United Nations Mission in Bosnia and Herzegovina

Judicial System Assessment Programme (JSAP)

THEMATIC REPORT IX

POLITICAL INFLUENCE:

The Independence of the Judiciary in Bosnia and Herzegovina

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UNITED NATIONS

CONTENTS

0 EXECUTIVE SUMMARY

The many constitutions of Bosnia and Herzegovina (BiH) proclaim the independence of the judiciary, but there is little recognition that simply stating it does not make it a fact. More than five years after those declarations, it is clear from JSAP's many interviews with the judiciary and from following cases through the court system that the judges do not truly consider themselves independent and that they are not treated as such by the other branches of government or other forces in society. Institutionalising judicial independence is a part of building democracy in BiH. The de-linking of the legislature, executive and judiciary is necessary to create the conditions in which the judiciary can operate as a truly independent institution, contributing to the rule of law.

Lack of judicial independence takes many forms and is manifested in many ways. The institutional framework in which the judiciary operates was inherited from a system in which there was no recognition of the concept of independence, and much of that mentality still prevails amongst both judges and politicians. While judges now have autonomy over individual cases, court presidents still have substantial power, for example in the allocation of cases, a non-transparent system, which allows the president to give the case to the right judge and reallocate if things seem to be going wrong. The de-politicisation of the appointment of court presidents in the Federation of BiH is also a positive step, but to what extent that is true in practice as well as theory is not so clear. Certainly, it has not prevented politicians from trying to exert their authority.

One of the surprising features about the influence of politics over the judiciary is the blatant way in which it is exercised, with court files containing letters from politicians about particular cases and with public statements from politicians blaming in some way judges from doing their job. Judges who attempt to deal professionally with cases involving important figures find themselves subject to dismissal attempts, or, worse, physical assault.

There is no doubt that some judges have been willing participants in political attempts to deal with cases in certain ways, for example cases involving minority victims or cases that will involve the government in further liabilities, such as employment cases. Whether the ongoing review of current judges and prosecutors will be able to deal with the worst excesses is not yet certain.

Professionalisation of the appointment process for judges and prosecutors, along with significant salary increases, is a recent big step forward. However, like many things in BiH, the law is one thing and reality another. The salaries are higher, but they are still paid many months late and sometimes at a reduced rate. And the effect of higher salaries will not be felt in full until the courts are properly funded in terms or material expenses. Until they are, courts and especially court presidents will remain dependent on the will of politicians.

There are definitely signs of moves in the direction of independence, but it will be a long and slow process. It is necessary to create the proper institutional framework, but equally important and more difficult is the creation of an environment of proper thought and expectation amongst the public at large. The notion of an independent judiciary is a new concept. It involves a paradigm-shift in mind and mentality. The political environment, the judges and the ordinary citizen must accept and should welcome a new approach.

1 INTRODUCTION

The Constitution of Bosnia and Herzegovina (BiH) and those of its entities guarantee, in various ways, equality before the law and the right to a fair trial. Implementation of those rights is fundamental to establishing the rule of law. However, since international assistance to BiH began as part of the peace process, it has been a tenet of the international community that the local judiciary is not independent and, in particular, is under strong political influence.

The political factor, along with institutional and legislative factors, has formed an essential element of JSAP's evaluation of the judicial system since its inception in late 1998. Its first report from early 1999 concluded that judicial independence is compromised in cases involving powerful forces in society and that overt interference with the judicial process in the form of improper instructions, intimidation and violence is an every day occurrence in some parts of BiH. However, no systematic study had been undertaken to investigate the patterns of political influence.

This report is the result of an attempt to fill the information gap on the nature and extent of political and other external influence on the BiH judiciary. The main research was undertaken by the JSAP Team in Doboj in 1999/2000, in the Doboj District of the Republika Srpska (RS) and Posavina and Zenica-Doboj Cantons in the Federation of BiH (Federation). This has been supplemented in this report by information provided by other JSAP teams in other regions. A large part of the report consists of case summaries, comments on them and quotations from meetings with members of the BiH judiciary. Thus, the report assesses the performance of BiH judges and prosecutors through their actual handling of cases and lets them describe the past, the present and the future.

Initially, JSAP found that while most judges admitted that there was political influence on the judiciary, they all denied that it happened in their own court. However, with the development over time of a relationship of mutual trust and assistance between JSAP and the judiciary, judges became much more open and explicit about how their work was affected by political influence. Some even welcomed the opportunity to talk. JSAP thus became aware of numerous demonstrations of the indirect effect of political and ethnic factors in the dispensing of justice, although direct links were harder to find.

In the description of cases, the full names of the people concerned are given. In general, JSAP reports have attempted to avoid this unless required in the context. However, it is not possible to describe the political position of the person concerned, and so indicate the weight of any influence they might wield, without doing so. This is the whole point of this report. In any event, in many cases the situation described will reveal who the persons are. Cases and interviews with members of the judiciary from the Doboj region predominate because the primary research was done there. It does not imply that the situation there is different or worse than elsewhere.

One important finding in the report is that to the extent the BiH judiciary is politicised, it is by and large due not to the bad will of its members, but because of sociological factors and tradition. Although a review of sitting judges is currently taking place, there are no grounds to believe that the problems in the judiciary will be solved by getting rid of "bad" sitting judges and finding new "good" ones to replace them with. JSAP's assessment is that this medicine will be inadequate. The problem goes much deeper.

2 SOME INTERNATIONAL COMMUNITY PROJECTS ADDRESSING INDEPENDENCE OF JUDICIARY

2.1 The Madrid PIC Rule of Law year

Three years after Dayton, the international community belatedly acknowledged that the lack of the rule of law was one of the root causes of the problems facing BiH. The December 1998 Madrid Declaration of the Peace Implementation Council (PIC) declared that building the rule of law was a top priority for 1999. Recognising this fact, an ambitious list of judicial reform goals were set:

> We consider the establishment of the rule of law, in which all citizens have confidence, as a prerequisite for a lasting peace, and for a self-sustaining economy capable of attracting and retaining international and domestic investors. We resolve that a top priority for 1999 will be to build the rule of law in Bosnia and Herzegovina. We will work to achieve this through a thorough programme of judicial reform, including:
>
> - the creation of an independent, impartial and multi-ethnic judiciary;
> - the establishment of judicial institutions at the state level in accordance with the opinion of the Venice Commission, including an institution to deal with criminal offences by BiH public officials in the course of their duties;
> - strengthening prosecution of organised crime, return-related violence, corruption and other serious criminality;
> - faster police restructuring, including the establishment of multi-ethnic, professional police forces;
> - rationalising and reinforcing the institutions for human rights protection;
> - strengthening the Constitutional Court;
> - better public information about the rights of citizens and legal assistance;
> - developing and implementing an equitable mechanism to enforce legal rulings.

This ambitious and comprehensive reform plan was not followed up by any resource analysis on what was needed to implement it, despite the fact that it concerned the whole gamut of responsibilities of many European ministries of justice and interior. The institution charged with achieving these goals, the Office of the High Representative (OHR) began 1999 with only one and a half staff members to cover all the issues related to judicial reform. By the end of the year it had four people. Even if other departments in OHR have also been engaged to a certain extent, the overall level of staffing has been insufficient.

It is quite clear that the difficulty of the reform process was underestimated, as was the level of resources needed to achieve results.

2.2 JSAP and its first report

The growing international community concern in 1998 that the rule of law in post-war BiH was not a healthy patient was based on the scattered experience of international community organisations that had an interest in the issue. However, it was clear that substantive, comprehensive information on the judiciary of BiH was lacking, although it was equally clear that no reform could be justified without proper and substantiated information to form its basis.

At the same time, it became clear to UNMIBH that in order to have a credible law enforcement system, its efforts to restructure, reform and democratise the local police needed to be complemented by similar efforts in respect of the judiciary. To get some reliable

knowledge of the functioning of the BiH judiciary, JSAP was set up by the Security Council under Resolution 1184 on 16 July 1998. Working within UNMIBH, the JSAP mandate was:

> to monitor and assess the court system in Bosnia and Herzegovina, as part of an overall programme of legal reform as outlined by the Office of the High Representative

When JSAP was established in late 1998, it first concentrated on collecting basic information about the court system and describing its institutional, technical and political dimensions. In its first report, for the period November 1998 to January 1999, these were the tentative conclusions as for the political dimension:

> 1. Judicial independence would appear to be compromised either in cases which involve powerful forces in society or in cases which impinge on ethnic politics, particularly in the fields of housing, employment and criminal cases.
>
> 2. In the many cases which lie outside these categories the initial impression is that the principle of impartiality is generally adhered to, though in other respects owing to inadequate resources, legislative weaknesses or insufficient authority vested in the courts justice may not always be well served.
>
> 3. Overt interference with the judicial process in the form of improper instructions, intimidation and violence is in some parts of Bosnia an every-day occurrence and where it takes place, it may have an impact which may go far beyond any individual case to which it relates.
>
> 4. JSAP did encounter some judges who were openly biased, but a perhaps more substantial source of political influence is the result of the genuine fear of many judges of the consequences for their families and themselves of applying the law.
>
> 5. A significant number of judges and prosecutors at grass-roots level are prepared to make correct decisions by which they put themselves at risk. Equally many within the judicial system wish to see judicial independence enhanced by being freed from its present state of politicisation.
>
> This final point is a basis for some optimism over the future development of the rule of law in Bosnia and Herzegovina in the midst of the immense difficulties that it faces.

JSAP's initial findings confirmed much of the anecdotal information previously held about the judiciary. In its further work, the initial findings were not only confirmed but were supported with more evidence. In assessing the judiciary, an overall feeling developed that the situation was even worse than expected, especially with respect to judicial independence.

2.3 The OSCE Judicial Survey and Roundtables

Shortly before JSAP was established, the Rule of Law Section in the Democratization Department of the Organization for Security and Cooperation in Europe (OSCE) in BiH carried out a survey of judges to gather information about the judiciary. Not only was accurate information on the number of courts and judges difficult to get hold of, but also determining what the BiH judges thought about their professional situation was, to a large extent, guesswork. One of the questions in the survey concerned political factors related to dependence upon or interference by executive authorities.

From the answers to this question, it could be seen that the members of the judiciary looked to engagement of the international community to assist in affirming their

independence. There were considered to be great difficulties in separating judicial power from the legislature and the executive, and it was pointed out that influence from these two other segments of society affected the performance of judges. Insufficient co-operation from other state bodies and institutions, e.g. difficulty in getting court orders executed, was mentioned in particular. The judges also pointed out that due to poor material conditions, they were often forced to take on supplementary positions in business or politics.

In the second half of 1998, OSCE arranged five round-tables throughout BiH, where fifteen BiH judges at each roundtable met with five Norwegian judges. The general conclusions based upon what the judges themselves expressed were:

- The courts do not get the material resources they need to do their work properly.
- They are inefficient and they do not have the necessary office equipment.
- It is difficult to assess whether the situation of the courts is due to the economic situation in the country or the result of the priorities of the government. The government's will to improve the situation does not seem overwhelming, to say the least.
- Each judge has far too many cases. There are a high number of unsolved cases.
- The salaries of the judges are so low that there is a danger of corruption.
- The courts are not independent. The judges are subject to pressure from politicians as well as from criminals.
- The judges want to be independent. They support the efforts to change the appointment process to secure independence and to give the judges protection against illegal removals.
- The legal system is in a transitional period. New laws are gradually substituting the laws of the former Yugoslavia.
- Judges do not get the necessary information about new laws. Several of the judges had never seen the European Convention on Human Rights even though it has been incorporated into local law by the Constitution.
- The courts do not have money to buy the legal books they need. They do not even have texts of the law that they are supposed to base their decisions on.

2.4 Six conferences on Independence of Judiciary

The roundtables were followed up by six conferences from 7 to 17 September 1999 with the title *Politicians meet Judges on Independence of the Judiciary* as a joint OSCE, UNMIBH and OHR project. The aim was to inform politicians about the difficult situation of the courts and make them accountable for the current problems. Four Nordic judges were invited to give a short introduction followed by discussions on:

- The Principle of Separation of Powers
- Selection and Appointment of Judges
- Administrative Bodies for the Judiciary
- The Duty of Judges to Act Impartially

A booklet was printed addressing these topics. Court presidents as well as politicians with responsibility over the judiciary, such as ministers of finance, were invited. Many judges stated that this was the first time they had met with politicians and they were generally hesitant to speak. However, when the ice had been broken, they described the situation in terms roughly similar to those articulated in the judicial survey and the round-tables.

Many of the ministers of justice gave strong support to the judges and showed a praiseworthy good will. However, these individuals are usually not politicians, but rather legal professionals called in to run the ministry. Politicians who could bring about increased funding of the courts either did not say anything or did not attend at all. The general

impression was that the ruling parties were not very interested in the question and would prefer to keep the courts underfed rather than support reform.

One prominent judge said this about the lack of interest from the politicians at the conference in Banja Luka:

> I am sorry that today we do not have here those responsible leaders of the political parties to show their consensus about the resolution of this key issue. All of them in their programmes are in favour of an independent, sovereign judiciary, of the rule of law, but in fact in practice it is not so.

2.5 JSAP comments on independence of the judiciary

Following those conferences, the statement from the BiH president and the letters from the Sarajevo Cantonal Minister of Justice referred to in paragraph 5.1.2 and 5.1.3, leaders of judicial institutions and representatives of executive authorities turned to JSAP for advice on the issue of independence, expressing a wish for JSAP to submit its views on the matter in writing.

A JSAP report entitled *Comments on the Independence of the Judiciary* was released in February 2000. The comments were based on the provisions of international instruments on the independence of the judiciary, and were formulated to assist judicial and executive authorities in BiH in their task of securing and promoting the independence of the judiciary. Topics included were:

- communication between the ministry of justice and the judicial institutions on specific cases
- media statements made by members of the executive on specific cases
- respect for the judiciary versus freedom of speech in individual cases
- the need for the ministry of justice to request judicial institutions to submit statistical data on pending cases
- failure of the executive to fulfil its responsibility to provide adequate working conditions for judicial institutions.

The recommendations were meant to give some guidelines for the relationship between the executive and the judicial branch of government, but in the long run it is the will to be independent and to respect independence that counts. The climate in society must provide the basis for independence along with the constant checks and balances of a democracy, and, not least, these standards must be upheld by the media.

3 THE YUGOSLAV TRADITION

3.1 No division of power and no independence

The division of power among the legislature, the executive and the judiciary was not part of the communist theory of state and BiH has no tradition of genuine independence of the judiciary. However, basically pre-war Yugoslavia (SFRY) seems to have been a society in inner harmony without politicians feeling the need to exert much direct influence on the judiciary. Nevertheless, the judicial system had an in-built lack of independence ready to be used if and when there was a need for it.

Based upon its collective experience, some of which is presented in this report, it is JSAP's assessment that the traditional lack of independence sticks far deeper and has more consequences than usually is perceived by the international community. The important role of the courts to provide an avenue for citizens to challenge the activities of the state and to be the guardian of human rights and other rule of law principles, where independence is a presupposition, is a new concept. While independence is often said to be accepted, experience indicates that this notion is not always fully understood or accepted, not only within the BiH political environment but also by many members of the judiciary. True independence will involve a paradigm-shift in mind and mentality.

3.2 Controlling judicial appointments

Within the judicial system, the lack of judicial independence was particularly manifested in the process of appointing judges, for which the Assembly of the Socialist Republic of BiH was the competent body. Judges had to be of "high moral quality." In SFRY, determination of moral quality was in the hands of the labour unions, the Communist Party and the police. Indeed, it is believed that the police had the real power in this regard. In an internal UNMIBH report of 5 July 2000 addressing court security, a judge described the former relationship with the police:

> Asked about the local police's performance, he [the judge] was uncomfortable criticising the local police either in a positive or negative way. He seemed scared to give any opinion. He pointed out that before the war the Police was very powerful and the Ministry of Interior gave orders to judges.

A practical consequence of the appointment system was that almost 100 percent of the members of the judiciary joined the Communist Party, even if most of them did not participate actively.

3.3 Control by internal court organisation

The internal organisation of the courts also undermined the development of judicial independence. In the former Socialist Republic of BiH, the court president was appointed by the Minister of Justice on the proposal of the Communist Party and other segments of society, as well as local politicians. Presidents, at least in the more important courts, were to a large extent political figures and outsiders in the judiciary, with little judicial experience. After a period, they would move on to other important political positions.

The formal powers of the court president added to the level of control exercised over individual judges and their handling of cases. Through the internal organisation of the courts, i.e. in court departments and, in smaller courts, the general sessions of judges, the court

president and other judges were able to control the handling of a case allocated to one judge or a panel of judges. This control was effected by giving "advice" on how to collect and assess evidence and interpret the law, and binding decisions could be imposed. Even a judgement already reached could be modified and in this way a court president was able to control the cases in "his" court.

This system was defended on the grounds that judges without experience needed supervision and that the court should speak with one voice in legal matters. This rationale is contrary to accepted notions of judicial independence. If a judge is not able to handle a case by himself, he should not be a judge. If a judge commits an error, then this should be taken care of in the appeal system. Only judges presiding at a court hearing, having listened to the witnesses, the parties and the submissions of counsel, should be able to have a say in the case. In fact, the way in which cases could be influenced by other judges was so far from the expectations or experience of members of the international community that the full implications of this system were not understood until mid-1999.

From this, it can be seen that in SFRY the courts not only lacked external independence, but individual judges were not independent within the court system. In fact, it could be said that the courts were subject to a type of executive administration with the court president serving as a chief administrator. No doubt, in the local tradition, the court president felt responsible for the decisions of the other judges of the court, since the state considered judges as subordinates of the court president.

In truth, the system of internal court organisation enabled politicians to control judges and to influence the work of the courts. Invariably, this system substituted administrative orders for independent judicial thought, thus ensuring that the courts would not pose an institutional challenge to the interests of the state.

3.4 Control by the dismissal and reappointment procedure

The disciplinary system added to the control exercised over the courts. A wide number of officials or bodies, among them the president of the court, court departments or in smaller courts the general session of judges, the president of the next instance court, the Minister of Justice and Assembly committees could propose the dismissal of a judge or prosecutor, the final decision being made by the Assembly. Through simple psychological means, the system served its purpose even if dismissals were not often carried out. Political control over the court president, arising from the method of appointment, and his own ability to follow the daily business in the court and to have "talks" with a judge if necessary, was probably a sufficient control mechanism in the hands of political interests.[1]

As there was no concept of judicial independence, life tenure to protect judges from outside influence did not exist. On the contrary, judges were appointed for a limited period of eight years. This also added to the level of political control over the judiciary, as judges had no right to re-appointment, which was within the discretion of the body that appointed them.

[1] Anecdotal evidence indicates that court presidents and judges consulted local power figures and "godfathers" to discuss how to deal with particular cases. Even if this has some similarities with the form of conflict resolution in which the "judge" is more of a mediator seeking advice from tribal elders, it is not compatible with the judge's role in the rule of law tradition that developed from such models. Judges in many countries might be said to be sitting in an ivory tower too remote from the ordinary life they must deal with in the courtroom. On the other hand, in the SFRY tradition judges could be said to have been too involved in their society and too dependant on it.

4 POLITICAL CONTROL BASED ON ETHNICITY DURING AND AFTER THE WAR

4.1 The new Constitutions

The constitutions that came into force in both entities during and after the war made some significant changes to the court system, including introducing the notion of independence and changing the conditions of appointment of judges and prosecutors.[2]

The RS Constitution declares the courts to be "autonomous and independent" and the public prosecutor's office to be "an independent State body", judges and prosecutors are given life tenure, and RS National Assembly is responsible for their appointment and dismissal.[3]

In the Federation, the judicial system is more complicated with provisions found in both the Federation and cantonal constitutions.[4]

The Federation Constitution creates three Federation level courts, although only two, the Constitutional Court and the Supreme Court function. The Human Rights Court does not. Judicial power is to be "exercised independently and autonomously." Judges in those Federation courts are nominated by the Federation President in concurrence with the Vice-President and approved by a majority of the House of Peoples. Judges may serve until the age of 70, but can be removed for cause by consensus of the judges of the same court. The Constitution has no provisions for the election of presidents of those courts, but in the Supreme Court the president is elected every two years, with a rotation of ethnicities.

