



Bosnia and Herzegovina in search for accountability

Prosecution of high profile politicians in Bosnia and Herzegovina

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Summary

The study conducted by the World Bank (2009) reports that the government of BiH is ranked the least accountable among countries in the region, including judiciary system. Even though judicial reforms created institutional conditions for independence of judiciary, a number of structural and political problems still hamper effectiveness of BiH judiciary (Azinovic, Bassuener, Weber, 2011). One of those aspects recognized as problematic in BiH judiciary is prosecution of high profile politicians (OSCE 2010), a phenomenon examined in this study. This research is based on case study approach which allowed in depth investigation of the processes and judgments of three cases of high ranking politicians in BiH, namely Dragan Covic, Edhem Bicakcic and Mladen Ivanic all of whom held the highest positions in BiH Presidency or Council of Ministers and later in their respective political parties. The study examined why, in spite of strong evidence, are these politicians acquitted before the court of BiH. During the course of this study number of obstacles were encountered in accessing evidence or indictments, documents that otherwise should have been made available to BiH public. In addition all of the prosecutors involved in the case refused to take part in this research. Nevertheless insightful data was obtained from judges, documentary evidence and media reports. The research identified number of irregularities in BiH judiciary system that enabled acquittal of these cases:

- The court interprets the laws differently for different cases which raises suspicion in independence of judiciary
- In the middle of the trial the court stops the process under the excuse of not being authorized to deal with the particular case
- Irregular use of evidence and inconsistent procedures regarding admissibility of evidence
- Issue of limitations of legal proceedings and why there is a delay up to 10 years in commencing the processing of the cases.
- Political and media pressures on judiciary is something that BiH judicial system has not been addressing seriously

Having in mind the complexity of socio-political structure of BiH it is evident that the present problem of inadequate prosecution of high profile politicians can cause serious public mistrust in impartiality, independence and transparency of judiciary system. Taking into consideration the judiciary context in BiH, this study suggests a policy option that does not require use of extensive additional resources to make changes to BiH legal system. The most realistic policy option is to create a set of guidelines that can be used by prosecutors as well as judges in cases brought to the Court of BiH. In long term, application of these guidelines can lead to the creation of a common and unified policy in prosecution in general as well as in prosecution of high profile politicians in BiH and ultimately contribute to a higher level of internal accountability of the entire judicial system.

1. INTRODUCTION

Although for over twenty years Bosnia and Herzegovina (BiH) has been making efforts to strengthen democracy, one of the basic democratic postulates, the accountability postulate, has been missing from most of multilateral institutions, whilst obstruction of law is common occurrence in BiH. Study conducted by the World Bank (2009) reports that the government of BiH is ranked the least accountable among countries in the region, including judiciary system. Although the partial reform in the judiciary system has been enforced with the aim to enhance the quality of court's work by raising it to the level of rule of law, the current situation is far from satisfactory.

The situation is summarized by Gary D. Robbins (2010), Ambassador and Head of OSCE Mission to BiH: *'Despite noteworthy progress, much remains to be done. The goal of a BiH justice system fully capable of upholding the principles of rule of law remains distant.'* It is in this context that the role of judiciary gains relevance in contemporary endeavors to acquire regime legitimacy and meaningful form of democratic practices. Furthermore, the judiciary is a key structure responsible for accountability and constitutional control. The issue of legal accountability should be addressed not only in terms of how effectively judiciary fulfills its function of rendering public officers legally responsible and accountable but the internal accountability of the courts should address as well (Schedler, Diamond & Plattner, 1999).

Important aspect of accountability is judicial independence,, -as a vital element for courts to have capacity to fulfill their function of constitutional control, legal accountability, and justice administration (Pilar, 1999).¹ Lack of judicial independence is a problem recognized in the BiH judiciary system by the OSCE Program of Justice Sector Monitoring and Advocacy. Through this Program the OSCE has monitored criminal proceedings before all courts in BiH since 2004, including the prosecution of the high-profile politicians and, in 2009 the OSCE issues the following statement: *'OSCE BiH is deeply concerned about the nature of statements expressed by some prominent political representatives, particularly but not exclusively from the Republika Srpska, in relation to the work of the Court of BiH and BiH Prosecutor's Office. While the executive and legislative powers may legitimately scrutinize and comment on the functioning of the judiciary, the Mission's assessment is that these statements, due to their harsh content, unsubstantiated nature, and frequency, overstep the limits of acceptable criticism and constitute undue pressure on these independent institutions.'*

Since then, the practice of influencing political figures, especially the ones that were or are in trial at the Court of BiH, through media and other ways is continued. This is also examined by Azinovic, Bassuener and Weber (2011) who argue that BiH judiciary is not free from political pressures or corruption. This highlights the question why most of the court proceedings against high-ranked politicians have resulted in acquittals. This question is a basis for a policy problem/question addressed in this study: are these acquittals grounded in sound legal evidence and to what extent politicization of the process played part in this. Addressing this question is important not only for increasing transparency, but it is a vital in order to realize accountability trustworthiness and in making relevant information available for those who are interested to know what actually happened (Bemelmans and Videc, 2007).



