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Judicial System Assessment Programme (JSAP)

THEMATIC REPORT VI

EXPERT EVIDENCE:

The use and misuse of court experts

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0 EXECUTIVE SUMMARY

The ability of the parties in a court case to obtain justice depends not only on the quality of the judge and counsel but also on the court's access to relevant evidence. In the inquisitorial system used in Bosnia and Herzegovina, court expert witnesses are regular participants in the judicial process and their evidence often plays a crucial role in the final decision. However, the appointment process for court experts is considerably less regulated than that for judges and prosecutors. Concern over the system of court experts has focussed on questions of independence, the quality of reporting and abdication of responsibility for decision making by undue reliance on expert reports.

In mid-1999, JSAP began an inquiry into the court expert system and this report is the result of that research. It looks at the system of appointment both generally and in individual cases, the financing of court experts, the quantity and quality of their reports and the possibility of abuse of the system in high profile and sensitive cases.

A number of aspects of the system were identified that could limit the independence of expert reporting and affect the rights of the parties to a fair trial. The lists of permanent court experts varies greatly in numbers and fields of expertise in different parts of the country and seems to bear little relationship to need. Neither is there any effective quality control of experts as they are appointed to the lists.

However, there are greater problems in the selection of experts in individual cases. The courts frequently disregard the lists and employ one particular expert in all cases in that field. Only in the larger courts is there any attempt to diversify. This practice is, however, not dictated by improper motives but rather lack of funds. In criminal cases, courts are obliged to pay the expert fees from their rather limited material expense budgets. This means that they are forced to bargain with experts who, in return for a fixed fee get a virtual monopoly on all work. However, the use of a limited pool of experts means that they have no incentive to improve the quality of their reporting or use new techniques or theories. Also, in sensitive cases, the courts have been known to appoint experts who are connected in some way with one of the parties and so cannot maintain the appearance of independence.

The quality of expert reports is also of serious concern. Many are too academic, extremely long and seem to have only a distant connection with the real world. This puts the parties in a difficult position if they wish to understand the case against them or challenge it. They are also frequently used where an expert report is not necessary, e.g. where another witness could testify on the matter or where a simple calculation is required that could be done by the judge. This is driven by the requirement on courts to establish the material truth.

As usual, the problems identified require a number of solutions. It is not necessary to abolish the entire system to achieve better results, although ultimately, the whole relationship of the court to the parties requires review, including consideration of adoption of a more adversarial process. As cases before the courts are becoming more complex, with genuine needs for expertise, it is an appropriate time for the judicial system to focus on this important issue.

1 INTRODUCTION

The ability of a judicial system to dispense effective, efficient and even-handed justice in particular cases depends on a variety of factors, one of which, clearly, is the people involved, both lay and professional. The principal actors in the process are the judges, prosecutors and counsel. More transient roles are played by the parties themselves and the witnesses called to present evidence on their behalf.

In focussing on how to improve the operation of the court system and the quality of justice, attention naturally focuses on the regular participants, there by virtue of their position, such as judges. However, in Bosnia and Herzegovina (BiH), a fundamental and repeated role is also played by expert witnesses, known as court experts. They play as established a role as any judge or counsel and often equally important. At the same time, their appointment and use is less regulated, leaving them potentially more open to outside pressure and influence. In evaluating their role, consideration also needs to be given to the application of the European Convention on Human Rights (ECHR) and in particular the principle of equality of arms.

JSAP concern over the use of court experts, the quality and independence of their reports and the level of reliance put on them by judges in individual cases, arose in the initial phase of JSAP's activities. The questions of the unavailability of certain types of expertise and the cost of expertise as a drain on court budgets were among matters drawn to our attention by the judges themselves.

In February 1999, JSAP Mostar began a detailed investigation into the question of court experts and this was later complemented by similar research undertaken by the Sarajevo team. The teams interviewed both judges and experts themselves on the topic, considered the relevant legal provisions, reviewed court files in which expert reports were presented and obtained information from court accounting departments on the cost of expertise. Since then, other JSAP teams have provided information on the use of experts in specific cases.

This report examines the institution of the court expert including his role in proceedings, the system of selection and appointment of experts, the funding system for court expertise in criminal cases and the quality and quantity of expert reports

The difficulty of obtaining accurate information on court budgets, along with both a reluctance and an inability to effectively second-guess court decisions and the conclusions of experts, have not prevented this report from drawing some general conclusions about the use of court experts in BiH and making some recommendations for reform, which can be found at the end of the report.

2 THE ROLE OF THE EXPERT WITNESS

2.1 The purpose of expert testimony

Judges cannot be and are not expected to be omniscient and, in particular, they are not expected to have any degree of specialist knowledge in domains other than law. In fact, for judges to use their own knowledge of different sciences is specifically discouraged on the grounds of possible lack of impartiality, even if the judge happens to be an expert in the field. In BiH, as elsewhere, the judiciary is expected to have knowledge of matters that are commonly known. Obvious ones are local geography and popular habits. Beyond that, some judges maintain that as professional educated people they should have a better than average knowledge of the world; others disagree.

In considering the use of court experts, it is important to distinguish between factual evidence and the evaluation of it. Factual evidence is generally presented to the court by eye-witnesses – people who describe situations and actions from first hand knowledge as participants or observers – and also includes objects, such as weapons and things left at the scene of the crime. The role of the expert is to evaluate this evidence in order to determine something else. For example, from considering medical reports and other evidence, an expert may be able to determine the seriousness of an injury; from looking at company balance sheets and from knowledge of the local business environment, an expert may be able to determine the worth of a company at a particular time; from considering the skid marks on the road, the damage sustained and other factors, an expert can determine the speed of a vehicle at the time it had an accident.

In general, however, expert testimony should not go to the "ultimate issue." An expert can make certain deductions from the factual evidence presented but should not give conclusions on matters that are for the judge to decide, such as guilt or innocence or contractual capacity. This distinction is sometimes hard to draw, as is that between facts and their interpretation. The relevance of these distinctions to the use of court experts is dealt with later in this report.

Legal systems have developed rules and methods by which the judicial system uses experts in different fields to evaluate factual evidence. There are different ways of doing this depending on the court system and the role of the judge and parties in relation to the evidence.

2.2 The common law tradition

At one end of the spectrum is the practice in common law countries, in which the parties are responsible for marshalling all the evidence that they think is required for their case and for ensuring the attendance of witnesses. They alone determine what evidence will be called and whether expertise is required. If evidence on a point in question is not called, the judge may decide on the case without that evidence, even if it is to one party's detriment. A clear example of this is that in criminal cases, if there is insufficient evidence to convict, the accused must be acquitted.

Common law trials favour one concentrated hearing rather than a series of shorter hearings. They permit rigorous cross-examination of every witness and encourage pragmatism and efficiency. It is considered important for evidence to be given orally so that the court can assess the demeanour, and hence credibility, of witnesses.

One feature of this system is that expert evidence is the exception rather than the rule. The courts encourage parties in civil proceedings to agree on as many issues as possible before a trial begins. This certainly contributes to the reduced need for expert evidence. In addition, if one party calls an expert, the other side generally calls its own expert, despite the rule that witnesses do not "belong" to one party. This use of two or more experts in each field can add substantially to both the length and the costs of the proceedings, thus providing a further practical disincentive for the use of experts.

Experts are chosen by the party calling them and are briefed by that party before the trial. They prepare their evidence on the basis of the facts given to them by that party. There are extensive procedural rules governing the presentation of expert evidence in court and the cross-examination of experts. Unlike other witnesses, experts attend the full court hearing and may be asked to revise their opinion in the light of a different factual background presented to court than that assumed when they prepared their report. Experts are expected to present their qualifications and suitability for the assignment as part of their evidence, as well as explaining in some cases the theoretical basis on which their evaluation is made. The judge has to decide between the various pieces of conflicting expert testimony.