Courts at the cantonal level are partly regulated by the Federation Constitution and partly by Cantonal Constitutions, which for the most part repeat the relevant provisions of the Federation Constitution. Judges of the cantonal courts are nominated by the cantonal governor and appointed by a majority vote of the cantonal assembly. They serve until age of 70, but may be removed by the consensus of the judges of the Supreme Court. The judges in each cantonal court elect their own president. Judges of municipal courts are appointed by the president of the cantonal court, after consultation with the municipal executive. They may also serve until the age of 70, unless removed by consensus of the judges of the cantonal court. Election of municipal court presidents is sometimes determined by the cantonal constitution and sometimes by the cantonal law on courts, but in all cases, the president is elected by the judges in that court.

It has been argued that the new constitutions have made the judiciary independent merely by virtue of the fact that they so declare. However, it is JSAP's assessment that this has not yet been achieved and in fact cannot be so by mere declaration. JSAP has met a number of judges and politicians who have not felt comfortable accepting a sociological and realistic way of looking at the law. The difference between law in practice and law in books is

[2] More detailed provisions on the judiciary and prosecution can be found in ordinary legislation, especially the laws on courts. New legislation affecting the appointment dismissal of and disciplinary proceedings against judges and prosecutors is discussed in paragraphs 4.4 and 6.1.

[3] Provisions on the judiciary and prosecution are found in Chapter X. The Constitution was published in Official Gazette of the RS 21/92, 28/94, 8/96, 13/96, 15/06, 16/06 and 21/96.

[4] The provisions on Federation courts are found in Chapter IV C of the Federation Constitution, and provisions on cantonal courts in Chapter V 4. The Constitution was published in the Official Gazette of the Federation 1/94, 13/97 and 13/97. It does not include reference to the prosecution.

a new notion. However, the Federation "system" giving the power to appoint municipal court judges to cantonal court presidents, the power to dismiss to the judges of the same or superior court, and the power to elect court presidents to the judges themselves may, in the long run, promote independence.

It should be noted briefly that none of the constitutions deal with minor offence courts and that these courts are not treated as part of the judicial system, despite the fact that most, if not all, of the cases they deal with are judicial in nature. Political influence, whether by means of the appointment and dismissal procedures or otherwise, and the impact of low salaries, inadequate funding and the other problems discussed in this report affect minor offence courts in a similar fashion as the regular judiciary. However, many of the ways in which the independence of the regular court system has been improved in recent years have not been carried over to the minor offence courts. For example, minor offence courts were excluded from the ambit of the new laws on judicial and prosecutorial service. In some cantons, minor offence judges are appointed for only fixed terms of four or eight years. This renders them particularly open to political influence and JSAP is aware of judges who were concerned about losing their position following a change of government. Only Tuzla Canton has so far increased the salaries of minor offence judges in line with increases for regular judges and prosecutors.[5]

4.2 The new concept of loyalty to ethnicity

In BiH the war came as a double hindrance in the transition to democracy. Ironically, the heritage of inherent judicial dependence was very useful during and after the war, as political influence over the judiciary became a tool for the three ethnic groups to defend and take care of their interests. Most of the present political contamination of the judiciary stems from this period.

It is JSAP's assessment that after the war those in power by and large did not want an independent judiciary. They aimed at keeping their traditional control over the courts, only replacing loyalty to socialism with loyalty to ethnicity. These expectations and the ability to fulfil them have inevitably had a strong impact on how judges act. Even judges who JSAP considers very competent sometimes feel compelled do things they should not do.

A few examples from recent internal UNMIBH reports illustrate the general political climate in which the BiH judiciary works:

> *(From a report of 8 May 2000)* Members of the BiH judiciary continue to inform UNMIBH of problems in asserting their independence in the face of pressure by local politicians. In separate meetings, judges and prosecutors from Gorazde and Zepce told UNMIBH that their work continues to be plagued by political pressure, lack of material resources and especially fears for the security of themselves and their staff.
>
> *(From the Doboj weekly report of 15 June 2000 referring a meeting with Zeljko Mikic, President of the Orasje Municipal Court. The issue was an investigation into allegations of violent behaviour on 11 May 2000 by a suspect, Marko Benkovic, former municipal leader of HDZ. The victim was Krunoslav Vikovic, the Governor of Posavina Canton.)* Only two judges were working in the criminal department and Judge Iljo Klajic was appointed to investigate the case. The investigating judge was a former colleague of the suspect in the army during the war. As for external influence in the case, the President admitted that the suspect was a

[5] The question of minor offence courts is dealt with at greater length in JSAP's *Thematic Report I: Courts for Minor Offences.*

popular personality in the municipality and this factor might generate influence in the conduct of the proceedings. He admitted that in small municipalities like Orasje, it would be difficult for judges to maintain total independence in dealing with this kind of case.

(From the Mostar weekly report of 15 June 2000, referring a meeting with Cantonal Court President Castimir Mandaric on the sensitive issue of non-execution of arrest warrants against some influential people accused of war crimes) President Mandaric acknowledged that the local law enforcement authorities might fear for their own security or have feelings of "ethnic solidarity" with the accused. Mandaric said that events take their own pace in Herzegovina and those who want to speed them [the processing of war crimes charges] up should take into consideration the insufficient infrastructure at the Cantonal Court to deal with any problems, including lack of court police and security in general.

(From the Banja Luka weekly report of 2 November 2000 on a meeting with the Minister and Deputy Minister of Justice of Central Bosnia Canton) On the subject of war crimes, the Deputy Minister said he believes that both the Cantonal Prosecutor and the President of the Cantonal Court are involved in political games at an unacceptable level. In his view, the Prosecutor pushed hard regarding the war crimes cases because of the upcoming elections, while the President was reluctant to handle the cases for the same reason.

4.3 Continued control over judicial appointments

It should not come as a surprise that the system of appointing judges did not function properly during wartime and this unfortunately continued after the war. Some appointments were made in a violation of the basic standards of fairness and competitive evaluation. Thus, due to the political interests of the ruling parties that wanted to control the judiciary, inexperienced lawyers who could be "trusted" by the political authorities were appointed ahead of experienced judges. In the Federation, it was quite clear that the first round of appointment of judges was part of a political deal. A municipal court judge told JSAP that he was offered the chance to be a cantonal court judge, but only if he would agree to become a member of the political party making the offer.[6] Five of the many meetings JSAP has had on this issue illustrate how local actors describe the political impact on the judiciary:

(On a meeting with Novak Vidic, President of the Modrica Minor Offence Court, on 30 September 1999) Mr Vidic complained that the nomination of judges comes from political parties, which suggest their candidates to the government. There is a tacit agreement by which each party has its own "quota" on the judiciary.

(On a meeting with Sava Lekovic, President of the Doboj District Court, on 13 October 1999) According to Mr Lekovic, many judges currently working were appointed during the wartime, are very poor in quality and there would be no harm in weeding out those judges. … The President was very sceptical about independence of judiciary in the RS. The existing law permits politicians to decide the fate of judges unilaterally.

(From the Doboj weekly report of 11 November 1999) Advocate Martin Dzido informed JSAP that during and after the war appointments to judiciary were made on the basis of nationality rather than professional competence. In addition, poor service conditions for judges and prosecutors became a stumbling block to attracting talented people to the profession. He added that some of the judges did not know how to write a judgement, so they would pronounce a decision but not write the judgement for a long time.

[6] In fact, some, if not all, of the cantonal laws on courts prohibit in some way judges from being members of political parties.

(From the Doboj weekly report of 11 November 1999, on a meeting with Biljana Brkic, President of the Bar Association, Doboj Region) Prior to becoming an advocate, she worked as a judge for ten years. In the 1990s, she was Assistant to the Minister of Justice and during the war she was the Inspector of Courts in the RS. In that capacity she participated in the selection of judges from 1992-95. She said that during that period, about 400 judges were appointed to various courts in the RS. The basic criteria for appointment as a judge were ethnicity and political allegiance. The Serb Democratic Party (SDS) recommended candidates for appointment. During this process, quality was sacrificed for ethnicity. It became very hard for professional judges to work with these judges and many good judges left judiciary and became lawyers. During the war, the SDS used to advise courts what to do and how to do their work. Perhaps that will continue even after the war. It may take years to make the judiciary free from external interference.

(From a report on the Doboj Team meeting on 4 February 2000 with Zdravko Popovic, President of Teslic Basic Court) He pointed out that in his court a few judges were thoroughly incompetent, but there is no mechanism in place to remove them. In the past, if more than 50 percent of the judgements of a judge were overturned by the appellate court, that would be a reason for removing the judge. Currently, even after the overturning of more than 80 percent of his decisions by an appellate court, a judge can remain on the bench.

4.4 The impact of low salaries, housing dependence and court funding

Until May 2000, a crucial problem both in the RS and the Federation was the low level of judges' salaries, as well as the fact that they were often paid late. In the RS, the monthly salary range had been between DM 300 and 500. Police officers generally earned more than judges. In the Federation, salaries varied from canton to canton. In some cantons they were as low as DM 600-700. Salary payments were often three or four months late and sometimes only 60-70 percent of the total salary. Moreover, the salaries and other material funding of the courts were not distributed in a transparent way, but depended on the ability of the court president to get funding allocated to his court.[7]

Under this regime, courts could not be independent. The unsatisfactory low levels of pay for judges also raised suspicions and allegations of bribery, both from parties to court proceedings and the general public.

Some statements made by Venceslav Ilic, then President of the Federation Supreme Court, in an interview in *Dnevni Avaz* on 20 August 1999 are relevant to this topic (not UNMIBH translation):

Question: Are your salaries low?

They are not only low, but late too. Two days ago we received our salaries for May. Every country in the world, whose primary goal is building an independent and autonomous judiciary, pays special attention to living standard of its judicial workers. That means that they are given such salaries that can ensure them a decent life. We want incorruptible judges while giving them their salaries once in three months. We also want judges with authority, and I know that recently electricity and telephone have been shut off in the house of one of our judges, because he doesn't have money to pay the bills. What authority among people can a judge of the Supreme Court have without electricity and a phone?

Question: Are judges corruptible?

Not at the Supreme Court because they are people with high morality.

[7] New legislation substantially increasing judicial salaries is discussed in paragraph 6.1.3.

Question: And what about the lower courts?

I don't know. I am sure only about what is happening "in my house".

Question: Does the Federation of BiH have an independent judiciary?

If a political party influences the selection of judges, then we cannot talk about independent judiciary in the Federation of BiH. And today parties influence the selection of judges. If it weren't like that, I would easily select two Croat judges. Thus, I have to expect a certain kind of party agreement on fitness of judges.

This interview shows that Mr Ilic was very concerned about court independence. By making the reservations he did, he obviously wanted to send the message that the state of the courts was alarming.

The low and delayed payment of salaries had a significant impact on independence. One court found a creative solution to address this situation by taking a loan from a private company to pay salaries on time. Although JSAP inspection did not find any evidence that the company was involved in any pending cases, this way of solving the salary problem is not acceptable and reveals a basic lack of understanding of judicial independence and the rule of law.

Some quotations from JSAP reports give a picture of the general status of the judiciary and how economic dependence may pave the way for political influence:

(From the Doboj weekly report of 7 October 1999 on a meeting with Uzeir Kalabic, President of the Zavidovici Municipal Court) The purpose of the meeting was to assess the influence of politics, if any, in the work of the court. The President advised that he has been working in the court for the last 23 years and that during this period many attempts were made by politicians to influence him, but without success. The understanding of the international community of the independence of judiciary is not correct, in the sense that the courts are not directly under political pressure, but the Ministry of Justice is quite often subjected to economic pressure. This affects the overall independence of the judiciary. The President said that the courts in Zenica-Doboj Canton are very badly funded and have been struggling to maintain their integrity and independence. He was compelled to seek some financial support from the Mayor of the municipality to fill the gap in the budget of the court. The Mayor was a politician and he was not under any obligation to financially support the court. Since the President had been in the municipality for a long time, most people know his integrity and they never tried to take any undue advantage from the assistance. But this would not be the situation in other localities. Besides that, the judiciary is unable to attract qualified persons, because service conditions are very poor. Meanwhile, many experienced judges are leaving the profession. This is causing irreparable injury to the independence of judiciary. Further, he said that the seminars and sermons on independence of judiciary would not deliver any tangible results unless the material situation of the courts improved.

(From the Doboj Team meeting with Sava Lekovic, President of the Doboj District Court, on 13 October 1999) The President recalled a futile attempt made by politicians some time back to dislodge him from this position. At present, the Minister of Justice can remove any judge, if he wants to, in accordance with the existing law. Besides that, politicians can use allocation of funding to courts as a tool to pressure them. If a judge is not politically correct, politicians could strangle the court by not allocating adequate funds to run it. In short, the courts are not able to assert independence due to existing laws and lack of specific regulations on allocation of funds.

(From notes of a Doboj Team meeting with Zahid Kovac, Cantonal Prosecutor, Zenica on 21 October 1999) Another important point he brought to the attention of the team was the miserable service conditions of judges and prosecutors. This state of affairs contributes much to corruption and inefficiency in the system. Good professionals do not want to work in courts. So, the judiciary and prosecuting bodies have to be content with low quality professionals.

(From an internal UNMIBH report of 4 May 2000 on a meeting with Katarina Tomic, President of the Vares Municipal Court) The court does not receive sufficient funds for material costs. She told JSAP that this contributes to delays in the adjudication of cases that require expert opinions. She also advised that judges are at the mercy of local politicians, because almost all judges are members of political parties and many of them are displaced persons. They live in apartments allocated by the local authorities, which contributes much to the dilution of the independence of the judiciary. People have more or less lost confidence in the judiciary. She emphasised that the allocation of funds to courts depends on the influence of the judge in local politics. The setting of court budgets has been the prerogative of the Minister of Finance and they remain as confidential bilateral deals without any rational criteria.

(From the Doboj weekly report of 18 May 2000 on a meeting with Goran Djuric, Acting President of Doboj Basic Court) He stressed that only four judges out of fourteen have solved their housing problems. He emphasised that the bad material conditions of the court and the status of the judges, as well as their unsolved housing problems, have an impact on the efficiency of the work of the court and contribute to delays in the adjudication of cases.

4.5 Control by internal court organisation, from formal to informal

In the Federation, the laws on courts for every canton except that of Zenica-Doboj kept the former system of court departments and general sessions of judges able to determine legal issues in cases not assigned to them. However, as a result of JSAP advice, in almost all cantons, their power has now been limited to dealing with administrative matters. In the RS, OHR, urged by other international community organisations, removed comparable provisions from the draft law on courts and judicial service. This was an important step to independence as it removed not only the opportunity for the court president and other judges in the same court to influence individual judges and the outcome of cases, but also thereby closed a door commonly used by politicians and others to influence court decisions.

Despite these attempts at reform, the court president still retains the ability to substantially influence judicial matters through his administrative powers, not least in the allocation of cases. Urged by JSAP, some court presidents, however, have started to develop a system where cases are allocated randomly. From practical examples, it can be seen that there is a need to prevent court presidents from selectively allocating cases to the “right” judge according to the political sensitivity of the case. JSAP is aware that in some cases with political implications the court president has even re-assigned judges to handle those cases, based upon what the court president learns about the possible outcome. Re-assignment allows the court president to postpone a judgement in a sensitive case if this is convenient. JSAP has seen this method refined by several re-assignments during the course of one case. Also, by allocating politically sensitive or complex cases to younger judges with less experience, the court president will have greater opportunity to influence the outcome through the tradition of giving “advice”.

It can be observed more generally that the SFRY tradition has not been changed. A court president in BiH has a position exceeding that in most civil and common law countries. Judges have reported to JSAP that due to the power of the court president they have signed

decisions supposed to have been reached in a panel of judges without the panel having been convened. During a JSAP inspection of court files, JSAP found a blank judgement form already signed by the lay judges.

An incident in the Sarajevo Cantonal Assembly on 29 June 2000 illustrates not only the lack of understanding of court independence and what should be subject to political discussion, but also that the former common perception of the court president being responsible for his subordinates is still alive. In a session on the report of the activities of the courts in Sarajevo Canton for 1999, a member of the Assembly expressed dissatisfaction with a decision of the Cantonal Court regarding an educational appointment. The events, as reported in Sarajevo newspapers, are described in a report from the JSAP Sarajevo Team of 22 September 2000:

> The first article explains that Nermina Causevic, member of the Cantonal Parliament and member of the Social Democratic Party (SDP) was dissatisfied with the decision of Cantonal Court that vacated two decisions of Sarajevo Municipal Court II regarding the appointment of the Director of Musical Primary School Novo Sarajevo. Ms Causevic asked for revision of the court proceeding and for dismissal of Amir Jaganjac, President of the Sarajevo Cantonal Court. The journalist interviewed Mr Jaganjac, who stressed that as court president he does not have competence to deal with individual cases, which is the competence of the judge dealing with the particular case. Mr Jaganjac added that the Parliamentary Assembly was not the place to discuss somebody's dissatisfaction with a particular court decision.
>
> The second article published the statement of Miro Lazovic, President of the SDP Cantonal Board, who said that the statement of Ms Causevic did not reflect the opinion of the SDP, but just represented her personal attitude.

The fact that the member raised the question in the Assembly is a reminder that some politicians have no compunction about meddling with the courts, but the reactions to it show that doing this, at least in the open, is no longer accepted as politically correct.

5 SOME ILLUSTRATIONS OF POLITICAL INFLUENCE AND THE PERCEPTION OF INDEPENDENCE

5.1 Overt interference

5.1.1 Politicians controlling the election of the President of Zivinice Municipal Court

During the war, the 1986 Law on Courts of the former Socialist Republic of BiH was carried over as a law in force in the territory that is now the Federation. Under it, the Minister of Justice appointed court presidents and various officials and bodies could submit proposals. When cantonal laws on courts were passed that gave the power of electing presidents to the collegial body of judges in each court, there was concern in some quarters about losing this source of power.

The Law on Courts of Tuzla Canton was passed in 1996.[8] Although the politicians in Zivinice no longer had any formal vote on the question of court president, they addressed the election in a very robust manner. At one point, the Chairman of the Municipal Council of Zivinice, the Municipal Mayor of Zivinice, and the President of Executive Board of the Party of Democratic Action (SDA), realised that their "candidate" might not be elected. Therefore, on 10 July 1997, they wrote a letter to the second instance court administering the court in question:

> Subject: Election of the president of the Zivinice Basic Court[9]
>
> ….. Mr President, we want to inform you that in the event of the election of Mr Terzic to the position of president of the Zivinice Court, we shall immediately initiate the procedure for abolishing the Zivinice Municipal Court, regardless of the consequences that may arise from this.
>
> As the election has not yet been held and it is not too late for your reaction, you are kindly requested to prevent this, in accordance with what we agreed.

This political interference was successful as it prevented the election of the "wrong" candidate. The letter reveals that they still considered themselves as having some influence, or in fact control, over who should be the court president, regardless of what the law said, even if it now had to be exerted by means of political pressure. It is noteworthy that this was expressed in writing, as if this was an ordinary thing for politicians to do. The letter also illustrates the common perception that the president of the second instance court controls his first instance courts. The politicians obviously considered the issue to have been already settled after the meeting with the second instance court president referred to in the letter. Apparently, the notion of independence not only was not accepted, it was not even known. Based upon this, we must acknowledge that there is a long way to go before the judiciary is de-politicised.

5.1.2 The BiH State President Alija Izetbegovic denounces a judge

A statement given by Alija Izetbegovic, member of the BiH Presidency, on 8 September 1999, attacked the authority of courts to execute eviction orders (not UNMIBH translation):

[8] Official Gazette, 3/96, 8 July 1996.
[9] Under the new law, the correct name was Zivince Municipal Court.

> Today, I have learnt that these days A, with his wife and two children, was evicted from the apartment given to him as a refugee for temporary use. The mentioned person was evicted on the basis of the eviction order signed by the judge NN. ….. In the capacity of the Member of BiH Presidency, elected by the people at the free elections, I invite all to refuse to issue and execute the orders for eviction of refugees by which they have been prevented to return to their homes, since such eviction orders are immoral and unlawful. All those that are not brave enough to work in conformity with their own moral norms should leave their positions.

There is no doubt that the President had genuine concerns about the evictees. But to respect judicial independence, members of the executive should restrict themselves to suggesting changes to the laws if they lead to undesirable consequences and not arguing on the basis of unlawfulness, as the courtroom is the proper arena for legal disputes. The most serious part of the statement is, however, the direct attack on the judge herself, saying that what she had done was immoral. Accordingly, the only "brave" and "moral" ones who deserve to be in their positions are those who "refuse to issue and execute" such eviction orders, i.e. those judges making decisions in accordance with the interests of their ethnic group. This interference in an individual case sent a dangerous signal to the judiciary not to apply the law in eviction cases and for the police not to execute eviction orders.