1.1. Methodology

The research was organized using a case study approach with in-depth investigation of three high profile cases acquitted before the courts in BiH (Bičakčić, Čović and Ivanić).² As an empirical inquiry, case study approach is suitable for investigating a social phenomenon within its real life context and it permits the use of multiple sources of evidence (Yin, 1989). Since the case study approach is useful in understanding particular issues in a greater depth, it was suitable for undertaking comprehensive analysis of the court processes Bičakčić, Čović and Ivanić. Also, relevant provisions of the European Court of Human Rights (ECHR) and Law of Criminal Procedure (CPC) were analyzed and their implementation in all three processes was measured. This study takes into consideration the specific nature of legal research which allows researchers in legal field to make conclusions and recommendations based on the analysis of only few cases, as it has been done in this research:

- Anglo-Saxon law system treats individual court decision as a source of law in the form of legal precedent making it not only possible but mandatory to make general conclusions over one case
- Continental law system treats individual court decision as a significant source of law and as a guidelines for further processing by using strength of arguments so making general conclusions over one case is possible and advisable;
- In the sum of 326 court cases in front of the Section II of the Court of BiH only 8 were processes against politicians and 6 of them were acquitted, one of them entered into a plea agreement and one was first degree conviction but only for a part of indictment. Therefore this study chose three most prominent cases against political figures that can be classified as high profile because they performed highest functions in BiH Presidency, Council of Ministers or were at some point leaders of three major political parties. They are also representatives of three constitutional nations in BiH.³

In addition to analyzing evidence the original plan was to conduct interviews with purposefully selected individuals with the key connection to the cases examined (Tonkiss, 2006). The people who were approached for the interview were: prosecutors and their assistants working on these cases and judges who presided at the courts during the trial. However, even though I carefully explained the study in a non-threatening way (i.e. not aiming to find the faults but to study and analyze the process) I was not allowed to conduct a single interview with the prosecutors or their assistant who worked on those cases. Furthermore, despite the fact that I specifically followed the protocol provided in 'Guidelines for access, publishing and disseminating of information in the possession and under the control of the Prosecutor office of Bosnia and Herzegovina' I was refused access to inducement in all three cases without any written explanation.⁴ This action of Prosecutor's Office of Bosnia and Herzegovina is contrary to the provisions of the 'Law on Free Access to Information in Bosnia and Herzegovina'. In addition it shows poor attitude towards legal research and furthering knowledge in judiciary. It can also be understood as a tendency to prevent external assessment and evaluation.

Interviews conducted with judges who presided at the courts during the trial and the other judges of the Section II of the Court of BiH⁵ provided key data for this study. The interviews were semi- structured qualitative interviews based on a series of open- ended questions and topics

¹ Autonomy of the courts and judicial independence are necessary to achieve impartiality in the task of adjudication and to ensure the advancement of the rule of law and effective legal accountability. The independence encompasses political autonomy from other governmental branches what is essential in the quest for horizontal accountability. This is crucial to ensure that judge's decisions are not influenced by political considerations (Pilar, 1999).

² At a time of the indictments and trials for those cases the defendants were the highest political, state and entity officials. Edhem Bičakčić was a prime minister of the Government of FBiH, Dragan Čović was a deputy prime minister of the Government of FBiH and a minister of a Ministry of finance of FBiH, (currently he is a President of a political party Croatian Democratic community (HDZ BiH)), and Mladen Ivanić was a prime minister of the Government of RS. That fact, as well as a fact that, among the other things, they were accused of Abuse of Office or Official Authority, makes these three cases high profile.

³ In the rest of the cases defendants were delegate in the House of Peoples of the Parliamentary Assembly of BiH, Minister of Defense of FBiH and a member of the Presidency of BiH and two Assistant Secretaries of Defense of FBiH that are lower functions of those that were performed by the accused in chosen cases.

