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THEMATIC REPORT 8

PROSECUTING CORRUPTION:

A Study of the Weaknesses of the Criminal Justice System in BiH

(November 2000)

INTRODUCTION

The successful prosecution of corrupt government officials is necessary in order to restore confidence in the institutions of BiH. Presently, the general public justifiably perceives the BiH institutions to serve as harbors for politicians to engage in unlawful activity with impunity. The failure to check government corruption is contributing to the erosion of BiH society and is sapping the BiH economy of its vitality. Numerous reports from international organizations have decried widespread corruption in both the public and private sectors. The lack of prosecution of government corruption seriously deters economic progress and fuels public distrust of BiH politicians to handle public affairs honestly and transparently. Indeed, the failure to curb corruption discourages foreign investment and undercuts the will of the international community to fund projects that support BiH institutions. Consequently, the prosecution of corrupt officials is essential to curbing the abuse of government authority and to restoring the public's faith in BiH institutions.

It is the task of a criminal justice system to deter corruption in society through the successful prosecution and punishment of individuals engaged in corrupt activity. The criminal justice system in BiH, however, does not promote the effective prosecution of corruption cases. For instance, the Criminal Procedure Code impedes the efficient handling of case investigations and the production of evidence at trial. Additionally, in corruption cases against government officials, political pressure exerted upon the prosecutor can improperly influence the prosecution of those cases. Thus, if the fight against corruption is to be waged successfully, reform of the criminal justice system is necessary. In particular, reform is necessary to create more efficient criminal proceedings. Hereto, the courts, the office of the prosecutor, and law enforcement agencies must strengthen their resolve against outside political pressure that is commonly exerted in the prosecution of public officials and, to this end, insist that staff members act professionally and execute their duties competently.

This thematic report is divided into six parts. Part 1 introduces the central thesis of this report. Part 2 provides a brief picture of the deleterious effects of corruption on BiH society, such as institutional distrust and economic disincentives. Part 3 describes the investigating roles of the police, the prosecutor, and the investigative judge. Part 4 recounts in detail a recent case against four Tuzla Canton officials, in order to gain an understanding of how the criminal justice system processes a corruption case. Part 5 analyzes that case and provides insight into what the prosecution of a corruption case reveals about the criminal justice system and the fight against corruption: for instance, whether the method of investigating a case, especially the role of the investigative judge, is efficient; whether the prosecutor's role in gathering evidence during an investigation and producing evidence at trial is effective; whether the first instance court is overburdened with evidence-gathering responsibilities; and whether the appellate procedure promotes judicial economy. Part 6, which concludes this thematic report, asserts that issues of professionalism and competence and obstacles within the criminal procedure hamper the successful prosecution of criminal cases and, accordingly, offers proposals to reform the criminal justice system.

2 OVERVIEW: CORRUPTION IN BIH

2.1 Efforts of the International Community to Combat Corruption

Since the signing of the Dayton Peace Agreement in December 1995, the international community has been engaged in redevelopment of the political, economic, and physical infrastructure of BiH. It is estimated that by the end of December 1999 the international community committed more than $4 billion to fund international efforts to reconstruct BiH society in accordance with the terms of the Dayton Peace Agreement. This amount does not include the more substantial costs to support the international SFOR military contingents. During the first three years of reconstruction, the international community concentrated its resources on physical reconstruction, in dire response to the widespread devastation of homes, buildings, and physical infrastructure throughout BiH.

By the end of 1998, the international community had achieved a sufficient amount of physical reconstruction to enable it to shift its focus to reforming public institutions and promoting conditions for a free-market economy. This shift constituted, in part, a response to a growing awareness of widespread corruption. In 1997, the Customs and Fiscal Assistance Office (CAFAO), formed under the auspices of the European Commission, issued reports documenting the fraudulent handling and diversion of

public funds in BiH. Motivated by a growing concern about unbridled corruption in BiH, the Peace Implementation Council (PIC) encouraged the international community to promote measures to combat corruption and, in particular, the misuse of public funds. The PIC emphasized the need for establishing transparency in government operations and strengthening the judicial system. To this end, the Office of High Representative (OHR) established an Anti-Fraud Unit to lend assistance to BiH authorities in identifying and investigating illegal activities. In addition, the United Nations created the Judicial System Assessment Programme (JSAP), which consists of international and domestic judges, prosecutors and lawyers who monitor the judicial system and scrutinize the handling of criminal and civil cases in all BiH courts**(1)**.

The international community's acknowledgement of and response to corruption in BiH society is a work in progress. In particular, both OHR and JSAP have promoted measures to strengthen the rule of law and to eliminate political interference in the judicial system. For instance, recently enacted laws have created independent judicial and prosecutorial commissions and councils (hereinafter, judicial and prosecutorial commissions) in both entities of BiH, the Federation of BiH (the Federation) and the Republika Srpska. Additionally, international organizations have recommended revisions of the laws of criminal procedure in both the Federation and Republika Srpska and have provided training for prosecutors about the coordination of case investigations with the police and the handling of criminal cases at trial. Furthermore, UNMIBH's International Police Task Force (IPTF) has provided special training to domestic police agencies on combating organized crime and fraud. There is a general consensus that a substantial level of international support is still necessary in order to develop an independent judiciary and to eliminate political interference with the prosecution of criminal cases.

2.2 Corruption: Eroding BiH Society

The lynchpin holding BiH society together is the Dayton Peace Agreement, whose annexes contain a roadmap to rebuilding BiH society in the aftermath of a divisive war. Since the signing of that agreement, the international community has, among other things, devoted its resources to containing military engagement, organizing democratic elections, promoting the rule of law, restructuring domestic police forces, facilitating the return of refugees, and rebuilding the economic infrastructure of the country. However, according to a report by the United States General Accounting Office (GAO) to a congressional committee, corruption is threatening the successful implementation of many aspects of the Dayton Peace Agreement**(2)**.

The GAO report alleges that corruption is pervasive throughout BiH's political, judicial, and economic systems. According to the GAO report, the institutional framework of the judicial and law enforcement systems is inadequate. As a result, public officials face low levels of accountability. These factors undercut the successful prosecution of government corruption and white-collar crime. Moreover, the GAO report asserts that BiH political leaders have failed to demonstrate the political will to adopt reform measures designed to combat corruption. Furthermore, the GAO report contends that the judicial and law enforcement systems are subject to political influence, which compromises the effective administration of justice. The experiences of JSAP, through its direct contact with judges, prosecutors, and private lawyers for the last two years, generally confirm the GAO's assessment of the judicial system.

Government corruption occurs in many forms. For instance, government officials award public contracts to friends or family members, sometimes extracting a fee from the contract recipient, although they are not the lowest or most qualified bidder. Politicians use their public office to avoid the payment of customs or taxes, accept money transfers illegally, exploit the purchase of property through the privatization process, or deny fair opportunities to businesses deemed unfriendly competitors or unwilling to pay bribes. Ultimately, political patronage and corrupt tactics create hidden costs to doing business, which chase away investors who are unable to project business start-up costs or operating expenses on a consistent basis. The lack of business investment translates into the loss of jobs in a society that already suffers from extraordinarily high unemployment.

The consequences of unchecked corruption for BiH society are staggering. Corruption results in the diversion of financial and human resources that could otherwise benefit more pressing public needs. According to a survey conducted in 1999 by the United States Agency for International Development (USAID), a large donor to BiH institutions, BiH businesses stated that they routinely pay bribes to receive government contracts or loans in order to avoid the closure of their businesses. The USAID survey confirms the general perception that BiH government officials are able to abuse public office for private gain and not be held accountable. This perception will not abate unless government corruption is prosecuted vigorously and government operations are subject to public scrutiny. The glaring reality is that BiH politicians are reluctant to introduce reform measures to combat government corruption because they have a stake in maintaining the status quo. The consequences are not negligible: citizens receive fewer services from their government, foreign governments or businesses are reluctant to invest in a corrupt environment, the economy stagnates, and the general public loses faith in public institutions.

Foreign governments are wary of promoting investment in the BiH economy or giving aid to BiH institutions because of the persistent failure of BiH politicians to reform institutions and curb corruption. The United States of America failed to recover $900,000 of embassy operating funds and loan payments deposited in a Sarajevo bank that engaged in corrupt activities. In addition, the World Bank lost $340,000 as a result of a fraudulent procurement transaction. According to the GAO report, nearly all of the international aid ($407 million) provided to the BiH entity governments for general budget support is not audited and is, thus, subject to potential misuse. The GAO, based upon its finding of pervasive corruption in BiH, recommended that the Secretary of State of the United States of America reassess the level of financial assistance to BiH, including the possible suspension of all aid. This recommendation could blunt the request of the President of the United States of America to the Congress to approve $100 million in assistance for BiH in 2001.

In short, the failure to combat corruption is eroding BiH society. Unless widespread corruption is checked, the unmistakable consequence will be reduced foreign aid and investment, which, in turn, will undercut the prospects of fulfilling the aims of the Dayton Peace Agreement and revitalizing the BiH economy.

2.3 The Need for an Effective Criminal Justice System

If BiH society is to develop into a sturdy democracy, which enjoys a healthy economy based upon the rule of law, then its public institutions must effectively rein in corruption in both the public and private sectors. The criminal justice system is society's primary mechanism to combat corruption and crime. Essentially, the courts, the prosecutors' offices and law enforcement agencies comprise the criminal justice system. Each of these institutions must operate effectively in order for the criminal justice system to serve as an effective deterrent against corruption in the public and private sectors.

The judiciary's independence is essential if the courts are to adjudicate corruption cases against government officials. Also, professionally minded judges, prosecutors, and law enforcement officials are essential to the carrying out of investigations against powerful public officials. In recognition of these crucial facts, the international community promoted measures to strengthen the judiciary and the prosecutors' offices so that they are able to rebuff improper interference or pressure exerted by government officials. In the summer of 2000, laws in both entities established judicial and prosecutorial commissions and vested them with substantial power to control their own affairs. Among other things, these commissions are empowered by law to review applicants' credentials and recommend only qualified individuals for judicial and prosecutorial posts. In addition, these commissions have the authority to discipline judges and prosecutors for unethical or unprofessional behavior. Furthermore, the commissions are currently reviewing all sitting judges and prosecutors for competency and are empowered to recommend the removal of judges and prosecutors who are not fit to hold office.

Notwithstanding the potential of the newly established judicial and prosecutorial commissions to improve the level of professionalism and competency of judges and prosecutors, the criminal justice system is currently struggling with an image that it does not administer justice effectively. The judiciary, the prosecutors' offices, and law enforcement agencies are plagued by criticism that they are subject to direct or indirect political influence. International officials allege that high-ranking BiH politicians have blocked the investigation and the prosecution of corruption cases. Although these allegations may be general and lack specific details, it nevertheless remains that there are very few convictions of public officials on charges of corruption. If, indeed, the criminal justice system is to fulfill its obligation of combating corruption, then the process of indicting and prosecuting corrupt government officials must accelerate and result in a higher rate of successful convictions.

In its report, the GAO asserted that inadequacies within the BiH criminal justice system preclude the successful prosecution of corruption cases. The remainder of this report picks up on that assertion and examines a government corruption case prosecuted in the Tuzla Municipal Court. The focus of this report shifts to analyzing the effectiveness of the criminal justice system in processing a corruption case, including identifying impediments within the system that hinder successful prosecution. The purpose here is not to lay fault with any particular institution or individual, but rather to present an insight into the legal framework confronting judges, prosecutors and law enforcement officials when investigating and prosecuting a criminal case within the criminal justice system. A critical examination, however, is necessary in order to identify systemic weaknesses and, accordingly, to propose appropriate corrective measures. After all, the vitality of BiH society depends upon an effective criminal justice system that successfully combats crime and, thereby, establishes the rule of law as the benchmark of public service.

3 INFORMATION GATHERING AND INVESTIGATING ROLES: THE POLICE, THE PROSECUTOR AND THE INVESTIGATIVE JUDGE

3.1 General

The current Criminal Procedure Code of the Federation, as well as that of the Republika Srpska, is largely based upon the criminal procedure of the former Yugoslavia. This report analyzes only the Criminal Procedure Code of the Federation and not of the Republika Srpska. In 1998, during the first phase of criminal procedure reform, the Criminal Procedure Code of the Federation was revised. Since then, the Criminal Procedure Code of the Federation has not been revised, although the second phase of criminal procedure reform, currently ongoing, may result in additional revisions. The Criminal Procedure Code of the Republika Srpska currently is under review.