President Izetbegovic's statement was made while the six conferences on independence of the judiciary referred to in paragraph 2.4 were taking place, serving to illustrate in a disappointing way that there was a need for such meetings. The participating judges were reluctant to publicly address the statement in the open meetings, but based on informal reactions it was quite clear that they were frightened. A letter of 8 September 1999, from the president of the court who had handled the actual case, to the High Representative, the heads of UNMIBH and OSCE and to the Human Rights Ombudsman for BiH, shows how the judges felt their independence undermined:

> The reason for directly addressing you like this is the statement of a member of the BiH Presidency published in daily newspaper *Avaz* on 8 September 1999, with the title "Refuse all orders for eviction of refugees". In order to protect the physical and moral integrity of the judiciary, we appeal to you to demonstrate to officials of the executive and legislative bodies in a practical way the independence of judiciary.
>
> [The letter then goes through the particular case.]
>
> From what is mentioned above, you can draw your own conclusions regarding the conditions for the functioning of the courts as "independent instances". For us it is possible to issue high quality court decisions only when judicial authorities are separated from the executive and legislative authorities, both in the terms of their budgeting and appointment processes.
>
> We appeal to you to use your powers to genuinely and immediately protect the independence of the judiciary and judges, who only do their work and lawfully implement current laws. The statement mentioned above has already achieved its objective, as it has resulted in open threats against the judiciary and its officials, letters from disabled war veterans, immediate suspension of proceeding with claims and interruptions in implementation of valid court decisions. This represents a signal for the 33 judges of this court, and most likely for others in the judiciary, to resign from their jobs or else their physical integrity and already shaken morality might be jeopardised even further.
>
> **Please treat this letter as confidential, since we expect that executive authorities may possibly act in revenge, and certainly direct it against the officials in the judiciary.** (Bolded in the original.)

The author of the letter has now agreed that it can be made public. The fact that he asked for confidentiality when the letter was sent clearly shows that at that time he felt that the judges in his court could seek "protection" only from the international community.

One defence that was made on the President's behalf was that court independence was not at stake because we should distinguish between court decisions and their enforcement. It was argued that decisions and execution, which in BiH is mostly carried out by the regular police, had to be "harmonised", which in the local political language obviously meant that the police could ignore court decisions if that was convenient. This is a total misunderstanding of the rule of law. To go to court and get a judgement is not a game; in a functioning democracy parties must also be able to enforce their judgement. It is crucial, especially in a country where much property is effectively state-owned, that those in political power not should have the effective power to declare court judgements null and void at the enforcement stage. JSAP has addressed this in its *Thematic Report V Enforcement: Execution of court judgements in civil cases* (discussed in paragraph 5.2.1).

The presidential statement aiming at having the courts not make orders for eviction and the police not enforce any would obviously affect the return process in a negative way. There were therefore strong reactions to it.

On 8 September 1999, Ambassador Dr Gret Haller, Human Rights Ombudsperson for BiH, gave a statement where the merits of the case were explained, and these general comments on the rule of law were included:

> Respect for Human Rights in Europe is inevitably linked with the principle of Rule of Law – that is the highest moral standard of democracy. If morality is invoked to undermine principle of the Rule of Law, as it was done by Mr Izetbegovic, the member of the Presidency of BiH last night, it could even mean the end of morality. The Rule of Law must prevail. This must be understood by all officials of this State, in order to integrate Bosnia and Herzegovina into the family of the European countries.

The High Representative, Wolfgang Petritsch, met with the President on 10 September 1999 and, in a press statement, called on all government officials to respect the law on property. Following this meeting, Ambassador Petritsch welcomed what was called President Izetbegovic's "clarification" that "refugees who want to return must be enabled either to return to their pre-war homes or be provided with other accommodation". This was probably regarded as a way of not escalating this sensitive issue.

On 11 September 1999 Ambassador Robert Barry, the OSCE Head of Mission, expressed his support for the High Representative's statement and underlined that the fundamental principles underlying the property laws should be absolute and unconditional. Ambassador Barry praised the Sarajevo judiciary for implementing the property laws in a fair and balanced manner.

These reactions from the international community concentrated on the return process and the property laws, although the situation also called for underlining the general question of independence of judiciary and that the executive should respect the separation of powers. Instead, this point was addressed in the aftermath of President Izetbegovic's statement.

5.1.3 The Sarajevo Canton Minister of Justice writes letters to the courts

The President's statement came at the end of a series of efforts by politicians to protect temporary occupants from being evicted on the basis of court decisions. The title of a letter dated 13 April 1998 from Jusuf Zahiragic, then Sarajevo Canton Minister of Justice and a lawyer himself, to the Presidents of the two Municipal Courts in the canton is a clear revelation of naked political pressure on the courts:

> Subject: Warning regarding execution of judicial verdicts on forceful eviction of temporary occupants from apartments or houses.

The use of the word "warning" from the executive to the courts indicated that the minister lacked a basic understanding of judicial independence, and this was later confirmed.

The letter refers not only to the housing laws, but also to what are called "conclusions" made by the Parliament on 12 March 1998 "in order to achieve the purpose of those laws". Although the conclusions were not laws, they were printed in the Official Gazette. It seems, not surprisingly, that the basic difference between laws and political statements was not recognised in the communist tradition and still is not. The good intentions of the conclusions were to avoid families being evicted onto the street. However, in the political environment in BiH, such techniques are used to uphold post-war status quo and to counteract one of the bases for the Dayton peace: that people have the right to return to their pre-war homes. There may be some substantiated concern that not all the by-products of this policy are favourable, but it is not acceptable for conclusions to be used as a basis for politicians to make their own judgements as to whether court decisions were "right" or "wrong" and to intervene by writing letters in specific cases, thus clearly undermining the independence of the courts.

Examples of such pressure, commonly observed also in the RS, can be seen in a number of letters from the same Minister of Justice throughout 1998 and 1999. In a letter of 19 May 1998 to a court president, referring to the warning letter mentioned above and addressing a specific case, Mr Zahiragic wrote:

> The eviction was scheduled in spite of the warning from this Ministry.

In the same letter the Minister called for a general session of judges to be held to request the opinion of the judges:

> whether the Court President and Judge NN had offended their work service.

This was an open threat to initiate disciplinary proceedings, with the traditional side effect of psychologically calling the other judges to order. The tone of this and the other letters indicates that the Minister thought that this kind of political interference was perfectly acceptable.

This situation raised considerable concern about the relationship between the executive and the judiciary, and UNMIBH convened a meeting with the cantonal Minister of Justice and the court presidents of Sarajevo Canton to discuss the matter on 4 October 1999.

In preparations for the meeting, the presidents expressed some fear to JSAP, but mostly anger and they supported the idea of a meeting to stand up before the Minister. During the meeting, however, they barely said a word that the Minister could perceive as opposing

what he had done. Instead they hid behind JSAP without openly supporting the JSAP criticism. It seemed clear that the Minister was a hard fighter, used to exercising power, and the impression was confirmed that he found it perfectly in order to extend this to the courts.

The meeting revealed that the court presidents forwarded such letters from the Minister to the judges involved, who made them part of the case file, instead of filing them in the office of the president or sending them back. Although the letters were sent to the parties as part of the case file, the judges stated that letters had no influence whatsoever on the case. But in the political and judicial environment in BiH, such assurances should be treated with scepticism. As the parties were aware of the existence of the letter, this would inevitably influence their actions in the case, one of them presumably seeing it as a drawback, the other as an advantage.

In the end, the Minister reluctantly admitted that he should not have sent such letters and stated that he would not do so any more. However, his lack of understanding of the basic principles of separation of powers was demonstrated when he added that it was more appropriate that the Minister for Housing or the Minister for Work, Social Affairs and Refugees sent them.

To obstruct the return process was apparently an overall political goal too important to be left to judges, who could no longer be trusted to take care of the interests of their ethnic group. In this regard, the statement from President Izetbegovic mentioned above and the letters from the Minister were a demonstration of this dissatisfaction and an attempt to uphold control. As such, they were an indication of a slowly growing judicial independence and a development in the right direction.

The High Representative removed that Minister of Justice from office on 29 November 1999 stating as part of the reasons for removal that he had:

> repeatedly interfered with the independence of the judiciary by issuing instructions, warnings and interpretations to the Presidents of Municipal Courts I and II, as well as to individual judges and to prevent the execution of court ordered evictions.

JSAP has no doubt that the attitude of the former Minister still prevails, but as a strong signal was sent that such overt influence was no longer acceptable, politicians have lost their open door into the courts. Now it is up to the judiciary to guard the entrances. As this report shows, the members of the judiciary are now talking more and more openly about how they have been subject to influence until now. This is a satisfactory development and is in itself a preventative measure.

5.1.4 The Posavina Canton Prime Minister interfering in an investigation in order to be re-elected

The situation of the former Prime Minister of Posavina Canton is an almost tangible example that the mentality of overt political influence being perfectly acceptable still prevails. Before the upcoming elections in November 2000, the Prime Minister visited a court in an attempt to influence the investigation phase of a criminal case:

> *(From the Doboj weekly report of 19 October 2000)* The President of the court told JSAP that the Prime Minister of the Canton visited her twice to ask her to release two tanker lorries confiscated by the court pending criminal investigation. At the first meeting, the Prime Minister demanded the release of the tankers. Since the court refused to entertain the request,

> at the second visit he told the court that at least one tanker, which was registered in Posavina Canton, should be released at least temporarily until the coming elections. The Prime Minister feared that if the tanker were not released before the election, this would affect the prospects of the HDZ [the Croat Democratic Party] in the village where the owner of the company resides. The President turned down this demand also.

The Prime Minister must have feared that the party and its voters, not least the apparently influential suspect, would blame him if he were not able to exercise power over the courts. For the Prime Minister, his visit to the court turned out to be unfortunate as the OSCE Election Appeals Sub-Committee removed him from the list of candidates for the elections based upon his interference in this case. The incident shows that the political environment can no longer rely upon silence from the judges in exerting pressure.

5.2 Housing and return related cases

5.2.1 Obstructing the Dayton Peace Agreement

JSAP Thematic Report V Enforcement: Execution of court judgements in civil cases

The Dayton Peace Agreement recognised the right of all refugees and displaced persons to freely return to their homes of origin and to have restored to them the property of which they were deprived in the course of hostilities since 1991. This is a cornerstone of the peace agreement and domestic and OHR-inspired legislation is aimed at securing these rights. Still, five years after Dayton, hundreds of thousands of BiH citizens are refugees and displaced persons. The serious ethnic implications have made implementation of this policy a minefield, including in respect of political pressure exerted on the judiciary, as politics in both the RS and the Federation has worked to sabotage Dayton in this regard.

The housing and property legislation in both entities aims to deal with these cases quickly outside the court system through administrative organs. However, the courts in both entities remained competent for implementing eviction orders for repossession of accommodation not declared abandoned and whose repossession had been sought by way of civil proceedings.

JSAP's *Thematic Report V Enforcement: Execution of court judgements in civil cases*, released in September 2000, discusses enforcement of evictions through the court system. The report identifies political pressure as a major problem, exerted both at a general level and on an individual case basis. One technique used by the legislature has been to adopt "conclusions", intended to ameliorate the effects of legislation, which are published in the Official Gazettes in spite of the fact that they are not legally binding (also discussed at paragraph 5.1.3). Unacceptable political influence in these cases was also reflected by frequent and lengthy delays in the court process. Failure to enforce court ordered evictions violates the rights guaranteed by the ECHR.

Further details are found in the report, which also notes some recent progress in this area, primarily attributable to a more favourable political environment.

OSCE Report on the legal system and returns

An OSCE Human Right Department report of November 2000, *The Legal System and Returns, BiH 2000*, deals with the lack of prosecution of return related violence, of looting

incidents and of authorities for obstructing property law by means of a chart describing single cases. Some of the conclusions drawn from the cases are:

> Systematic discrimination on the basis of ethnicity continues to be a pervading factor. There appears to be little evidence of criminal proceedings being concluded efficiently or expeditiously, courts, prosecutors and police often masking bias by ineffectual investigations, excessive time delays and dubious decisions.
>
> On a positive note there has been a significant increase in the amount of prosecutions of mayors and housing officials for obstructing return and obstructing the implementation of the Property laws. On a less positive note, all of these prosecutions have been initiated as a result of pressure from OSCE and OHR and none of them appear to be close to conclusion. There has been little evidence of genuine commitment or initiative on behalf of prosecutors to overcome local pressures. The prosecution of corrupt housing officials and mayors is seen as an important test of their independence.

JSAP concurs with these conclusions. It should, however, be noted that the ineffectiveness, delays and other weaknesses described are endemic in the BiH judiciary and are frequently found in cases with no political implications at all.

5.2.2 Return related violence cases in Bratunac and Janja.

In mid 2000, a series of serious incidents aiming at affecting the return process in north-eastern RS took place, such as in Bratunac, and with particular intensity in Janja.

On the arrival in Bratunac on 11 May 2000 of buses conveying approximately 200 Bosniac women, a crowd of more than 400 demonstrators blocked the road and threw stones at the buses. The women belonged to the groups “Mothers of Srebrenica” and “Women from Podrinje”, who had been living in the Tuzla area since the ethnic cleansing of Bosniacs from the Bratunac/Srebrenica area in 1995. They were on their way to commemorate those tragic events. The local police did not manage to control the demonstrators, who, after a fifteen-minute barrage of stones, forced the buses to reverse and flee the area. Several passengers, police officers and an SFOR member suffered minor injuries.

In Janja, an eviction of three Serb displaced persons had been scheduled for noon on 24 July 2000. A large crowd assembled to block the eviction; some of the protesters were hostile toward the local police and IPTF. The crowd blocked the surrounding roads and eventually gathered in front of the Janja police station. The Mayor of Bijeljina met with representatives of the protesters in the mid-afternoon, and the crowd started to disperse three hours later. However, instead of peacefully returning to their homes, members of the crowd attacked Bosniac property owners. These attacks set off a three-day period of violence against Bosniacs, tapering off on 26 July. During these three days, 30 to 50 separate incidents were reported to the local police or IPTF, including severe bodily injuries and arson of houses by use of molotov cocktails.

Both incidents seriously disrupted the return process. For instance, the RS Ministry for Refugees and Displaced Persons did not have a presence in Janja for weeks after the events, one minority police officer resigned and the eviction process, which only resumed recently, still faces incidents.

Some aspects of the judicial proceedings that followed the incidents are of particular interest. When complex incidents as these occur, there is usually a diversity of crimes and offences committed, ranging from disturbance of public peace and order and obstruction of

officials while performing their duty to bodily injuries, attacks against officials and even, as in Janja, arson. JSAP observed the usual worrying lack of communication between the uniformed police and the crime department, between the police and the prosecutor and between the prosecutor and the courts. This opens the field for politicisation of the handling of such cases, which is possible because of the traditional lack of coherence in the law enforcement chain.

It was a critical tendency of the police to treat actions that clearly constituted crimes as minor offences and thus to send only to the minor offence courts, without even informing or asking advice from the prosecutor.[10] In Bratunac, this led to derisory sentences, such as suspended fines, being pronounced by the minor offence court for actions such as physical assault of a police officer.

A second worrying tendency observed was sending parallel reports to the prosecutor and to the minor offence court, as in Janja. Legally speaking, parallel proceedings are not problematic if the different facts are at issue, but as a result of this practice of the police and the general lack of co-ordination, one set of facts resulted in two prosecutions before two different courts. This was usually the result of a lack of communication internally in the police, as the uniformed police tended to send requests for minor offence proceedings to the minor offence court immediately after the events occurred, while the crime police department sent criminal reports to the prosecutor after further investigation. The latter then requested criminal investigations by or directly charged the suspects before the basic court. Both happened in the Janja case. JSAP found that the prosecutors concerned were not aware of the parallel minor offence proceedings. The President of the minor offence court, for his part, did not find it necessary to contact the prosecutor in respect of those aspects of the events that should obviously have been treated as crimes rather than minor offences.

The most serious part of the Janja incident before the Bijeljina Basic Court followed a classic pattern. After an investigation by police and without requesting any investigation by the court, the Bijeljina Basic Public Prosecutor submitted an indictment against three persons. After two hearings, having interrogated all three defendants and about ten witnesses, the court acquitted all defendants. The acquittals were most probably due to the fact that the police officers, who were crucial eyewitnesses, changed statements they made previously in internal memoranda once they were in court. Under the criminal procedure law, they could not be examined on their previous statements as their internal notes were not produced before the investigating judge and so were not admissible as evidence in the main trial. In an environment such as in this area, a prosecutor should realise the heavy pressure that might be put on the police officers, and prevent this outcome by properly securing all the evidence before the investigating judge.

The handling of the case could be seen as “suicide tactics”, making errors that easily would lead to acquittal.

5.2.3 “A Croat enemy of the Croat nation” – the Frankovic case

On 29 April 2000, Stolac municipal housing officer Augustin Frankovic (Croat) was assaulted by Andrija Marcic (also Croat). This incident happened during a weekend when

[10] For example, physical assault is a minor offence, but it constitutes a crime if it causes a bodily injury, whether light or serious. In the same manner, physically obstructing a road or freedom of movement can be considered as a disturbance of public peace and order, but if it prevents a court, administrative or police officer from implementing an eviction order, it constitutes the crime of obstruction of an official while performing his duty.

Frankovic was off-duty, but appeared to be related to his office's decision to evict Marcic. In view of the sensitive political situation in the Stolac return area and the fact that no return-related incidents were previously brought to justice there, the international community was concerned to ensure the proper processing of this case.

On 17 May 2000, the Stolac Basic Public Prosecutor filed a request for investigation due to a reasonable suspicion that the crime of violent behaviour had been committed. Frankovic then approached the prosecutor and demanded that the crime be qualified as attempted murder. During the 24 May 2000 investigative hearing in the Stolac Basic Court, the prosecutor amended his request, raising qualification of the crime to "grievous bodily injury in conjunction with violent behaviour." During hearings in June 2000, the Stolac Municipal Court[11] heard several witnesses who seemed to be reluctant to testify or appear in the court at all. Prior to the conclusion of the investigation, the court obtained medical and neuro-psychiatric reports on Frankovic's injuries.

On 31 July 2000, the prosecutor laid an indictment against Andrija Marcic for violent behaviour, which carries a term of imprisonment of between six months and five years.[12] Based on the neuropsychiatric expert's opinion that Frankovic suffered only light bodily injury, the previous charge of grievous bodily injury was abandoned.

In October 2000, the Stolac Municipal Court, presided over by a Serb judge, held two hearings in the main trial and heard the evidence of the accused, the victim and several witnesses. On 26 October 2000, the court found Andrija Marcic guilty of violent behaviour and sentenced him to five months of imprisonment, suspended for two years. In passing this sentence, the court several times stated that Marcic's status of a refugee, who committed the act in question out of fear of being displaced again, was a mitigating circumstance and referred to articles 40, 41, 42, 49, 50 and 51 of the Federation Criminal Code. The Stolac Municipal Prosecutor, who conducted the prosecution at trial and who is a Bosniac, planned to appeal the sentence.

The main trial was held in a professional manner by both the judge and the prosecutor. While JSAP welcomed the first verdict from the Stolac Municipal Court in a property-related incident, the sentence could have been more severe. The trial disclosed the underlying feeling of guilt among those in charge of implementing the property laws in Stolac. In his emotional testimony, the victim, who in the meantime had resigned from his position as president of the Stolac Commission for the Return of Property, complained that, due to the enforcement of evictions, he was labelled as an enemy of the Croat nation and his and his family's movements were restricted. Thus, while justice has been done to some extent by the verdict and the sentence, other issues remain at large in society as a whole regarding returns. Anger still prevails towards officials who implement the property laws and they feel guilty for doing so. This is, however, a problem that the court system cannot be expected to solve.

5.3 Other cases with ethnic implications

5.3.1 The trial of two Mujaheddin before the Maglaj Municipal Court

The following story illustrates that the courts are working in an environment where the public opinion may affect their functioning in a way that is not favourable to the rule of law.

[11] During the course of this case, new municipal courts and prosecutors' offices were created in the canton, under the law on courts, hence the change in names.
[12] Federation Criminal Code, article 339 (2).