⁴ 'Law on Free Access to Information in Bosnia and Herzegovina- (Official Gazette of BiH no. 28/00

⁵ Interviews were conducted with the judge Dragomir Vukoje who was member of the Panel in the case Čović Dragan and the others, with the judge Izo Tanakić who was member of the Panel in the case Bičakčić Edhem and another, with judge Ranko Perić who was a president of HJPC and judge Carol Michael Peralta who were not connected to those cases but who are currently working in the section II of the Court of BiH.

⁶ Semi-structured interviews are suitable for this kind of study, because they will allow interviewees, who are knowledgeable about the cases, to raise issues, bring in new ideas and add what they see relevant.

⁷ In preparing this study I was aware of the constraints in interviewing elites: they are less likely to share information, there is a risk of cancellation and interviews being conducted under pressure (Mangen, 1999).

⁸ Since content analysis runs the risk of ignoring context and multiple meanings its combination with thematic analysis reduced this problem.

carefully prepared in advance. The questions were used to open discussion and provide further prompts, instead of restricting interviewees' responses (Brayman, 2004).⁶ Qualitative interview allows for investigation of sensitive topics (Byrne, 2006), thus facilitating smooth flow of communication on sensitive issues related to the cases. Interviewees were asked for permission to record the interview, but they declined due to sensitivity of information and court protocols, instead copious notes were taken and the full transcript of the conversation was made immediately after the interview.⁷ During the interviews some judges provided interesting opinions and evidence but asked for it to be exempt from the report. This is the specific ethical situation researchers of sensitive topics have to deal with and I decided to respect their wishes.

In analyzing the obtained data the research relied on thematic analysis (Miles and Huberman, 1994), complemented with content analysis where appropriate.⁸ The validity of the research was achieved by using the strategy of triangulation, which is one of the most popular techniques in achieving trustworthiness of the results (Steinke, 2004). Interview data were complemented with analysis of the evidence used in the court. The corroboration of multiple techniques and sources of data will increase the validity and reliability of findings. In interpreting data I sought the support from two colleagues who are practicing law and are experienced lawyers.

Furthermore within this research I analyzed media reports connected to those trials and counted the number of harsh media statements of the influential figures of both Entities related to these trials. The OSCE Mission to BiH considers harsh media statements of the influential figures related to trials to high profile politicians as a way of politicization of the judiciary, so I took into consideration this parameter as well. -The following section provides a brief overview of the legal system in BiH and it presents key deficiencies and problems in prosecuting high profile politicians in BiH as identified in the literature review. This section also highlights the importance of dealing with the policy problem of prosecution of high-ranking political figures in BiH.

2. PROSECUTION OF HIGH PROFILE POLITICIANS IN BiH: DEFFICIENCES AND PROBLEMS

2.1 Judiciary system in BiH

Since the establishment of BiH as an independent state (1992) legal and judiciary system of BiH continued to be a subject to numerous changes until today. The year 2003 was marked by dramatic changes including court and prosecutorial restructuring, the adoption of new criminal and criminal procedure codes, civil procedure codes, and the formation of new judicial institutions. These newly formed bodies included the State Court – Court of Bosnia and Herzegovina, the BiH Prosecutor's Office, a single State High Judicial and Prosecutorial Council (HJPC), and Judicial and Prosecutorial Training Centers in the Federation of BiH (FBiH) and Republika Srpska (RS).

⁹ Those areas are: judiciary, execution of criminal sanctions, access to justice, support to economic growth and a coordinated and well-managed and accountable sector.

¹⁰ Those sub groups are: Independence and Harmonization, Efficiency and Effectiveness and Accountability and Professionalism with the common strategic objective: 'To further strengthen and maintain independence, accountability, efficiency, professionalism and harmonization of the judicial system which ensures the rule of law in BiH' (Bosnia And Herzegovina Justice Sector Reform Strategy 2008 – 2012)

Furthermore on June 23, 2008 at the session of the Council of Ministers of BiH 'Bosnia And Herzegovina Justice Sector Reform Strategy 2008 – 2012' (BH JSRS) was adopted with the objectives classified in five areas⁹ and a set of agreed strategic programs and activities to build a better, more accountable and more effective judicial sector throughout BiH. The issues concerning the judicial system in BiH that are addressed through this strategy have been divided into three sub-groups, and a number of strategic programs were developed for each sub-group.¹⁰



According to the Strategy there are five main issues that fall under the sub-group 'Independence and Harmonization' that are addressed through specific strategic programs, the first three of which relate to further protecting judicial independence: *'The current process of preparing and executing judicial budgets could potentially be vulnerable to undue political pressure, and as such the role of the HJPC as an intermediary between the judiciary and the executive authorities in the budgeting process needs to be strengthened. The ability of the ministries of justice, as well as the Brčko District Judicial Commission, to set strategic guidelines and priorities for budget planning for the judicial system also needs to be strengthened, but such decisions also need to be based on a thorough and up-to-date assessment of the financial needs of judicial institutions, as current judicial budget plans and projections are often based on information that does not reflect current realities.'* (Bosnia And Herzegovina Justice Sector Reform Strategy 2008 – 2012).