Some professionals are not always happy to be asked to provide opinions, as this will almost always involve disagreeing with fellow professionals. In addition, although an expert is only doing his job, nobody likes to be on the losing side and in the adversarial system, at some point the judge will reject one expert's point of view.

Some aspects of the common law practice can be found in civil law jurisdictions that use a more adversarial approach.

2.3 The BiH tradition

With an inquisitorial civil law tradition, trial procedure in BiH is at the other end of the spectrum. Here the judge is in control of the proceedings and the parties and counsel play rather passive roles. Trials are held over a number of short hearings and it is common to have more than ten in any one case. Courts do not rely as much on the demeanour of witnesses in assessing evidence as on the court's written record made at each hearing. This is not taken verbatim as presented by the witness, but is the judge's summary of what the witness said.

It is the judge alone who determines who should be called as witnesses. The role of the court is to determine the "material truth" (explained below). Unlike adversarial systems, the court does not distinguish between the quality of different evidence. There is no rule that the best evidence must be presented and there is no preference, for example, for first hand evidence over that of an expert.

The effects of this system on the use, value and independence of expert testimony are dealt with in the rest of this report.

3 THE APPOINTMENT OF COURT EXPERTS

3.1 The list system

In theory, the court expert appointed to provide a report in any one case is selected by the judge from a list of permanent court experts.[1] The legislative basis for the development of these lists can be found in the various laws on courts in force throughout the country. The procedures and pre-conditions for appointment are largely similar.

In the Republika Srpska (RS), the Law on Courts and Judicial Service provides that work of court experts is to be determined by court Rules of Procedure, which are in turn made by the Minister of Justice.[2] Although JSAP has not seen the rules referred to, we have been informed that District Courts recommend people for appointment as experts to the Minister of Justice, usually after consultation with Basic Courts in their area, and that the appointment is made by the Minister from time to time. A separate list is made for each district.

In the Federation of BiH (Federation), appointment is made at the cantonal level, in some cantons by Cantonal Court presidents and in others by cantonal Ministers of Justice. As in the RS, the laws on courts have few provisions on the process of or requirement for appointment and the detail is found in a separate law or subordinate regulation. These generally contain a minimum requirement of higher education, one requires BiH citizenship, some refer to characteristics such as worthiness to be a court expert or absence of a criminal record. Lists of court experts are published from time to time in the relevant Official Gazette.

While there is occasionally some sort of requirement for consultation before appointment to the list, this is not universal and where it does exist it is not clear in practice how it works. The level of discussion between Ministers of Justice and the local courts seems to depend on the strength of the relationship between the two. There is no requirement that the appointer consult with the relevant professional body, such as the Institute of Accountants and Auditors in respect of the appointment of financial experts, and this consultation does not appear to take place in practice. Ironically, although they are not themselves experts, judges consider that they are able to assess the ability of experts in different fields and know whether an expert is a good one or not. However, the standard against which they seem to measure experts is one involving the format and timeliness of reporting.

For some fields of possible expertise, the usual requirement to have a university degree is not always understandable, e.g. for carpentry or plumbing. This might explain why there are no persons appointed to be experts in the types of field for which tertiary education is not necessary and may also explain why some expert reports on simple matters are couched in extremely academic terms.

It is arguable that what amounts to fifteen lists of experts is not necessary in such a small country and that one list would suffice, if lists are necessary at all. However, given the fragmentation of the court system and the way in which the courts choose experts in a particular case, reducing the number of lists is not likely to have any effect at all.

In most parts of BiH, appointment to the list is of unlimited duration and experts can remain on the list until they ask for removal or their appointment is terminated. In Sarajevo

[1] How this works in practice is discussed in chapter 5.

[2] Articles 40 and 41. Largely identical provisions were contained in the previous law, in effect at the time this report was researched.

Canton, however, a change was recently made and experts are now appointed only for four years. It is too early to estimate whether the quality of experts has improved as a result but it has been perceived as a way to encourage competition between experts and thus the quality of their reports. Also in Sarajevo Canton, JSAP has been told that a financial expert was recently removed from the list after it was discovered that many of his reports were completely fictitious and criminal charges have been brought against him. Mere incompetence or delay, on the other hand, do not lead to dismissal in practice and, in fact, the reasons for delay are more likely to result from the mechanics of the court funding system than the fault of the expert.

3.2 The current lists

The current lists of court experts contain many names and a wide variety of expertise. For example, the list from Central Bosnia Canton includes experts in various forms of medicine, in finance, economics, accounting, traffic, telecommunications, mechanics, agriculture, veterinary science, geodesy, architecture, graphology, civil engineering, housing, forestry, technology and protection at work. The distinction between some of them, such as the different forms of medical and financial expertise identified in the list, is not immediately obvious. Other parts of the country have similar lists. Numbers of experts in each region also vary wildly – the list for the Trebinje District included around 20 names whereas that for Central Bosnia Canton had over 100. There is nothing to prevent the appointment of experts to the list from out of the geographical area covered and this is occasionally done, for example in West Herzegovina Canton where some experts from Mostar are on the list.

Insufficient information is available to be able to comment on the ethnic breakdown of experts vis-à-vis the area for which they were appointed, but it is abundantly clear that very few of them are women.

Apart from individuals, legal entities such as companies and educational establishments can also be appointed as court experts, provided people on the staff meet the individual requirements. However, few lists actually contain legal entities, although there is a practice of using academic institutes to provide second opinions where necessary. A number of judges commented on the absence of an institute of any sort in their region. Some saw it as a disadvantage and others accepted that it is probably not economically feasible to have a large numbers of these bodies in such a small country. There was, in fact, considerable uncertainty expressed as to whether these institutes exist at all and where they might be located, as courts in some regions habitually use institutes outside BiH.

Being a court expert is not a full-time job. Experts may be professionals in a private capacity, work in central or local government or, in some cases, are retired. A number of court experts seem to carry out their work as experts within their normal working day – in other words, are being paid for doing two jobs at once. This is only a concern of the judicial system if it somehow affects their work as an expert, either by creating a conflict of interest or by limiting their capacity to give the expertise the attention it deserves. It should, however, be a matter of concern for both their employing organisations and the taxpayer.

While the Federation has seen considerable enthusiasm in some areas for appointment, with many new experts entering the lists, judges in the RS have reported that there is considerable reluctance to be appointed as people do not want to risk being involved in criminal proceedings.

3.3 Conclusions

- While there is nothing necessarily wrong with the list system, the wide variety and number of types of experts appointed to the each list indicates that the content of the lists is not determined with reference to the needs of the courts. The flexibility of the system to cope with changing needs in terms of new fields of expertise and the nature of incoming cases may also be doubted.

- In some cases, the minimum educational qualifications might create a barrier to getting the most relevant and useful expertise.

- There is minimal quality control in practice over who can enter the lists and no co-operation with relevant professional organisations.

4 THE FINANCING OF EXPERTISE

4.1 Civil cases

There are different methods for the payment of court experts depending on whether the case is a civil or criminal one. In civil cases, one of the parties is generally responsible for paying for expertise. When ordering expertise, the court requires the party who will benefit from it to pay an amount into court that the judge estimates is appropriate for the task. Until the funds are paid, the expert does not begin work. On completion of the task, the expert submits an account, which the court may accept or reduce.

One judge stated that his practice has been to cut expert bills in half as they all charge too much. Some experts, on the other hand, have suggested that they are not paid enough and that the fee charged should be calculated as a percentage of the amount of money in dispute. This is a difficult issue, as no one method of calculation seems appropriate for all cases. Calculation as a percentage of the claim will allow experts on easy matters to reap huge rewards in some cases while discouraging experts from acting in small cases and the work performed will not bear any relation to the cost. Costing according to the time spent encourages wasted time, although the effect of competition might reduce this problem. It may also make the costs prohibitive in smaller cases and courts are clearly reluctant to require people on limited incomes, such as pensioners, to pay large amounts for expertise. The latter is probably a fairer system, provided that the costs are not disproportionate to the size of the claim.