In November 1998, two displaced Serbs were allegedly abducted, tortured and kept in illegal confinement for more than 48 hours under fear of death when they lost their way in the Donja Bocinja area, their former area of residence. The suspects were two Mujaheddin, Imad Al Husein from Lebanon and Omar Bedjavi from Sudan. Until recently, this area was the de facto power base of the Mujaheddin forces that fought alongside the Bosniacs during the war. In this community the purpose of abduction would be to deter Serbs from returning to their villages.

UNMIBH needed to exert strong pressure on the prosecutor to initiate criminal proceedings against the suspects. During the investigation, the Mayor of Maglaj came to the court and publicly threatened the victims. After that, they refused to appear before the court for fear of their personal safety.

The suspects were indicted for illegal confinement and torture. At the trial the judge asked them to stand up while the indictment was read. Both refused and accused the judge of organising the trial to appease the international community. They were both found guilty of illegal confinement under article 187 of the Federation Criminal Code, but not of torture, and received a suspended sentence of two months' imprisonment.

JSAP was told that local politicians had exerted considerable pressure on the court. The presiding judge of the panel informed JSAP that the suspects deserved leniency due to their status as displaced persons. JSAP has been told that Alija Izetbegovic, President of BiH, invited the suspects to attend an official meeting along with the local authorities of the municipality, including Maglaj Municipal Court judges and the prosecutor. This would send a signal to the police and judiciary to take notice of their status in the society.

After intervention from UNMIBH, the Maglaj Municipal Prosecutor filed an appeal against the verdict and the Cantonal Court eventually overturned the decision and sent the case back for re-trial. Several hearings were held in which the victims were put under IPTF protection. The panel of judges finally decided to once again reject the indictment for torture and imposed the same sentence. The prosecutor's appeal is still pending.

5.3.2 A murder case in Canton 10 with a Croat perpetrator and a Bosniac victim

Grounds for suspicion of favourable treatment because of ethnicity might be found in the case of Boro Brnic, a Croat from Canton 10, for the murder of a Bosniac in July 1998.

The defence was based on his psychiatric state, as Mr Brnic was found to have a considerable quantity of alcohol in his blood at the time of the shooting. The court ordered two psychiatric reports but only one was received. It stated that the accused was a pathological drunkard and that even small quantities of alcohol would cause orientation disorders. However a psychologist's report considered that although the accused suffered from post-traumatic stress disorder, he was in contact with reality. The victim's family asked for further expert evidence on the point, because the psychiatrist's findings were contrary to the analysis of blood and urine and the most serious types of alcohol disorder had been chosen when it was more likely that it should have been given a more benign classification. Neither the prosecutor nor the court supported this proposal. Instead the court made its findings on the basis of the psychiatric evidence favourable to the accused. Even if this could not lead to an acquittal, instead of a severe prison sentence the court ordered him to undergo mandatory psychiatric treatment and detention in a medical institution.

After various procedural steps regarding possible appeals and changes of venue, he was released from further treatment and detention about six months later on the basis that his cure was complete.

5.3.3 A Bosniac murder victim in Doboj in 1993

In the early summer of 2000, the JSAP Doboj Team received information on this case from the victim's father. He had a copy of the police photo-documentation made during the investigation on the spot. All information about this case comes primarily from the father.

On 15 May 1993, Nermin Mulamehic, a Bosniac, was murdered with a double barrel gun in broad daylight near the busy market in Doboj while he was sitting in his small shoe repair shop. According to the victim's father, many people witnessed the incident and he identified the perpetrator as Milica Savic, a Serb woman, who appeared to open fire without any apparent reason. The victim was transferred to Banja Luka Hospital where he was declared dead. The theory of the father is that the suspect killed a Bosniac at random as a revenge for the loss of her son during the war.

The police did some investigation but concluded that the perpetrator was unknown.

The victim's father left Doboj out of fear and went to live near Tuzla in the Federation. After seven years of inaction on the part of the Doboj District Public Prosecutor's Office, he wrote a letter to the Tuzla Cantonal Prosecutor's Office naming the suspect and a few witnesses. On 25 May 2000, his recorded statement was forwarded to the Doboj District Public Prosecutor and a copy was later given to JSAP. JSAP inspected the registry of prosecutor's office in Doboj but could not trace the letter. On 11 September 2000, after JSAP intervention, the Doboj District Public Prosecutor's Office sent a letter to the local police asking for new information and evidence relating to the case.

The police wrote back saying that the gun allegedly used for committing the murder was confiscated from the police by SFOR and destroyed during "Operation Harvest" in 1997, in which SFOR collected unaccounted weapons from the public and from law enforcement agencies. Further, the police reported that they did not have the autopsy report as the autopsy had been carried out in Banja Luka. They said that the Banja Luka police had now been asked to find it.

In his statement to the Tuzla prosecutor, the father of the victim gave detailed addresses, including telephone numbers, of the eyewitnesses. The Doboj prosecutor asked the police to interview Ms Savic, who currently lives in Doboj and runs a restaurant, and also the witnesses named in the father's statement. The police have reported that Ms Savic claims to have an alibi and that they were unable to find the witnesses.

The father of the victim informed JSAP that another witness, Rasim Hrnjadovic, who is currently living in the United States of America, sent a witness statement by fax to the police. Recently, the Doboj District Prosecutor advised JSAP that the police informed his office that they still continue to work on the case.

The police handling of the case, especially in the initial stages, is below any professional standard. The only explanation can be the ethnicity of the victim.

5.3.4 A Bosniac murder victim in Teslic in 1999

This case originates from a fistfight on 17 February 1999 between Faruk Hadzimujic, a Bosniac, and Marko Peric, a Serb. After the fight, a former Serb military police officer, Brane Milicic, a long time acquaintance of Mr Hadzimujic, took him away saying that he would drop him at his apartment. Mr Hadzimujic went with him, but Mr Milicic is alleged to have driven the Bosniac to a distant place and used a blunt object to kill him. Mr Peric was arrested as a suspected accomplice and kept in pre-trial detention for about nine months, while Mr Milicic escaped.

On 20 August 1999, the Doboj District Court acquitted Mr Peric of murder but found him guilty of grievous bodily injury in respect of the fistfight. Mr Milicic, tried *in absentia*, was acquitted of all charges.

One week later, on 27 October 1999, the Doboj District Public Prosecutor lodged an appeal to the RS Supreme Court. However, the District Court did not forward the appeal to the Supreme Court until seven months later, on 3 May 2000, despite advice from JSAP on several occasions that it should do so.

On 5 June 2000, the Supreme Court accepted the appeal, sending the case back for retrial. Both accused were arrested and kept in detention from 22 September 2000.

In the new trial, hearings were held on 6 and 23 November 2000 and the panel of judges found both guilty of murder. Brane Milicic received eleven years and Marko Peric eight years of imprisonment. They still have the right to appeal.

The systemic problem in this case is that the prosecution was not able to control the forwarding of the appeal to the Supreme Court. In fact, it is doubtful that this would ever have happened without JSAP's monitoring. The case throws doubt on the ability of the system to proceed in a serious case with ethnic implications.

5.3.5 The Liska Street case in Mostar

On 10 February 1997, Croat uniformed and special police officers detailed to provide security at a Carnival taking place in west Mostar, became aware that a group of Bosniacs was approaching the cemetery in Liska Street, only a short distance from where the Carnival was taking place. Expecting trouble to result, the police tried to stop the group from reaching the cemetery by opening fire, resulting in the death of one and the injury of around 20 Bosniacs.

This incident escalated tensions and ethnic divisions in Mostar. The first trial in this case, conducted in 1997 by Judge Davor Zilic of the West Mostar Basic Court, failed to properly address the matter. The biased and incomplete first police investigation provided the basis for the evidence presented during that trial.

Following a report of the Federation Ombudsman, in 1999 the UNMIBH Human Rights Office oversaw the re-investigation of the incident by the joint Ministry of Interior Crime Unit. On the basis of the subsequent police report, on 16 August 1999, the west Mostar Deputy Basic Prosecutor, Zeljko Knezovic, requested an investigation by the west Mostar Basic Court. This was initially held up by the fact that there were only four judges in that court, following the appointment of several others to the Cantonal Court.

Upon the appointment of fifteen judges to Mostar Municipal Court I in May 2000, OHR South and UNMIBH communicated to the relevant court officials that a thorough, impartial and speedy judicial investigation of the Liska Street incident was expected. Davor Zilic, then president of the court, advised that Judge Irena Pehar, who is a Croat, was assigned as investigative judge on this case.

On 5 July 2000, she conducted the first hearing on charges involving the negligent endangering of human life, including causing death.[13] On 11 July, all five suspects exercised their right to remain silent and declined to give any statement to the court.

Following the summer holidays, the investigation resumed on 25 August 2000, when statements from the three first witnesses were taken. As of 11 October 2000, eleven investigative hearings had been conducted and statements taken from 37 witnesses. Generally, all 20 Bosniac witnesses appeared reluctant to disclose any relevant information and tended to forget the important events that they previously recalled in their statements to the police. Almost none of the witnesses identified the suspects in the court. One witness stated that even if she would have had recognised any of the suspects, she would not disclose this information. This trend among the Bosniac witnesses seemed to be less than spontaneous. There are reasons to believe that the witnesses might be reluctant to talk because they returned to or plan to return to west Mostar.

The statements of seventeen Croat police witnesses were, generally, illogical, full of contradictions and evidently false. They provided almost no relevant information about the events of 10 February 1997. Defence counsel, some of whom are among the most prominent counsel in West Mostar, tried to channel the statements of those witnesses to show that the events of 10 February 1997 were the result of a well prepared and organised action by Bosniacs, which the international community contributed to.

Throughout this complex investigation, the conduct of the investigative judge was professional. Judge Pehar succeeded in adequately directing the proceedings and focusing the conduct of the parties on the incident. During the initial hearings in September 2000, the Deputy Municipal Prosecutor, Zeljko Knezovic, was inactive in questioning witnesses and did not insist upon the confrontation of the witnesses with the suspects. On 14 September, JSAP met with Mr Knezovic to address his lack of activity. As a result, he participated more actively in the following hearings. On 11 October 2000, at Mr Knezovic's request, Judge Pehar summoned additional Bosniac witnesses, mainly key figures in the Bosniac political and religious scene, who had led the procession of Bosniacs to the Liska Street cemetery. Interestingly, they had not previously given statements to the police about the events in question.

The fact that this judicial investigation is being conducted more than three years after the incident is beneficial for the suspects. They maintain their silence and the witnesses claim not to have seen anything. As of November 2000, most of the witnesses had been heard but, even with the increased activity and efforts of the prosecutor, their testimonies provided little evidence. The material evidence, mainly the photographs taken during the incident identifying some people holding guns, remains to be presented. The prosecution plans to use these photographs as the main basis for raising indictments and thus continuing the proceedings.

This investigation again revealed the difficulties of administering justice in the ethnically and politically divided city of Mostar, despite the recent creation of a multi-ethnic

[13] Federation Criminal Code articles 308 (4) and 304 (4).

judiciary. The unwillingness and inability of the Bosniac witnesses to shed light on the events of February 1997 when they finally received their day in court was a disappointment and pointed at the complexity of the political environment in which the courts must operate.

5.4 Cases involving "war heroes" and others with political contamination

5.4.1 A procession through Kiseljak, a Croat town, with three presumed Croat draft dodgers

The JSAP Banja Luka Team learned of an horrific crime that took place in Kiseljak in 1993 during the Croat-Bosniac war. Allegedly, 38 Croat soldiers tortured three presumed draft dodgers on the back of a truck parading through Kiseljak town, after which one died and the other two were gravely wounded.

JSAP's discussion with the Kiseljak prosecutor suggested that there was a large number of witnesses, including some court officials, who watched the procession from the office window. The brother of the victim who died also talked briefly with JSAP and claimed that the soldiers stabbed his brother repeatedly in the abdomen, beat him profusely and publicly castrated him.

During the war, the Kiseljak court took only preliminary investigative actions in the case. It was characterised as grievous bodily harm, and following that characterisation the case then fell under the Federation Amnesty Law and the court could take no further action.

The JSAP Banja Luka Team raised the case with the Municipal Prosecutor and his deputy. JSAP believed that the case should be restricted to the five or six perpetrators who were actually on the back of the truck, and re-characterised as a more serious crime. If that was done, the amnesty provisions might not be applicable and the case could proceed. The way in which the case was handled can only be understood as an unwillingness to prosecute Croat soldiers who fought for the Croat cause.

5.4.2 Judge Bahra Coralic beaten up at the cemetery in Bihac

The JSAP Team in Bihac started monitoring the case concerning Bahra Coralic in December 1998.

Muharem Begic lost his job as a police officer in 1993, possibly because he was considered to be a supporter of Fikret Abdic's party, the Democratic National Union of BiH (DNZ). Mr Begic filed an employment case against the local authorities and the Bihac first instance court ordered his reinstatement as a police officer as well as compensation for lost income.

Upon the failure of the Centre for Security Services in the then Bihac District, now the Ministry of Interior in Una Sana Canton, to reinstate him, Mr Begic submitted a criminal report against the Chief of Police, Edham Besic.[14] JSAP had several meetings with the Bihac Municipal Prosecutor urging him to act upon the report. In the end, the case was dismissed due to application of the Amnesty Law. However, as a result of pressure from JSAP and Federation Ombudsman, Mr Begic was reinstated in 1999 to a position as police officer in the Kljuc Police Station.

[14] Under the Criminal Code then in force, failure to reemploy workers under a court decision was a crime.

When the district authorities did not pay the compensation for lost income, in June 1995 Judge Bahra Coralic in the Bihac court made a decision to enforce this part of the judgement. The same night, she was abducted from her home, handcuffed, taken to a cemetery and severely beaten. The prosecutor requested an investigation against the three alleged perpetrators, Abdulah Besic and Emir Besic, both cousins of the chief of police, and Hazim Kosovac.

For reasons of impartiality, this case was transferred to the court in Cazin. The investigating judge, Jadranka Lojic, who was also the court president, dismissed the case against Abdulah Besic due to his mental incapacity. This was on the basis of the opinion of one expert witness. After two years, during which time no hearing was held, Judge Lojic then allocated the case to a judge with little experience. The two other suspects were indicted and the court pronounced its verdict in March 1999. The panel found the two guilty, sentencing Emir Besic to two years of imprisonment and Hazim Kosovac to one year. On 13 July 1999, the Cantonal Court imposed more severe sentences upon appeal, namely three years and six months for Mr Besic and one year and ten months for Mr Kosovac.

The JSAP Bihac Team believes that the relatively severe sentencing was due to its monitoring of the case, even if the motive for committing the crime was not completely reflected in the sentence. The presiding judge was concerned to complete the case since so much time had passed.

Mr Kosovac started serving his sentence, while Mr Besic absconded, most probably to Croatia, until the Amnesty Law was applied. Under that law, Mr Kosovac was released from prison.

In the meantime Ms Coralic had submitted a criminal report against the Chief of Police, Edham Besic himself. When the investigation started he joined the Federation Ministry of Interior in Sarajevo, where he still works. After the investigation, the case was dismissed under the Amnesty Law.

The JSAP Bihac Team considers that application of the Amnesty Law in the region was politicised and that it was given the widest possible interpretation, if not one actually beyond the law. The team also observed possible misuse of the Amnesty Law in other cases in Bihac.

In Bihac it was commonly believed that the incident in the cemetery was the consequence Judge Coralic had to suffer because of her decision in favour of Mr Begic, and that this was ordered by the Chief of Police himself. It is the view of the JSAP Bihac Team that the handling of the case by the President Jadranka Lojic as investigative judge was politically influenced, as evidenced by the acceptance that Abdulah Besic was mentally unfit and the fact that she more or less kept the file in her drawer for two years. Declarations by court experts that defendants are unfit both in respect of mental capacity to commit a crime and ability to stand trial is commonly observed in cases with political implications.

In assessing her handling of the case, the political role of Hasan Pjanic, then Cantonal Court President, should not be overlooked. He is widely believed to have represented the political interests of the ruling SDA party. His power bases, however, eroded as the local wing of the party that controlled him gradually lost the confidence of the international community and its representatives were removed from office in the fall of 1999. In late March 2000, Mr Pjanic resigned from his position as President of the court, but remained as a judge. This is discussed further at paragraph 5.4.3. Ms Lojic resigned both from her position as

president and judge in January 2000, shortly before disciplinary proceedings commenced in respect of alleged irregularities connected to court's registration of old cars. She, and three other judges in the Cazin Municipal Court who also resigned, had declared several hundred plaintiffs to be car owners based upon allegedly unsatisfactory evidence.

On 1 December 1999, Bahra Coralic became a judge at the Cantonal Court in Bihac.

5.4.3 Kafkaesqe difficulties in removing the registration of a fictitious company and the exit of a court president

This case illustrates how ordinary BiH citizens may find themselves in deadlock in dealing with the court system, through the application of rules to the point of absurdity. The resolving of the case more generally illustrates how important it may be to reduce the power of some of the members of the judiciary whose ties to the outside world are questionable. The case also is an example of a direct result of the work of the international community, in this case JSAP, in the area of judicial reform.

The company Comfort was registered in the Register of Companies and Public Institutions by the Bihac Cantonal Court on 8 September 1997 in the name of Sead Basic as sole owner, by somebody misusing Mr Basic's ID card. Mr Basic found out about the company when police inspectors contacted him in respect of outstanding tax payments of approximately DM 500,000[15]. As the Cantonal Court refused to delete the company from the register *ex officio*, Mr Basic filed a lawsuit in the Bihac Cantonal Court on 29 September 1998, requesting the registration of the company to be declared null and void. The Cantonal Court referred the case to the Municipal Court on 9 December 1998 as the court with original jurisdiction.

Upon the court's request to name a defending party, Mr Basic had no other option than to name the company itself. The judge was of the opinion that the lawsuit could not be sent to that defendant, because it was fictitious and did not exist at the indicated address. After one year, on 20 December 1999, the court declared the lawsuit withdrawn, with Mr Basic still named as the company's owner, despite the evidence before the court that if the company did exist at all he had no connection to it.

At around the same time, between 6 and 13 December 1999, JSAP carried out an inspection of the Registry for Companies and Public Institutions in Bihac. The scrutiny of the handling of company registers by the courts had been on the agenda of JSAP for some time. Various findings, together with ample allegations of irregularities related to the registration of companies, were at the root of the inspection. The resulting report was published in May 2000 as JSAP's *Thematic Report IV: A Case Study in Economic Reform*, and revealed severe irregularities in the operation of the registry.

At the end of March 2000, Hasan Pjanic, President of the Cantonal Court, who was the judge in charge of the registry, resigned from his position as President upon pressure from the new Una Sana Canton Governor. This was a result of the findings in the inspection, together with other dissatisfaction with his performance as President, because of his connections with the then removed wing of the SDA party and his role in not properly following up on corruption investigations directed against former officials. The pressure from the Governor was partly inspired by information submitted by the international community and Mr Pjanic

[15] Basic submitted a criminal report against unknown perpetrator to the Bihac Municipal Prosecutor's Office on 7 October 1999. The case is still ongoing.

apparently resigned voluntarily upon fear that, if he did not do so, the High Representative would remove him as a judge in the court as well as court president. Soon after, he was relieved from his responsibility for the company registry by the new President of the Cantonal Court. This was of some significance as the registry should promote transparency in commercial activity and, therefore, should be run properly, which, according to the JSAP report, Hasan Pjanic had not been able to do. Since March 2000, JSAP has observed a considerably better functioning of the Bihac judiciary.

In the Sead Basic case, upon his appeal, on 13 March 2000 the Cantonal Court cancelled the decision at first instance and returned the case for retrial. On 8 June 2000, the results of the company registry inspection and its recommendations being known, the Municipal Court made a new decision establishing the nullity of the registration of Comfort, which was finally removed from the court register on 8 August 2000.

5.4.4 The inheritance and criminal cases involving Ermin Cehic before the Zavidovici Municipal Court

In mid-November 1999, the President of the Zavidovici Municipal Court telephoned the JSAP Doboj Team to bring to their attention difficulties the court was having in dealing with various civil and criminal cases involving Dr Ermin Cehic. He asked JSAP to make contact with the local police to get some basic information. Dr Cehic was Assistant Minister in the Zenica Canton Ministry of Public Health, Deputy Director of the Regional Medical Centre and a member of the Cantonal Assembly representing the Liberal Democratic Party. During and after the war he had risen to high levels in politics and popularity. According to the President of the court, Dr Cehic was a very influential person in the canton.