Despite all of this, 'Mid-term Strategic Plan of The Ministry of Justice of Bosnia and Herzegovina for the period 2009 – 2011' (2010) does not deal with this problem.¹¹ However 'Action Plan for the Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina (2009 – 2013)' (2008) (BiH JSRS AP), as well as two revised BiH JSRS AP¹² provides specific steps and activities for implementation of the objectives established in BH JSRS concerning independence and harmonization. These have been important achievements but out of all planned activities in the Strategic pillar one in the 'Report on Implementation of the Justice Sector Reform Strategy in Bosnia And Herzegovina and its Action Plan For 2010' (2010) it is evident that only 66,67 % of all planned activities are achieved. Which brings a point that much more remains to be done and that the BiH judiciary system is still far away from the postulates of independence and depoliticization?

In identifying the policy problem this study was informed by earlier mentioned the OSCE Spot report (2009) that addresses the court processes of influential figures in BiH: *'Frequently, the Court of BiH and the BiH Prosecutor's Office has been the objects of attacks coming from political and other influential figures of both Entities, mainly in connection with investigations or trials conducted by these institutions against them. For instance, the former member of the Presidency of Bosnia and Herzegovina and current President of HDZ BiH Party Dragan Čović stated on a number of occasions that his own trial on charges of abuse of office – which started in 2006 before the Court of BiH -- was politically motivated. However, in the course of the last 12 months these instances have dramatically increased and the intensity of criticism and pressure has reached an unprecedented level'*. In relation to this matter Spot report unfortunately offers only a very vague solution by appealing on politicians to refrain from any improper influence or pressure on the judicial process and from attacks upon the reputation and integrity of the judiciary.

Since then, the politicization of high profile political figures is continued, especially the ones that were or are on trial at the Court of BiH, through media and other ways even though most of the court proceedings against high-ranked politicians have resulted in acquittals and many of investigations against them never resulted even with the indictment.

Even a press release of the Transparency International BiH (2011) 'Negligence and the frivolity of the judiciary in the case of Čović-Lijanović' indicates that there are some serious problems and deficiencies in the prosecuting high-ranked politicians in BiH. However, as it is the case with the OSCE report, Transparency international also does not recommend any solution for this problem.¹³

¹¹ Specific strategic programs that will be implemented in the judicial system by the Ministry of Justice of BiH in the period between 2009 and 2011, as stated in the 'Mid-term Strategic Plan of The Ministry of Justice of Bosnia and Herzegovina for the period 2009 – 2011 (2010)' are: 'Ministry of Justice of BiH is the central coordinating body in the judicial area. The activities of this strategic area are defined through five strategic programs, whose implementation should contribute to the strengthening of an independent, accountable, effective, professional and consistent justice system in BiH. One of the key obstacles to the efficiency and effectiveness of the courts is a huge backlog of cases, which amounted to 1.9 million in late 2006. About 56% of these cases involve small value claims in the enforcement procedure, while about 20% of the cases involve misdemeanor cases. Removing claims for utility bills from the judicial system will undoubtedly be an important step in solving this issue, but it will require certain changes in the legislation. Therefore, in the following period it is crucial to ensure implementation of agreed Action Plan for Reduction of Case Backlogs in BiH courts, including the enactment of relevant regulations that will help reducing the case backlog. With regard to enhancement of professionalism in the justice sector, it is necessary to invest additional efforts in the harmonization and modernization of the system of bar examination throughout BiH, in order to harmonize it with best practices of other countries. The status and performance of the Court Police of BiH, as an important element of the judicial system, will also be improved. The judicial system is a decisive element in sustainable economic growth of a country. Business entities in BiH do not have adequate access to mechanisms of alternative dispute resolution (ADR) to help them avoid lengthy and costly law suits. Corporate law suits are particularly harmful to small and medium enterprises. Certain pilot initiatives to test the ADR mechanisms, such as mediation, gave positive results in terms of extra judicial settlement of different types of corporate disputes. The minimum required infrastructure is already in place, but the challenge lies in the way of promoting ADR throughout the country. In order to achieve that, Ministries of Justice should build capacities for determining strategic direction for ADR. Enacting the Law on Obligations (Law on Contracts and Torts) is also one of the priorities of the Ministry of Justice of BiH.'