4.2 Criminal cases

Criminal and minor offence proceedings present a different picture. Because courts must prosecute *ex officio*, the cost of court experts fall on the court itself and is paid from material expense portion of the budget. The amount paid for individual pieces of expertise is sometimes regulated in some way. In Sarajevo Canton, this is by specific regulation. Where there is no legislation, some court presidents have set limits for their court. However, in most cases, at some point the setting of the fee results from a bargaining process between the court and the expert.

A guilty party can be asked to reimburse the court costs, including the amount spent on expert fees. While this reimbursement is frequently sought, it often never eventuates and attempts to enforce reimbursement orders are mostly unsuccessful. Some judges estimated that at least 50% of those ordered to pay do not do so. One court president stated that repayment was more likely if the defendant was not sentenced to a term of imprisonment. Given the state of his court's budget, that provides a real and improper incentive to hand down some other kind of sentence. The same judge commented that his judges did not exempt anyone from paying the costs of expert fees in the previous year because of the impoverishment of his court, which is understandable but not a valid reason for not giving poor defendants this benefit.

4.2.1 The cost of expertise v the money available

The drain on short-funded court budgets by the high cost of expertise was a constant source of lamentation by court presidents. In order to get some clear idea of the proportion of material expenses required to pay court experts and thus the extent of the problem, JSAP

obtained detailed information on the amounts paid to court experts in criminal cases in all the first instance regular courts and four minor offence courts in Herzegovina-Neretva and West Herzegovina cantons and for the Trebinje and Nevesinje Basic Courts in the RS for the period January to June 1999.[3] Although we expected that taking figures for a six-month period would provide a fairly representative sample of amounts needed, in one court the payment for July massively exceeded the total for that first six months. Another court advised that expert payments, for some inexplicable reason, were always higher in the second half of the year.

A further reason why a reliable comparison between experts fees and funds available cannot be made is that it is not easy to get accurate information on total material expense budgets, especially for minor offence courts whose administrative costs are often paid directly by their municipality without a separate budget line.

Asked to give estimates of the proportion of material expense budgets spent on experts, some court presidents gave rather extravagant figures ranging from 25% up to 100% "from time to time". The reality is not as bad. By comparing expert payments for six months with the court material expense budgets for that same period, we can conclude that the amount spent on experts varies between around 5% to 20% of the material expense budget, with most courts in the 5-10% bracket. This calculation does not include minor offence courts for which the evidence was too unreliable.

However, there is another factor that needs to be taken account of when assessing the need for funding. Material expense budgets are used to pay all court expenditure apart from salaries, and with the exception of intangible items such as depreciation and some capital costs. From this source come various employee entitlements, such as warm meal and transport allowances, electricity and phone bills, PTT costs for delivering court documents, payment for court appointed defence counsel and a myriad of other things. In many courts, the PTT bill alone accounts for over half of the material expense budget. Some courts have had their telephones cut off for inability to pay the account.

The discretion as to which bills to pay out of the monthly fund, often received several months late, belongs to the court president. This means that court experts must compete for payment with employees, service providers, defence counsel, etc. Court presidents have developed considerable skills in balancing these competing interests, but the net result is that in some courts experts are habitually paid many months after the court order authorising their payment. In some cases, the time lag is more than six months.

4.2.2 Regional variations

There is some regional variation on the types of expertise needed in different courts, although the figures obtained indicated that this did not always follow expectations. For example, the Capljina region, with the M17 running through it, sees a lot of traffic accidents. During the period investigated, easily the biggest proportion of expert payments from the Capljina Basic Court[4] were to medical rather than traffic experts, although this may still relate to road accidents. In the minor offence courts, traffic was the only form of expertise used. In

[3] See Annex I. Note that the amount of expertise paid for is not the same as the amount of expertise used in criminal proceedings during the same period. A more reliable method of establishing the extent of use and cost of court experts would be by determining the amount of times expertise was actually provided to the court during the period in question. However, as this would involve going through every criminal file, it was rejected as being too time-consuming.

[4] Since this research was undertaken, new municipal courts have replaced the basic courts in Herzegovina-Neretva Canton. In this report, the old names are used as these were valid at the time of research.

Konjic, on the other hand, there is said to be more violent crime, leading to needs for a different range of more expensive expertise. Autopsy, along with establishment of paternity, is considered the most expensive form of expertise. The Nevesinje Basic Court breathed a sigh of relief when a change of jurisdiction moved murder cases to the aegis of the district court and it no longer had to pay for autopsies.

The needs for expertise vary widely between courts and bear no relationship to the size of the court. Out of three courts each with three judges, the Stolac Basic Court paid 480KM for expertise during the period in question, the Prozor/Rama Basic Court paid 1,000KM and the Citluk Basic Court paid 2,990KM. The last was significantly more than some of the larger courts. Of course, these amounts paid do not reflect only the amount of expertise needed or asked for but also the state of the court budget – if they do not have money left they cannot pay.

4.2.3 Setting court budgets

It has been hard to get any concrete information on how material expense budgets are set. Information obtained by JSAP in 1998 indicated that the amount allocated for material expenses was related in some way to the number of staff in the particular court, possibly as a proportion of the monthly salary payments. During this inquiry, one judge specifically stated that in his court the material expenses were 20% of the salaries, although it was not clear if this was by accident or design. Another judge mentioned that in his opinion, if the amount for experts is to be calculated as a proportion of salaries, it should be a realistic proportion, otherwise a different system should be adopted. This gives some credence to the proportion theory.

Some material expenses can be seen to clearly relate to the number of staff in a court, for example, meal and transport allowances. Others may have some marginal connection. For example, as the number of judges in each court and thus the number of administrative staff is dictated at least in theory by the number of incoming cases, the PTT costs for delivering documents may relate, in a rudimentary way, to the number of people employed in the court. However, as evidenced above, the amount of money necessary for expertise has no connection with this.

Clearly a better system of budgeting is in order. In ordering expertise in criminal cases, courts are fulfilling their legal duty. They have no choice. In prosecuting crime, they are carrying out an essential task in establishing the rule of law and a society where people can live without fear, with the guilty punished and the innocent freed. They should not be prevented in this endeavour by measly court budgets or by being put in a position where they have to bargain for services. This serves the interests of nobody, either the courts, the public or the accused. Its effect on the quality of expertise is dealt with later in the report. Various methods could be used to overcome the problem, including massively increased court budgets or a separate, largely unlimited income stream for expertise in criminal cases.

4.3 Conclusions

- While the percentage of court material expense budgets used to pay expert fees was not as high as expected, it is still significant given the minimal amount of these budgets and the quantity of other essential expenses to be paid from them.
- It is also clear that the amount of expert fees bears no relationship to the size of the court.

- The present system of funding court expertise in criminal cases serves the interests of nobody and needs to be completely changed. This amount of court funding must bear some relationship to need.

5 THE SELECTION OF EXPERTS IN PARTICULAR CASES

5.1 Use of the list

Legislation does not determine how a judge chooses an expert in a particular case, and in most of the country, they have complete discretion over whom to appoint, other than some expected restrictions regarding conflict of interest contained in the various procedure codes.[5] Judges are expected to choose from the list if possible, but the discretion for not doing so is quite broad.[6]

In Sarajevo Canton, article 12 (3) of the Law on Conditions for the Performance of Expert Services of 1998 decrees that the president of the court should use the services of experts on the list equally. The number of times each expert is used must be recorded in a separate register. One such register obtained for 1998 indicates that article 12 was not being followed and the pattern of use of different experts follows largely what is described below.

In reality, various practical considerations determine which expert a judge will call upon. In some cases, especially in civil litigation, the parties may suggest an expert and unless there is any objection the judge will follow that suggestion. Otherwise, it is freely acknowledged by many judges that they continue to use the same expert in the same field time and time again, although several judges also stated that they would like a greater choice of experts.