In describing, in chronological order, the cases involving Dr Cehic, JSAP does not take any stand as to who has the material right. The reason for including these cases in this report is both to describe how the police, prosecution and courts, in their actions and their words, confirm how political influence is a reality in BiH, and also to assess the capacity of the system to work without fear or favour.

Background

The cases in question originate from the death of Abdul-Kadir ef Kadic in 1989 and are disputes between his legal heirs, his estate not yet being settled, initially because of the war. The deceased had ten children. The eldest son was Zijad Kadic, later deceased, his heir being Indira who is married to Ermin Cehic. Hasan Kadic, Bahrija Kadic and Aisa Mrkonja are other heirs known to JSAP to be involved in the disputes. The main subject matter seems to be the family house.

Bahrija Kadic claims that, as her father was an Imam of a mosque, the socialist Government imposed a series of civil disabilities on him. According to her, their father transferred the property to his eldest son, Zijad Kadic, in 1967 so that a loan to build the house could be taken in his name. According to her, the loan was repaid by the contribution of all members of the family. After the death of her father, Bahrija Kadic continued to reside in the house. Her legal position is that the transfer of the property to Zijad Kadic was fictitious and for convenience, rather than a transfer in reality, but that transfer is the basis of Indira Cehic’s current claim to ownership.

After the marriage of Indira and Dr Cehic, a civil suit was filed in the Zavidovici Court asking the court to declare Indira to be the lawful owner of the property by virtue of succession and that her father got the property from her grandfather through a gift.

Dr Cehic issued two notices, on 2 June and 9 August 1999 respectively, asking Ms Kadic to vacate the apartment within 15 days. She alleges that after the first notice, Dr Cehic managed to cut off the water and electricity supply to the apartment and that she was not able to get it reinstalled, either upon complaint to the administrative authorities of Zavidovici municipality or to the police and the court. In a letter to the Federation Minister of Justice of 24 August 1999, she put forward the following allegations:

> Also, it is a public secret that Cehic has organised a group of criminals that beat up my brother Hasan Kadic [on 11 May 1999], and on several occasions he has sent all sorts of suspicious characters to threaten me.
>
> The culmination of everything occurred on Friday 13 August 1999, when Cehic organised a group of five local offenders, very well known to the police, paid them 30 KM each to break and enter my house and remove everything inside it.

She claimed that the furniture and the wardrobe were ruined and that belongings were missing including gold ornaments worth around DM 20,000 and currency equivalent to DM 15,000 and that furthermore the Cehic family took possession of the house by replacing the locks. She also alleged that while Dr Cehic and his associates were removing her belongings from the apartment, her sister Aisa Mrkonja called the police and asked for their intervention. The police did not respond to that request. However, when Ms Kadic started to physically obstruct the removal of her belongings, Dr Cehic called the police and they protected him and his helpers. Ms Kadic complained to the IPTF about the actions of the police, but said that the IPTF explained that the police acted on the recommendation of the deputy public prosecutor.

She also stated that the deputy prosecutor refused a personal request from her sister to take any appropriate action. True or not, at least in her perception, Ms Kadic associated that refusal with that fact that, on the same day, Dr Cehic was a member of the jury for "Election of Miss Summer of Zavidovici", in the discotheque MISS, whose owner, she said, was the husband of the deputy prosecutor.

Bahrija Kadic claims that she was thrown out of the apartment without any legal process by Dr Cehic who took the law in his hands and that the police and prosecutor passively supported his getting possession of a property that had been entangled in a dispute for many years. Ms Kadic claims that she filed a petition with the court for an injunction confirming her right to remain in the apartment but that the court refused that request and that a complaint with the police bore no result.

<u>The police, the prosecution and the court suggest that it is difficult to handle the case</u>

After the telephone call from the President of the Zavidovici Municipal Court on 19 November 1999, over the next few days JSAP met with the Chief of Police, with the Municipal Prosecutor and the court president, amongst others.

The Chief of Police acknowledged that he received a complaint from Ms Kadic. From the police records, JSAP learned that the police, the municipal deputy prosecutor and the investigation judge went to the scene of occurrence on 13 August 1999. However, a crosscheck in the files of the prosecutor's office and the court revealed that no record of that

existed and that subsequently those judicial authorities had taken no action. The Chief of Police indirectly indicated that the "story" presented by Ms Kadic concerning Dr Cehic's influence, might have some truth. He suggested that JSAP meet the prosecutor.

The Municipal Prosecutor initially avoided responsibility by saying that Dr Cehic did not commit a crime and that at most there might have been a minor offence. He confirmed that Dr Cehic was a very influential person by stating that judges were not interested in taking up cases involving him, being concerned about their personal and professional security. He agreed that the other accomplices were known criminals in the locality and that two of them had recently been convicted for robbery. During the meeting, he said that he would ask for a criminal investigation by the court. However, he failed to do so until 12 January 2000.

Meetings with the President of Zavidovici Municipal Court confirmed what the prosecutor had said. He said that, at the end of October 1999, as part of efforts by the Cehic family to end the pending cases, the Deputy Cantonal Minister of Justice, in the presence of Dr Cehic, telephoned him. During the course of the conversation he, the president, was asked in an ordering tone to grant "preferential treatment" to the cases involving the Cehic family. Following this and other events, the judges in the Zavidovici court passed a resolution on 4 November 1999 asserting their right to work independently without interference and forwarded it to the Ministry of Justice and the Cantonal Court, stating amongst other things:

> In the meantime, pressure on individual judges and especially on the president of the court continues, direct as well as indirect, especially from several close relatives of the other civil party in these proceedings, with intention to have a decision made that will exclusively benefit the person that puts the pressure. …. Generally, these threats to the judges and president of the court range from personal threats, to threats that this person, with his political influence and private connections with several ministers as well as people from other segments of authority in the canton, will replace the president of the court and certain judges, and bring and appoint completely different persons, specifically mentioning the names of these people, as president of and judges in this court. The same person has said directly to the judge that he (the president) can make any decisions he wants, but that those decisions will be cancelled under his influence in the Cantonal Court, the Cantonal Prosecutor's Office and other organisations, until a decision that is to his benefit is issued.

This resolution speaks for itself. It is obvious that the judges themselves were not comfortable with the pressure they felt was exerted on them and that they connected this to Dr Cehic having a powerful position in the community. However, acting in a co-ordinated way followed by drawing the attention of JSAP to the case, they might have felt able to resist outside influence and resist fear. The court president informed JSAP that the judges were reluctant and not even willing to deal with cases involving Dr Cehic, so he would be forced to thrust the cases upon a new judge who joined the profession only seven months previously.

A "suicide" search

On 10 December 1999, an investigation judge issued a search warrant in respect of the incident on 13 August 1999, without waiting for a request from the prosecutor for investigation. JSAP was told that in appropriate situations, even without a formal request for investigation from the prosecutor, an investigating judge could issue a search warrant.

The aim was to search the dwelling of Dr Cehic to look for the valuables that might belong to Ms Kadic. However, the police did not conduct the search until three days later and in consultation with Dr Cehic, on the pretext of finding a time "convenient" for him. This was contrary to any professional police behaviour, and as a result the relevance of the search was

lost. Furthermore, in carrying out the search, the police did not adhere to the procedural requirements of the law, by failing to summon the necessary witnesses to be present. It has been suggested that this was done on the advice of Dr Cehic. Under the Federation Criminal Procedure Code, evidence collected in breach of its provisions may not be used as evidence in court. The omission of proper steps by the police meant that any evidence collected would not be admissible in a trial and thus be part of "suicide tactics". The conclusion of the court president was that the search ended up doing more damage to the case than if it had not been conducted.

Again after a few discussions with JSAP, the prosecutor submitted a formal request for investigation on 12 January 2000.

Dr Cehic calls for UNMIBH support to protect his human rights

Seemingly, to counter the ongoing investigation, in a letter to UNMIBH's Special Representative of the Secretary General, Dr Cehic called upon support from UNMIBH. On 18 February 2000, UNMIBH Civil Affairs, IPTF and JSAP met with Dr Cehic to discuss his request.

Dr Cehic complained about the court having issued the search warrant mentioned above and said that he was served with a summons to appear before the court on 22 February 2000, which infringed his human rights. He later asked for UNMIBH intervention to protect him from these alleged violations. At the meeting he also said that he also had written a letter to OHR and had contacted the Federation Ombudsmen. He reasoned that UNMIBH influenced the investigation against him because Ms Kadic's niece used to be a language assistant in IPTF and, according to him, she had threatened local police officers with de-certification if they refused to assist her aunt in this matter. He was of the view that a misunderstanding caused the recent developments and that the judicial authorities had been so alarmed by the JSAP interest in the case that they felt forced to launch an investigation. It appeared that he would have been pleased if JSAP informed the court that it was no longer interested in following up the cases he was involved in. If not, he stated that he would take the case to "higher authorities" in Sarajevo and convene a press conference. He also announced that at the next session of the Cantonal Assembly, of which he is a member, he intended to put forward a motion to form a commission that would deal with his case. He indicated that he already had support from assembly members for this, and that the commission would include members from OSCE, OHR and UNMIBH Civil Affairs.

The meeting ended with the UNMIBH representatives warning him that he should let the court decide the matter. To the UNMIBH officers attending the meeting, it seemed that Dr Cehic had a habit of requesting help from figures in important positions and without any concern whatsoever was willing to use his position as a cantonal official to obtain whatever he wanted. In short, Dr Cehic abused all notions of public service.

Dr Cehic allegedly initiated false reporting of a crime

On 4 April 2000, Amel Hasanic, said to be a local criminal, went to the police and reported that 20-year-old Bakir Mrkonja, the son of Aisa Mrkonja and nephew of Bahrija Kadic, had engaged him to kill Dr Cehic for DM 5,000. However, during his interrogation, Mr Hasanic did not keep to this story but said that, in order to create trouble for Ms Kadic, Dr Cehic had paid him DM 5,000 and even promised him a residency visa for Germany if he told the police and the court that Ms Kadic had paid him to kill Dr Cehic. On 6 July 2000, the prosecutor initiated investigative action against Mr Hasanic and Dr Cehic for acts of false

information in respect of a crime. Mr Hasanic and another witness were heard by the investigating judge on 17 August 2000 and confirmed what he had told the police. Bakir Mrkonja has also been heard.

Inadequacies in the indicting process without the judge taking action

The investigation in respect of the incident on 13 August 1999 was completed and the file was forwarded by the prosecutor on 25 August 2000, but in a manner that was flawed, as he called for summary proceedings, which are conducted by a single judge.[16] If imprisonment of more than three years is possible, the case should be prosecuted by way of regular criminal proceedings before a panel of three judges. The charges included aggravated theft,[17] which alone is punishable with imprisonment of up to 5 years and thus the prosecutor did not handle the case correctly. In addition to that charge were those of infringing the inviolability of an apartment and malicious mischief.[18]

On 9 October 2000, JSAP learned that the judge concerned had kept the file without taking any action. JSAP insisted on correction and the file was sent back to the prosecutor on 10 October 2000. The Federation Criminal Procedure Code being replete with formalities, the corrections had to be acted upon within three days. Even if time limits like this could be said to protect the interest of the suspect, they can also effectively be misused to bring cases to an end if convenient. This has been observed by JSAP on several occasions. Thus, the failure of the prosecutor could have fitted into the picture of "suicide tactics". However, in this case he rectified the error and returned the case to the court on 12 October 2000, within the time limit.

The case being ready for trial, Dr Cehic has twice evaded the summons sent by the court.

As for the suspicion of initiating the false reporting of Mr Hasanic, the investigating judge informed JSAP in the last week of November that he would forward the records for indictment to the prosecutor.

The criminal case against Dr Cehic is one of several criminal cases where it seems safe to say that never would have reached the investigation stage, not to say the trial stage, without JSAP intervention, this monitoring counterbalancing any influence rooted in politics. However, such a pattern of behaviour serves as a discouraging example of the incapacity of the chain of justice to deal in an effective and impartial manner and assert independence against local celebrities without the support of the international community.

The civil cases concerning the house and the estate are still pending without the court "system" in the canton being able to resolve the dispute. In the meantime, the one in the "stronger position" has the advantage. Dr Cehic has now renovated the house. Bahrija Kadic is currently residing in the summer kitchen, which forms an attachment to the main building. Since there are no toilet facilities available in the kitchen, she goes to her sister, Aisa Mrkonja's apartment, for this purpose.

[16] Federation Criminal Procedure Code, articles 412-427.
[17] Federation Criminal Code, article 274 (1)
[18] Federation Criminal Code, articles 191 and 281.

5.4.5 The abduction trial against Dragomir Kerovic

The JSAP Tuzla Team started monitoring this case in December 1999, at the request of UNMIBH Brcko. At that time, the case was halted at the main trial phase in the Lopare Basic Court, seemingly due to Dr Kerovic's local position and high political connections.

Background

Dr Dragomir Kerovic is the director of Lopare Hospital and he stands trial for an event that took place on 6 September 1997. The crime alleged originates from a short relationship Dr Kerovic had with a young woman who became pregnant. In spite of the insistence of Dr Kerovic, who has a family, she refused to have an abortion. In her 29th week of pregnancy, Dr Kerovic is said to have requested one man to recruit two more, provided them with RS police uniforms and asked them to bring in the woman. The uniformed men came to the house where the woman lived with her parents, saying that she was a suspect in a drug affair. Her father was lightly injured in trying to prevent them from taking her to their car, where Dr Kerovic was waiting. During the trip to Lopare Hospital, a bag was placed on her head, and Dr Kerovic gave her an injection. At the hospital, another man, never identified, was present and a gynaecological intervention was made. After that, Dr Kerovic and the other men drove the victim to a nearby military camp and dropped her off on the street. She was finally taken to the gynaecological department of Bijeljina Hospital where she delivered a dead foetus, the abortion provoked by the intervention.

Dr Kerovic was at the time a representative for the SDS in the BiH House of Representatives, and, according to information given to the IPTF, there was pressure exercised by the Pale SDS leadership, upset at the idea of losing such a key local figure as Dr Kerovic.[19]

IPTF reports prior to the JSAP involvement in the case describe several obstructions made not only by police officers, but also by the Bijeljina Basic Public Prosecutor, Vinko Lazic, who was in charge of the case from the beginning. IPTF information indicates that the prosecutor informed Dr Kerovic in detail about the investigation and that Dr Kerovic and the prosecutor are close friends, having founded the SDS branch in Lopare together. IPTF considered that the prosecutor did not take appropriate investigating steps and did not immediately provide the investigative judge with the information that Dr Kerovic apparently confessed his participation in the event in question. In fact, the investigating judge never heard Dr Kerovic.

Judicial inadequacy in dealing with the case

On 25 May 1999, the Bijeljina Basic Public Prosecutor first indicted Dr Kerovic before the Bijeljina Basic Court for the crime of simple abduction under article 50 (1) of the RS Criminal Code Special Part, in force at that time.

Dr Kerovic first evoked immunity as a Member of Parliament, and after his function terminated, he moved to the Federal Republic of Yugoslavia (FRY).

[19] He was openly supported by Mocilo Krajisnik, founder of the SDS, who was arrested by SFOR on 3 April 2000 and charged with genocide and crimes against humanity against Bosniacs and Croats from mid 1991 until the end of 1992.

The Bijeljina Basic Court issued an arrest warrant, considering him to have escaped. On request from the Bijeljina Basic Court, on 16 June 1999, the Bijeljina District Court transferred the case to the Lopare Basic Court on the grounds that most of the evidence was within its jurisdiction.

When Dr Kerovic returned to Lopare, he continued his activities as director of the local hospital. In spite of the fact that he had not been heard in the investigating proceedings and without then holding a hearing, the Lopare Basic Court accepted his request to replace the arrest warrant with an order for bail. JSAP learned from an interview with one judge of the court that he had initially been asked by the President of the court to withdraw the arrest warrant in question and was facing problems due to his refusal.[20] The case was allocated to another judge.

An examination of the case files showed that the Lopare Basic Court accepted the claim of Dr Kerovic that he was in a depressive state that did not allow him to appear in court to stand trial. This was based upon a statement made in court by a psychiatrist who appeared to have been brought in from Belgrade by Dr Kerovic's defence lawyer. This opinion did not seem to conform with the fact everybody in the small community could observe for themselves that his mental state did not prevent Dr Kerovic from carrying out his normal personal, working and political life and to handle his key position in Lopare.

When appointing an expert to give a written opinion on his ability to stand trial, the presiding judge in the Lopare trial panel did not follow the prosecutor's proposal. Instead he designated a psychiatrist from Sokolac, RS, who was preparing her Ph.D. thesis under the psychiatrist from Belgrade who previously had made the statement mentioned above that Dr Kerovic's mental state was incompatible with his attendance at trial.

The Lopare court's handling of the expert issue was heavily criticised in the media. The lawyer of the victim, who was hired by the local Helsinki Committee, made press statements denouncing the attitude of the court.

From the case files, the JSAP Tuzla Team considered that the qualification of the crime in the indictment as simple abduction was inappropriate and did not cover all the aspects of the crime. A more appropriate classification would have been grievous abduction under article 50 (2), comprising the alternatives of threatening to inflict grievous bodily injury and abduction committed under particularly serious circumstances. Under this qualification, the Bijeljina District Court should have been the first instance court. In addition, forcible abortion could also be charged concurrently as a grievous bodily injury under article 42 (2).

After JSAP intervention, the District Public Prosecutor and the Presidents of the District and Basic Courts eventually admitted to the wrongful handling of the expert issue and the qualification of the case. In a hearing on 17 December 1999, the Lopare Basic Court declared itself incompetent and forwarded the case to the Bijeljina District Court. However, the indictment was not changed, this being in line with the responsibility of the court to *ex officio* establish the material truth, even if this may lead to conviction for a more serious crime.

[20] His dismissal was required by the former RS Minister of Justice and he faced suspension for several months before being de facto reinstated upon a gentlemen's agreement with the President of the court, after JSAP started to investigate the matter. JSAP discovered that the suspension was allegedly motivated by the judge's poor performance according to the quota and reversal systems, but that this was in contradiction to the court's statistics.

The District Court did not await a written psychiatric opinion from the expert designated by the Lopare court but instead designated a new expert, a neuro-psychiatrist from Banja Luka. His report concluded that Dr Kerovic was able to stand trial, thus enabling the court to eventually resume the main trial after almost one year of judicial standstill and three years after the events occurred.

Taking over the case, the president of the panel at the Bijeljina District Court gave the JSAP Tuzla Team the impression that he was keen to solve this case in a proper and professional manner. He expressed his satisfaction that the case was no longer handled by the Lopare court. He said that he had not faced any attempted influence in the case and he did not appear to fear any. To the JSAP Tuzla Team, the District Public Prosecutor did not hide the fact that his retirement due on 1 January 2001 might facilitate a more independent approach in the case.

In September 2000, adding to the many particularities of the case, the Deputy District Public Prosecutor informed JSAP that a significant part of the file had disappeared. UNMIBH called for an internal investigation and proposed that the prosecutor's office facilitate reconstruction of the file by using copies kept by IPTF and JSAP.

Update

The last development in the case is that in a court hearing on 23 November 2000, following a proposal by all three lawyers, the Bijeljina District Court, declared itself not competent and referred the case to the Bijeljina Basic Court. The reason for this is the recent changes in the RS Criminal Code, in force from 1 October 2000. Under the new law, basic courts in RS have first instance jurisdiction where the law prescribes a maximum sentence of up to twenty years imprisonment, while previously their jurisdiction was limited to ten years maximum. In this case, the maximum sentence is between ten and twenty years of imprisonment. JSAP has learned that, in the opinion of the Bijeljina District Court, the case had not reached the stage that it could proceed with it. Due to its own closure, JSAP has not been able to confirm the accuracy of this opinion.

JSAP considers that Dr Kerovic's status as a political figure explains how the police, the prosecution and the courts have handled the case. Even in the prosecution of a serious case like this, local laws and judicial practice allow extensive delays based upon grounds that are not compatible with sound and effective law enforcement upholding the rule of law in a democratic society.

5.4.6 The attempts to clean the Doboj judiciary during cases against Milovan Stankovic and Milena Panic, two politicians

These two cases are included as examples of the political pressure put on judicial officials dealing with cases against politicians. Local politicians in the then RS ruling Sloga coalition exerted this pressure. This coalition comprised the Serb People's Party of RS (SNS RS, the party of the RS President Biljana Plavsic), the Serb People's Social Democrats (SNSD, the party of the RS Prime Minister Milorad Dodik), and the Socialist Party of RS (SP RS).

