented—and did not generate the predicted maelstrom of political controversy, suggests the effectiveness of the strategies employed: transparency, the release of a preliminary report, and active consultation focusing on the appropriateness of the objective criteria with affected parties.

It is also worth noting that this process did not require a long period of time. The preliminary report was drafted in the course of three weeks and circulated in late May 2002. Consultations with judges in ninety courts followed through June and mid-July. The final Report, with recommendations, was issued on August 15, 2002. The High Representative imposed the laws effecting the changes on November 1, 2002.⁵⁰ In some ways, the rapidity of the process, still allowing for intensive discussion, may have provided the IJC team an advantage by leaving insufficient time for those opposed to the project to organize any effective resistance. If the project had languished over the course of a year or

⁴⁷ For example, the court president of Kozarska Dubica was bitterly frustrated by the closure of her court. The court president and municipal leaders of Srebrenik were also very much frustrated. While they made zealous pleas on behalf of their respective courts before the final closures were announced, they did not come back to complain afterward. The municipality of Tomislavgrad sent a letter of protest, but only in Maglaj was there a concerted effort to overturn the decision to close the court; the political process in that canton considered exercising local control to reverse the High Representative's decision but ultimately determined not to do so. See IJC Final Report at 100, 104–05 (cited in note 10).

⁴⁸ Retention of the court in Žepče could not be justified by any of the objective criteria, but Žepče had been the source of particularly acute ethnic tensions in the past, and a previous High Representative decision had made special allowances there to accommodate and to ease those tensions. The initial draft of the report recommended the closure of the court in Žepče, but the High Representative's decisions on court restructuring, as described in note 49, made an exception and spared the Žepče court. The final draft of the report, Annex C, notes the exception made for the Žepče court.

⁴⁹ For the High Representative's decisions enacting into law the Amendments to the Law on Courts in each of the ten cantons of the Federation of Bosnia and Herzegovina as well as in the Republika Srpska, see *All High Representatives Decisions* (Nov 1, 2002), available online at <<http://www.ohr.int/decisions/archive.asp?m=&yr=2002>> (visited Apr 5, 2008).

⁵⁰ *Id.*

more, it may have appeared far more vulnerable to political opposition—the short timeline projected a greater sense of vigor and inevitability. Additionally, the expedition with which the project was carried out also sent the message that this was a no-nonsense, objective, by-the-book, and by-the-numbers operation; it came across largely untainted by implications of political or ethnic agendas.

As for the criteria ultimately adopted and relied upon for the restructuring exercise, the Report speaks clearly. The criteria chosen—essentially population data, history of case-filing statistics, and geographical distances—were entirely objective. The data used was beyond significant dispute or debate because it was obtained from official government sources.⁵¹ A terse simplicity of analysis and language in the Report was consciously chosen to give a robustness to the recommendations and to create less room for attempts to renegotiate at the margins. Subjective factors and political nuances—which can always be questioned or debated—were consciously excluded from the final Report, where every recommendation was supported by hard data.⁵²

Other lessons can be learned from mistakes that may have been made in the Bosnian court restructuring. The first was the reluctance to bring trusted, reform-minded judges and ministers more deeply into the planning process. They were consulted, of course, but mostly at arms length, with neither intensive nor extensive involvement in the entire exercise. It became apparent quite late in the process that a select number of the judges had much to offer in formulating proposals and strategizing for success. In particular, the team consulted judges on the estimated quotas—establishing workload expectations for judges to determine how many judges would be needed for each court.⁵³ It was with hesitation and trepidation that these judges were brought to the table, and their identity was carefully protected, in an effort to insulate them from backlash from their colleagues. The creativity and honest helpfulness of this group—selected with an eye to ethnic and geographic balance—was impressive, suggesting that the project may have benefitted from their input at earlier stages

⁵¹ At the very least, the data had come from the very same local governments later aggrieved by the court closure decisions generated by applying such data to the objective criteria. It was harder for them to criticize the decisions when they were the source of the data that—when applied to the criteria—produced that result.

⁵² The project team was not ignorant of the more subtle issues. Indeed, subjective considerations were frequently brought to the team's attention in the course of the project, by political advisors to the High Representative as well as Bosnian politicians concerned about the project's broader implications for pending political issues and forces. But the project team could not afford to let its project become a tool for anyone's political agenda, however salutary. The credibility, and consequently the viability, of the restructuring project depended on transparency with an unimpeachable, objective basis for its conclusions, applying the same criteria, the same way, to every court.

⁵³ See the Report at Sec 1.3 and Annex A.

and on a broader range of issues. That said, protecting the anonymity of such participants was of paramount importance, lest the project be perceived as the personal agenda of any personalities of influence in the Bosnian legal or judicial establishment. “Focus groups” involving such individuals might have been useful, as that would have elicited their input without giving them power in—and therefore blame for—the ultimate decisions.