The Criminal Procedure Code of the Federation (hereinafter, the Criminal Procedure Code) regulates the procedure for investigating and prosecuting criminal allegations. Although the Criminal Procedure Code contains numerous procedural intricacies, the Criminal Procedure Code nevertheless sets forth a standard investigative process that involves the prosecutor, law enforcement agencies, and the investigative judge. In this report, the standard investigative process is composed of two stages: (1) the information gathering stage and (2) the preliminary examination stage. This investigative process is subject to numerous exceptions contained in the law, whose analysis is beyond the scope of this report.

3.2 The Information Gathering Stage Conducted by the Prosecutor and Law Enforcement Agencies

Under the Criminal Procedure Code, the initial stage of gathering information from suspects and witnesses does not constitute a formal investigation, and the statements of suspects and witnesses taken during this initial stage cannot be introduced as evidence in main trial proceedings. The prosecutor, however, relies upon information gathered during the initial stage in order to determine whether to request a preliminary examination by an investigative judge and to decide upon the scope of the preliminary examination. Only the investigative judge, upon petition to conduct a preliminary investigation by a prosecutor, conducts a formal investigation. Statements taken by the investigative judge from suspects and witnesses during the preliminary examination may be used as evidence during main trial proceedings. Prior to the investigative judge conducting a preliminary examination, however, the prosecutor and law enforcement agencies play a pivotal role in the initial gathering of information about a crime and the lodging of criminal charges.

Generally stated, the prosecutor has the authority and the obligation to uncover crimes, identify criminal perpetrators, and supervise the activities of law enforcement officials during preliminary criminal proceedings**(3)**. The prosecutor is also responsible for drafting the indictment against an accused, subject to a favorable decision of an investigative judge that finds an adequate evidentiary basis to warrant the lodging of an indictment**(4)**.

If there are grounds to suspect a crime has been committed, law enforcement agencies must attempt to locate the criminal perpetrator(s), secure physical evidence, gather relevant information, and take statements from citizens that may be useful in further criminal proceedings**(5)**. On the basis of the information gathered, the law enforcement agency drafts a criminal charge and forwards it to the competent prosecutor**(6)**. The criminal charge cannot contain the contents of statements given by individual citizens, but must include all other physical evidence and official notes**(7)**. The prosecutor scrutinizes the criminal charge for legal validity and assesses whether the evidence submitted in support of the criminal charge establishes "probable cause"**(8)**. The prosecutor may reject the criminal charge if the evidence is insufficient or, alternatively, request that the law enforcement agencies gather further information**(9)**. In certain instances, for example where the identity of the perpetrator is unknown or where an autopsy or exhumation of a corpse is desired, the prosecutor can request the involvement of an investigative judge**(10)**. In addition, the investigative judge may intervene in this preliminary stage of gathering information and conduct an investigation if postponement of the investigative judge's involvement were to jeopardize the criminal investigation**(11)**.

3.3 The Preliminary Examination Stage Conducted by the Investigative Judge

If the prosecutor is satisfied that the evidence supports the criminal charge, then the prosecutor petitions the investigative judge to conduct a preliminary examination. The prosecutor's request for a preliminary examination marks the juncture at which the heretofore information gathering proceedings assume the status of a formal investigation. The petition identifies against whom the investigation shall be conducted, the nature of the criminal activity, and the relevant evidence**(12)**. The prosecutor may propose that the investigative judge conduct certain investigations, that certain individuals be interrogated, or that particular individuals be taken into custody**(13)**. The prosecutor is obligated to provide the investigative judge with all documents relevant to the criminal charge, including physical evidence**(14)**. However, the prosecutor must separate out the statements of the accused, of witnesses, or of expert witnesses and place them in a sealed envelope**(15)**. These statements are not available for inspection and may not be used in the criminal proceedings by the investigative judge or the judge presiding at trial**(16)**.

Upon receiving the petition from the prosecutor, the investigative judge examines the evidence submitted in support of the petition. If the investigative judge concurs with the prosecutor's request, then the investigative judge orders a preliminary examination. Prior to ordering a preliminary examination**(17)**, the investigative judge must examine the accused**(18)**. Alternatively, an investigative judge may, upon recommendation of the prosecutor, waive the preliminary examination and order the prosecutor to issue an indictment against an accused, if the investigative judge concludes that the information gathered constitutes sufficient grounds to warrant indictment**(19)**.

Upon issuing the order for a preliminary examination, the investigative judge takes charge of the investigation. The investigative judge conducts the preliminary examination to develop relevant facts in order to determine whether or not the evidence warrants the bringing of an indictment against an accused**(20)**. During the preliminary examination, the investigative judge may undertake any action necessary to conduct the proceedings effectively, including expanding the investigation**(21)**. The investigative judge may obtain the assistance of law enforcement agencies in gathering information, such as dwelling searches, confiscation of physical evidence, or the carrying out of other investigative actions**(22)**. The investigative judge must gather evidence about the accused, including prior criminal behavior, and order the accused to undergo medical and psychological examinations, if necessary**(23)**. Both the prosecutor and defense counsel may be present at many proceedings conducted by the investigative judge, for example, witness examinations, expert witness examinations, and dwelling searches**(24)**. Also, the prosecutor and defense counsel may file motions requesting the investigative judge to undertake certain investigative actions. If the investigative judge disagrees with the motions, the matter is then referred to a panel of judges, which decides on the motion**(25)**.

3.4 Concluding the Preliminary Examination and the Decision to Indict: The Roles of the Prosecutor and the Investigative Judge

Ultimately, the investigative judge determines whether the evidence supports the allegations contained in the prosecutor's petition**(26)**. Before the close of the preliminary examination, the investigative judge must allow the prosecution and the defense counsel to examine evidence and file motions for the presentation of new evidence**(27)**. The investigative judge dismisses the preliminary examination if, during the course of the preliminary examination or at its completion, the prosecutor declines to prosecute the matter**(28)**. Once the investigative judge has completed the preliminary examination, he must forward the investigation documents to the prosecutor**(29)**. Depending upon the investigative judge's findings, the prosecutor may terminate further prosecution, issue an indictment, or request the investigative judge to perform additional inquiry**(30)**. The prosecutor may appeal a decision of the investigative judge denying further inquiry to a panel of judges**(31)**. If the prosecutor does not file a motion for additional inquiry and does not issue an indictment or request additional inquiry within three months of being furnished the investigation documents, then the criminal prosecution is assumed to be dismissed**(32)**.

Alternatively, if the investigative judge finds that there is sufficient evidence to support the criminal allegations, then the prosecutor has the authority to issue an indictment**(33)**. The Criminal Procedure Code is silent as to the degree the indictment must conform to the conclusions of the investigative judge. The prosecutor's filing of the indictment commences the main trial proceedings against a defendant before a court**(34)**. The Criminal Procedure Code provides that the defendant may challenge ("traverse") the indictment and defend against the prosecutor's allegations at trial in accordance with evidentiary procedure of the main trial**(35)**.

4 THE VIKALO CASE

4.1 JSAP's Method of Gathering Information

JSAP relied upon its Judicial System Officers (JSOs) in its Tuzla office to monitor the prosecution of former Tuzla Canton officials who allegedly used their positions as public officials to commit fraud. The JSOs gathered information from IPTF officers who monitored the initial criminal investigations against the Canton officials. In addition, the JSOs met with the judges involved in the case and with the Municipal Prosecutor who handled the investigation and the trial of the case. The documents contained in the court file were too numerous to permit individual inspection. However, the JSOs obtained and reviewed the more probative documents, such as the prosecutor's indictment, the Municipal Court's verdict, the Cantonal Court's decision, etc. Furthermore, the JSOs monitored the proceedings of the main trial before the Tuzla Municipal Court. Finally, the JSOs remained in contact with a representative of OHR, who closely followed the development of the case. Hence, this thematic report draws, in part, upon the observations of the JSOs while monitoring the case and upon essential court documents.

4.2 Political Background of Tuzla Canton (Canton 3)

Generally stated, political leaders in the Tuzla region have vied for control of the cantonal and municipal governments. Perhaps one reason for the political competition is that Tuzla Canton is one of the richest cantons in the Federation. A dominant political party in the Tuzla Cantonal Assembly is the Party of Democratic Action (SDA), whose leading figure was Alija Izetbegovic, a former member of the Presidency of BiH. The SDA is plagued by internal rivalry between SDA moderates and conservatives, which, in turn, reflects larger differences between the SDA leaders at the regional and entity levels. In addition, the SDA is in competition with other political parties, which have won a majority of legislative mandates in municipal assemblies. For instance, in the 1999 Tuzla Municipal Election, the Social Democratic Party (SDP), whose leading figure is Zlatko Lagumdzija, won 19 of 30 mandates in the Tuzla Municipal Assembly. The SDA won only three mandates. The SDA, SDP, and other political parties compete for control of the Tuzla cantonal and municipal governments, which manage substantial government resources and are responsible for entering into lucrative contracts with businesses for government services.

Rivalries within and among political parties spurred accusations against Tuzla Canton officials in 1998. In the fall of 1998, a former cantonal Governor, Izet Hadzic, brought allegations of corruption against the cantonal Prime Minister, Hazim Vikalo, at the seventh Cantonal Assembly. From 1997 to 1999, Hazim Vikalo served as the Prime Minister of the Tuzla Canton. During this period, Halid Kovac served as the Minister of Finance, and Osman Sinanovic served as the Minister of Health. Both Kovac and Sinanovic were members of the Prime Minister Vikalo's cabinet.

In November 1998, the Cantonal Assembly weighed allegations of corruption against Prime Minister Vikalo and his cabinet members, but lacked the necessary political support to oust them from office. This initial political foray, however, sparked a criminal investigation. The criminal investigation against Vikalo and some of his cabinet members gained momentum during the early months of 1999. Later in the spring of 1999, amid mounting political pressure resulting from revelations of alleged criminal behavior, Vikalo resigned as Prime Minister of Tuzla Canton, and the cantonal Governor, Tarik Arapcic, dismissed members of Vikalo's cabinet and appointed replacements. Governor Arapcic appointed Bajazit Jasarevic, an SDA member, to replace Vikalo as the Prime Minister of Tuzla Canton.

4.3 The Information Gathering and Preliminary Examination Stages

4.3.1 Information Gathering by Law Enforcement Agencies

The Tuzla Cantonal Prosecutor's office and the cantonal police initially began to investigate Prime Minister Vikalo and his cabinet members about the time that the Cantonal Assembly considered the allegations of corruption in November 1998. In early 1999, with encouragement from the OHR and from representatives of the IPTF, the investigation intensified. Federation officials assigned Federation police teams to assist the Tuzla cantonal police in the investigation process. The different law enforcement teams involved in the investigation included the cantonal Ministry of Interior police, the Federation Ministry of Interior police, and the Federation Ministry of Finance police.

The involvement of different levels of law enforcement agencies in the same investigation created tension and prompted government officials to interfere with the police investigation. Tension surfaced between Federation officials in Sarajevo and cantonal officials in Tuzla, which was incited by a division among SDA party officials. Law enforcement officers experienced political interference during the course of their investigations and feared they would lose their jobs if they filed accurate reports documenting their findings.

Moreover, the Federation Minister of Interior and the Cantonal Prosecutor strictly controlled the investigation. The Cantonal Prosecutor blocked requests from the law enforcement agencies to seize documents relevant to the investigation from Canton officials. The chief of the Canton's crime police prohibited the chief of the Canton's organized crime unit (both departments are within the Canton's Ministry of Interior) to speak with IPTF officers about the investigation. The chief of the Canton's organized crime unit was largely responsible for investigating the corruption allegations. Eventually, the cantonal Minister of Interior forced the reassignment of the chief of the organized crime unit to Brcko. The international community, however, successfully pressured cantonal authorities to re-instate the chief of the organized crime unit.

The severe sanction that the High Representative imposed against the cantonal Minister of Interior acknowledged the Minister's serious intent to obstruct law enforcement agencies from investigating allegations of corruption against Vikalo and his cabinet

members. On 29 April 1999, the High Representative removed Ferid Hodzic from the office of cantonal Minister of Interior. The High Representative cited the following grounds: (1) direct interference in investigations conducted by both the Canton and Federation police, (2) misuse of public authority to coerce or bribe police officers to engage in a cover-up of illegal financial practices in Tuzla Canton, (3) attempting to coerce or bribe police officers to delete from police reports vital evidence material to the investigation, and (4) removing the chief of the Canton's organized crime unit so that the chief could not continue in the investigation.

4.3.2 The Involvement of the Office of the Prosecutor

The Office of the Prosecutor is organized at the entity, canton, and municipal levels. Each prosecutor's office has a chief prosecutor and deputy prosecutors and is separately managed, although subject to control through a hierarchical system.