On 26 November 1999, the JSAP Doboj Team met the Doboj Basic Public Prosecutor and had a discussion on pending cases against local politicians. He advised the team that his office did not accord any special treatment for politicians in criminal proceedings. The team then brought to his attention two pending cases against politicians residing within his

territorial jurisdiction. One was against Milovan Stankovic (and four others), who was at that time a member of the Main Board of the SP RS, the case against him arising from the time he was a sitting member of the RS National Assembly. The other case was against Milena Panic, at that time a sitting member of RS National Assembly and the President of the Doboj SNS RS, the case against her arising from the time she was the Secretary of Doboj Municipality.

Milovan Stankovic case background and lack of progress

The case against Milovan Stankovic related to an event that took place on 27 August 1997. The investigation was completed by 1 October 1997. Similarly speedily, on 16 October 1997 the prosecutor formally indicted him for crimes under article 23 of the RS Criminal Code General Part and article 199 (2) of the Special Part, i.e. intentionally inciting another to commit a crime, being an attack on an official carrying out work related to public or state security where the offender has threatened to use a weapon.

Mr Stankovic was alleged to have initiated an action to forcefully take over a radio/television transmitter and redirect the television program of the SRT (Serb Radio Television) studio in Pale to Banja Luka by giving instructions to four men and handing over a pistol to one who was unarmed. After meeting with Mr Stankovic, the men went to the transmitter and, threatening with their pistols, disarmed first two and later, after a change in shift, nine police officers in charge of the security of the transmitter. Threatening the duty technician at gunpoint brought about the desired redirection. During the operation Mr Stankovic was in telephone contact with the four men and he arrived at the scene during the events. The policemen were eventually released, and Mr Stankovic and the four others were apprehended the same day and held in custody until 1 September 1997.

In his defence, Mr Stankovic classified the activities as civil disobedience, claiming that the whole action was planned with the intention of enabling the citizens of Doboj to watch the Pale program from Banja Luka. He admitted that he handed out a pistol but said that he did not give any instructions and claimed that use of force and disarming the police officers was not even necessary.

At the main trial stage the case reached a deadlock. Article 279 of the RS Criminal Procedure Code requires the presiding judge of the panel to set the trial date no later than two months from the date the indictment was received by the court, but no hearing had been held by mid-January 1998. At that time, Mr Stankovic was appointed as RS Minister of Interior in the Sloga coalition government. This in itself is extraordinary based upon his own statement describing his role in the event on 27 August 1997, but is perhaps illustrative of the RS political environment at that time. Moreover, political developments would be the obvious reason for not organising the trial within the time limit prescribed by law.

Milena Panic case background and lack of progress

As for Milena Panic, the Doboj Basic Public Prosecutor advised JSAP that on 16 December 1997 the Ministry of Interior asked him to investigate allegations of abuse of official position, namely her position as Secretary of Doboj Municipality, and forgery from 14 December 1993 until 4 November 1997. On that day a new secretary was elected and Ms Panic was ordered to leave the office immediately.

On 18 December 1997, the prosecutor requested a formal investigation of both crimes. Ms Panic had allegedly misappropriated funds of 22,000 Yugoslav dinars, equivalent at the relevant time to DM 12,000. It was said that she had kept for herself amounts of at first five

and later ten dinars charged for announcements in the Official Gazette regarding lost documents. Her defence was that the money handed to her from the municipal officials receiving these fees from the public was used for the work of the Assembly, such as buying office supplies and cocktails. She claimed that receipts for all the expenses were kept in her office and must have disappeared after she was forced to leave on 4 November 1997. The investigation was pending for a long time without tangible results.

The letter signed by Milena Panic aiming at cleansing the Doboj judiciary

While the investigation against Ms Panic was ongoing and before the main trial against Mr Stankovic had started, the Doboj judiciary was faced with a "cleansing" attempt. In spite of the fact that none of the positions mentioned below were vacant, new candidates were proposed in a letter of 1 June 1998 to the RS Government, of which Mr Stankovic had then become a member, and with Ms Panic as one of the co-signatories:

> SUBJECT: Proposal for candidates for functions in judicial bodies
>
> Agreement was reached among representatives of the SNS Doboj Municipal Board Doboj, SPRS Doboj Municipal Board and SNSD Doboj Municipal Board that the following are proposed for functions in judicial bodies: … [then followed names of people proposed for the positions of
> - Doboj District Public Prosecutor;
> - President of the Doboj Basic Court;
> - President of the Doboj District Court;
> - Head of the Doboj District Prison;
> - President of the Doboj Minor Offence Court [the person proposed for this position was the acting President of the same court].]
>
> | For SPRS | For SNSD | For SNS |
> |---|---|---|
> | Velibor Ristic | Slavko Kovacevic | Milena Panic |

A copy of the letter was sent to the SNS RS Main Board Banja Luka. The persons proposed might have had good qualifications, but the letter did not question the capabilities of the incumbents. It was really asking for a cleansing of the Doboj judiciary based upon a straightforward "agreement" reached at local political level. Such a letter in itself tells a story of political influence and it is notable that the fact that Milena Panic herself was under investigation did not inhibit her in taking this initiative even in an open signed letter. In fact, the judges in question received this fact as a forceful attempt to stop the case against her.

The letter did not lead to a change in the local judiciary at that time, but proceedings in the cases against Mr Stankovic and Ms Panic remained at a standstill.

The suspension of the court president

The next developments in this saga took place the following year when, on 9 September 1999, President Rajko Stokic of the Doboj Basic Court reactivated the investigation against Ms Panic. Twelve days later, on 21 September 1999, the Minister of Justice submitted a proposal for his dismissal to the Commission for Election and Appointments of the RS National Assembly, under articles 57 and 62 of the Law on Regular Courts, then in force. At the same time, the Minister of Justice asked the President of the

Doboj District Court to keep Mr Stokic under suspension pending the proceedings at the National Assembly and he received a suspension order on 4 October 1999.

The Doboj JSAP Team invited Mr Stokic to a meeting on 13 October 1999 to get his version on the developments that led to his suspension. He said that the reason given for his suspension was that he owned a restaurant, but that this reason had no legal validity. Article 6 (3) of the Law on Regular Courts prohibited judges from doing businesses or outside activities that would affect the dignity of the profession. His wife and another woman owned a restaurant, but the law did not prohibit family members of judges from doing business. He was of the opinion that the suspension was politically motivated and said that about one year before the Social Democratic Party (SDP) approached him to ask him to join the SDP. He refused, stating that he could not become a member of any political party. At that time they threatened him with dire consequences. He believed that his suspension was directly linked to the case against Ms Panic, due to his activating the investigation against her, and he advised the team that he also was dealing with the case against Mr Stankovic. It seemed to him that no politicians of either the ruling or opposition parties were pleased with the way in which he had been dealing with these cases. He advised the team that there was no law to keep him under suspension, but that the National Assembly could dismiss him. He feared that the suspension might continue for years and that he would not be able to do any work during this period.

The same day, the Doboj JSAP Team met with Sava Lekovic, President of the Doboj District Court, to get more information on the suspension. He was very careful in talking on the issue, but he was willing to share the relevant documents. At the suggestion that the reasons mentioned in the order of suspension did not reflect the possible reasons provided in article 6 (3), he said that he could not explain it. However, he attributed political motives to the suspension and subscribed to the suggestion of the team that extraneous considerations might have been a contributing factor. Further, he advised that the Ministry of Justice had initiated similar proceedings at least against three more judges, two in Banja Luka and one in Prnjavor.

On 21 October 1999, the JSAP Doboj Team met with Goran Djuric, Acting President of Doboj Basic Court, on the suspension issue. He advised the team that the reason stipulated in order of suspension of the Minister of Justice was not valid under the law or the facts of the case and that this was a typical case of political interference in the administration of justice. He said that the action of the Minister of Justice sent a strong signal to all judges to behave in an “appropriate” way. Moreover, he sought the assistance of JSAP to protect his predecessor from illegal dismissal, in order to send a warning to politicians in dealing with the judiciary.

The Head of JSAP met with the RS Minister of Justice in late 1999 to discuss the suspension of Rajko Stokic. This may be the reason why his service was not terminated. Mr Stokic filed a complaint with the Human Rights Chamber on 5 May 2000, questioning the suspension procedure. He also began an administrative case challenging the legality of the suspension and requesting reinstatement with all back wages. He was reinstated to his position as President of the Doboj Basic Court in July 2000.

Update

Milovan Stankovic resigned from his position as RS Minister of Interior in August/September 1998. UNMIBH information indicates that he was forced to do so because he was too “military minded” and lacked political diplomacy. After his resignation, he continued to live in RS for two years, but the Doboj Basic Court never attempted to proceed

with the case while he was there. On 31 January 2000, the indictment was corrected with respect to some personal information. Amongst other things, obviously to pay him respect, it was added that Mr Stankovic:

> completed command headquarters academy and holds a Masters of Political Science, and was awarded eleven times in the former JNA [the Yugoslav National Army], and received the Milos Obilic medal in VRS [the RS Army]. [The latter is a medal instituted in the name of an old Serbian hero and is only awarded on rare occasions.]

It is safe to say that Mr Stankovic is a war hero and, as JSAP has seen in several cases and as is seen again below, this provides a person with quite some protection in criminal cases. When JSAP attempted to check up on the status of the case more recently, the Doboj Basic Court advised that it had been informed by the Modrica Police that Mr Stankovic is now in Belgrade.

In the case against Milena Panic, on 27 April 2000 the Basic Public Prosecutor filed an indictment before the Doboj Basic Court for misuse of office under article 226 (2) of the RS Criminal Code Special Part. The first hearing took place on 7 August 2000 and Ms Panic attended. She did not attend the three subsequent trials scheduled for 5 and 26 September and for 23 October 2000, explaining that she was preoccupied with the business of the RS National Assembly. She attended the latest hearing on 24 November 2000. The next hearing was scheduled for 12 December 2000 when the financial expert will be heard.

5.4.7 The murder case against Celo before the Sarajevo Cantonal Court in 2000

The so-called Celo case is a criminal case, believed to arise from a settlement of accounts between the participants, in a criminal environment with its roots in both BiH and Germany.

On 31 March 2000 Rahman Ajdarpasic was murdered and a companion shot and wounded while dining at a restaurant in Ilidza. The murder took place in broad daylight in a restaurant in the outskirts of Sarajevo. This in itself reveals a depressing trust by the perpetrators in the lack of rule of law.

One of the suspects is Ismet Bajramovic, known as Celo. He was convicted several times before the war and has served prison sentences.

Experience says that qualities and abilities useful for criminal activities, such as an orientation towards action, fearlessness, ruthlessness and slyness, also are useful in war. This was true in BiH and during the war people with criminal records on several occasions played an important role in both glorious and less glorious activities.

During the war, Celo held a high position and became a “war hero”. After the war he was subject to investigation in a number of cases, but not one has ended with an indictment and he remained a suspect.

It is not unusual in BiH that cases against some people never go beyond the investigation stage. The term “the untouchables” is used to describe them. JSAP has used the term “notorious suspect” instead of the usual term “notorious criminal”. *JSAP Thematic Report IV: A Case Study in Economic Reform*, expresses it this way:

> A notorious suspect is defined as a person who in the post Dayton period has repeatedly figured as the suspect of serious high profile crimes, but is not seen to be prosecuted, or against whom the courts have been unable to conclude a case. This is commonly understood to be due to the powerful position of the suspect. The problem is widespread in BiH, to the extent that JSAP would be in error not to mention it. It must, however, be emphasized that the use of the term does not imply any foregone conclusion regarding the guilt of the suspect.

The Celo case, as it became known, was closely followed by JSAP. It must be emphasised that JSAP's role was to observe whether the investigation by the Sarajevo Cantonal Court was carried out in accordance with professional norms, not to establish guilt.

Celo was held in custody in the same prison that he was working from during the war. There he has been able to act as a "king" as many of the prison staff used to be his subordinates. The Prison Governor, after having being criticised for leniency and perceiving his position to be under strong pressure from two sides, developed heart problems and took several months sick leave. According to a judge inspecting the prison, on one occasion Celo threatened to "rip off the head" of the investigating judge and "serve it on a plate" in the Cantonal Court. Local politicians have called the investigating judge asking him to release the suspect from the prison.

At one stage the pressure from the political environment to influence the investigation took a direction that called for a strong warning from the international community. This was addressed in a letter of 5 June 2000 to the Ambassadors of PIC member states in Sarajevo from Ambassador Klein, the Special Representative of the UN Secretary General asking the Ambassadors to make it clear at all levels locally that it is essential that justice is seen to be and that justice is done.

The reasoning behind the letter was that the Ambassadors should take the opportunity to warn their political contacts. It is of quite some concern that wartime co-operation has prevailed and that some politicians do not comprehend the necessity to cut the ties from the war. The letter from Ambassador Klein, having been widely disseminated, came into the hands of the press and was published in the *Ljiljan* political magazine for 26 June to 3 July 2000. This seemed to have had a significant effect. As the interest of the international community was now displayed, political pressure on the judiciary was no longer a problem, apparently for fear of publicity and because the judges and prosecutor could no longer be trusted to keep silent.

JSAP is pleased to relate that the investigating judge performed very well. It was, however, of some concern that he kept saying that without support from JSAP he would probably not have been able to handle the case as he did. It also was a concern that another judge known to JSAP as very competent said that he would resign rather than sit in a panel dealing with this case.

The indictment against Celo and four others was raised at the end of September and the main trial started on 18 October 2000, with heavy security measures both inside and outside the Cantonal Court building. The main trial has so far been conducted in a professional manner.[21]

[21] On 5 February 2001, shortly before printing this report, Celo was convicted and sentenced to 20 years of imprisonment, while two of the others were sentenced to 23 and 25 years respectively. The other two got one year each.

5.4.8 Some cases dealt with by the JSAP Doboj Team involving local celebrities

The Tesanj Municipal Court

On 8 February 2000 the team met with Salih Memic, President of the Tesanj Municipal Court in the Federation and reported:

> The team had been receiving numerous complaints about delays in the conduct of adjudication in the court. The team met with the President of the court and had a detailed discussion on variety of issues affecting the functioning of the court. The team brought to his attention a few cases pending for a long time and he expressed great support for the work of JSAP and promised that he would organise the trials as a priority. The very next day, the parties informed JSAP that the court had fixed dates for their trials.

This incident indicates that unless some external agencies monitor the functioning of the courts, the general population may not be able to deal with them.

Long pending cases before the Teslic Basic Court

The JSAP Doboj Team found many criminal cases against groups with political influence that had been pending for a long time at the Teslic Basic Court. Court records indicated that the court was even more cautious than usual in dealing with political or influential figures of the locality. The criminal case against Marinko Djukic, former chief of police, and others for illegal confinement and torture was pending for at least two years. The president of the court advised JSAP that the long delay was due to lack of an experienced criminal judge to deal with the case, but JSAP considered that the court was much too cautious due to its inability to deal with power bases.

Four other cases dealing with abuse of official position and misappropriation of funds by local politicians were pending in the court. The reason for the inaction on the part of the court was attributed to lack of sufficient funds to engage experts.

The suit against Predo Kujundzic, member of the SDS, before the Doboj Basic Court

The cause of action in this case arose on 5 June 1992, when a Doboj police officer, Nenad Kujundzic, requisitioned a car and a truck from Mato Krajinovic, a Croat, for the use of the RS Army. According to available evidence, the vehicles were not transferred to the Government. Instead, the defendant forged the signature of the plaintiff, giving himself a power of attorney to sell, drive and register the vehicles. Using this document, he sold the truck to a third person. Later, the vehicle was sold to the company of the defendant, Predo Kujundzic.

Mr Krajinovic filed a civil suit against the RS government and Predo Kujundzic on 19 May 1997. While the case was pending, the police located the vehicle in Serbia and brought it back to Doboj on 13 January 1998. The plaintiff contented that he never executed the power of attorney and the court ordered an expert opinion to establish its authenticity. The expert opined that the signature of the plaintiff was forged. On 24 November 1999, the plaintiff waived his claim against Mr Kujundzic and later made a settlement proposal. Accordingly, his claim was limited to getting the vehicle back from the first defendant, the RS, without any claim for damages, which would normally be part of a claim if a plaintiff has any confidence in the functioning of the court system.

In this case, the plaintiff was not able to get justice according to law, obviously due to his Croat ethnicity and the defendant's influence in the judiciary.

The Srpski Brod Oil Refinery tax evasion case before the Doboj District Court

This case concerns tax evasion of many millions of DM by the Srpski Brod Oil Refinery in which the primary question is whether products launched onto the market were really new products or were in fact existing products under different names. According to the prosecution, the five suspects abused their official authority as managers of the business and forged official documents, both crimes under articles 226 (4) and 236 (2) of the RS Criminal Code Special Part, then in force. The resulting financial losses to the RS government are said to have amounted to around DM 12 million and the company made an allegedly unjust profit of around DM 3 million.

An investigation was initiated against the suspects on 6 October 1999 and on the same day, four out of the five were detained. However, the court did not order the detention of the director of the company, the prime suspect. On 11 October 1999, the prosecutor filed a petition for his detention, which was granted. During the detention, the office of the prosecutor and the court came under tremendous pressure from leaders of trade unions and local celebrities to release the suspects. The court was also under pressure from local media and through parliamentary debates. On 22 October 1999, all the suspects were released. This was to have a direct bearing on the whole investigative process and results of the case.

Two of the four financial experts finally appointed from Banja Luka and Doboj are former colleagues of the main suspect, and possibly also the others, when they were all in management positions in a local bank.

A related prosecution is going on in the Odzak Municipal Court in the Federation, involving tax evasion related to the sale of same products from the same refinery in Srpski Brod. The Odzak court called one of the suspects in the Srpski Brod case as an expert on the principal issue of whether the products in question were new or fictitious. In some matters, inter-entity "co-operation" seems to work. Nothing should be a surprise in the BiH courts.

The case against Andrija Bjelosevic before Doboj Basic Court

Andrija Bjelosevic, former head of the police in Doboj and now in a high position as an adviser in the RS Ministry of Interior in Banja Luka, is charged with abuse of official authority under article 226 (3) of the RS Criminal Code. In 1991, when Slovenia declared itself independent, a truck loaded with six brand-new VW Golf cars, parked at the police station as a precautionary measure, was not returned to the driver from the Slovenian company Compass-Hertz. The explanation was that the cars would compensate for losses suffered by the Bosnian government during the war in Slovenia.

In the file there is a certificate for temporary confiscation of items, clearly confirmed with the signature of Mr Bjelosevic. The Doboj Basic Public Prosecutor, in nine years of inactivity, had not even submitted a petition for an inquiry on the basis that he had to have a statement from Mr Bjelosevic. Even if correct, it is hard to believe that this was impossible during all those years.

"Suicidal" changes in the panel of judges during a trial

On 25 June 1992, the Doboj police requisitioned a passenger car from Svjetlana Cosic, a Croat, and issued a certificate to her. The car was handed over to Goran Neskovic, then the SDS-appointed court president, for official use. He later became the Deputy Minister of Justice in the RS and is now in private practice as a lawyer in Doboj.

When the war ended, the car was not returned to Ms Cosic. She asked the police and the Doboj District Court to return it, but was told that it had disappeared when Mr Neskovic became Deputy Minister of Justice. On 26 November 1996, she filed a suit asking for restitution of the vehicle and, if this was not possible, compensation for its value. As the case was pending at the Doboj Basic Court without any progress, she sought the assistance of the IPTF. Even after ITPF intervention, nothing happened for two years and in September 1999 the IPTF referred the case to JSAP to follow up.

Following JSAP's monitoring of the case, a final decision was made on 21 April 2000 in favour of the claimant, awarding her DM 15,580 as the value of the car. However, the composition of the panel of judges had been changed towards the end of the trial and as expected, the public attorney filed an appeal against the judgement. It is difficult to see this blatant procedural error as nothing other than the usual suicide tactics. Obviously, on appeal the Doboj District Court had to send the case back to the first instance to repeat the proceedings.

The intention of the first-instance court in giving such a judgement should not be seen as promoting justice and rule of law, but to appease JSAP and still frustrate the plaintiff as the victim.