One reason for continuing to use the same expert is that he produces quality reports and on time. The courts develop a relationship with that expert. The West Mostar Minor Offence Court, which only uses one traffic expert, advised that the expert in question takes an interest in these cases generally and visits the court on his own initiative once a week to see what is going on. Another reason for always using the same traffic expert, given by the Capljina Basic Court, is that the expert's reports have never been overturned.

5.2 Non-use of the list

In a number of cases, the regular expert is not actually on the list of experts. Some courts could not produce a copy of the relevant list.[7] One judge stated that his traffic expert was on the relevant list, although that was not correct. Another was not sure if her traffic expert was on the list or not.

If there is no expert on the list for the particular field of expertise required, and sometimes even if there is, the courts cast their net far and wide, including the Federal Republic of Yugoslavia (FRY) and Croatia. This is despite the fact that the same expertise is available locally or from other parts of the country. For example, the courts in West

[5] As an example, the provisions of the Federation Criminal Procedure Code on court experts are included as Annex II. The provisions of the RS Criminal Procedure Code and both entities' Civil Procedure Codes are almost identical.

[6] For example, under article 237(4) of the Federation Criminal Procedure Code, experts not on the list may be appointed "if postponement is risky or if the permanent experts are incapacitated, or if other circumstances so require." It is certainly arguable that latter criterion could be broadly interpreted to include insufficient funding.

[7] This problem was primarily in the courts in the Bosniak parts of Herzegovina-Neretva Canton, where development of the list had been problematic for some years as a result of the war. It should be solved soon as advertisements have been made requesting applications for appointment as experts to a unified list for the canton.

Herzegovina and Canton 10 continue to use autopsy services from Split, Croatia, despite the possibility of having them done in Sarajevo. Courts in the southeastern RS get autopsies and other more complex forms of expertise performed in Podgorica or Belgrade (FRY). A number of courts in Croat-dominated areas use a traffic expert from Croatia, who is not on the list, despite the fact that there are many local traffic experts.

There is, of course, no reason in principle why expertise cannot be provided from abroad and many small countries probably do the same. However, it may be contrary to the law to permit this when there are experts on the list,[8] and it should be of some concern to the government and taxpayers that funds are going abroad unnecessarily.

The reason given for using foreign experts is ostensibly cost. While some judges said that experts from Croatia were more expensive and took too long to produce reports, most considered that using an expert from FRY or Croatia was cheaper than using an expert from other parts of BiH, either from the other entity or from other cantons within the Federation. This invariably coincides with ethnicity. For example, the former West Mostar Basic Court apparently negotiated a fixed fee for autopsies with the centre in Split, Croatia, for a total price of 550KM including transport. By contrast, we were told that if they were to obtain the same expertise in Sarajevo the cost would be at least 2,000KM. The Nevesinje Basic Court mentioned the same figure for having autopsies done in Sarajevo and so the judge elects to use experts in Podgorica (FRY) for half the price. The fees for autopsies in Sarajevo Canton are limited by regulation, though we do not know if that applies to requests from courts outside the canton. We were told that the price set is around 200KM. The fact that two courts in completely different parts of the country mentioned that same price for autopsies in Sarajevo gives some credence to the possibility of discriminatory pricing. However, JSAP was also told that parties to court cases, especially defendants in criminal cases, prefer to have experts from the same ethnicity as themselves and that the court will oblige in order to create an appearance of fairness. This will, on the other hand, create problems is the victim is from a different ethnicity.

5.3 The relevance of cost

Cost was always mentioned when discussing the choice of experts, even if they are from the list. At least one court president mentioned that he tries to avoid using experts as much as possible because of the strain on the court budget. Another said that he has to beg court experts to work for the court because of the delays in and low amount of payment. This is said to result in not necessarily getting the best experts.

Courts say that they have bargained with certain experts to conduct expertise for a set price. This is confirmed by looking at the payment records, which indicate almost complete consistency in the amount paid to particular experts. For example, one traffic expert used by several courts in the Herzegovina-Neretva and West Herzegovina cantons was almost always paid the same fee each time by each court, although the fee varied considerably between courts, ranging from 150 kuna (around 40KM) at one minor offence court to 400 kuna (100KM) at a former basic court. Other courts had established fees somewhere between these amounts.

One result of this is that some experts who are on court lists have never been used at all while others, on or off the list, have developed virtual monopolies. While there is no

[8] See footnote 6.

guarantee of use (except theoretically in Sarajevo Canton), this does seem to defeat the purpose of having lists at all. The development of virtual monopolies also reduces the incentive for experts to work diligently or expand their professional horizons. Several experts interviewed expressed their discontent that they were never or rarely called by the courts.

By contrast, one expert in Sarajevo claimed that he earns 70,000KM per annum from expert fees. Given the set figures for expertise, this may be exaggerated. The traffic expert mentioned above, who works all over Herzegovina, was paid 20,100 kuna (5,025KM) in the first six months of 1999 for 86 pieces of expertise for six courts[9] and he was the easily the most frequently-used expert in the region. While the picture of experts making a fortune from the judicial system is clearly false, the existence of monopolies is certainly true. In all the courts looked at, only the larger ones such as the two Mostar Basic Courts and the Trebinje Basic Court showed any significant variation from the theme by using different experts in one field.

While the system of regular prices may work if all tasks performed by the expert are largely similar, it will break down in areas of complexity and variation. For example, financial experts are required to deal with a broad range of questions and one that will become broader with the full development of a market-based economy. Cases of large-scale fraud, for example, or privatisation based claims, are in a different league from run-of-the-mill valuation of goods and allow experts to demand significant fees. This may require courts and experts to focus more closely on how much work is necessarily encompassed in each case and what is dispensable.

5.4 Conclusions

- It is clear that ethnic affiliations do have some affect on the choice of expert, in some cases to the possible benefit of defendants and detriment of victims, but the most important factor in selecting an expert in a particular case is cost.

- Using experts not on the list is commonplace and is certainly contrary to the spirit, if not the letter, of the law and defeats the purpose of the list system.

- The development of virtual monopolies for some court experts is probably prejudicial to the improvement of expert reports and the use of new or better methods of analysis. The impact of this is likely to become more noticeable as cases become more complex.

[9] Of course, he may also have worked for courts for which we do not have information.

6 THE METHOD OF MAKING REPORTS

The rules and practice regarding expert reports are similar in civil and criminal cases. Experts receive instructions on the subject of their report from the judge during the course of the proceedings.[10] Sometimes these instructions are quite detailed and sometimes they are very brief. However, the analysis performed by experts is not usually extensive or time-consuming.

Generally, the expert makes his findings on the basis of the documents in the court file. These will include the initiating documents in the case and witness testimony as well as any police reports. Experts are not usually expected to visit the site of the event in question, except, rarely, the scenes of serious crimes or talk to the parties (other than in cases where they have to do a psychiatric examination). This may be the case even when they are called to determine the nature of bodily injuries. In fact, for an expert to talk to one party without the presence of the other would probably constitute a violation of the ECHR principle of equality of arms.

They submit their reports in writing. Even in traffic cases, it seems that experts are not expected to and do not usually visit the scene of the accident but rely on descriptions and photographs provided in the police file. One judge commented that they should visit the scene and one expert stated that he does do so whenever he considers it necessary.

Unlike other witnesses, court experts may attend all the hearings in the case, although this appears to happen rarely. Only one judge stated that it was his practice to require experts to attend every hearing and comment at the end as to how the evidence affected his findings. Most judges stated that experts do not need to attend hearings. They only do so if one of the parties has requested it in order to clarify something or because of disagreement. If a party does not agree with the content of the expert report, a second report is called for, and if that contradicts the first report, a third report is obtained, known as super-expertise. These later reports are generally made by an institute. Some judges grumbled that complaining about the first report is done too frequently in civil cases as a method of delay and one referred to several cases where the findings of the institute were exactly the same as the original expert, only cost several times more.