The Cantonal Prosecutor, reportedly a member of the SDA, participated in the initial phase of the investigation. During this period, it appeared that the Cantonal Prosecutor and the cantonal Ministry of Interior police were cooperating in the investigation. However, the Cantonal Prosecutor did not cooperate with the Federation Ministry of Finance police. The Cantonal Prosecutor refused to communicate with the Federation Ministry of Finance police, arguing that the Criminal Procedure Code did not impose such an obligation**(36)**. In fact, relations were so strained that OHR was compelled to urge cooperation.

OHR, which was monitoring the investigation through its Anti-Fraud Unit, was dissatisfied with the Cantonal Prosecutor's poor handling of the investigation. The Cantonal Prosecutor was at odds with both OHR and the Federation Prosecutor. During the course of the investigation, OHR requested the Cantonal Prosecutor to produce timely investigation reports, but the Cantonal Prosecutor balked. In one instance, the Cantonal Prosecutor, after meeting with the Federation Prosecutor and discussing the investigation, declined to file five criminal reports. At that point, the Federation Prosecutor deemed the Cantonal Prosecutor's action insufficient and filed the criminal reports, including an extensive report prepared by the Federation Ministry of Finance police. The contents of this last report prompted the investigative judge to expand the scope of the investigation to include other activities.

When the Cantonal Prosecutor approached the point of filing a petition to conduct a preliminary examination by an investigative judge, he made a tactical decision. In March 1999, the Cantonal Prosecutor divided the subject matter of the investigation by lodging separate petitions at both the Cantonal Court and the Municipal Court**(37)**. The Cantonal Prosecutor's decision resulted in two different prosecutors processing limited aspects of the overall investigation against Vikalo in two different courts. The Cantonal Prosecutor believed that certain alleged criminal offenses involved property damage in an amount less than KM 10,000**(38)** and, thus, could fall under the jurisdiction of the Municipal Court. However, cantonal law also provided the Cantonal Court with jurisdiction over these criminal offenses.

Each petition requested the investigative judges at the Cantonal and Municipal Courts to investigate only certain aspects of the entire investigation. One petition requested the Cantonal Court to investigate three separate allegations against Vikalo (allocation of apartment, financial donations, and salt trade), while the other petition requested the Municipal Court to investigate two separate prosecutions (the case discussed herein and another matter). The petition lodged with the Municipal Court requested a narrow scope of investigation limited to the purchase of vehicles. The remaining investigations against Vikalo are pending, and a discussion of the facts of those cases is outside the scope of this thematic report. However, all of the investigations actually involved the same underlying offenses: abuse of public office for the benefit of others and negligent performance of public duties.

The period after the filing of the petition requesting a preliminary examination was marked by disruption within the prosecutors' offices. The Cantonal Prosecutor then transferred the relevant part of the case to the Tuzla Municipal Prosecutor for further action. At times, the initial Tuzla Municipal Prosecutor, who was also involved in the investigation process, reinforced the Cantonal Prosecutor's recalcitrance to conduct a vigorous investigation. OHR intensified its criticism of both prosecutors' poor handling of the cases. In particular, OHR criticized the prosecutors for failing to pursue the investigation energetically, for refusing assistance from Federation authorities, and for interpreting evidence and regulations so restrictively as to undercut the investigation. OHR especially criticized the prosecutors' failure to supply the investigative judge with relevant evidence and, further, by requesting that the investigative judge limit the scope of the investigation.

For the foregoing reasons, the Canton Governor and the cantonal Ministry of Justice initiated dismissal proceedings against the Cantonal Prosecutor and the Municipal Prosecutor. Finally, in June 1999, OHR issued an order removing both prosecutors from their posts, and new prosecutors took over the cases pending in the Cantonal and Municipal Courts.

4.3.3 The Preliminary Examination by the Investigative Judge

In mid-March 1999, an investigative judge from the Tuzla Municipal Court began the preliminary examination and, thus, assumed the role of primary investigator to determine whether there was sufficient evidence to warrant an indictment**(39)**. The preliminary examination lasted approximately through July 1999. From the outset, the investigative judge was hampered by the prosecutor's lack of cooperation with the police in obtaining evidence and the prosecutor's failure to provide the Municipal Court with relevant information. Because the Criminal Procedure Code requires the sealing of statements taken from any accused, witness, or expert witness gathered by law enforcement agents, the investigative judge, in conducting the preliminary examination, carried the burden of interrogating all relevant witnesses, including the defendants**(40)**. In addition, although the investigative judge received criminal reports from law enforcement agencies, it was nevertheless necessary during the preliminary examination to verify the factual basis of the findings contained in those reports, which was a time-consuming process**(41)**.

The investigative judge assumed an active role during the preliminary examination. The investigative judge promptly complied with the Municipal Prosecutor's request for a preliminary examination. The investigative judge examined approximately 30 witnesses and held about fifteen hearings. On occasion, the investigative judge sought the assistance of law enforcement agencies to assist with the investigation. In all, the investigative judge required approximately five months to complete the preliminary examination.

The president of Municipal Court influenced the preliminary examination process. Upon the filing of the petition to conduct a preliminary examination, the president of the Municipal Court personally assigned the case, as the Municipal Court does not use a random case allocation system. During the course of the preliminary examination, the president of the Municipal Court convened sessions with the investigative judge and other judges within the court and expressed his views regarding the actions to be taken in the investigation.

In one instance, the investigative judge was seemingly caught between the prodding of the president of the Municipal Court and an opposing prosecutor. The president of the Municipal Court recommended that the investigative judge expand the use of expert witnesses to additional financial transactions involving the Vikalo government instead of limiting the scope of the investigation to transactions involving only the purchase of vehicles. Based upon the contents of additional crime reports filed with the Municipal Court, the investigative judge then sought a second, more comprehensive expert opinion concerning financial damage suffered by the Tuzla Canton government. In this instance, the Municipal Prosecutor did not agree with the investigative judge's action. In other words, the Municipal Prosecutor's limited request for use of an expert witness actually was undercutting the strength of the prosecution's case.

4.4 The Indictment

In August 1999, the Tuzla Municipal Prosecutor brought formal charges of government corruption against (former) cantonal Prime Minister Hasim Vikalo, cantonal Minister of Finance Halid Kovac, cantonal Minister of Health Osman Sinanovic, and Damir Piric, a bookkeeper in the Ministry of Finance**(42)**. The indictment alleged that Vikalo had abused his official position and authority to obtain profits for others and that he had performed his official duties negligently**(43)**. The indictment further alleged that Sinanovic had abused his official position and authority to obtain profits for others and that both Kovac and Piric had performed their official duties negligently.

The indictment alleged six criminal offenses (including multiple counts) against the defendants. The first offense of the indictment alleged that Vikalo ordered the director of the Canton's Department of Strategic Reserves to contract with AB Behapol for the purchase of 140 tons of whitewash paint in the amount of KM 140,000 for the purpose of enabling AB Behapol to reduce its debts with Tuzla Banka DD.

The second offense alleged that, although there was no budgetary approval from the Cantonal Assembly, Vikalo approved loans to municipalities (KM 2,901,072), to state-owned companies (KM 4,219,500), and to privately owned companies (KM 461,000) in violation of the Article 8 of the Canton's Law on Budget.

The third offense, consisting of three counts, alleged that both Vikalo and Kovac arranged for the purchase of numerous automobiles from car dealers (PAD Nosse and AB Commerce) without conducting a competitive bidding process and without budgetary approval from the Canton government, causing damage to the Canton government in an amount exceeding KM 10,000. In addition, the indictment alleged that Kovac negligently performed his duties resulting in the overpayment for the shipping costs of vehicles and for overpayment of vehicles whose specifications were not in conformity with contract terms.

The fourth offense (two counts) asserted that Kovac was responsible for an excess payment of KM 9,500 for the purchase of government vehicles and failed to inspect the vehicles to ensure that they met contract specifications, causing damage to the Canton government in the amount of KM 9,500. The second count alleged that Kovac was responsible for overpayment to the car dealer, AB Commerce, in the amount of KM 8,188 for the purchase and delivery of the vehicles by failing to inspect the vendor's invoice, resulting in the double payment of the shipping expenses.

The fifth offense (four counts) alleged that Sinanovic abused his public authority and violated the cantonal Law on Strategic Reserves when he authorized the purchase from DLJ Medifarm Tuzla of physiological solutions in the amount of KM 502,309 (Count 1), of hemo-dialysis units in the amount of KM 310,120 (Count 2), and bottle infusion systems in the amount of KM 110,000 (Count 3), contrary to public tender regulations of the Canton government. The fourth count alleged that Sinanovic entered into a three-year exclusive distributorship contract with DLJ Medifarm Tuzla for the supply of medical and consumer goods to the Canton government, notwithstanding Canton regulations requiring a competitive bidding process.

The sixth offense alleged that Damir Piric, a bookkeeper in the Federation Ministry of Finance, issued two bank transfer orders, each in the amount of KM 50,000, for payment of invoices to DD Eurobih Tuzla (for the purchase of beef and fish products), although there was no obligation to pay because of prior satisfaction. The sixth offense alleged that Piric had caused damage to the Canton in an amount exceeding KM 10,000.

4.5 The Main Trial

The main trial began on 2 November 1999, with Judge Mensur Djonlic acting as the president of the trial panel. In addition to Judge Djonlic, the trial panel included one professional judge and three lay judges. Attorneys for the defendants brought a motion requesting a change of venue to the Mostar Cantonal Court and seeking the disqualification of all Tuzla Municipal Court judges and Tuzla Municipal Prosecutors on the grounds that the defendants could not get a fair trial in Tuzla. Defense counsel

skillfully used the motion to influence public perception of the trial. Prior to the hearing, defense counsel held a press conference and briefed the media of their intent to change the venue of the trial. Defense counsel asserted that a fair trial was not possible because the political atmosphere, a climate of judicial intimidation, and inappropriate statements by the prosecutor before the Cantonal Assembly prohibited a fair proceeding. The court adjourned the hearing to consider the motions.

At a hearing on 9 November 1999, the Municipal Court rejected the motions of defense counsel. Defense counsel then sought to disqualify Judge Djonlic because of his recent appointment, on 29 October 1999, by the Cantonal Assembly to serve as a judge on the Cantonal Court. After that appointment, the president of the Cantonal Court transferred Judge Djonlic back to the Municipal Court from the Cantonal Court for a temporary period in order to continue to handle the Vikalo case. However, the Tuzla Canton law only allowed the assignment of a Cantonal judge to a Municipal Court for a maximum period of six months**(44)**. The president of the Cantonal Court wanted Judge Djonlic to remain in charge of the Vikalo case; however, the trial of the case stood a good chance of lasting longer than six months. At a hearing on 16 November, however, Judge Djonlic withdrew from the case, and Judge Dijana Milic of the Tuzla Municipal Court replaced him as president of the trial panel. The trial was then adjourned to enable Judge Milic to review court documents.

In general, Judge Milic processed the case diligently and denied defense counsel motions to postpone proceedings. In all, the main trial proceedings lasted into the spring of 2000. Judge Milic, as the president of the court panel, dictated the hearing proceedings, which the courtroom clerk recorded with a manual typewriter. The acoustics during some of the hearings were poor and, eventually, resulted in the use of audio speakers.

The Municipal Court, under the direction of Judge Milic, recommenced the main trial on 30 November 1999 with the reading of the indictment. The Municipal Court heard statements from the defendants from 30 November to 5 December 1999. The defendants denied any wrongdoing. Their testimony at trial was at variance on several points with statements given to the investigative judge. In mid-December, the Municipal Court resumed hearings and elicited testimony from three to five witnesses per hearing. Several of the witnesses were current or former cantonal officials. Some witnesses were also under investigation for alleged acts of corruption while in public office. In all, more than 30 witnesses, including expert witnesses, testified.

At times, the main trial proceedings were marked by tension. The local media covered trial proceedings and reported a verbal attack by a member of the Federation Parliament against the Judge Milic, accusing her of incompetence. As president of the court panel, Judge Milic confronted attempts by defense counsel and by a lay judge to destabilize the proceedings. During the examination of the former cantonal Minister of Justice by defense counsel, Judge Milic refused to let the witness answer whether he knew the meaning of the legal expression "nulla poena sine lege" or whether he could identify any basis upon which to convict the defendant. Defense counsel protested that the witness was competent to answer the questions and threatened to leave the hearing. Then, unexpectedly, one of the lay judges also threatened to quit the proceeding, if the witness were not allowed to answer the questions. Thereupon, Judge Milic adjourned the hearing and conveyed to the lay judge that such behavior was unacceptable. The lay judge relented, and the criminal proceedings resumed.