In the retrial before the Doboj Basic Court on 17 November 2000, however, the same decision was reached, awarding her DM 15,580.[22]

The case against the Chief of Police in Teslic, Milenko Bubic

Milenko Bubic, the Chief of Police in Teslic, was indicted for causing grievous bodily harm in an incident that took place in 1996.

There has been no disciplinary action in reaction to the indictment and the President of the Teslic Basic Court informed JSAP that he has professional difficulties in the case. He feels uncomfortable presiding in the trial, since the court works on a regular basis with the Chief and at the same time has to deal with him as a suspect in this criminal case. The President therefore asked the Doboj District Court to transfer the case to another court, but that was refused.

In a meeting with JSAP, the President of the District Court advised JSAP that to transfer the case would set a wrong precedent for similar situations in the future as the local courts in the region would avoid dealing with cases against policemen. This does, however, not take into account the particular circumstances that this case involves the Chief of Police.

[22] On 17 January 2001, shortly before the printing of this report, the Doboj District Court rejected the appeal and confirmed the first instance verdict.

5.5 Employment cases

5.5.1 General remarks

In August 1999, the JSAP Doboj Team started to look into employment cases. The team inspected the court registers for the year 1996 and 1998 of the Doboj Basic and District Courts, the Teslic and Modrica Basic Courts, the Zenica Municipal and Cantonal Courts and the Ozdak Municipal Court. The aim was to analyse the procedural histories of employment cases seeking reinstatement in pre-war employment and compensation for loss of wages and related benefits between wartime dismissal and reinstatement. The information accumulated through this process showed that there would have been thousands of these cases pending in the BiH courts and that most of the cases had been pending for a long time.

The team found that the number of cases with Bosniac and Croat plaintiffs in the RS and with Serb plaintiffs in the Federation was negligible, in spite of the fact that employees of a different ethnicity than those in military control in the region were targeted for dismissal during the war. During and after the war, in refilling positions, the supporters of SDS were preferred in the RS, SDA supporters in Bosniac-controlled areas in the Federation and HDZ supporters in Croat dominated areas. The jobs in question are not only with manufacturing companies, but also include government departments, hospitals, schools, the judiciary and the telecommunications sector.

The low number of ethnic minority plaintiffs may be explained by the general low return rate and because people are not interested in reinstatement. Even if claims are restricted to compensation, minorities may consider it largely impossible to file a lawsuit in the other entity. There is a general reluctance to travel in the other entity, even if there is no particular danger. The lack of success of their former co-workers in employment cases in courts of their own ethnicity would add to this. Even if a judgement gave compensation, success at the enforcement stage is doubtful. So, presumably, most people would find it not worth while to spend money on a lawyer in an employment case in the other entity. Accordingly, there are no findings to indicate that the RS courts discriminate against plaintiffs of Bosniac or Croat origin or Federation courts against Serbs.

During the war, labour laws were passed both in the Federation and in the RS to provide enterprises with a legal basis to terminate employment and reduce their numbers of staff following war damage and loss of markets. After the war, there were also changes in the labour laws. However, provisions regulating the procedures for carrying out a dismissal were not changed.

JSAP has not thoroughly examined the substantive issues in the employment cases, but the impression given is that generally the plaintiffs argue that they not were given written notice of dismissal in accordance with the law and that they were therefore denied their right to appeal. It is argued that the dismissals were void for that procedural error and so a right to reinstatement and compensation for loss of salary and other benefits remains.

According to local legal tradition, when these procedural rules have been violated the remedy is reinstatement. Consideration of what would have happened if the rules had been followed is not necessarily relevant. If the decision to dismiss is declared void and reinstatement granted, the defendants feared that they would be required to pay compensation as most plaintiffs had not earned and had not been able to earn elsewhere in the meantime. If dismissed for substantive reasons that were not permitted by law, employees would be in an even better position to obtain reinstatement and compensation for loss of income.

The companies that are sued are, as it seems, now running businesses with an increased number of workers compared with their war time activity and have taken on other employees with less seniority in the former positions of the plaintiffs. As most defendants are pre-war state or socially owned companies, the political concern is that through liability to pay compensation, employment cases may be a threat to the BiH economy. In this situation, the political interest would be to exert pressure over the courts to not reach final verdicts in employment cases.

Unlike courts in the Federation, those in the RS maintain separate registers for employment cases. JSAP therefore concentrated on the RS in its research. Under the RS Civil Procedure Code, employment cases should be dealt with urgently, but the JSAP Doboj Team found that the courts did not accord any priority to these cases.

The team found that in employment cases a final verdict against the defendant was rarely obtained. Instead, it found that the courts systematically adopted delaying tactics to discourage people from seeking judicial remedies in these cases. The delaying tactics included the shuttling of cases back and forth between first and second instance courts with several first instance trials, postponement of cases indefinitely and appointment of court experts unable to provide reports on time. Meetings with the judiciary confirmed the view that the courts act as the representatives of political parties and look at national policies on employment rather than adhering to the letter and spirit of the law and the merits of each case.

Two comments given to JSAP on the handling of employment cases summarise the perception of the first instance judges:

> *(On a Doboj Team meeting on 10 January 2000 with Zdravko Popovic, President of Teslic Basic Court)* Our interlocutor stressed that the Doboj District Court did not confirm a single judgement ordering reinstatement in employment. As an example of how wrong the District Court is in its decisions, Mr Popovic mentioned that in two cases in which the Basic Court decided to follow the instructions of the former, the Supreme Court dismissed its judgements. Finally, Mr Popovic said that the President of the Doboj District Court was not happy with his [Mr Popovic's] comments qualifying the District Court as highly political. According to what some judges of the Doboj District Court have told Mr Popovic, that court follows clear instructions of the politicians in order "not to reemploy some employees when companies are in crisis".
>
> *(On a Doboj Team meeting on 4 February 2000 with Zdravko Popovic, President of Teslic Basic Court)* The meeting was organised to discuss the issue of delay in dealing with employment cases. The president of the court advised JSAP that the first instance courts were not pleased with the attitude of the District Court in dealing with appeals in employment cases. He said that the District Court simply returns cases for re-trial without applying its mind to the judgements of the lower court. Generally, there is neither specific guidance nor reasons given for sending back the case to repeat the proceedings. It was obvious that during the war employment was terminated without any respect for the law. All those terminations were illegal and the victims were entitled to get their jobs back with unpaid back wages. But the District Court creates barriers to justice for the people affected.

The JSAP Doboj Team found that, partly because of the constant return employment cases with few or no guiding principles, judges do not want to deal with them and they are therefore usually assigned to very junior judges. Their lack of experience may also be a contributing factor to the large backlogs of these cases. For example, in the Doboj Basic Court, a judge with only six months' experience was assigned the responsibility for

employment cases and enforcement. She expressed difficulties in achieving her required quota of cases for each month.[23] JSAP found that to fulfil the quota requirement, she often resorted to dismissing cases based on minor faults in the initiating complaint, which she could have asked the plaintiff to rectify.

The net result of this practice is that these cases never reach the stage of finality, some bouncing back and forth between first and second instance courts more than three times. The team was also told that plaintiffs are usually prepared to accept any settlement whatever proposed by the employer.

During the period of its observation, the JSAP Doboj Team observed some improvements in the way the employment cases are dealt with. This fits in with the general pattern that whenever JSAP starts an inquiry into a particular issue, this has an effect upon the performance of the judiciary within the field. Concern as to how employment cases are dealt with was also raised in a meeting with between the President of the RS Supreme Court and the Head of JSAP in June 2000.

It is significant that the Doboj District Court is now increasingly giving its reasoning when sending a case back for retrial. In November 2000, the JSAP Doboj Team reported an increase in the number of employment cases reaching a final verdict and the execution of eight verdicts on reinstatement.

In a co-operative effort with OHR, the RS has now adopted a new Labour Law,[24] introducing different limitation periods for filing lawsuits from the effective termination of employment. This will probably reduce concern about the impact of employment cases on the RS economy.

Very broadly, the new RS Labour Law and amendments imposed by the High Representative to the Federation Labour Law have reduced, if not removed entirely, the role of the courts in dealing with the war-time dismissal cases. Instead, in both entities, commissions have now been set up to deal with these cases. It now generally falls to these commissions to determine, in accordance with evidence presented, whether employment was illegally terminated and then to determine any amounts of compensation and/or severance pay.

5.5.2 The Nadica Misic employment case before Teslic Basic and Doboj District Court

This case illustrates some of the problems involved in employment cases, which are also to a large extent typical for the judicial system as a whole.[25] Unusually, the Doboj District Court did give explanations as to why it sent the case back for retrial. In a typical fashion, however, the case bounced up and down altogether four times before the question of reinstatement was solved. The question of compensation is still pending. This illustrates the lack of ability of the court system to reach a conclusion on the substantive issues in the dispute, and thus to fulfil the role of the courts to serve the public.

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[23] The quota system is the method used to assess the performance of judges, by comparing the cases they close or otherwise dispose of each month with a set norm or quota, fixed in internal court rules. For example, municipal court judges in Tuzla Canton dealing with civil cases are expected to dispose of 17 such cases per month.

[24] Official Gazette of the RS, 38/00, published on 8 November 2000.

[25] See for further discussion JSAP's *Thematic Report X Serving the Public: The Delivery of Justice in Bosnia and Herzegovina.*

The defendant company was initially named as DP Promtes. DP could be translated as socially owned. The company employed Nadica Misic as a cashier until 1 April 1995 when she was dismissed. She filed a lawsuit, but on 4 March 1997 the Teslic Basic Court dismissed her complaint on grounds that she had not submitted any evidence supporting her claims. Contrary to the practice later adopted, on 15 May 1997 the Doboj District Court accepted her appeal and returned the case for retrial on the basis that the court should not have dismissed the case so early in the proceedings.

On 13 July 1997, the Teslic Basic Court ordered the company MTP Promtes, to reinstate Ms Misic and "to pay contributions to the Pension Fund and Health Insurance and to all other funds that she is entitled to". The change from DP to MTP is unexplained, but is probably due to a change in the formal ownership. MTP could be translated as mixed-ownership company. The reasons given for ordering reinstatement were the failure to give notice of dismissal in writing and that "her employment was terminated illegally without passing a proper decision and allowing the right to appeal". Even if the dismissal was based upon the company's genuine need to make redundancies, it could not be accepted "because even that kind of decision [dismissal] must be made in accordance with the law".

On 2 November 1998, the Doboj District Court accepted the appeal from the company and returned the case for retrial, mainly because the compensation was granted "without stating exactly for which purpose and in what amount, so the refuted decision in this part is unclear and cannot be executed." In this regard, the appellate court decision cannot be criticised.

On 31 August 1999, the Teslic Basic Court re-made its previous decision on reinstatement and awarded Ms Misic fixed sums for loss of salary and specified allowances, such as hot meals and winter food, and also for future losses until her reinstatement took place.

On 1 November 1999, the Doboj District Court for the third time in this saga returned the case for retrial. The court found that the name of the company was not correct as it had changed to DTP Promtes from 22 February 1995 and the Basic Court referred to the defendant as MTP Promtes. DTP can be translated as state trading company. In BiH procedure, it does not appear usual for a court to rectify misspelling of names and similar mistakes on its own initiative and the consequent sending of cases back is a cause of sometimes long and unnecessary delays. Remarks were also made that Ms Misic was not entitled to compensation for hot meals, as actually working is the reason for receiving that allowance. Further, the court raised questions as to whether Ms Misic had worked in a company owned by her daughter after she lost her job in Promtes, as the defendant had argued. The former argument seemed valid enough, and also the latter if proved. According to JSAP information, Ms Misic's position is that she only gave her daughter a helping hand occasionally, without receiving any salary, and that the company has the burden of proof of deductions to be made from her compensation.

On 21 December 1999, the Teslic Basic Court made its fourth decision using the correct name, DTP Promtes, and ordered the company to reinstate Ms Misic and give her "all other rights she is entitled to according to the Law on Labour Relations". In the decision it is stated that if she had been working in her daughter's company, this could not be a reason for dismissal in the first place, as it should have been done in writing specifically referring to that basis. The relevance of that issue to the compensation question was not directly addressed. On 21 March 2000, the Doboj District Court at last confirmed the part of the first instance court decision on reinstatement. On the question of compensation, it returned the case, once again

with the understandable reason that the first instance decision "is unclear and non-executable". There were also comments on the right to compensation for hot meals and that "salaries earned working at some other place" should be deducted. The latter question seems to be never ending as long as no clarification is made as to which party has the burden of proof.

Ms Misic is now reinstated and works as a saleswoman in the company. The question of compensation has been put on hold in order to get clarification from the RS Supreme Court. One step in this process may be a judgement in a similar case from the Supreme Court, in which a teacher was granted compensation.[26] In that decision, the Supreme Court stated that a worker whose employment has been illegally terminated is entitled not only to the compensation for lost earnings, but also for other lost income, such as allowances for annual leave and meals. JSAP has been informed that this is in accordance with the old SFRY practice.

JSAP has been informed that the presidents of all six basic courts under the Doboj District Court had previously taken a stand similar to the Supreme Court view. Recently, the Doboj District Court seems to have agreed with this, except for the hot meal allowance. The RS Supreme Court decision to include hot meals should normally be taken as a precedent, but it seems that the Doboj District Court maintains its disagreement and the conflict remains to be finally solved.

5.6 War crimes cases

5.6.1 Confusion in Central Bosnia Canton

In the summer of 2000, JSAP learned of around 56 war crimes cases pending in the Cantonal Court of Central Bosnia Canton with no action taken since the unification of the court system in the canton in June 1998. The cases include about 850 named alleged perpetrators, including some of the highest authorities in the Canton and the Federation. The cases are highly controversial because they derived from the Herceg Bosna High Court, which sat in Vitez, and thus all concerned Croat victims and Bosniac perpetrators. War crimes cases from the territory of the canton involving Bosniac victims and Croat perpetrators fell under the jurisdiction of the Zenica-Doboj or Sarajevo Cantonal Courts, due to war time front lines and the universal jurisdiction of war crimes. Thus, the standard bias towards ethnic balance in all matters, including the rule of law, could not be maintained regarding war crimes cases, and the Croat side pushed strongly for prosecution, while the Bosniac side tried to postpone consideration of the cases.

At the end of August, after a lengthy discussion, the Cantonal Court President, who is a Bosniac, accepted JSAP's advice to register the war crimes cases and open investigations. The President also finally accepted that his interpretation of the Rome Agreement of February 1996 (the so-called Rules of the Road) was not necessarily correct. The President had suggested that the agreement prohibited the court from taking any action at all on war crimes cases until the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague granted approval, whereas JSAP explained that the agreement only forbade detention or indictment of the suspects, but that all other judicial actions should continue in accordance with local procedures. In October, JSAP met again with the president to discuss implementation of the cases and to check the new registry book for war crimes cases. While

[26] Case number Rev 90/99, from 15 September 2000.

the cases were properly registered, the President remained reluctant to allocate the cases to investigation judges in his court, and agreed to do so only after JSAP's insistence.

While JSAP's intervention to assist the court system to fulfil its legal obligations proved successful, the war crimes episode suggests that the local judiciary is still not mature enough to function as an independent guarantor of the rule of law. Both the Croat and Bosniac judicial authorities demonstrated their highly politicised perspectives and voiced their deep concern over adverse consequences for political parties and the general public if the court either processed (or postponed) consideration of war crimes cases. In general, the war crimes cases show that the judicial reform process is still incomplete in BiH.

5.6.2 Difficulties at the Mostar Cantonal Court

At the beginning of January 2000, the Cantonal Court in Herzegovina-Neretva Canton received from the Cantonal Prosecutor's Office an indictment charging five Croats from Mostar with war crimes against civilians and prisoners of war, the so-called Mostar Five case. The file had been previously reviewed by the ICTY Prosecutor in accordance with the Rome Agreement, who included the case in the "A category"[27] and informed the local authorities accordingly.

Initially, the Cantonal Court judges of all ethnic groups disputed the feasibility of having this trial conducted in the Cantonal Court in view of the high status of the first accused, who until the trial began was President of the City Board of HDZ Mostar, and the current political and security situation in Mostar. It was also questionable whether the local police would be willing or able to execute the arrest warrants against the accused and there were concerns about the security of any judge involved in processing of the case.

JSAP noted that the court had around 30 war crimes indictments and investigations, which were in process of being sent for ICTY review under the Rome Agreement. In view of the prospect that the recently established Cantonal Court[28] might be processing a large number of these sensitive cases in the near future, the international community became increasingly concerned about the lack of material conditions, impartiality, and general security in the court. There are no court police in the Canton and the Ministry of Interior provided temporary security protection to the court only on rare occasions. In addition, the judges and prosecutors processing these cases needed training and support.

In 2000, JSAP observed a positive change in attitude of the judges involved in the war crimes cases, who by now appear at least reconciled with the view that they will process them, and in its frequent contacts with the Cantonal Court, JSAP has seen a professional approach in their processing. OHR South and the JSAP Mostar Team also pressed the relevant authorities for the urgent establishment of the court police in the canton, necessary for the safe processing of these numerous cases.

[27] In this category of case, the Prosecutor has taken the position that for the purpose of determining whether the criminal charges should be continued at this stage, the documents submitted to him are sufficient evidence, by international standards, for securing an acceptable basis that the individual in question committed serious violations of international humanitarian law, excluding genocide.

[28] The Cantonal Court was effectively established in September 1999, when 18 judges, composed of seven Bosniacs, seven Croats and four others, took up their new positions. However, disputes about the internal organisation of the court and other matters, in which the sides were usually drawn up on ethnic lines, were not resolved for several months after that.

These efforts in supporting and preparing the Mostar judges to process the war crimes cases proved useful when during the autumn 2000, ICTY reviewed four more cases and sent them for domestic processing. Currently, the Cantonal Court panels are in process of issuing detention orders in three separate war crimes cases against a total of 21 Bosniacs. Additionally, a court panel is expected to issue a detention order in the case of three Serbs, who are, however, believed to reside in the RS or FRY and thus be unavailable.

In view of the sensitive political situation in the canton and the relatively recent establishment of the multi-ethnic Cantonal Court, there is a continuing need for the international community monitoring of the war crimes cases. To facilitate security, the court police should be deployed there as a matter of priority.

6 THE OPTIMISTIC FUTURE?

6.1 The new laws on courts and prosecution, a benchmark towards independence?

6.1.1 Lack of political will to reform the judiciary

There is no doubt that judicial reform in BiH has not been moving ahead at a satisfactory speed. In fact, far too little progress was made in 1999, in spite of it being the Madrid PIC rule of law year. One major issue at the beginning of 1999 was the long-pending RS and Federation laws regulating judicial and prosecutorial service. The two RS laws, the Law on Courts and Judicial Service and the Law on the Public Prosecutor's Office, were not passed until April 2000 and came into force in May. In the Federation, the one law for both the courts and the prosecution, the law on judicial and prosecutorial service, was passed by the House of Representatives in February 2000, but by May it had not passed the House of Peoples, in spite of its having been on the agenda several times. The law finally was imposed by the High Representative on 17 May 2000 and came into force the same day.

The fact that the Federation political system was not able to deal with and solve important issues regarding a functioning court system is confirmed by the circumstances surrounding two other important laws. One is the Law on Amendments to the Law on the Supreme Court of the Federation of Bosnia and Herzegovina Regulating the Supreme Court Competence in Federal Crimes. Under the Federation Constitution terrorism, inter-cantonal crimes, unauthorised drug dealing and organised crime, fall within the exclusive competence of the Federation rather than the cantons.[29]

However, by the end of 1998 the Federation had not passed any relevant legislation, nor had it created a Federation court with jurisdiction to investigate and deal with those serious crimes. On 30 July 1999, the High Representative felt compelled to impose a law giving competence to the Federation Supreme Court. It was clear that this new burden called for more judges and resources to be allocated to the Supreme Court, but by November 2000 this had not happened. This confirms that Federation politicians have no interest in the issue and that they do not want to resolve this crucial question.

The Federation Constitution also provides for the establishment of Court Police, to provide court security and enforce judgements. Their financing is a Federation level responsibility, but until now this police force only exists in three cantons because of lack of funding. In the RS, there is no separate institution of court police and so, unlike their counterparts in the Federation, the RS politicians cannot be blamed for failing to carry out such a mandate. They have "only" failed to deal with the vital issues of court security and lack of police power to assist the bailiffs to enforce court decisions.

Independent and effective courts are essential in attracting domestic and foreign investment in the economy and combating serious crime. The lack of interest in these issues on the part of the politicians is simply further confirmation that they do not want independent courts, they want control.