¹² Action Plan for Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina for the Period 2009 – 2013 (Revised) (2010) and Second Revised Action Plan for Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina for the Period 2009 – 2013 (2010)

¹³ Furthermore, the press relies states that *'Besides showing neglect and frivolity of judicial institutions in BiH, especially in the case of abuse of position on the highest level, these and similar cases further waste trust of the citizens in the judiciary, and that is why only urgent investigation into this case and sanctioning of those responsible for these extremely serious omissions can lead towards the regaining of public confidence in the judiciary. The fact that criminal investigations against high-ranking political and government officials in BiH last for years, without results, certainly does not provide the development of public confidence in the work of judicial institutions. Having in mind the catastrophic criminal policy of the courts in BiH, which adjudicated only a few cases of corruption, and in the 2 / 3 of them make conditional judgments, and that according to latest figures issued, there were only 9 judgment in cases of corruption in a year, it is clear that the prosecution of corruption in BiH is still an acute problem.'* (Transparency International BiH: Negligence and the frivolity of the judiciary in the case Čović-Lijanović, March 2011.)

¹⁴ OSCE Human Dimension Commitments are :

- Commitments Related to the Right of Peoples to Self-determination,
- Commitments Related to Structural Components of a Democratic Society,
- Commitments Related to Human Rights That Are Applicable to All,
- Commitments Related to Human Rights with a Focus on Specific Groups,
- Commitments Related to Equality, Tolerance, and Non-discrimination,
- Commitments Related to Specific Threats to Human Security and
- Commitments Related to International Humanitarian Law

OSCE Human Dimension Commitments (2005), <http://www.osce.org/odihr/elections/16363>

The politicization of the BiH judicial system is also visible through the information of the Center for Investigative Journalism (CIN) from Sarajevo according to which the 40 original documents from the prosecution record in the case against Čović and the others during the correspondence between the Prosecutor's Office (BiH), the Court of Bosnia and Herzegovina (BiH) and the Prosecutor's Office of the Canton Sarajevo (KS) have disappeared.. In the Interview for CIN Nives Kanevčev, Chief Prosecutor in KS said that she got the 'hot potato' and that the 'crucial evidences' in the case are missing. At the same time her colleague, Chief State Prosecutor, Milorad Barašin said that missing documents 'are not of the great importance for the case' and that 'if is necessary they can be obtained from the Custom Office at any time' (Missing evidences in the case Čović-Lijanović, Center for Investigative Journalism, 2011).

Independence and depoliticization of the judiciary is generally recognized as a fundamental principle of international human rights law, including several international instruments such as the International Covenant on Civil and Political Rights (ICCPR) adopted 1966, the European Convention on Human Rights and Fundamental Freedoms (ECHR) adopted 1953, and OSCE human dimension commitments.¹⁴ This principle is also enshrined in the Constitution of BiH, which recognizes the direct applicability of the ECHR and its priority over all other national laws. According to the UN Basic Principles on the Independence of the Judiciary (Principle 1 and 2), *'it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary... the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'* States should take any specific measure necessary for guaranteeing the independence of the judiciary, therefore protecting judges from any form of political influence in their decision making (Human Rights Committee, General Comment N. 32 on Article 14, 23 August 2007, Para. 19.).

Bearing in mind all the above mentioned and the complex political structure of BiH it is necessary to urgently take actions to improve prosecuting high profile politicians, as a part of comprehensive process of the depoliticization of the judiciary system in BiH..

3. Key findings in the analysis of three cases (Čović and others, Bičakčić and others and Ivanić)

As previously stated this research started with the case study analysis of the indictments, court processes and verdicts of three processes against high profile BiH's politicians. From the sum of all 326 processes against high profile politicians at the Court of BiH I chose those three cases because all the accused performed high level government functions and were, at the same time the representatives of three BiH constituent peoples.