4.6 The Municipal Court's Verdict

On 27 March 2000, the Tuzla Municipal Court announced its verdict at a hearing. The Municipal Court found Hazim Vikalo, Halid Kovac, and Osman Sinanovic guilty of all counts charged in the indictment. The Municipal Court found Piric not guilty.

The Municipal Court found that Vikalo had abused his official position and authority to obtain profits for others and also had performed official duties negligently for his involvement in the purchase of paint from AB Behapol, the purchase of vehicles from PAD Nosse, and the approval of loans to municipalities and to socially and privately owned companies.

Moreover, the Municipal Court found that Kovac had performed his official duties negligently for his involvement in the purchase of vehicles from PAD Nosse, the overpayment made to PAD Nosse, and the purchase of vehicles from AB Commerce.

Furthermore, the Municipal Court found that Sinanovic had abused his official position and authority to obtain profits for others for his involvement in the purchase of medical supplies from DLJ Medifarm and in the execution of an exclusive distributorship contract with DLJ Medifarm for the purchase of medical supplies over a three year period.

Finally, the Municipal Court found that Piric had not performed his official duties negligently when he issued bank transfers to DD Eurobih Tuzla.

It is not the purpose of this thematic report to recount the entire verdict; however, some observations are noteworthy. The Municipal Court's verdict, signed by Judge Milic, was 65 pages. The verdict identified the defendants, witnesses, and expert witnesses who testified at trial. The verdict further contained a twelve-page itemization of documents submitted during the course of the proceedings and considered by the Municipal Court panel in reaching its conclusions. The verdict systematically discussed each count of each offense and analyzed the facts, although the verdict's rendering of the facts of the case was, at times, difficult to penetrate. In some instances where the Municipal Court rejected the contentions of the defendants, the verdict indicated reasons therefor. In addition, when the Municipal Court rejected the testimony of the defendants, the verdict cited factual discrepancies or variances in testimony that undercut the credibility of the defendants. Furthermore, the Municipal Court, in the verdict, altered the factual description of the offenses charged against Vikalo in the indictment, which, in the court's opinion, altered the style and not the essence of the factual description of the alleged criminal offenses. Also, the Municipal Court, in the verdict, altered the factual description of the offenses charged against Kovac regarding the purchase of vehicles from PAD Nosse and from AB Commerce.

The Municipal Court accumulated a substantial amount of documentary and testimonial evidence relevant to whether Vikalo, Kovac, and Sinanovic committed the alleged criminal offenses. With regard to Vikalo, the Municipal Court found that that Vikalo violated the law in effecting the purchase of KM140,000 worth of paint from AB Behapol, a local company with debt problems. In directing that the paint be purchased, Vikalo failed to act in accordance with standard procurement procedures governed by Canton law. Also, the Canton had no demand for paint at the time of purchase. According to the Municipal Court, the evidence further showed that Vikalo acted contrary to law in approving loans to the municipalities and to socially and privately owned companies without the approval of the Cantonal Assembly. In particular, the Municipal Court evaluated the facts and applicable law and concluded that the loans were expenditures that required budgetary approval.

With regard to both Vikalo and Kovac, the Municipal Court found that they ordered and executed the purchase of ten Golf vehicles from PAD Nosse through a contract dated 8 September 1998. This purchase resulted in overpayment in the amount of KM 10,150.08 for "extra accessories" that were standard features of Golf vehicles sold by another automobile dealer. The Municipal Court based its conclusion on the finding of expert witnesses. Significantly, neither Vikalo nor Kovac followed regulations requiring a public bidding procedure in order to ensure competitive offers, as required by the Federation law regulating the purchase of goods and services and the allocation of contracts. That law became effective on 10 August 1998, after it was published in the Official Gazette of the Federation. Accordingly, the Municipal Court found Vikalo and Kovac guilty of negligent performance of official duties that resulted in damage to the Canton government.

In addition, with regard to the purchase of other Golf vehicles, one Audi, and two ambulances from AB Commerce, the Municipal Court examined the factual record and concluded that the actions of Kovac resulted in damage to the Canton government. In particular, the Municipal Court found that Kovac acted unscrupulously in separate transactions involving the purchase of ten other Golf vehicles from PAD Nosse (contract dated 29 September 1997) and the purchase of five Golf vehicles and two ambulances from AB Commerce (contract dated 16 June 1998). As to the contract dated 29 September 1997, the Municipal Court concluded that PAD Nosse improperly charged Tuzla Canton KM 9,500 for vehicles that did not meet contract specifications. As to the contract dated 16 June 1998, the Municipal Court concluded that the contract did not include the cost of shipping. AB Commerce billed shipping expenses separately and received payment. Tuzla Canton paid to AB Commerce KM 9,620 for shipping expenses, although the evidence showed that AB Commerce's expenses to ship the vehicles were KM 1,432. Thus, AB Commerce over-billed Tuzla Canton KM 8,188 for actual costs of shipping. The Municipal Court concluded that Kovac, as Minister of Finance, was responsible under internal ministry rules (Book of Rules on the Internal Organization and Classification of Jobs of the Ministry of Finance) for ensuring proper execution of the terms of contracts and accurate payment upon execution of the contracts. Hence, the Municipal Court found that Kovac, in his capacity as Minister of Finance, performed his official duties negligently and was responsible for overpayments to PAD Nosse and to AB Commerce.

With regard to Sinanovic, the Municipal Court considered the documentary evidence and witness testimony presented during the course of the first instance proceedings. The Municipal Court found that Sinanovic, as Minister of Health, entered into three contracts with DJL Medifarm for the purchase of saline (on 25 July 1997 in the amount of KM 502,309), for the purchase of hemo-dialysis kits (on 12 November 1997 in the amount of KM 310,120), and for the purchase of saline bottle systems (on 13 November 1997 in the amount of KM 110,000). The contracts identified the purchases for strategic reserves. The Municipal Court reasoned that there was not an urgent need to purchase these products for strategic reserves, as Sinanovic had contended. The Municipal Court held that Sinanovic violated the Canton law regulating strategic reserve purchases, which required a pre-approved purchase plan from the director of the Canton's Department of Strategic Reserves. This law appeared in the Official Gazette on 31 May 1997 and came into effect eight days after publication. In addition, Sinanovic failed to conduct any public bidding process to ensure a competitive bidding process. The facts showed that DJL Medifarm, although it received payment, delayed delivery of the purchased products for over one year and, with regard to the contract dated 13 November 1997, had failed to deliver any of the products as of 30 June 1999.

In addition, the Municipal Court found that Sinanovic entered into an exclusive distributorship contract with DJL Medifarm for a three-year period, enabling DJL Medifarm to be the sole supplier of medical products to the Tuzla Canton. The facts revealed that DJL Medifarm drafted the terms of the contract without objection from Sinanovic. The Municipal Court rejected Sinanovic's defense that he entered into the three-year exclusive distributorship contract because of a favorable outcome of the contract with DJL Medifarm involving the hemo-dialysis kits. The Municipal Court did not find that contract favorable because of DJL Medifarm's failure to deliver the kits on time. The Municipal Court concluded that Sinanovic knowingly entered into the contract without consulting with the Tuzla Canton government, contrary to the interests of the Canton and for the direct benefit of DJL Medifarm.

Finally, with regard to Piric, the Municipal Court found him not guilty of failing to inspect invoices in order to prevent double payment. The Municipal Court reviewed the Book of Rules on the Internal Organization and Classification of Jobs of the Ministry of Finance regarding the duties of a bookkeeper. The Municipal Court concluded that Piric, as a bookkeeper, was not responsible for supervising the payment of accounts and, therefore, was not obligated to review underlying invoices upon which authorizations for payments were based. Therefore, the Municipal Court found that Piric could not be criminally responsible for authorizing the payment of two bills, previously paid, in the amount of KM 50,000 each.

The Municipal Court sentenced Vikalo, Kovac, and Sinanovic to imprisonment for two years and two months, six months, and one year, respectively. In addition, the Municipal Court ordered Vikalo and Kovac to make restitution for the damage sustained by Tuzla Canton.

The defendants appealed their convictions, and the Municipal Prosecutor appealed the not guilty finding against Piric and the length of sentencing against the defendants, which the Municipal Prosecutor deemed insufficient. The Municipal Prosecutor did not request the Municipal Court to order the immediate imprisonment of defendants. Consistent with the Criminal Procedure Code, the sentence of imprisonment against the defendants was stayed until the final outcome of the appeal**(45)**.

4.7 The Cantonal Court's Appellate Decision

A panel of three judges of the Tuzla Cantonal Court held a session on 4 October 2000 and then issued a 20-page written decision. The Deputy Cantonal Prosecutor, Vikalo, Kovac, Sinanovic, and their defense counsel attended the session and presented their arguments on appeal. The Cantonal Court did not conduct a hearing and receive new evidence**(46)**. The Cantonal Court vacated the verdict and remanded the case back to the Municipal Court for a new trial**(47)**. In so doing, the Cantonal Court specified that, in addition to the grounds for contesting the verdict, as raised by the parties, it was also reviewing the verdict ex officio, as required by law**(48)** In exercising its ex officio duties, the Cantonal Court overruled the verdict of the Municipal Court on the grounds that, among other things, the Municipal Court failed to provide adequate reasoning in support of the verdict and failed to resolve questions of law and fact.

With regard to the first offense against Vikalo, the Cantonal Court noted that the Municipal Prosecutor, at a main trial hearing on 21 March 2000, modified the original indictment regarding the unlawful purchase of paint. The Municipal Prosecutor modified the indictment to state that Vikalo gave orders to the director of the Department of Strategic Reserves to take all necessary actions relating to the purchase of the paint. The indictment originally alleged that Vikalo gave orders to the Director of Strategic Reserves to sign a contract to purchase paint. The Municipal Court, however, in convicting Vikalo, based its verdict upon the modified indictment. The Cantonal Court held that the Municipal Court committed an error in basing its verdict upon the modified indictment and essentially gave a new content to the alleged unlawful action. The Cantonal Court ruled, therefore, that the verdict exceeded the charge in the original indictment**(49)**.

In addition, the Cantonal Court stated the verdict failed to determine that the purchase of the paint was an action that fell within Vikalo's authority, which was a decisive fact necessary to establish that Vikalo had abused his office and exceeded his authority. More specifically, according to the Cantonal Court, the verdict failed to identify grounds in support of the conclusion that Vikalo's order to the Director of Strategic Reserves to purchase the paint was within the scope of his official authority**(50)**. The Cantonal Court particularly noted that the verdict further failed to consider the legal effect of Article 10 of the Law on Strategic Reserves of Tuzla Canton. Article 10 provides that the purchase of strategic reserves shall be pursuant to an annual program determined, not by the Canton Prime Minister, but by the Canton government at the proposal of the Director of Strategic Reserves. Thus, the Cantonal Court reasoned that the verdict failed to show sufficient legal grounds that Vikalo had exceeded or abused his authority.

With regard to the second offense against Vikalo concerning improper loans, the Cantonal Court stated that the verdict failed to determine the legal significance of the economic terms "expenditure" and "outlay/extra" as contained in the cantonal Law on Budget. According to the Cantonal Court, a legal determination was crucial to determining whether the loans required budgetary approval. In addition, the Cantonal Court questioned the Municipal Court's rejection of expert testimony regarding these economic terms. The Cantonal Court further stated that the verdict failed to consider Vikalo's defense that the loans were necessary to prevent social unrest and, thus, failed to resolve the content of the offense charged**(51)**. In sum, the Cantonal Court ruled that the Municipal Court failed to specify the basis for its decision and the reasons for accepting or excluding evidence in the record**(52)**.

With regard to the third and fourth offenses against Vikalo (partially) and Kovac (entirely) concerning several contracts involving the purchase of vehicles, the Cantonal Court again concluded that the verdict was not sound. The Cantonal Court stated that the verdict failed to identify facts to show that Vikalo and Kovac knowingly purchased the vehicles, notwithstanding that Canton law required a public bidding procedure**(53)**. In addition, the Cantonal Court stated that the verdict was unclear and contradictory regarding the purchase of vehicles from PAD Nosse and AB Commerce. The Cantonal Court stated that the record contained no documentation to show that Kovac was responsible for the purchase of the vehicles. Further, the Cantonal Court was not satisfied that the verdict was based upon clear evidence that the costs for extra accessories for the Golf vehicles from PAD Nosse and the shipping expenses for the vehicles from AB Commerce were unwarranted.