6.1.2 New appointment and disciplinary processes limit political control

The Law on Judicial and Prosecutorial Service imposed in the Federation provided for the creation of one Federation Judicial Commission and ten Cantonal Commissions, with a

[29] Chapter III, article 1 e, as amended on 5 June 1996.

similar structure for prosecutors. The Commissions are responsible for reviewing candidates for judicial and prosecutorial vacancies and providing opinions on disciplinary proceedings and on draft legislation affecting the judiciary or the prosecution. The Federation commissions deal with matters affecting the Federation level courts or the Federation Prosecutor's Office and meet together with the relevant cantonal commissions to deal with matters affecting cantonal or municipal courts and prosecutors.

The Federation Judicial Commission has seven members – three judges of the Federation Supreme Court, two members from the Association of Judges, one from the Association of Prosecutors and one legal professional. The three or five members of the cantonal commissions (depending on the population of the canton) are appointed by the judges of the cantonal court from among the judges in the canton.[30] The prosecutorial commissions are created in a similar way. From this it can be seen that the commissions are professional and, for the most part, collegial with no political element.

In RS, the new laws create a High Judicial Council with thirteen members and a High Prosecutorial Council with eleven members. In addition to providing opinions on candidates for appointment, the Councils play a direct role in disciplinary proceedings. The members of the High Judicial Council are the President of the Supreme Court and one other Supreme Court judge, the President of the RS Constitutional Court, the Republic Public Prosecutor, one judge from each of the five court districts of the RS, the President of the RS Association of Judges and Prosecutors and three eminent RS lawyers.[31] The High Prosecutorial Council is created in a similar fashion.

The law as passed by the RS National Assembly included the Minister of Justice as a member of the High Judicial Council. This was in spite of warnings from the international community that the overall guiding principle of the law should be to separate the judiciary from the executive. It was feared that in practice the Minister would dominate the Council and suppress free and open discussion. As the law also forbade members of the Council from being members of any political party (in addition to article 5 which prohibits judges from being politically active[32]), insistence on the membership of the Minister could only be seen as a manifestation of fear of losing control.

After the law had been passed, the High Representative imposed some small, surgical amendments, one of which was to replace the Minister's membership with that of an additional eminent lawyer. The Minister of Justice was offended, seemingly because he and the political environment did not differentiate between having a professional body to review the professional qualifications of applicants, especially necessary in BiH because of a history of misuse, and the power over final appointment by the Assembly, where of course the voice of the Minister would be heard.

It should be noted that in BiH the prosecution has been traditionally treated as part of the judiciary and in these new laws prosecutors are dealt with similarly to judges. This is not necessarily in accordance with international practice. In neither the common law nor the civil law tradition is the prosecution part of an independent judiciary. On the other hand, the

[30] See articles 5-7. Presidents of cantonal courts cannot be members as they have the power to appoint municipal court judges.
[31] Articles 45 and 46.
[32] The laws in both entities clearly prohibit judges and prosecutors from being members of political organisation. Although this is controversial by European standards, these provisions were considered necessary in the opinion of the BiH profession, as members of a party, plainly and simply, would be expected, or at least assumed, to follow that party's line.

prosecution is not an ordinary part of the executive either, as it should be above political influence. Because prosecutors also needed financial independence and protection from political influence in the same way of judges in BiH, the new laws continue to treat them similarly.

It must be admitted that both the Federation and RS laws have some shortcomings. Nevertheless, OHR obtained overall international support for its work to get the laws functioning, as this was crucial for cutting the judiciary and the prosecution free from politics. At one stage it was doubtful whether the laws in the RS would be passed, and the Supreme Court President and the RS Republic Prosecutor voiced the opinion of all their colleagues when they insisted that in the worst case the laws should be imposed. The situation in the Federation was similar and the Supreme Court President and the Federation Prosecutor strongly supported the imposition of the Federation law.

The new laws make no changes in the competencies to appoint or with whom the competent bodies may or shall consult. The significant change is that the competent bodies must choose from those applicants who have been approved by the commissions and the councils, which have no politicians to exert even informal control. No person can be appointed as a judge or prosecutor unless the relevant commission or council has given him or her a positive rating. Only when the commission has delivered its opinion, can the competent bodies use their discretion to shape a judiciary where political considerations may also play a role, for instance having a balance of genders, ages or ethnicities and other similar parameters.

The laws also regulate the disciplinary process. In the RS the High Judicial Council has the power to impose disciplinary sanctions (reprimand, reduction in salary or fine). As for dismissals, the National Assembly may only do so on the proposal of the Council, which means that the power of the Assembly and the role of the Minster of Justice have been substantially limited. This should provide protection from the former informal psychological pressure exerted or felt to be exerted over the judiciary and from any hidden political influence.[33]

The Federation law is more limited in this respect.[34] The relevant commission must be notified of all disciplinary proceedings and may make its own inquiry into the matter and give its opinion. However, the final decision is made and sanctions imposed by the court presidents or chief prosecutor. Similarly, although the commissions must be invited to give their opinion in dismissal cases, the power to dismiss continues to rest with the consensus of judges in the immediately superior court, except in the Federation Supreme Court where it is by consensus of the other judges. This in itself gives quite substantial protection, perhaps too much.

The developments in the first months after the new laws are interesting regarding the role of politics in the appointment process.

This new situation has made the politicians confused. JSAP has observed several attempts from politicians in the Federation to discuss the issue with the commissions and to influence their opinion. It must be admitted that this also may be done in good faith, for example in order to get effective judges willing to address serious crime.[35] JSAP has also

[33] See the RS law on judges articles 54 - 57 also for the material causes for disciplinary sanctions. The detailed proceedings are regulated in articles 58 - 68, and suspension in articles 69 - 72.
[34] See the Federation law articles 22 - 27.
[35] As in Una Sana Canton, where the Governor in a conference convened by JSAP and US Department of Justice, Central and East Europe Law Initiative, on 25 August 2000 in plain words told the judges that he was not satisfied with their performance, especially in combating organised crime and corruption. His directness on

observed that the professionals do not feel quite comfortable with their new freedom and have turned to JSAP for advice.

Attempts at pressure can be seen in a letter of 30 October 2000 from the Mayor of Mostar, clearly seeing himself losing control, to Judge Jurisic, President of the Cantonal Commission:

> The procedure of appointment of judges to the Court for the Central Zone of the City of Mostar is pending. In view of the political and organisational particularities of the Central Zone, the Mayor and the Deputy Mayor believe and suggest that it would be useful and advisable, before making proposals for appointment, to conduct certain consultations with us.

In his reply of 2 November 2000, Judge Jurisic, defending independence, explained the work of the Commission and advised that any consultation should be conducted with the President of the Cantonal Court, who under the law had the duty to appoint the judges in question.

While this reply might have been an easy one, since the joint Commission already had made its recommendation, it should nevertheless serve as a model for the commissions and the councils to refuse any "consultations" and refer this to the appointing bodies. On 13 November 2000 the Head of JSAP sent Judge Jurisic a letter stating, in part:

> I would like to point out that your advice that the Mayor direct his concerns to the appointing authority, the President of the Cantonal Court, respects the autonomy of the appointing authority to consider other sources of information during its decision-making process. Of course, the appointing authority must select an individual recommended by the Judges Commission. Herein lies the enormous impact the judicial commissions can have on the process of selecting judges for the bench and further underscores the importance of judicial commissions in recommending candidates based upon professional considerations only.

6.1.3 Raising salaries: a step towards independence

Low pay was considered to be one of the most serious obstacles to improving the status and independence of the judiciary. Therefore the new laws are crucial for the future development of the BiH judiciary because they increase judges' and prosecutors' salaries considerably. In some cases they will be more than four times greater and the daily bread should no longer be a concern. The salary also has a symbolic effect. Society must provide the necessary financing of the judiciary to ensure independence as the cornerstone of the rule of law and show that it is really committed to democracy.

Initially, some politicians claimed strongly that there were no financial resources to pay these salaries. The salary increase was probably one of the main reasons why the law had to be imposed in the Federation. For the judiciary at the Federation level, this could hardly have been a problem, since the Federation pays only the salaries of Supreme Court and Constitutional Court judges, and the Federation Prosecutors. In each canton, the number of heads involved is so small that this argument had no real credibility. Although the laws were passed by the RS National Assembly, the implementation of the salaries turned out to be a problem there also.

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that occasion is not commonly seen in BiH. Some time later, when vacancies were advertised, attempts were made to influence the Cantonal Commission in its work to get judges who could be trusted (!) for willingness to fight crime.

The judges and prosecutors who had long awaited the new laws, not least because of the higher salaries, were concerned. Would the pessimistic, but in BiH realistic, saying that the law is one thing, reality is another once again prove true?

In the Federation, at both the Federation and the cantonal levels, different kinds of spontaneous actions were taken by the members of the judiciary, supported by the Judges' and Prosecutors' Associations, putting heavy pressure on the politicians and even coming up with classic trade union threats. The international community welcomed this new aggressive role and supported it by co-ordinated lobbying efforts between OHR, JSAP and the UNMIBH Civil Affairs Office, giving the message that not paying salaries in accordance with the law might affect donor money. On 27 July 2000, Ambassador Dr Matei Hoffmann, Senior Deputy High Representative, involved OHR by sending a letter to the Federation Prime Minister Edhem Bicakcic, the Federation Deputy Prime Minister, and all cantonal Governors and Ministers of Finance saying:

> I am writing to you with regard to the Law on Judicial and Prosecutorial Service, imposed by the High Representative on 17 May, 2000. This law is essential starting point in our collective efforts to reform the judiciary in the Federation. You are aware of the importance the International Community attaches to the creation of a truly independent judiciary. Only through the development of a truly independent judiciary can we hope to see proper adherence to the European Convention on Human Rights and sustainable economic development.
>
> To that end, the International Community expects full political and financial support is provided by the Federation and Cantonal governments to the implementation of this new salary structures and for the new independent authorities set up to issue recommendations on the selection and discipline of judges and prosecutors.
>
> The judiciary is not just another branch of the civil service. It is an essential arm of governance and must be funded in accordance with its needs as described in the new law.
>
> I look forward to your cooperation in advancing this most critical initiative.

One after the other, the cantons gave in, also facing the reality of competition and fearing a drain of judges and prosecutors to cantons that had raised the salaries. This is an interesting example that in BiH events also have their own dynamics. The salaries have now been adopted in the budget at the Federation level and in all cantons except in Canton 10 and in Herzegovina-Neretva Canton.

In the RS after a long process the new salaries were paid retroactively in the beginning of October 2000.

JSAP hopes that in the future the salaries in both the RS and in the Federation will be paid and on time.

6.1.4 Review of sitting judges and prosecutors

One of the reasons why the salary question is so important is that the new laws provide for a comprehensive review of the suitability of serving judges and prosecutors over a period of eighteen months. The review can be seen as part of a reciprocal relationship between the judiciary and society at large, which, in return for the increased salaries, should require high standards of quality and efficiency in the administration of justice. This has paved the way for the overall acceptance in the judiciary for the process. The underlying causes for the review are the non-democratic appointment process in the former system and

the highly politicised process in the war and post-war period with ethnic and political loyalty as an important qualification for appointment (see paragraphs 3.2 and 4.4). Once salaries are increased, it should be easier to recruit new, qualified candidates, not least among qualified former judges who have left the bench to become advocates.

The JSAP involvement in the review is described in *JSAP Thematic Report VII: JSAP and the Judicial Review Process in Bosnia and Herzegovina*.

However, this report shows that to the extent the BiH judiciary is politicised, it is by and large due not to the bad will of its members, but because of sociological factors and tradition. There are no grounds to believe that the problems in the judiciary will be solved by getting rid of "bad" sitting judges and finding new "good" ones to replace them with. JSAP's assessment is that this medicine will be inadequate. The problem goes much deeper.

6.1.5 Some comments on the new laws from the judiciary

JSAP has received a number of comments on the new laws:

(From the Banja Luka weekly report of 10 August 2000 meeting Nenad Balaban, President of the Banja Luka District Court) He was confident that due to the new Law on Courts and Judicial Service a sufficient number of applications for the well paid positions could be obtained from highly qualified candidates. However, he expressed his worries and discontent about the fact that the salaries of RS prosecutors and judges were not yet paid according to the new law. The President is hopeful that the relevant intervention of OHR with the RS Government will be successful. He mentioned two cases where judges, according to information the judge had received from citizens, have taken bribes**.** Asked on what basis the proceeding for a comprehensive overview of those judges may be initiated, he referred to the evaluations to be given by the president. He openly described how in previous times politicians, mainly members of the Serb Democratic Party, had requested him to remove judges from certain cases and, by other means as well, exercised influence on the handling of sensitive cases. He stated that he was convinced that the new law providing the judiciary with the necessary independence would become a cornerstone for the rule of law in RS.

(From the Banja Luka weekly report of 10 August 2000 meeting with RS Republic Prosecutor Vojislav Dimitrijevic) He welcomed the new provisions on prosecutorial service. With regard to the prosecutors' independence provided for in the new law, he emphasised that actual independence rather depends on the political situation prevailing in RS than on legal regulations. Especially with the upcoming elections, numerous attempts were made by politicians to exercise influence on those prosecutors handling corruption cases.

(On a meeting between the Head of JSAP meeting and Slavko Sanjevic, President of the Trebinje District Court, and Milan Bosic, President of Trebinje Basic Court, on 4 September 2000) Sanjevic said there is a need for a continual judicial review. Bosic believed that the judicial review provides a good opportunity to eliminate "bad people" from the judiciary. As to judicial independence, a judge himself has to realise that he is independent. The politicians, and certainly the Ministry of Justice, have not yet truly accepted the notion of judicial independence even though they proclaim it. The Minister of Justice was the first to oppose the taking away of his power of judicial appointment. Both Sanjevic and Bosic acknowledged that political influence is exercised over the courts. Firstly, there are no specified criteria for the Ministry of Justice's allocation of material expenses to the courts, which can thus be arbitrary and dependent on a good relationship with a court president. Additionally, for example, if it would be in the government's interest to prevent a certain eviction, the court presidents or judges, directly, would receive phone calls to this effect. Regardless, both court presidents saw hope in the new laws on judicial and prosecutorial service and stated that this is "the best thing

that has happened to the judiciary in the last 50 years." The laws should help to raise the status and dignity of judges.

(From the Doboj weekly report of 19 October 2000) The President of Odzak Municipal Court informed JSAP that the local politicians were putting tremendous pressure on the court in respect of its functioning. After the imposition of the OHR Law on Judicial and Prosecutorial Service, the Cantonal Government adopted a strategy to undermine judiciary. In payment of salaries to employees, the judiciary was given stepmother treatment. All governmental employees received salaries on time except the judges and prosecutors of the Canton. They received their salaries for September on 18 October. After the OHR law, the budget for material assistance to courts was reduced to about 40 percent. This would adversely affect the operation of the judiciary in the Canton.

(From an interview with the RS Republic Prosecutor Vojislav Dimitrijevic in Glas Srpski on 21-22 October 2000) Glas Srpski: We often speak about an impartial and independent judiciary. Having put the laws (the Law on Courts, the Law on the Public Prosecutor's Office (PPO) and the Criminal Code) into force, is the RS on the way to achieving that? "This is the way, that is a step towards impartial and independent judiciary. In order to reach the end, a lot more steps need to be taken. First of all, we need to create a situation within the RS budget that would make the judiciary independent. By this, I mean that a certain form of judicial budget needs to be established and the courts and PPOs should be granted certain assets to perform their duties. Then the reform of the judiciary, which would reinforce the role of courts and PPOs, has to continue."

It is only accidental that most of these quotes are from the RS, similar comments have been made from the judiciary in the Federation. It is striking that the judges and prosecutors at this stage are a lot more open about political influence in the recent past and the present than they have been. Surprisingly after such a short time, it seems that the new laws regulating the courts and prosecution are building a new self-confidence in the judiciary. It is hoped that this will enhance the general resistance against political influence and promote independence so that the politicians have to accept this as a reality regardless if they want it or not.

6.2 Draft laws on court budget

Separate court budgets have long been on the international community agenda as a prerequisite for an independent judiciary. This was one of the main topics in the OSCE, OHR and UNMIBH conferences of September 1999 on independence of the judiciary (see paragraph 2.4) and JSAP has been promoting this idea since then.

In April 1999 at a session of the Sarajevo cantonal government, the President of the Sarajevo Cantonal Court, Amir Jaganjac, presented the idea of a separate budget to be granted to the court. This was accepted and on 18 February 2000 the Cantonal Assembly adopted a budget for 2000 in which the budgets of the courts and prosecutors' offices were separated from the budget of the Ministry of Justice. This was the first step on the road to real financial independence of the judiciary from the executive and was pointed out as an example to be followed. However, according to Mr Jaganjac, a technical problem remains on the control of the budget, as the transfer of monthly instalments to the courts should be automatic, without needing to initiate a request. A similar initiative was begun in the RS later in the year when the Ministry of Finance agreed to directly fund the RS Public Prosecutor's Office, bypassing the Ministry of Justice. Recently, the American Bar Association's Central and Eastern Europe Law Initiative drafted laws on court budgets in the RS and the Federation, which would create separate court budget offices and give payment of court finances priority over other budget items. If passed, the laws should be a significant step forward.

7 CONCLUSIONS AND RECOMMENDATIONS

In a country where the rule of law prevails, courts accord equal justice to all, rich or poor, powerful or weak, hero or villain. From the many examples given in the previous chapters, it is clear that this is not yet the situation in BiH. It is equally clear that there is no easy solution to this problem. Institutional reform requires changes on many fronts and for the BiH judicial system it will involve attention to the structural framework in which the courts operate, the legislation with which they work, the relationship between the judiciary and the other branches of government, the expectations of the judiciary from the public at large and the judges' own conception of what it means to be independent and impartial.

A few conclusions drawn from the material in this report are given here. These are not meant to be exhaustive and are in no particular order.

- One significant problem is the traditional organisation of the court system, whose legacy remains in the minds of many judges and politicians. This system removed the ability of individual judges to have control over their cases, which was instead in the hands of court departments. Court presidents, who were political appointees, wielded enormous power over the organisation of their court. This power still remains, even if the power of court departments has been limited and the manner of appointing court presidents changed, at least in the Federation.

- The recent increase in judicial salaries was a very positive step, even if the law needed to be imposed in the Federation. However, the effect of the increases is partly nullified by the failure of the governments to pay the salaries on time or to give corresponding increases for minor offence court judges.

- Decent salaries are only half the financial issue. There is not yet any solution to the problems of scanty court budgets, which mean that courts remain in the position of dependence on the whim of politicians to be able to function at even minimal levels. Until courts are properly funded, they will not be able to take their proper place in a democratic society.

- The professionalisation of the appointment process for judges and prosecutors is also a positive move. While there is evidently some confusion over the loss of their influence over the process on the part of some politicians, the judges and prosecutors themselves seem to be vigilant to protect the integrity of the process.

- While politicians and other powerful individuals still seem to consider that it is their right to have cases before the courts dealt with in the way they wish, there is evidently a growing recognition amongst the judiciary, the media and the public, that this is not the way things should be. This is a crucial development.

- Poor performance by judges is due not only to deliberate misuse of their position, but more often to a widespread lack of understanding of the rule of law and how justice should be done. Even the notion of independence itself is not always understood.

- Judges and prosecutors have been found to make procedural errors on purpose, referred to in this report as suicide tactics, knowing that this will lead to delays and even in the end mistrials. This may be done in cases with political implications, even if no actual external pressure is exercised, if the judge or prosecutors thinks that it is "expected" of him to deal

with the case in a particular way. It may also be done to satisfy the international community or the public at large, to assure them that justice was done. The complexity and detail of BiH procedural legislation gives fertile ground for this practice.

- Regulations that in most countries have the purpose of protecting human rights, and do that, in BiH serve instead to protect criminals and their activities far beyond their normal scope or intention. Apart from the return process, lack of ordinary law enforcement is a much bigger problem in BiH than ordinary human rights violations.

- It is unlikely that the review of all current judges and prosecutors for suitability will have any significant long term effect, even if it does weed out some bad judges. That alone will not create a good and well-functioning judiciary.

- The high intellectual standards of the legal professional generally in BiH give some grounds for optimism for the future. There are definite resources to build upon, once the judiciary itself realises the importance of taking responsibility for the development and reform of the judicial system.