Presumably because their qualifications to perform expertise have been established by virtue of their inclusion on a list, experts do not include in their reports any mention of their particular qualifications to undertake the task at hand. This is unlike the system in common law countries where challenging the knowledge of the expert in the precise field in question is part and parcel of the argument at trial.

Once the report is given to the court, copies are sent to the parties, who have the opportunity to question the report and request the presence of the expert at the next hearing.

[10] The OSCE commentary on the Federation Criminal Procedure Code notes that if there are criminal and civil proceedings arising from one set of facts, it is not possible for the judge in one proceeding to rely on an expert report produced for the other proceeding.

7 THE QUANTITY OF USE OF COURT EXPERTS

7.1 The principle of material truth

Before beginning research for this report we had been presented with two hypotheses. The first was that expert evidence is called far too frequently and often when unnecessary. The second was that, although judges are obliged to rely on them, the quality of expert reports is poor and that experts are frequently subject to external influence, which makes their reports less than impartial. These theories were considered and are dealt with in this and the next section.

The necessity for calling many witnesses generally is dictated in part by the requirement of the various procedural laws for the court to determine what is known as material truth. Unlike the adversarial system, a judge in BiH is not able to rely only on the evidence presented to make his decision and cannot limit his inquiry to that evidence only. If the judge does not call for evidence that may help determine the material truth, his decision may be overturned on appeal. The internal court evaluation of the quality of a judge's work depends entirely on how many of his judgements were overturned on appeal, so there is clearly an incentive to err on the side of caution. Exactly what is "material truth" is not clear, including to some local judges who suggested that the principle should be abolished, but it does encourage a no-stone-unturned approach. They are more ready to go on searching than to make a decision.

While the search for material truth might seem more likely to lead to calling many witnesses of fact, it also seems to require many experts. Rather than relying on the evidence before them to draw their conclusions, judges prefer to call for experts to evaluate it.

7.2 Excessive use of experts?

Many judges expressed to us the view that they used experts in almost every case, although while talking about payment difficulties a contrary view was sometimes given.

In order to evaluate this, we took the total number of payments for expert fees over the six month period reviewed and compared it with the number of incoming criminal cases for that period for seven first instance regular courts.[11] Clearly, because the payments for expertise may relate to work that was done the previous year, the correlation between numbers of payments and cases is not exact, but the results are nevertheless interesting. The percentage of cases in which expertise was paid for ranged from 17% to a massive 230%. Only two courts were above 40%. This somewhat dispels the myth about experts being used in every case, particularly as some cases require several different experts and so they are probably used in a considerably smaller percentage of cases than indicated by these results.

This does not, of course, mean that all expert reports are necessary. For example:

- It is clear that expert evidence is called on matters that in some countries would simply be agreed by the parties beforehand, such as quantum in civil claims. There is no provision

[11] The comparison for minor offence courts was not possible because we did not have reliable or recent information on the numbers of incoming cases. However, comparing the number of expert fees paid with JSAP's information on court caseload for 1998, those courts order expertise in around 2-4% of cases.

for parties to agree on certain issues before trial, which would be contrary to the court's obligation to establish the material truth.

- There are other areas where the use of experts may be affected by the absence of strict definition or criteria in the law, for example, in determining whether an injury should be classified as serious or light bodily harm.

- Expert evidence is also used because of lack of experience of other organs, such as the police. There is considerable use of experts in traffic cases to determine the cause of accidents, even though the road rules are clear. This may be a result of poor police reporting, although we should again note that the police reports we have seen in court files appeared sufficiently detailed and the need for additional expertise questionable. Unless it is challenged by the defendant, there is no need to automatically call an expert.

- As there is no preference for direct evidence of facts, there is a tendency to use experts where other judicial systems would insist on first-hand evidence.

There is also disagreement on how second-instance decisions affect the need for expert evidence. Some appellate judges agreed with the proposition that lower courts relied too much on expert evidence in cases where it is not necessary. On the other hand, one lower court judge stated that it was the appeal court that drove the demand for expertise and overruled decisions because there was no expert report on simple matters like who had the right-of-way where there had been a traffic accident. Another first instance judge said that in criminal cases it is the prosecutor who demands expert reports, especially in the investigation phase, so that he can clarify the facts and establish enough evidence to launch a prosecution, without the responsibility of having to pay for it. The judge said that the higher court would overrule his decisions if he did not comply with the prosecutor's request. JSAP research indicates that around 20-30% of first instance judgements are overturned on appeal and sent back for retrial on the basis of failure to properly establish the evidence, which indicates that the first instance judges are probably correct in their criticism.[12]

In determining whether there is an over-use of court experts, it is important to recall the distinction between facts and expertise made earlier in this report. An expert should not be asked to provide facts unless they in some way cannot be obtained elsewhere. The reference in several laws to the role of court experts being to "clarify facts" may not help in making the distinction between the two types of evidence.[13] The following examples, we hope, will make this clear. These were all cases seen by JSAP or referred to by judges spoken to during the course of this inquiry.

- Normally, if good are lost or stolen, courts get an expert to evaluate them. One example of an unnecessary piece of expertise given to us by a judge is the evaluation of commonly available items, such as a television. Presumably, in criminal cases valuation is necessary for the purposes of compensation claims, as it is not relevant to the question of guilt. As far as the victim is concerned, his loss is that amount that he would have to pay to obtain a similar television. As far as the perpetrator is concerned, his profit is what he actually got for selling it. Both of these are facts for which an expert is not necessary. If the television was recently purchased, the victim may be able to produce receipts of how much he paid for it. Alternatively, a second-hand television dealer could give evidence of how much he

[12] This issue will be dealt with further in the forthcoming JSAP report on delays.
[13] E.g. Federation Criminal Procedure Code, article 236, Posavina Canton Law on Courts, article 73.

would charge for a similar model. Neither of these is expert evidence and both are more direct than using an expert.

- The second is an example from the investigation phase of proceedings seen by JSAP. The case involved illegal trade of animals and the question was how much profit the accused had made from this. This was relevant to determine whether he should be charged with a more or less serious crime. Evidence was given by the accused of the various financial transactions undertaken during the process including how many people were involved, how much they paid for the animals and how much to transport them, how they shared the profits, etc. Nevertheless, the judge ordered an expert to determine their profit share. Given the simplicity of the transaction, most people, including, clearly, the judge, could have done the calculation in their heads. However, the judge was concerned to deal with and be seen to deal with the matter thoroughly and appropriately.

- Some judges also referred to a need for expert evidence in civil cases involving loss of income. Admittedly, in some cases, such as those involving prospective loss of income from the death of income-producing family members over a period of years or decades, some serious and difficult actuarial calculations are necessary regarding present value of future income. It was not, however, evident that calculations of that complexity are made in those cases. In fact, different examples were given or seen. For example, in one case involving failure of an employer to pay wages over a period of time, there was a reference to the need for some sort of financial expert to determine the exact amount. Given that the plaintiff was on a fixed income for the period in question, this is a matter of simple multiplication. This is an example of a case where the plaintiff or the judge could produce his own calculation and let the defendant or parties disagree with it.

7.3 Conclusions

- Given the elusive nature of the quest for material truth and the judges' clear reluctance to risk having their judgements overturned on appeal, there is a clear tendency for them to call for expert evidence rather than to rely on the facts before them. Thus they do not take up the challenge of making their own decisions but are able to abdicate responsibility for doing so by having a third party assess the evidence. In a sense, they are therefore not acting as judges at all, and if they try to do so they are likely to be overturned on appeal.