With regard to the fifth offense against Sinanovic concerning the purchase of medical supplies, the Cantonal Court asserted that the verdict lacked an adequate factual basis to conclude that the purchases were not for strategic reserve purposes. According to the Cantonal Court, the Municipal Court failed to consider whether the purchases were made to meet current needs. The Cantonal Court also indicated that the Municipal Court should have examined the Law on Strategic Reserves, which came into effect in June 1997, to determine whether the procedures of this law governed the purchase of the medical supplies from DLJ Medifarm. The Municipal Court failed to interpret the law and determine whether the Minister of Health was authorized to contract for and to purchase strategic reserve goods and, if so, whether Sinanovic was obligated to obtain prior approval from the Director of Strategic Reserves. According to the Cantonal Court, the issue of whether Sinanovic purchased the medical supplies to meet urgent needs, which the Municipal Court rejected, depended upon whether the medical supplies were purchased for strategic reserves. Also, the Municipal Court, which concluded that DLJ Medifarm drafted the contracts (including the three-year exclusive distributorship agreement), should have considered whether the contracts disadvantaged the Ministry of Health. With regard to the exclusive distributorship agreement with DLJ Medifarm, the Cantonal Court held that the Municipal Court failed to determine whether the agreement resulted in damage to the Canton government and what the consequences were, if any, of Sinanovic's failure to comply with the Law on Strategic Reserves**(54)**.

With regard to the sixth offense against Piric concerning the issuance of two bank transfers (KM 50,000 each) for invoices previously paid, the Cantonal Court, upon the appeal of the Municipal Prosecutor, ruled that the Municipal Court failed to consider adequately whether Piric's supervisory duties included reviewing the accuracy of documents upon which transfer payments are ordered. The Cantonal Court held that the Municipal Court could not base its finding solely upon the description of bookkeeper's duties as set forth in the Book of Rules on Internal Organization and Job Classification of the Ministry of Finance. The Cantonal Court ruled that further consideration of Piric's duties within the context of his experience and work performance is necessary in order to determine whether or not Piric had the obligation to review underlying invoices prior to authorizing payment.

At the conclusion of its decision, the Cantonal Court held that, in reviewing the verdict based upon arguments of the parties and in its ex officio role, the Municipal Court breached essential provisions of criminal procedure. In accordance with Article 378(1) of the Criminal Procedure Code, the Cantonal Court vacated the verdict and returned the case to the Municipal Court for retrial. The Cantonal Court ordered the Municipal Court to review the previous evidence, take additional evidence, and then evaluate the evidence in light of the issues raised by the Cantonal Court in order to render a new verdict.

5 ANALYSIS: WHAT THE VIKALO CASE REVEALS ABOUT THE CRIMINAL JUSTICE SYSTEM

5.1 The Information Gathering and Preliminary Examination Stages

5.1.1 The Incompatible Roles of the Prosecutor and the Investigative Judge

A successful investigation in any criminal case depends upon the efficient and effective use of investigative resources. Under the Criminal Procedure Code, the three components of the investigation process (that is, the information gathering and preliminary examination stages) are the law enforcement agencies, the prosecutor, and the investigative judge. The Criminal Procedure Code, by requiring multiple layers of involvement in a standard investigation, creates a situation of dependency. The dependence of each component on the other to assist in the investigation process demands co-ordination. The lack of co-ordination can undercut the ability of any one of the components or all components to conduct an investigation efficiently and can even result in the blocking of an investigation. Because the evidence gathered during the investigation phase of a case ultimately shapes the indictment and can affect the proceedings at the main trail, it is vital that the investigative process be effective in gathering relevant evidence. In other words, the more efficient and effective the investigation, the more likely the prosecution of a criminal case will result in a guilty verdict at the main trial, if the evidence presented is beyond a reasonable doubt.

First, under the Criminal Procedure Code, the roles of the prosecutor and the investigative judge serve as a source of unnecessary tension, encourage the duplication of work, and can undercut the effective investigation of politically sensitive cases. In the Vikalo case, both the Municipal Prosecutor and the Cantonal Prosecutor consistently obstructed portions of the investigation and willfully refused assistance from law enforcement agencies, especially the Federation agencies, in the gathering of evidence. The initial prosecutors further refused to provide the Municipal Court investigative judge with crime reports prepared by law enforcement agencies. During the early phase of the criminal proceedings, when the Cantonal Prosecutor decided to seek the involvement of an investigative judge, he split the case by filing separate requests for preliminary examinations with the Cantonal Court and the Municipal Court. The Cantonal Prosecutor literally dumped portions of an overall investigation into the laps of two investigative judges. The Cantonal Prosecutor's actions prevented the handling of the entire criminal case by one court. In effect, the Cantonal Prosecutor used his discretion to undercut a more comprehensive, more effective investigation by one investigative judge.

Additionally, the petition for preliminary examination, submitted to the Tuzla Municipal Court, requested an inquiry only into the purchase of vehicles by Canton officials. Although a prosecutor's petition defines the scope of the preliminary examination, the investigative judge may expand the scope of the investigation**(55)**. In the Vikalo case, the Municipal Prosecutor reacted negatively when the investigative judge, at the advice of the president of the Municipal Court, expanded the scope of the investigation beyond the purchase of vehicles allegedly ordered by Vikalo and Kovac. Actually, the investigative judge expanded the scope of the investigation after receiving crime reports that the initial Cantonal and Municipal Prosecutors sought to withhold. Clearly, the Municipal Prosecutor wanted to confine the scope of investigation, and in this regard, was acting counter to the interests of justice.

Second, the Criminal Procedure Code unnecessarily confines the investigative judge by requiring the prosecutor, prior to forwarding all evidence to the investigative judge at the time of requesting a preliminary examination, to separate out and seal all statements taken from witnesses by law enforcement officials**(56)**. The Criminal Procedure Code deems witness statements taken by law enforcement officials to be unreliable in that such statements tend to undermine the objective approach of the court in reaching conclusions about decisive facts. However, statements taken by police officers are almost always the most recent and accurate version of the criminal event and, consequently, tend to be inherently more reliable than statements given at a later time to an investigative judge (when a witness has a less clear memory). Moreover, the investigative judge cannot see the witness statements taken by law enforcement agencies and, therefore, cannot determine if a witness has changed factual versions between the time the police took an earlier statement and the time the investigative judge examines the witness, which is at a more remote time. Under such circumstances, witnesses could voluntarily, or under duress, change statements or simply forget factual events without any possibility of the investigative judge confronting the witness about discrepancies in testimony concerning decisive facts of the case. Hence, the sealing of witness statements in the interests of preserving judicial objectivity runs counter to the judicial notion of searching for the truth by relying upon fresh eyewitness accounts that are recent and not remote in time.

In the Vikalo case, the investigative judge had to duplicate the work of the law enforcement officials and re-interrogate witnesses. The investigative judge also had to confirm the accuracy and reliability of the information contained in the reports filed by law enforcement agencies. A more efficient approach would allow the investigative judge, if this judicial role were to remain a part of the investigative process, to review the witness statements and use the information in those statements in order to decide whether to interview potential witnesses. (See, however, section 5.1.4, recommending the abolition of the role of the investigative judge). There is no reason to doubt the objectivity of an investigative judge, who is an expert in the evaluation of evidence and witness testimony. At the very least, an investigative judge could avoid hearing witnesses whose testimony, based upon their statements to law enforcement officials, is deemed immaterial.

5.1.2 Defiant Prosecutors Undermine the Criminal Investigation

The prosecutor is a key component responsible for processing the case through the criminal justice system. Under the Criminal Procedure Code, the prosecutor is supposed to be a leading force in the investigation of suspects and the prosecution of defendants at trial. The prosecutor has the authority to take the necessary action to discover crimes, identify perpetrators of criminal acts, supervise the activities of law enforcement agencies, request the involvement of an investigative judge in the criminal proceedings, and issue the indictment**(57)**. Moreover, the prosecutor actively participates in main trial proceedings, requests the investigation of new evidence, questions witnesses, delivers a closing argument assessing the facts, and recommends criminal punishment**(58)**. In addition to these powers, JSAP recommends, for reasons discussed under section 5.1.4, that the prosecutor's authority be expanded to oversee all aspects of investigation.

In truth, the prosecutor can wield enormous power at different stages of the criminal proceedings. Accordingly, the prosecutor must exercise his authority responsibly, for a misuse of authority or the failure to attend to investigative duties could effectively undercut the successful prosecution of a crime. In particular, the prosecutor can set the scope of a criminal investigation or, through the filing of an indictment, can determine the parameters of the criminal offense against a defendant at the main trial. Specifically, the prosecutor must be able to formulate a precise indictment, introduce incriminating evidence at the main trial, and obtain a guilty verdict where proof is beyond a reasonable doubt. In order to combat crime effectively, then, it is essential that a prosecutor be skilled, competent, and able to handle a criminal case with assistance from other prosecutors and other law enforcement agencies.

In the Vikalo case, the initial prosecutors, through their actions, seriously undermined the overall investigation. First, the initial Cantonal Prosecutor and the initial Municipal Prosecutor exhibited a defiant attitude toward the Federation Prosecutor, the Federation Ministry of Finance police, and OHR, whose Anti-Fraud Unit was monitoring the case. Both prosecutors poorly handled the investigation by failing to cooperate with Federation law enforcement agencies, by intentionally restricting the scope of investigation, and by withholding relevant evidence from the investigative judge. The initial Cantonal Prosecutor failed to produce timely investigation reports and also failed to file five criminal reports, contrary to the urging of the Federation Prosecutor.

Second, the initial Cantonal Prosecutor's decision to divide the investigation was not a prudent exercise of discretion. Splitting the investigation prevented one court from conducting a comprehensive investigation of Vikalo and his cabinet members**(59)**.

In sum, the initial prosecutors demonstrated an inability to process the investigation professionally. The performances of the initial Cantonal Prosecutor and the initial Municipal Prosecutor are a source of serious concern. These prosecutors defied their professional duty to detect and to prosecute criminal behavior vigorously. Their obstructive behavior, like that of the Canton Minister of Interior, suggests that they were politically motivated to undermine the successful prosecution of Vikalo and his cabinet officials.

JSAP believes that the hierarchy of the Office of the Prosecutor should foster co-operation among prosecutors at the Federation, Canton, and Municipal levels. The Office of the Prosecutor should maintain sufficient structure to ensure the necessary co-operation among its offices at the three levels of government. Differences in individual personalities can impair the level of cooperation among the three prosecutors' offices. This, in turn, can impede prosecutors at all levels from effectively pooling their efforts. The Vikalo case presents a nightmare scenario where the initial Cantonal and Municipal Prosecutors acted in defiance of the higher ranking Federation Prosecutor and were unwilling to accept assistance from the Federation Ministry of Finance police. The initial Cantonal Prosecutor's involvement in the early stages of the investigation left a lasting mark of strained relationships with law enforcement agencies and of willful intent to prevent a full investigation of the criminal allegations. The poor performance of the initial prosecutors in the Vikalo case underscores the necessity of staffing prosecutor's offices with competent, professional attorneys, who are able to coordinate the investigation of criminal cases with the assistance of law enforcement agencies at different levels of government.

Accordingly, the prosecutorial commissions, through their lawful authority, must cause the removal of prosecutors who obstruct criminal proceedings to the degree experienced in the Vikalo case. In addition, the prosecutorial commissions should rigorously review applicants for prosecutorial posts and recommend only those applicants who are professionally qualified to fulfill the duties of prosecutor competently and impartially. In the fight against corruption, there is no substitute in the criminal justice system for prosecutors who are dedicated to aggressive investigation of criminal activity and who are able to obtain criminal convictions in accordance with the law. Without such prosecutors, the criminal justice system will be rendered ineffective.

5.1.3 Obstructed Efforts of Law Enforcement Agencies

The strength of a prosecutor's case often rests upon the work of law enforcement agencies. For instance, police officers are often the first officials to arrive at a crime scene and have the duty of securing the crime scene and preserving all evidence. Moreover, law enforcement agencies routinely execute search warrants to confiscate important evidence. In a corruption case, the investigation is usually complicated and involves several suspects. Accordingly, more than one law enforcement agency may be involved in the gathering of evidence. Under these circumstances, the law enforcement agencies must co-ordinate their efforts, share information, and work in unison to gather reliable evidence. Without such cooperation, the prospect that a criminal investigation will result in a successful prosecution of an accused is diminished. Any sort of interference designed to obstruct an investigation can be ruinous.