The consultation process was carried out on an extremely swift timeframe, so there was not time to meet with all interested parties. While it was deemed necessary to meet with every Minister of Justice and every Court President whose court was slated for jurisdictional changes, the team did not meet with municipal leaders (for example, mayors). Some of these municipal authorities, those from Živinice and Srebrenik, for example, became actively involved in the consultation process anyway. It might have been wise to include them in the process from the outset. Perhaps better consultation with municipal leaders would have mitigated the negative reactions of the municipalities of Maglaj and Tomislavgrad.⁵⁴ This conclusion is uncertain, however, as the municipalities might only have been more agitated by meetings and consultations that did not yield favorable results for them.

Less useful from the political standpoint, but more significant in terms of meaningful input on the decisions would have been the ideas and thoughts of all the judges. Again, the judges consulted were essentially the court presidents alone. Had time permitted, it might have been helpful to conduct a forum of all judges in each jurisdiction, rather than limiting consultation to the court presidents. This process could have generated more and better comments about the proposals, simultaneously giving the judges themselves a stronger sense of participation in the process.

Particularly disappointing was the input received from the bar. Bar Association presidents and a couple of prominent attorneys were consulted, but they gave very little productive input. There was some evidence in the reserved and carefully worded comments of the attorneys consulted that they may have been afraid to voice opinions that might anger the judges; this is not surprising, as the attorneys have very little to gain by expressing their opinions on these topics and so much to lose—for example, the goodwill of the bench. It is not clear how the project might have better tapped the practicing attorneys in Bosnia on the questions of court restructuring, whether assurances of anonymity might have been effective or not, but it was clear that the strategy employed in this project failed to elicit meaningful support or advice from those who appear before the courts.

⁵⁴ See note 47.

Finally, it is clear that a number of unique circumstances—circumstances that may not be replicable elsewhere—helped this project. The High Representative’s power to impose legislation, and even constitutional amendments, substantially weakened the local authorities’ bargaining position on issues of court reform. The High Representative’s willingness to exercise that power was no less vital to the success of the project. It is a rare circumstance when that much political power is focused in a reform-minded individual. Most often, power is concentrated among those invested in the status quo, unwilling to push any kind of reform agenda. The fact that this was a post-conflict society with an outsider wielding the power of reform in the implementation of the peace agreement, therefore, made the reform opportunity unusual.⁵⁵

The project benefitted enormously from drawing upon the institutional knowledge and preliminary work of the IJC, as well as the Judicial System Assessment Programme. The “preliminary report” circulated in May 2002 was quickly assembled, but it was not entirely uninformed. Indeed, if it had betrayed a general ignorance of the realities of the Bosnian legal system, the credibility of the court restructuring team may have been irreparably damaged, jeopardizing the entire project.

VI. CONCLUSIONS

Overall, the court restructuring project in Bosnia and Herzegovina was successful in its stated purposes. The judicial appointment process proceeded on schedule and the court consolidations were implemented over the next several years. This success is remarkable for two reasons: first, the project was carried out in a highly charged political environment, and second, it was done by a team of professionals who, though resourceful and accomplished in their respective fields, had neither experience nor precedent to draw upon in approaching the restructuring task. The publication of this Article, with the Report attached, is designed to ensure that the lessons learned are preserved for future reference. Again, these lessons may be applicable in a wide variety of court reform contexts, whether in terms of the substantive criteria used to justify a court’s existence or closure, or in terms of the approach taken to minimize political backlash. How these lessons might apply to various judicial reform agendas, foreign and domestic—indeed, the attempts to reform courts in the United

⁵⁵ The situation is not, in fact, entirely unique, as the Author worked in South Sudan with local officials to establish an entirely new court system, under similar post-conflict circumstances. The Comprehensive Peace Agreement for Sudan, signed in 2005, called for South Sudan to enjoy six years of regional autonomy. There was no acceptable “status quo” here, as the South Sudanese government was eager to throw off the Islamic court system that the Khartoum government had long imposed. In this post-conflict environment, the people in power were highly invested in a complete reinvention of their court system.

States have certainly not been immune to politicization and partisan squabbling—is a topic for other papers and, perhaps, other authors.

The approach taken in this instance—both substantive and procedural—is not presented here necessarily as an ideal, but only as a record documenting what was done in Bosnia and Herzegovina. Future efforts can learn as much from the shortcomings of the Bosnian court restructuring as from the successes achieved. On issues of court configuration, however, groups who are interested in restructuring now have at least one source to look to, at least for ideas on how to restructure, if not a guide that can be followed. Not least among the lessons learned from the project is the simple fact no one was sure of at the outset: that it *can* be done.