8 THE QUALITY OF EXPERT REPORTS

8.1 General problems

Most of the judges spoken to by JSAP stated that they were generally happy with the expert reports they receive, although they confirmed that if they were doubtful about a report they could question the expert or get a second report, even if the parties did not comment. We have seen no examples in practice of judges questioning reports. Parties, on the other hand, are said to question the findings and require a second report, particularly where they want to create a delay. It also seems that judges usually accept the findings of the expert and, given their inability to use their own knowledge and the necessity to follow the principle of material truth, we had presumed that judges were obliged to do so. However, we have seen one case file where this did not happen. It involved a traffic accident where the plaintiff sued the driver of a vehicle that hit him when he was crossing the road in heavy traffic without looking. The expert's report led to the conclusion that the plaintiff was the author of his own misfortune, but the judge found in his favour anyway, awarding compensation, and that judgement was not overturned on appeal.

A number of expert reports have been reviewed as part of case files. On the whole, they seemed professional and were often lengthy, detailed and scientific in approach. However, despite the judges' lack of criticism, a number of general problems were identified.

8.1.1 Undue complexity

Complexity is a major problem. Expert reports generally take a very academic approach to what are often simple problems and are written in a phraseology that would be incomprehensible to many people. Traffic accident reports include several pages of complex mathematical equations with no explanation of what they are about. In reviewing an administrative litigation file, JSAP found a medical report written almost entirely in Latin and which was rejected by the court for that reason. An expert report is useless if the court cannot understand it but, even if judges have become accustomed to certain abstruse terminology, more importantly the parties must also be able to understand the report. There is no reason why experts cannot transform their knowledge into something comprehensible.

8.1.2 Relevance

Expert reports often do not include any reference to the questions posed by the judge. Neither do they relate the theory behind their analysis. A reader is not able to know, for example, why a particular method of valuation was chosen and is thus unable to properly evaluate the worthiness of the report. For a party to understand the report he would have to engage his own expert, which defeats the purpose of having one appointed by the court.

While there are some fields of expertise in which there may only be one method of assessment, in others, of which valuation is an obvious example, there are a number of possible methods, all of which could lead to very different results. In one example seen, the value of an old car written off in a traffic accident was calculated according to the price of a similar model new car and subjected to depreciation rates. These might be relevant for tax purposes but there is no reason stated in the report for using them or believing that the result is in fact the price that the plaintiff would have to pay for a similar used car in the local market. Some valuations for the purpose of mortgage registration have nothing more than a final figure, without even specifying what is included in terms of fixtures and fittings.

The choice of method is an important part of expertise and will become more so. In developed market economies, the debate in many commercial and economic cases often focuses more on methods of valuation than on the results, which follow once the method is chosen. This concept should be recognised by court experts.

Given this, it is also difficult to see, on many occasions, why expert reports are so detailed. For example, why are three pages of calculation necessary to determine the cause of a traffic accident when a car driving at an excessive speed smashed into a parked vehicle? Liability should be clear based on the road rules without the need for any expert report, let alone one based solely on formulae. Not only is the relationship between the court's request and the report unclear, so is the relationship between reports and reality.

8.1.3 The basis for expert findings

The quality of reports is also limited by fact that experts must rely on the information held in the court file. There may be factors relevant to the matter that have not been given in evidence but the system for making expert reports does not permit experts to seek more information from parties or witnesses. Also, in some cases the information provided by the police is said to be of poor quality – this is not only things like descriptions of scenes but extends to taking blood samples or finger-prints in such a way that they cannot be used.

8.1.4 Second instance reports

If an institute or other expert is requested to make a second report, there is not always an explanation as to what it considers wrong with the first report. There are a number of examples of this in the field of psychiatric or psychological examination of defendants who claim that they did not have the necessary mental capacity to commit the crime. Sometimes, experts come to completely contradictory conclusions about capacity for no apparent reason. Given that they are dealing with the same material, it is difficult to see how two people who are supposed to be experts in their field can disagree so conclusively without bothering to explain the foundation of their opinion.

8.1.5 Punctuality

Lateness of reports is also a problem. In a survey conducted by JSAP in early 2000 to determine what factors the judiciary considers important in causing delay in proceedings, 25 out of 33 judges pointed to delay in receiving expert reports. This was one of the higher proportions. Some judges also pointed out that before the war there was a practice of experts making their reports within two to three weeks. Now, judges say, they are obliged to wait much longer. Six months is not uncommon, according to some judges. JSAP is also aware of cases where experts have taken one, two or even more years. This is not always for fault of the experts. As described above, the inability of the court to pay the fee is important here. Some experts will not hand over their report until they are paid and they cannot be blamed for this approach.

8.1.6 Exceeding the mandate

JSAP has noted that, from time to time, experts go beyond their brief, as determined by the judge and give opinions on other issues. Of course, a judge is free to disregard these comments. But given the almost unlimited scope of judicial proceedings in BiH, this is worrisome as it tempts a judge to call for more and more evidence in an ever-widening circle

of inquiry. Judges should hold firm and not regard material that is not relevant to the particular case. It is pleasing to note that this stance has been taken. For example, in the Vikalo case before the Tuzla Municipal Court, the verdict notes carefully which parts of the expert reports were taken into consideration by the court and for what reasons, and which were not. In particular, the court rejected parts of some financial expertise that purported to deal with legal matters such as the definition of loans in certain relevant legislation. The court found that this was in the purview only of the court. We cannot comment on the correctness or not of that finding, but only present it as an example of the court considering the issue of mandate.

8.2 Conclusions

- Some aspects of the quality of expert reports are outside the control of the expert. However, in broad terms, expert reports are not comprehensible in the language they use or in explaining the foundation for their findings. This detrimentally affects the ability of parties to present their own case or understand the case against them.

9 POLITICAL INFLUENCE AND HIGH PROFILE CASES

9.1 General

As with the operation of the judicial system generally in a country going through a difficult transition process, there is a large question as to whether the current system of appointment and use of court experts permits, encourages or paves the way for political interference in the judicial process. There are a number of avenues by which this could happen. It is always difficult to reach definitive conclusions in ascribing motives but some examples are given which could be considered to speak for themselves.

9.1.1 Choice of experts

While there is the possibility of abuse in the system of the choice of permanent experts for the court list, given that no effective monitoring is done of candidates, this has not arisen as an issue in this inquiry and it does not appear to present an actual problem.

The problem arises more at the level of choice of expert in a particular case. Given that the courts do not follow a practice of using different experts as much as possible and frequently ignore the list completely for financial or other reasons, there is no institutional restriction to prevent them from bowing to external pressure to use an expert in a case who is known to be sympathetic to the local political powers or to a party himself perhaps. Given both the history and the small population of BiH, everyone's connections are known by everyone, including the judiciary.

The question of the independence of expert witnesses is crucial to the appearance of justice as well as the reality in each case. Therefore, provisions in procedural laws prohibiting appointment as an expert in a particular case should not be interpreted narrowly or taken as the only criteria for disqualification – the courts have a duty to ensure that an expert is not connected with a case or the parties to it in any way that may influence or appear to influence the outcome of the report. Grounds in law for not appointing a particular expert in any one case are limited to factors such as being related or married to a party in the case and being a current colleague of a party. In practice, there are many more subtle connections and JSAP is aware of a number of cases where, although not strictly in breach of the law, the appointment of a particular expert did not maintain the appearance or reality of justice. Some of these cases involved prominent local figures and the implication is that the court was not interested in having a truly independent expert.

One example is the Kerovic case.[14] Dr. Kerovic is a well known figure in the Lopare region, currently the director of the local hospital and prominent member of the local Serb Democratic Party (SDS) with a lot of personal support within the RS political circles. While the case was at the Lopare Basic Court, Kerovic stated that he was not able to follow the proceedings. His lawyer proposed calling a particular expert from Belgrade who he had most probably brought to court and who was waiting in the corridor. The expert was called in to court and was heard immediately. His opinion was that Kerovic was unable to attend the trial or present his defence due to a deep depression, despite that obvious fact, known to the court, that this "depression" did not prevent him from carrying out his normal working, political and personal life. The court later decided to call a second expert, who had been under the tutelage,

[14] Kerovic is alleged to have abducted his former girl-friend and forced her to have an abortion while eight months pregnant.

while doing her PhD, of the first expert. The case was transferred to another court before this expert reported.