With regard to the Vikalo case, efforts of law enforcement agencies were at cross-purposes and subject to political pressure. The relations between Federation law enforcement agencies (Federation Ministry of Interior police and Ministry of Finance police) and cantonal agencies, especially within the cantonal Ministry of Interior (the crime police and the organized crime unit), were marked by rancor and unwillingness to co-operate. Manifest political tension between SDA officials in Sarajevo and Tuzla produced an atmosphere of fear and intimidation directed against law enforcement officials investigating the defendants (SDA officials). The possibility that the investigation would implicate other SDA officials fueled political tension. In particular, the

cantonal Minister of Interior, Ferid Hodzic, waged a conscious battle to block or seriously to undermine investigations conducted by the Federation Ministry of Interior police and the Canton's organized crime unit. Evidently, Minister Hodzic was motivated for political reasons to undercut the investigation any way possible. Minister Hodzic's interference was so substantial, however, that the High Representative removed him from office for his obstructive behavior. The necessary intervention by the High Representative added a further political dimension to the investigation process, but mostly underscored the failed co-ordination efforts of the law enforcement agencies.

The Vikalo investigation highlights the need for the professional use of law enforcement agencies and, in its absence, the terrible abuses that occur. Law enforcement officials involved in the investigation encountered opposition at different levels: between Federation and Canton agencies, within the cantonal Ministry of Interior, and from the Cantonal and Municipal Prosecutors. The individuals who engaged in obstructive tactics were politically motivated and were not professionally dedicated to their public duties. In fact, the cantonal Ministry of Interior and the initial Cantonal Prosecutor strictly controlled the early phases of the investigation in an effort to contain its scope. During the course of the investigation, different law enforcement agencies were busy gathering evidence but not necessarily in an integrated fashion. Given the level of obstruction, it is certain that the investigations by the Federation Ministry of Finance police and the Canton's organized crime unit were not sufficiently coordinated, and thus undermined the ultimate utility of the criminal reports.

JSAP believes that the breakdown in cooperation between Federation agencies and Canton agencies were the consequence of political machinations. The Vikalo case is a classic example of what happens to a police investigation when high placed law enforcement officials, such as a Minister of Interior, are able to politicize an investigation for the purpose of blocking it. Without question, the installation of professional government and law enforcement officials, dedicated to ensuring the execution of police duties apolitically and in accordance with the law, is vital to inter- and intra-agency cooperation. Although Minister Hodzic was, no doubt, not the only government officer obstructing the Vikalo investigation, there is no question that this single person, motivated politically, was able to damage efforts to coordinate an effective investigation. The investigation of government corruption is a complex matter that necessitates coordinated, professional relations among law enforcement agencies. Lacking this, investigations of corruption cases will not result in convictions of corrupt government officials.

JSAP further believes that the establishment of a police commissioner post, at the Federation and cantonal level, as supported by UNMIBH, is vital in insulating law enforcement agencies from improper political pressure and in instilling professionalism throughout police ranks. An independent review board, external to the Ministry of Interior, selects the police commissioner, who must have advanced police and management experience and cannot be affiliated with a political party. By creation of this post, the police commissioner oversees and directs police functions in accordance with laws governing the execution of police duties. The office of the police commissioner consists of the chief of uniformed police, the chief of crime police, the chief of staff, and support staff. The Ministry of Interior is not involved in the oversight or operation of police functions. Instead, the Ministry of Interior's involvement is limited to setting priorities, in consultation with the police commissioner, with regard to issues that may affect the work of the police. Hence, the main purpose of establishing the post of police commissioner is to de-politicize police activity, which would thereby prevent the level of obstruction experienced in the Vikalo investigation.

5.1.4 Abolishing the Role of the Investigative Judge

JSAP recommends that the role of the investigative judge be abolished. JSAP's believes that criminal proceedings, in general, should be driven more by the parties (the prosecutor and defense counsel) and less by the judge. The use of the investigative judge to repeat witness interrogations and review massive documents already compiled by the prosecutor or law enforcement officials is unnecessarily duplicative. In addition, the reliance upon the investigative judge to take witness statements results in the prohibition of the use of fresh witness statements taken by law enforcement agents at the crime scene or after the occurrence of a criminal act, regardless of the inherent reliability of such witness statements. For these reasons, the role of the investigative judge should be abolished. Accordingly, the prosecutor should entirely oversee criminal investigations, bear the onus of gathering evidence, and issue indictments.

JSAP further believes that, during a transitional period, until the prosecutor and defense counsel are sufficiently trained in their new roles, a judge could confirm an indictment to ensure that the alleged offense in the indictment is punishable by law. After a reasonable period of time, the judge would no longer be obligated to proof the indictment to ensure its factual legal description meets statutory requirements. Rather, defense counsel would have the obligation to challenge the legality of the indictment. In order to perform this obligation, defense counsel must play an active role in criminal proceedings and, above all, be given complete access to and copies of all documents prepared by law enforcement agencies and by the prosecutor. Of course, a court should always retain exceptional powers to dismiss an indictment, ex officio, to prevent a miscarriage of justice. In this way, the first instance court would be relieved of investigative duties and could devote more time to main trial proceedings, where courts of law traditionally receive and evaluate all evidence and decide matters of guilt.

JSAP recognizes that the elimination of the role of investigative judge would place enormous responsibility on prosecutors to conduct effective investigations. Shifting the burden of investigation to the prosecutor is premised upon the notion that competent and dedicated prosecutors will oversee investigations. Arguably, in the Vikalo case, but for the investigative judge, uncooperative prosecutors and law enforcement agencies would have compromised the investigation and potentially undermined any prospect of prosecuting the case in the court of law. Nevertheless, saddling first instance court judges with burdensome investigative tasks that prosecutors can do is not a sustainable solution and ignores that first instance courts are overextended and cannot process cases efficiently. Rather, the better solution is to discipline prosecutors who handle investigations incompetently or otherwise act unethically. If a prosecutor were solely accountable for conducting the investigation, then the prosecutor would be compelled to avoid divisive tactics or else be faced with accusations of incompetence, be subject to disciplinary action, and possibly be removed from office**(60)**.

5.2 The Main Trial and Appellate Stages: Administering Justice at the Municipal Court and Cantonal Court Levels

5.2.1 General

All courts face the pressure of conducting proceedings efficiently within reasonable time frames while ensuring defendants their due process rights. In order to meet these expectations, it is essential that judges preside uninterruptedly over cases and avoid lengthy delays. Judges at the first instance court must adjudicate cases skillfully when reaching a verdict, in order to avoid reversal on appeal. However, to facilitate the reaching of sound verdicts, judges should not be the main vehicles to elicit evidence at trial. The production of evidence at trial should be the primary responsibility of the prosecutor and the defense counsel, and the prosecutor (not the judge) should bear the burden of proof.

The second instance court should develop a practice of not returning a case to a first instance court. The second instance court should, as a general rule, conduct hearings and receive evidence in order to resolve cases and, only as an exception, remand a case to the first instance court for further action if grievous error cannot be rectified through a hearing at the second instance. A criminal justice system that does not promote this form of judicial economy is not inclined to promote the efficient resolution of criminal cases.

5.2.2 The Municipal Court: Shouldering the Brunt of the Work, Bearing the Burden of Proof, and Enduring Lengthy Court Proceedings

The Tuzla Municipal Court handled the investigation and the main trial of the Vikalo case. The investigative judge began the preliminary examination on 11 March 1999. A panel of three judges began the main trial on 2 November 1999 and issued a verdict on 27 March 2000. Thus, the Municipal Court required just over one year to process this case.

As the duty to establish the facts of a case, under the Criminal Procedure Code, primarily falls upon the presiding judge at the main trial, it is no understatement to assert that Judge Milic shouldered the brunt of the work during the main trial. By the time the Municipal Court completed the main trial, it had heard the testimony of the four defendants and over 40 witnesses and had amassed a maze of documents relating to the underlying offenses. In performing her judicial function, Judge Milic confronted aggressive defense counsel, passive prosecutors, and an outburst of rebellion from a lay judge during court proceedings.

The procedure of burdening the first instance court judge with enormous fact-finding responsibilities permits the prosecutor and the defense counsel to adopt a passive role in producing incriminating evidence at the main trial. Such a procedure is counter-productive because the prosecutor and defense counsel are fully involved in the investigation phase of the case; whereas, the judge presiding at trial has no connection to the investigative phase of the case. Thus, Judge Milic faced the gargantuan task of learning the case at trial, while the Municipal Prosecutor and defense counsel, who were more involved in the fact-gathering process and, thus, better situated to produce evidence at trial in a clear manner, instead remained relatively inactive in eliciting evidence at the main trial.

Also, the decision of the president of the Cantonal Court to assign Judge Djonlic to the Vikalo case posed unnecessary delay in court proceedings. Although the president of the Cantonal Court may have intended to assign an experienced judge to preside over the Municipal Court panel, the decision of the president of the Cantonal Court was counter-productive because Judge Milic, in sudden fashion, inherited a case that already had begun.

JSAP recommends that main trial proceedings depart from an inquisitorial approach as practiced in BiH, which heavily relies upon a fundamental notion that the judge develops the facts of a case, and, instead, partially utilize some aspects of the adversarial approach, which requires the prosecutor to establish guilt, subject to defense counsel's rebutting evidence. This change is more in line with a party-driven process and complements JSAP's other recommendation to task the prosecutor with the duty of investigating cases, instead of an investigative judge (see section 5.1.4). These types of criminal procedure reform would substantially reduce the amount of time that a first instance court would have to devote to a criminal proceeding.

The presiding judge at the main trial unfairly bears the burden of producing evidence. The current criminal procedure is inefficient because it requires one individual, the presiding judge, to do nearly all of the work. A better approach is to shift, in an orderly fashion, the obligation to produce evidence at trial to the prosecutor and to the defense counsel, while maintaining the judge's ex officio role to perform inquiry and request additional witness testimony or the production of physical evidence during main trial proceedings. However, as prosecutors and defense counsel acquire competency in their new responsibilities, the judge's role, in turn, would increasingly focus upon ensuring the impartiality of main trial proceedings.

JSAP believes that the current criminal procedure results in prolonged pre-trial and main trial proceedings. Under the current procedure, the presiding judge actually bears the burden of proof because the court is obligated to build an evidentiary record. However, it is more appropriate that the prosecutor, who is the accusing party, should assume all obligations of this accusatory role, which, above all, is the obligation to produce sufficient incriminating evidence to prove the allegations contained in the indictment. Relieving the judge of the primary responsibility of building an evidentiary record should force the parties to conduct main trial proceedings more efficiently and, consequently, would reduce the time required by a first instance court to process a criminal case. A period of one year is too long for a first instance court to process a criminal matter, especially where the first instance court is fully engaged in all aspects of the pre-trial and main trial proceedings.

JSAP further believes that the ability of a president of a court to assign cases to particular judges opens the court to attack that judges pick and choose cases. Such a practice unnecessarily subjects the judiciary to accusations of bias. The better approach is to institute a system of random case allocation among a pool of qualified judges, based upon their area of judicial expertise, and thereby avoid any appearance of case manipulation in the eyes of the public and the parties to the action.

5.2.3 The Cantonal Court: Proofing Verdicts and Judicial Economy

Both the prosecutor and the defense counsel appealed the case to the Cantonal Court within fifteen days after the rendering of the verdict**(61)**. Instead of conducting hearings to gather new evidence, the Cantonal Court reviewed the verdict and the evidentiary record compiled by the Municipal Court. Essentially, the Cantonal Court concluded that the verdict was defective on procedural grounds. In its decision, the Cantonal Court asserted that the Municipal Court failed to provide adequate reasoning in support of the verdict or failed to resolve questions of law or fact in a clear manner. Accordingly, the Cantonal Court returned the case to the Municipal Court for a new trial**(62)**.

The administration of the Vikalo case at the second instance court reveals a counter-productive process. From the point of view of judicial economy, the remanding of this case for a new trial is enormously wasteful. The decision of the Cantonal Court identified violations of criminal procedure; however, it also deemed the verdict inadequately supported by the Municipal Court's interpretation of the evidence. To some degree, the Cantonal Court substituted its judgment on factual issues that the Municipal Court decided based upon a reasoned interpretation of the evidentiary record. At times, the Cantonal Court stretched its reasoning in order to find some basis to overturn aspects of the Municipal Court's verdict**(63)**. Now, on remand, the Municipal Court must interpret the Cantonal Court's decision and then re-try the Vikalo case. It is not improbable that the parties might again appeal the next verdict and that the Cantonal Court might again vacate that verdict were it to find the verdict defective on procedural grounds.

Cantonal Courts, sitting in the second instance, as a practice do not schedule hearings and receive evidence in order to resolve legal and factual issues that the first instance court erroneously or incompletely decided. Second instance courts in BiH almost never conduct hearings and issue final decisions, apparently for fear of reversal by the third instance court on appeal**(64)**. Such judicial hesitancy, however, runs counter to notions of judicial economy**(65)**. Articles 367 and 368 of the Criminal Procedure Code, however, permit second instance courts to conduct hearings for this very purpose, if there are legitimate reasons for not returning the case to the first instance court. These articles should be broadly construed to promote hearings before second instance courts. In the Vikalo case, the second instance court essentially passed the buck and declined to resolve the factual and legal issues. A better practice is to authorize either the prosecutor or defense counsel, on behalf of the defendant, to request a hearing before a second instance court.

The inability to appeal a decision of the second instance court to a third instance court also promotes judicial waste. Under the Criminal Procedure Code, neither the prosecutor nor the defense counsel (nor the first instance judge) could appeal the decision of the Cantonal Court. Article 384 of the Criminal Procedure Code only provides for the appeal of a verdict, as opposed to a decision, of a second instance court**(66)**. Generally stated, a decision concerns itself with non-final matters (such as violations of procedure); whereas, a verdict concerns itself with substantive, final matters. What if, however, the Cantonal Court's decision is not entirely correct? The Criminal Procedure Code does not afford an avenue of appeal to the Federation Supreme Court to check the Cantonal Court's decision, even though such a decision had the result of vacating a first instance verdict and ordering an entirely new trial. This procedural constraint is contrary to judicial economy, for if a third instance court were to disagree with a second instance court, then the perfunctory return of a case to the first instance court may be prevented. Hence, the appellate process unnecessarily shields the second instance court from accountability and provides little incentive for the second instance court to resolve questions of law and fact or to render final judgment in the form of a verdict, which, under the Criminal Procedure Code, would be subject to appeal to the Federation Supreme Court.

JSAP recommends a reform of appellate procedure to promote judicial economy. Nearly 21 months after criminal proceedings began in the Vikalo case, the Municipal Court is conducting a new trial. Although the criminal justice system may require a longer period to process more complex criminal cases, the criminal justice system cannot operate efficiently if second instance courts can vacate first instance verdicts and perfunctorily remand cases without the possibility of review by a third instance court. Second instance courts should conduct hearings, receive evidence, and issue final judgments. Only in instances where grievous error would prevent the resolution of a case on appeal, should the second instance court remand a case to a first instance court for further action.

JSAP also recommends a reform of appellate procedure to allow the appeal of a decision, and not simply a verdict, of the second instance court to a third instance court. The Vikalo case makes a compelling argument for permitting parties to challenge the decision of second instance courts regardless of the basis for overturning a verdict of a first instance court. Restricting the right of appeal only to verdicts of second instance courts promotes form over substance. A decision of the second instance court that undoes a first instance verdict should be subject to appeal to ensure that it is legally sound. Without such review, the tendency is for the second instance court to issue a decision (and not a verdict) and to return the case to the first instance court with unclear guidance for more evidentiary hearings or a new trial.

6 CONCLUSIONS AND RECOMMENDATIONS: THE NEED TO REFORM THE BIH CRIMINAL JUSTICE SYSTEM

6.1 The Larger Picture: Unchecked Corruption, Public Distrust of BiH Institutions, and Waning International Support

At the outset, this report provided an overview of corruption in BiH, its eroding effects on BiH society, and the imperative need for an effective criminal justice system that punishes corrupt government officials. The general public does not have faith in BiH politicians to conduct government affairs honestly. The GAO report, echoing complaints from international organizations, denounced the persistent lack of will of BiH politicians to reform institutions in order to combat public and private corruption. The GAO report stated that, based upon a survey conducted in October 1999, 50 percent of the people from all ethnic groups in BiH believe that corruption is prevalent at central and local government levels and, also, in the transaction of business in the private sector. Moreover, the GAO report further indicated that a substantial number of legal abuses of individuals' rights occur within the public administration system, which is staffed with individuals who handle public complaints selectively and who take bribes. According to the GAO report, influential political party officials secure the appointment of administration officials based upon party loyalty. Furthermore, the GAO report pointed out the near immunity from prosecution enjoyed by individuals who rose to power during the war and, since then, have built illegal networks that are linked to government officials.

The negative consequences of unchecked corruption are increasingly real for BiH society, as the international community grows weary of political obstruction and of a poor record of criminal convictions against government officials. The GAO report cited the Vikalo case and expressed skepticism that the government officials would serve sentences in prison. To date, that skepticism has proven accurate. More worrisome, the GAO report was unable to cite a single case, prior to the Vikalo case, where a court had found a high-level government official guilty of corruption charges and the official served a sentence in prison. Clearly, the observations in the GAO report reveal the current inability of the criminal justice system to combat fraud on a perceptible level.

International headline news also paints a grim picture. A front-page article, appearing in the International Herald Tribune on 27 November 2000, reported that the international community is losing its will to aid BiH. The article stated that BiH politicians have had a corrupting and debilitating aim of retaining power at all costs through, among other things, the misuse of state funds and the perpetuation of ethnic division. The article made reference to theft of public funds from six public utility companies and cited an audit that uncovered evidence of government fraud involving illegal disbursements, without authority or accountability, by the office of the BiH Prime Minister from a $50 million fund.

Indeed, not only has corruption eroded public confidence in BiH politicians and institutions, but also it is wrecking the prospects of future assistance. The GAO report recommended to the congressional committee that the Secretary of State of the United States of America reassess levels of aid to BiH, including possible suspension of all aid unless BiH officials demonstrate the will to fight corruption on a measurable level. The article in the International Herald Tribune reported that many large donors intend to reduce their aid to BiH in 2001 by as much as one-third of previous levels. These actions are a response to the failure of BiH institutions to reduce corruption in the public and private sectors.

JSAP concludes that the criminal justice system must undergo reform if it is to uphold its primary responsibility of punishing crimes, especially government corruption. Without undertaking the reform in line with the recommendations in this report, the criminal justice system will remain a target of criticism for its failure to establish a society based upon the rule of law. Reform, then, should be an immediate priority, as the window of opportunity to draw upon international support is closing. If this opportunity is missed, then the people of BiH will place even less confidence in public institutions and, sadly, corruption will dim the prospects of post-war normalization.

6.2 JSAP's Conclusions about the Weaknesses of the BiH Criminal Justice System

6.2.1 The BiH Criminal Justice System Fails to Uphold Its Primary Responsibility to Prosecute and to Punish Criminal Behavior While Protecting the Fundamental Rights of the Accused

The criminal justice system occupies the central role in rooting out and punishing individuals who perpetrate crimes and, to this end, largely depends upon its components: the courts, the prosecutors' offices, and the law enforcement agencies. The ability of the criminal justice system to prosecute and to punish criminals effectively is the quintessential means by which to defend citizens from criminal abuse and to deter criminal behavior.

A criminal justice system must protect the fundamental rights of the accused and afford defendants due process of law during the course of all criminal proceedings. Additionally, a criminal justice system must promote the professional and efficient handling of cases in reasonable periods of time.

The challenge in BiH is to establish a criminal justice system that is efficient and that protects the rights of a defendant and an injured party at all stages of criminal proceedings. In this regard, the Vikalo case identifies current problems affecting the criminal justice system that seriously undercut its level of performance. Indeed, the Vikalo case is symbolic, as it confirms the general public's perception that the BiH criminal justice system is neither able to investigate, to prosecute, and to punish criminal behavior effectively nor capable of processing serious criminal cases in a period of time that respects the fundamental rights of an accused.

JSAP concludes that the BiH criminal justice system's level of performance is substandard because it does not promote the effective investigation, prosecution, and punishment of serious criminal behavior, which, from a societal standpoint, is destabilizing. Such substandard performance is attributable, in part, to inefficient investigative and main trial procedures that, in practice, make the successful prosecution of serious criminal behavior an improbability. Thus, the BiH criminal justice system is, in effect, shielding criminals from being held accountable for their criminal behavior, which, ultimately, is a perversion of its responsibility to prosecute and to punish criminal behavior while safeguarding the fundamental rights of an accused.

6.2.2 The Lack of Professionalism and Competency within the BiH Criminal Justice System is Seriously Undermining the Effective Prosecution and Punishment of Criminal Behavior

Some of the problems the BiH criminal justice system are the by-product of defiant, combative individuals within the criminal justice system. To correct these problems, law enforcement agencies and prosecutors' offices must be staffed with competent and professional individuals who are dedicated to law enforcement and not to obstruction. The courts also cannot tolerate incompetence or obstruction from judges. Although the judges at the Municipal Court handled the Vikalo case dutifully, JSAP has, in other instances, encountered judges who failed to process cases competently.

Presently, the image of judges and prosecutors is marred by allegations that the criminal justice system is corrupt and unproductive. It would be wrong to deny that there may be some truth to such allegations. It would be even more wrong not to counter this negative image by failing to hold accountable judges, prosecutors, and law enforcement officials who fail to execute their duties ethically or competently.

The unrelenting expectation of professionalism and ethical behavior and their realization are necessary to eliminate substandard performance within the criminal justice system. The Vikalo case demonstrates the need for individuals within the criminal justice system to alter their professional attitudes about law enforcement, to take responsibility for their actions and to execute their duties faithfully. Notwithstanding any recommendations by JSAP to reform the criminal procedure law, there is, nevertheless, a considerable margin within the existing criminal procedure law that demands a new professional approach so that, at the very least, existing methods of investigating and prosecuting criminal behavior become more efficient and, ultimately, more effective.

In this respect, the establishment of the independent judicial and prosecutorial commissions is vital to instilling professionalism and competency in prosecutors' offices and in the courts. These commissions must assert their authority under law to ensure that only professional and competent individuals become judges and prosecutors. In particular, the commissions must firmly discipline judges and prosecutors who fail to execute their duties faithfully and breach ethical rules.

JSAP concludes that law enforcement officials, prosecutors, and judges must demonstrate higher degrees of professionalism and competency, if the level of performance of the BiH criminal justice system is to improve. Law enforcement officials, prosecutors, and judges must demonstrate an understanding that their mutual professionalism is essential to prosecuting and punishing criminal behavior effectively. In other words, as professionals, they must change their attitudes about their roles within the criminal justice system and take responsibility for their actions. To this end, the judicial and prosecutorial commissions must assert their authority over judges and prosecutors and make sure that only professional and competent individuals serve as judges and lawyers. According, these commissions should discipline, and where necessary remove from office, judges and prosecutors who act unethically or who fail to execute their official duties competently.

6.3 JSAP's Recommendations about Reforming Criminal Procedure

6.3.1 The Role of the Investigative Judge Should Be Abolished in Order to Relieve the First Instance Court of the Enormous Responsibilities of Conducting Investigations

Other problems afflicting the BiH criminal justice system are structural and, therefore, require reforming criminal procedure. The BiH criminal justice system should acknowledge that the first instance court is overburdened in the fact-finding process during the investigation. To reduce the court's burden, the prosecutor and the defense counsel must assume more active roles during the investigation phase. The prosecutor should be responsible for conducting investigations and gathering all incriminating evidence. The defense counsel should be responsible for obtaining copies of all relevant evidence from the prosecutor and bringing forth evidence that rebuts the prosecutor's allegations.

A period of transition would facilitate the implementation of this proposed procedural reform. During that transitional period, the first instance judge could examine an indictment to ensure that the alleged offense is punishable by law. Eventually, however, the defense counsel would have the obligation of challenging the legality of an indictment, before a court would be obligated to inspect its legality. The court should, nevertheless, retain its ex officio power to dismiss an indictment, in order to prevent a miscarriage of justice. Ultimately, this change in judicial role will relieve the first instance court of time-consuming investigations and enable the court to process cases that go to trial more efficiently.

JSAP recommends that the role of the investigative judge be abolished in order to relieve the first instance court of enormous responsibilities of conducting investigations. The elimination of the role of the investigative judge will foster criminal proceedings that are more party-driven and less judge-driven. During a transitional period, the presiding judge of the first instance court would increasingly rely upon the prosecutor to conduct investigations and to lodge indictments. At the same time, the presiding judge would increasingly expect defense counsel to challenge the legality of an indictment.

6.3.2 Main Trial Proceedings Should Be More Party-Driven and Less Judge-Driven so that the Parties are Obligated to Present Factual Evidence to an Impartial Judge, Thereby Relieving the First Instance Court of the Enormous Responsibilities of Building an Evidentiary Record

The BiH criminal justice system should also acknowledge that the first instance court is overburdened with the enormous responsibility of building an evidentiary record at main trial proceedings. The criminal procedure should burden the prosecutor with the hard work of establishing guilt and the defense counsel with the equally hard work of presenting exculpatory evidence

or challenging the prosecutor's evidentiary case. Although this technique is commonly associated with the adversarial approach of eliciting evidence at trial, many European judicial systems that have an inquisitorial approach require the parties to present evidence at the main trial. Currently, the prosecutor and defense counsel assume too passive a role in the production of evidence at trial. Yet, they are far more familiar with the facts of a case than a presiding judge by virtue of having been involved in the investigative phase of the case and the filing of pre-trial motions.