Another example of the appointment of unsuitable experts is the Srpski Brod oil refinery prosecution, in the Doboj District Court. The case involves allegations of abuse of official office and forgery and tax losses of around KM15 million, all revolving around the alleged launch of fictitious products onto the market. Some of the financial experts finally chosen from Banja Luka and Doboj are former colleagues of the defendants, when they were in management positions in a local bank, as well as being prominent in the then ruling coalition party.[15] Many influential figures in the RS are implicated in this affair.

A related oil refinery prosecution, equally contentious and politically charged, is going on in the Odzak Municipal Court. This case also involves tax evasion related to the sale of fictitious products from the Srpski Brod refinery. In a rare example of inter-entity "co-operation", the Odzak court called one of the suspects in the Srpski Brod case as an expert on the nature of the product in question. Not surprisingly, he advised that the products were genuinely new. As he had also been a witness in the Odzak case, apart from the obvious question of independence, this also breaches the general rule that a witness cannot be an expert.[16]

9.1.2 Other matters

In some circumstances, the decision to call an expert at all raises questions of impartiality. They can be used to delay proceedings and broaden the scope of the inquiry so that it becomes meaningless. One such example, is that case against Mr. Veselin Poljasevic in the Doboj Basic Court. Mr. Poljasevic, a prominent member of the SDS, is alleged to have abused his official position by submitting false vouchers in the amount of 5,200DM for the purchase of a second hand car for the municipality, for which the price was actually 3,200DM. The court ordered an expert to assess the value of the car. However, as the basis of the charge is forgery, the actual value of the car is irrelevant and that expert opinion unnecessary. It could be speculated that this was both a delaying tactic in a case that had been pending for a long time without any progress and was also intended to raise spurious issues to divert attention from the real ones.

Finally, once all the expert reports are in, the court may exercise its discretion in deciding to accept or reject the findings and may refuse requests from the parties for further expertise. One example is the Boro Brnic case in Canton 10. Brnic is a Croat, a member of the ethnic majority in a hard-line area, who was accused of murdering a Bosniak in July 1998. His defence was lack of mental capacity to commit a crime, based on his psychiatric state at the time that the crime was committed, when he was found to have a considerable quantity of alcohol in his blood. Although two psychiatric expert reports were ordered by the court, only one was received and it was primarily based on the suspect's own statement and his description of his mental disturbance. It stated that the accused was mentally ill and dangerous for his surroundings. It was contradicted by a psychologist's report. However, despite the request of the victim's family for further expertise, on the basis that the psychiatric report

[15] At first, the Institute of Economics was proposed to make the report. However, it demanded a fee of 110,000KM, clearly out of reach of the court and presumably an attempt to avoid involvement in the case, and so an alternative had to be found. The appointed experts agreed to accept a fee of 30,000 KM, still a considerable sum. Later, they demanded 60,000KM instead. The judge set a time limit of three months for provision of the expert report, which has now expired with no report being produced.

[16] Federation Criminal Procedure Code, article 239.

contradicted various other evidence before the court, the court refused, stating that it had two psychiatric reports, which was not true. The court upheld the findings of the psychiatrist.[17]

9.2 Conclusions

- The reliance of the courts on expert testimony probably reflects the wish of judges to avoid responsibility for making decisions generally. However, this can become more prominent and noticeable in cases involving high-profile parties.

- It is facilitated by the courts' approach to the use of experts, which allows them to exercise enormous discretion in the choice of experts. While the courts often ignore the formal existence of the list system, they apply the letter of the law in determining whether an expert is independent or not, and not the requirements of justice.

- The requirement to search for material truth allows them to obtain an excessive number of expert reports, which can help create delays and distract the court from the real issues.

[17] After a few months in Mostar prison receiving treatment, Brnic was released on the basis that he was no longer dangerous and his cure could be completed while he was at large.

10 RECOMMENDATIONS

A number of people, mostly within the international community, have suggested that the current system of appointment of experts by the court, with one expert making the relevant report in the case and not two or more, should be abolished and replaced with a requirement that each party appoint its own experts as in common law systems. In suggesting that the system should be reviewed, JSAP does not take such an extreme approach and considers that it would be inappropriate at this stage in the absence of other elements of the adversarial system. However, there are other ways in which the system of court experts could be improved on institutional and procedural levels to deal with the problems dealt with earlier in the report.

- In order to have some assurance of quality, prior to appointment to the list, there should be closer scrutiny of appointees. Appointments should be for a limited term and a method of evaluation of their performance should be developed. Performance should be regularly reviewed and there should be no hesitation in removing poorly performing experts from the list. In addition, the courts should not hesitate to report shoddy work to the expert's professional body, if there is one.

- The courts should encourage the parties to agree on experts to be appointed or, if that is not possible, parties should make their own recommendations from which the court makes the final choice.

- In appointing an expert in a particular case, the courts should have regard not only to the strict, narrow conditions of unsuitability contained in the procedure codes but also the broader notion of impropriety and the necessity of maintaining the appearance of justice being done.

- There will be no improvement to the system of court experts without radical changes to the financing system. If the allocation of funds to material expense budgets is not massively increased, as a minimum there needs to be a separate budget line with flexible and realistic limits for expert reports. Until this is done, the quality of justice will not improve.

- Judges should be more prepared to make use of factual rather than expert evidence and should be more prepared to use their own common sense and discretion in matters rather than relying on expert reports to state the obvious. This should reduce the number of expert reports necessary.

- Parties, counsel and prosecutors should be required to participate more actively in court proceedings, including in respect of expertise. They should be required to give good reasons why expert evidence is needed and should be encouraged to question the expert and his findings. They should do their own job and not rely on experts to do it for them. Neither should courts permit the use of experts when it is clearly merely for the purposes of delay.

- Experts themselves must improve the quality of their reports. They should state the theoretical basis on which their opinion is founded and they should prepare their reports in a way that is accessible to the parties to the case and their counsel, not just fellow experts. If disagreeing with the report of another expert, they should state the basis of that

disagreement. Reports should relate to the real world and not the academic world. Experts who do not comply with this should be removed from the list.

- Second instance courts should not automatically overturn the judgements of lower courts on the basis of failure to obtain expert evidence when that report was not really necessary to determine the outcome of the proceedings. Neither should they allow parties who did not complain about a report at first instance to use it as a ground for appeal. Second instance courts need to recall that they are engaged in the search for justice and not for perfection.

ANNEX I

This is the information obtained from courts in the Mostar region on the payment of expert fees for the period January to June 1999, as discussed in the main body of the report. All figures given in the table are for that period. Where no information was available the symbol "- -" is used.

Name of court	**Number of incoming criminal cases**	**Number of times expertise paid for**	**Number of payments for different types of expertise**	**Total amount paid for expertise (in KM)[18]**
Capljina Basic Court	60	14	Autopsy 1 Medical 8 Traffic 5	1,275
Citluk Basic Court	23	22	Agricultural 1 Financial 2 Mechanical 3 Medical 10 Traffic 6	2,990
East Mostar Basic Court	39	92	Ballistic 1 Economic 2 Financial 16 Mechanical 7 Medical 27 Neuro-psychiatric 12 Traffic 26 Unclear 1	8,138
Konjic Basic Court	82	26	Financial 2 Geometric 1 Graphological 1 Medical 6 Technical 1 Traffic 15	2,215
Prozor/Rama Basic Court	16	3	Medical 2 Traffic 1	1,000
Stolac Basic Court	29	5	Financial 2 Technical 1 Traffic 2	480
West Mostar Basic Court	57	17	Financial 1 Medical 6 Technical 3 Traffic 7	1,512
Ljubuski Municipal Court	- -	49	Financial 7 Mechanical 3 Medical 27 Traffic 12	4,385
Siroki Brijeg	- -	11	Financial 2	1,045

[18] Amounts paid in Croatian kuna have been converted at the rate of 4:1KM. Amounts paid in FRY dinars have been converted at the rate of 10:1KM. The rate was fluctuating at the time, but this is a fair approximation.

Municipal Court			Medical 4 Traffic 5	
Nevesinje Basic Court	- -	6	Financial 6	45
Trebinje Basic Court	- -	36	Financial 14 Medical 19 Technical 3	2,558
East Mostar Minor Offence Court	1,500 (approx.)[19]	52	Traffic 52	2,700
Ljubuski Minor Offence Court	550 (approx.)	6	Traffic 6	550
Siroki Brijeg Minor Offence Court	440 (approx.)	13	Traffic 13	813
West Mostar Minor Offence Court	1,500 (approx.)	52	Traffic 52	2,350

[19] Information on case loads for minor offence courts in this table is based on figures for 1998 given to JSAP by the courts and not checked with the incoming case register.

ANNEX II

The following is an extract from the Federation Criminal Procedure Code containing the provisions on appointment and reporting of experts, i.e. articles 236-246 as well as article 221 and 222(1). It is given as an example of the types of provisions found in BiH legislation. The provisions of the RS Criminal Procedure Code and the civil procedure codes of both entities are largely similar. There are other provisions of the Code that include reference to experts which are not included here, and the provisions on specific types of expertise, such as autopsies, have also been omitted.

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Article 236

Expert evaluation shall be ordered when the finding and opinion of a person possessing the necessary specialised knowledge is required to establish or evaluate some important facts.

Article 237

1. Expert evaluation shall be ordered in a written order by the authority conducting proceedings. The order shall indicate the facts to which the expert evaluation relates and the person called upon to make the assessment. The order shall also be delivered to the principals.

2. If there is a specialised institution for performing the particular kind of expert evaluation, or if the expert evaluation may be done in a government agency, such expert evaluation, especially if it is complicated, shall as a rule be assigned to that institution or agency. The institution or agency shall name one or several specialists who will make the expert evaluation.

3. When the expert is determined by the authority conducting the proceedings, that authority shall ordinarily name one expert, but if the expert evaluation is complicated, it shall name two or more experts.

4. If the court has permanent experts for a particular kind of expert evaluation, other experts may be appointed only if postponement is risky or if the permanent experts are incapacitated, or if other circumstances so require.

Article 238

1. A person summoned as an expert must respond to the summons and present his findings and opinion.

2. If an expert fails to appear though duly summoned and fails to justify his absence or refuses to testify, he may be fined up to 500KM, and in the case of unjustified absence, he may be compelled to appear.

3. The panel of judges (paragraph 6 of article 21) shall rule on an appeal against a decision imposing a fine.

Article 239

1. No person may be engaged as an expert who may not be interrogated as a witness (article 221) or who has been released from duty to testify (article 222) or against whom the crime was committed. Should such a person be so engaged, the court decision may not be based on his finding and opinion.

2. Grounds for disqualification of experts (article 40) also exist concerning a person who is employed in the same agency, enterprise, other legal entity or private employer together with the accused or injured party and with respect to a person employed by the injured party or accused.

3. As a rule, a person who has been interrogated as a witness shall not be engaged as an expert.

4. When a specific appeal is allowed against a decision rejecting a motion for disqualification of an expert (paragraph 4 of article 38), the appeal shall postpone presentation of the expert testimony unless postponement is risky.

Article 240

1. Before commencement of the presentation of expert testimony, the expert shall be summoned to carefully study the subject of his testimony, to accurately present everything he knows and finds, and to present his opinion without bias and in conformity with the rules of his science or art. He shall be specifically warned that presentation of false testimony is a crime.

2. An expert may be required to take an oath before presentation of his testimony. Before the main trial, the expert may be sworn only before the court, which shall be done if there is any fear that he will be prevented from appearing at the main trial. The reason for giving the oath shall be entered in the record. Permanent sworn experts shall merely be reminded of their oath before presentation of their testimony. The oath shall be given in the manner specified in article 231 of this law.

3. The authority before which proceedings are being conducted shall supervise the expert evaluation, shall show the expert the items to be studied, shall put questions to him, and, if necessary, shall seek explanations concerning the findings and opinions that are rendered.

4. An expert may be given clarifications and he may also be allowed to examine the record. An expert may propose that evidence be presented or articles and data obtained that are important to the presentation of his findings and opinion. If he is present at an on-the-spot inquest, reconstruction or other investigative proceeding, the expert may propose that certain circumstances be clarified or that certain questions be put to the person being interrogated.

Article 214

1. The expert shall examine that items being evaluated in the presence of the authority conducting the proceedings and the clerk of the court, unless expert evaluation requires prolonged tests or if the tests are performed in an institutions or government agency or if ethical considerations so require.

2. If analysis of some substance must be performed for the purposes of expert evaluation, only a portion of the substance shall be made available to the expert is this is possible, while the remainder shall be set aside in the necessary amount against the possibility of subsequent analysis.

Article 242

The expert's findings and opinion shall be immediately entered in the record. An expert may be granted permission to subsequently present his written findings or opinion by a deadline fixed by the authority before which proceedings are being conducted.

Article 243

1. If a specialised institution or government agency is commissioned to make the expert evaluation, the authority conducting the proceedings shall caution it that participants in the rendering of findings and opinions may not include a person referred to in article 239 of this law or a person for whom there are grounds for disqualification from expert evaluation as provided in this law and it shall be warned of the consequences of giving a false finding or opinion.

2. The material necessary for the expert evaluation shall be made available to the specialised institution or government agency. If necessary, the procedure described the provisions of paragraph 4 of article 240 of this law shall be followed.

3. The specialised institution or government agency shall deliver a written finding and opinion signed by the persons who made the expert evaluation.

4. The principals may ask the senior officer of the specialised institution or government agency to communicate to them the names of the specialists who are to do the expert evaluation.

5. The provisions of paragraphs 1 and 2 of article 240 of this law shall not apply when a specialised institution or government agency is commissioned to make an expert evaluation. The authority before which the proceedings are being conducted may seek explanations from the specialised institution or government agency regarding the finding or opinion it has given.

Article 244

1. A note shall be made in the record concerning expert evaluation or in the written findings and opinion as to who made the expert evaluation and the occupation, professional training and speciality of the expert.

2. When the expert evaluation has been completed, if the principals did not attend, they shall be informed that the expert evaluation has been done and that they may examine the record of the expert evaluation or the written finding and opinion.

Article 245

If the data of experts concerning their findings differ essentially or if their findings are unclear, incomplete or self-contradictory or inconsistent with circumstances as indicated by investigation, and if these short-comings cannot be corrected by interrogating the experts once again, the expert evaluation shall be repeated with the same or other experts.

Article 246

If an expert's opinion contains contradictions or shortcomings, or if a reasonable doubt arises as to the accuracy of the opinion given, and if these shortcomings or doubts cannot be eliminated by interrogating the expert once again, the opinion of another expert shall be sought.

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Article 221

The following may not be interrogated as witnesses:

1. A person whose testimony would violate a duty to maintain an official or military secret, until released from that duty by the competent authority;
2. Defence counsel of the accused concerning matters that the accused has confided to him as defence counsel, unless the accused himself so requests.

Article 222

1. The following are exempted from the duty to testify:
   1. The spouse or extramarital partner of the accused;
   2. Direct blood relatives of the accused, relatives in the lateral line up to and including the third degree, and relatives by marriage up to and including second degree;
   3. An adopted child or adopted parent of the accused;
   4. A religious confessor concerning matters that the accused confessed to him.