Criminal proceedings driven more by the parties and less by the first instance court judge promote judicial economy. Requiring the parties to bear burdens of proof and produce evidence consolidates the criminal process at the main trial stage. That is, the parties must be fully prepared to present their cases to the first instance court at the time of the main trial. Prior to the main trial, the prosecutor and defense counsel should be developing the evidence in accordance with the theories of their cases so that at the time of the main trial the presiding judge can direct the parties to present their evidentiary cases. Under the current criminal procedure, the judge at the main trial is duplicating the work of the investigative judge, while the prosecutor and defense counsel play an insufficient role in criminal proceedings. Under the current criminal procedure, the first instance court judge's intensive involvement in the gathering of evidence prior to the main trial and the production of evidence at the main trial constrains the judge's ability to rule on matters affecting the merits of the case from a neutral position.

Thus, in order for the first instance court to be more effective, the criminal justice system should redesign the role of the judge and shift the burden of presenting and rebutting evidence at the main trial to the prosecutor and defense counsel, respectively. In so doing, the judge should retain the authority to examine witnesses and request the production of evidence at the main trial (an aspect of the inquisitorial approach), in order to prevent the miscarriage of justice. This ex officio authority, however, should be exercised only in exceptional circumstances so that the judge can remain impartial.

JSAP recommends that main trial proceedings should be more party-driven and less judge-driven so that the parties are obligated to present factual evidence to an impartial judge, thereby relieving the first instance court of the enormous responsibilities of building an evidentiary record. The prosecutor and defense counsel should bear the responsibility of preparing their cases and of consolidating the presentation of evidence at the main trial stage. The first instance court judge should retain ex officio authority to intervene into the case at main trial proceedings, however, only in exceptional circumstances in order to preserve the judge's impartiality.

6.3.3 In Order to Promote Accountability and Judicial Economy at the Appellate Level, Second Instance Courts Should Develop the Practice of Conducting Hearings and Resolving Cases, and Decisions and Verdicts of Second Instance Courts Should Be Subject to Further Appellate Review

The BiH criminal justice system should further acknowledge that its appellate procedure does not promote the efficient resolution of cases, but rather perpetuates a cycle of non-final decisions. Over the past two years, JSAP has observed second instance courts decline to decide factual or legal issues and, instead, return the cases to first instance courts for further action. A criminal justice system that perpetuates a cycle of non-final decisions is contrary to the principle embedded in Article 6 of European Convention on Human Rights that criminal proceedings are to be conducted within a reasonable time**(67)**.

Appellate procedure should promote resolution of questions of law or fact by the second instance court, in order to expedite the final resolution of criminal cases, to ease the burden of cases being handled by first instance courts, and to avoid a duplicative trial process. In practice, second instance courts decline to issue final judgment in cases on appeal, even though the Criminal Procedure Code allows the second instance courts to schedule hearings, make factual determinations, and affirm or reverse verdicts of the first instance court**(68)**.

Second instance courts should, therefore, utilize the existing provisions in the Criminal Procedure Code and resolve cases by conducting hearings and issuing verdicts. Parties to an action on appeal should have the right to request a hearing at the second instance. Only in exceptional circumstances, for example if grievous error cannot be rectified through a hearing at the second instance, should a second instance court not render final judgment and, instead, remand a case for further action.

JSAP recommends that second instance courts utilize provisions in the Criminal Procedure Code to conduct hearings and issue final judgments. As a main rule, second instance courts should resolve cases on appeal and, as an exception, remand a case to the first instance court for further action.

In a similar vein, parties should be able to challenge a decision of a second instance court that vacates a first instance verdict, in order to ensure that such a decision is legally correct. Under the current criminal procedure, parties may only appeal a verdict (under limited circumstances) but not a decision of a second instance court. Such a procedural limitation, in effect, allows the second instance court to decide matters without being held accountable. It is, however, in the interests of judicial economy to allow a third instance court to review a decision of a second instance court before a case is returned to the first instance court for further action.

For instance, a third instance court could check any errors committed by a second instance court and, possibly, obviate the need for further action by the first instance court. Alternatively, the third instance court could provide definitive guidance on questions of law (and fact) that, upon appeal by the parties, the second instance court failed to resolve adequately. Providing an avenue of appeal to a third instance court would encourage the second instance court, as a general rule, to resolve a case and, only in exceptional circumstances, to return a case to the first instance court with clear guidance for further action. This type of appellate practice would promote the resolution of cases within a reasonable time.

JSAP recommends that the Criminal Procedure Code be revised so that decisions and verdicts of second instance courts are subject to appeal by the parties to a third instance court.

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(1) JSAP received a program mandate of two years and will discontinue at the end of November 2000. OHR continues to oversee the Anti-Fraud Unit.

(2) United States General Accounting Office, Crime and Corruption Threaten Successful Implementation of the Dayton Peace Agreement, July 2000.

(3) Article 41, Criminal Procedure Code. All further article references in footnotes are to the Criminal Procedure Code unless otherwise stated.

(4) Compare Articles 41, 150, and 166.

(5) Article 143. Note, however, Article 146, which governs on-the-scene investigations and requires the law enforcement agency to obtain prior approval from an investigative judge, who is not able to be present at the scene, to order expert evaluations. Article 146 also requires the law enforcement agency to inform the competent prosecutor, if possible, before ordering the expert evaluations.

(6) Article 143(5).

(7) Article 143(6).

(8) Article 145.

(9) Ibid.

(10) Article 147.

(11) Article 148. In this event, the investigative judge shall inform the competent prosecutor, if possible, and permit the prosecutor to attend the investigative proceedings.

(12) Article 150(3).

(13) Article 150(4).

(14) Article 150(6).

(15) Article 150(5).

(16) Article 79(1) and (2) and Article 150(5).

(17) Article 150(1).

(18) See Article 151(2), for an exception to this requirement.

(19) Article 152(1). The investigative judge, however, must first interview the accused, as required by Article 152(2).

(20) See Articles 149, 162, and 166.

(21) Articles 157 and 158. If the investigative judge expands the investigation, then the competent prosecutor must be informed.

(22) Articles 154(3) and 156.

(23) Article 164.

(24) Article 160.

(25) Article 159.

(26) See, in general, Article 151.

(27) Article 165.

(28) Article 162.

(29) Article 166(2).

(30) Ibid.

(31) Article 166(3).

(32) Article 166(4).

(33) Article 41(3) and 152. See, also, Article 166(1), which requires the investigative judge to terminate the preliminary examination if the facts are sufficiently clear to warrant the issuance of an indictment.

(34) Article 256.

(35) See Articles 256, 317-331 and 334-335.

(36) The Cantonal Prosecutor interpreted the meaning of "law enforcement agencies" (organa unutrasnjih poslova) restrictively, as contained in Articles 144 and 145. The Cantonal Prosecutor interpreted this language to embrace only officials of Ministry of Interior, excluding custom, tax, and financial officials.

(37) Article 46 provides that the superior prosecutor shall decide any jurisdictional conflicts between competent prosecutors.

(38) The currency of BiH is the Konvertibilna Marka (KM) or Convertible Mark.

(39) A comparison of criminal procedure laws dating back to the 1940's reveals that the role of the investigative judge in the investigative process has increased while the role of the prosecutor has decreased. Presently, the investigative judge occupies a central role in the investigative process and retains the authority, subject to appeal, to determine whether formal criminal charges should be brought against an accused.

(40) See Article 79(1), (2) and Article 150(5).

(41) Pursuant to Article 152(1), the investigative judge may concur with the recommendation of the prosecutor to waive the preliminary examination if the information so far gathered is sufficient grounds for issuing an indictment, subject to the investigative judge's obligation to examine the accused, as required by Article 152(2). The Municipal Prosecutor, however, did not recommend that the preliminary examination be waived.

(42) The indictment in the Vikalo case was just one aspect of a larger criminal investigation conducted after the Federation Ministry of Finance inspected the transactions of the Tuzla government during the period of 1997-98. The larger investigation included as many as fifteen government officials.

(43) The indictment against the four defendants is based upon Articles 358 and 366 of the Criminal Code of the Federation.

(44) See Article 102 of the Tuzla Canton's Law on Courts. Actually, Article 102 provides for the delegation of a judge from the Cantonal Court to a Municipal Court where there is an insufficient number of judges, which, apparently, was not the case.

(45) See Article 353(2). Compare, also, Article 348(1)-(6) and Article 183(2).

(46) See Articles 366 and 367, which set forth the basis and procedure for a second instance court to conduct a hearing and elicit new evidence.

(47) Article 374 permits the second instance court, among other things, to vacate a verdict and return it to the first instance court for retrial. See also, Article 378(1).

(48) See Article 370(1), which requires the second instance court to automatically review a verdict for essential violations of procedure. See also Article 358.

(49) See Article 358(9). It is difficult to understand how the modified language prejudiced the rights of the defendant at trial. In fact, the Cantonal Court, later in its decision, ruled that the defendants understood the modified bill of indictment and the modifications were not of such character as to require a longer time to prepare a defense.

(50) Even if the act of giving the order were not within the scope of duty of the cantonal Prime Minister, it is not clear how this fact alone would serve as a defense. If Vikalo ordered the Director of Strategic Reserves to purchase paint in violation of cantonal law, then the failure to abide by cantonal law could serve as a basis for finding an abuse of public office or negligent performance of official duties.

(51) See Article 358(7).

(52) See Article 351(7).

(53) The Cantonal Court's decision, although acknowledging that the Official Gazette of the Federation contained regulations governing the purchase of goods, seems to require additional, specific proof that the defendants knew they were violating public bidding procedures. Such a requirement would appear contrary to the legal maxim that ignorance of the law is not a defense.

(54) The Cantonal Court's decision neglects to recognize that the Municipal Court, based upon the evidence in the record, concluded that Sinanovic violated public bidding procedure by failing to solicit competitive bids. Moreover, a reasonable interpretation of the evidence supported the Municipal Court's conclusion that Sinanovic did not have the authority to enter into any contracts other than in accordance with the Law on Strategic Reserves, which became effective in June 1997, prior to the occurrence of the alleged criminal offenses. The Cantonal Court would appear to be substituting its judgment for the judgment of the Municipal Court on matters of fact-finding. In addition, the Cantonal Court declined to interpret the Law on Strategic Reserves to assist the Municipal Court in applying this law to the facts of the case.

(55) See Articles 157 and 158.

(56) See Articles 79 and 150(5).

(57) See Article 41.

(58) See Articles 317, 322, and 335.

(59) The subsequent Cantonal and Municipal Prosecutors assigned to these cases did not consolidate both cases before one court. Thus, Vikalo and other defendants are being tried on separate criminal charges in both the Cantonal Court and the Municipal Court.

(60) In fact, as discussed, OHR removed the initial Cantonal and Municipal Prosecutors from their offices.

(61) See Article 353.

(62) The Cantonal Court cited Article 378(1), which authorizes remand of the case for retrial in the event of criminal procedure violations.

(63) See, for example, footnotes 50, 51, 54, and 55.

(64) JSAP contacted judges at the Sarajevo Cantonal Court regarding the frequency with which second instance courts conduct hearings. One Cantonal Court judge could not remember a single Cantonal Court, sitting at second instance, having conducted a hearing in the last two years and could not identify a single case before then that resulted in a hearing. Another Cantonal Court judge was not aware of a single hearing in a case at the second instance level in the past eleven years. Still another judge, who handles civil cases at the Sarajevo Municipal Court level, could not recall a hearing at the second instance level in fifteen years. A judge at the Banja Luka District Court could only remember one case involving a hearing at the second instance level, apparently the result of heavy political pressure. Thus, although the law allows second instance courts to conduct evidentiary hearings, they almost never do so.

(65) The failure of second instance courts to resolve cases also leads to unnecessarily lengthy proceedings and runs counter to the right to a fair hearing within a reasonable time. See Article 6 of the European Convention on Human Rights.

(66) Compare Articles 384 and 385. Article 384 allows for the appeal of a verdict of a second instance court; however, Article 385 only allows for the appeal of decisions of first instance courts.

(67) The issue of delays in the judicial process generally will be the prime focus of JSAP's final thematic report, to be released shortly.

(68) Compare Articles 367, 374, and 384.