3.1. Charged and acquitted: background on the cases

During 2006 Dragan Čović and the others¹⁵ (Lijanović, Čović, Lučić, Tadić) were accused before the Court of criminal offences for Organized Crime under Article 205 of Criminal Code of BiH in conjunction with criminal offence of Abuse of Office or Official Authority (article 358, paragraph 3 of Criminal Code of FBiH), Giving Bribe (Article 363 of CC of FBiH), Giving Gifts and Other Forms of Benefit (Article 218 CC of BiH), Abuse of Office or Official Authority (Article 220,

¹⁵ Dragan Čović and the others first degree verdict X-K-05/02, 17 November 2006; second degree verdict X-KŽ-05/02, 02 June 2008



paragraph 3 of CC of BiH), Abusing Position of Power in Economy (Article 259 paragraph 2 of the CC of FBiH), Forging Documents (Article 351 paragraph 3 of the CC of FBiH) and a Tax Evasion (Article 272 paragraph 2 of the CC of BiH).

After a first degree trial Dragan Čović was found guilty for the criminal offence of Abuse of office or official authority in violation of Article 358, paragraph 3 of the CC of FBiH (Official Gazette of the FBiH no. 43/98) and sentenced to five years in prison, while the others were acquitted of all charges. After the appeals of the Prosecutor's Office and the Defense Council for the first accused Dragan Čović have been granted, The Appellate Division revokes the Verdict of the Court of Bosnia and Herzegovina No. X-K-05/02 of 17 November 2006 due to the essential violations of criminal proceedings and ordered a retrial before the Panel of the Appellate Division of Section II for Organized Crime, Economic Crimes and Corruption of the Court of BiH for Čović and Lijanović, and confirmed the acquittal for Tadić and Lučić.

At a second degree trial all charges were dismissed. On the Counts 1 to 3 of the Amended Indictment of the BiH Prosecutor's Office no. KT-277/04, 15 November 2008 Dragan Čović was accused exclusively only for the criminal offence of Abuse of office or official authority in violation of Article 358, paragraph 3 of the CC of FBiH. A Panel of the Appellate Division found that the Court of BiH doesn't have jurisdiction due to the fact that Amended Inducement is charging the accused only for the criminal offence from the CC of FBiH, without invoking the article 13 of the Law on Court BiH (LCoBiH) (Official Gazette of the BiH no.16/02).

The verdict (X-KŽ-05/02, 02 June 2008) states *'It is Court's obligation to deliver the verdict dismissing the charges if the Court is not competent to adjudicate on the relevant criminal offence and/or if there are impediments to examine the matter of the criminal proceedings. The Law requires that the Court continuously monitor if the requirement for the conduct of the proceedings is met and to deliver the verdict dismissing the charges at all times if it infers that the statutory requirements have not been met. Accordingly, the Panel ruled pursuant to the Article 283 (a) of the CPC BiH, namely they dismissed the charges due to the lack of jurisdiction of the Court.'*

In the case against Edhem Bičakčić and others¹⁶ under the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT- 396/05 dated 17 April 2009, the Preliminary Hearing Judge on 23 April 2009, confirmed that Edhem Bičakčić and Dragan Čović were charged with the commission of the continued criminal offence of Abuse of Office or Official Authority in violation of Article 358, paragraph 3, in conjunction with Article 23 of the FBiH CC and after a first degree trial at the Court of BiH were acquitted of all charges.

¹⁶ Edhem Bičakčić and Dragan Čović first degree verdict X-K-09/702, 8 April 2010; second degree verdict X-KŽ-09/702, 31 January 2011

After the BiH Prosecutor Office appeal (X-K_09/702, 08 April 2010) Panel of the Appellate Division of Section II for Organized Crime, Economic Crimes and Corruption of the Court of BiH finds the appeal ungrounded and therefore rejected.

In the case of Mladen Ivanić under the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT- 293/06 dated 10 October 2007, the Preliminary Hearing Judge confirmed on 22 October 2007 that Mladen Ivanić was charged with the commission of the Abuse of Office or Official Authority (article 337, paragraph 4 of CC of RS), Criminal enterprise (article 370, paragraph 1 of CC of RS), Abuse of Office or Official Authority (article 337, paragraph 4 of CC of RS in connection with article 24 of CC RS) and Giving Gifts and Other Forms of Benefit (Article 218, paragraph 2. of CC BiH). After the first instance trial he was found guilty for the

commission of the criminal offence of Negligent in Performance of Duty (article 344, paragraph 2 of CC RS) and was sentenced to one year and six months in prison.

After the appeal of the Defense Counsel has been granted, The Appellate Division revoked the Verdict of the Court of Bosnia and Herzegovina due to the essential violations of criminal proceedings and ordered a retrial before the Panel of the Appellate Division of Section II for Organized Crime, Economic Crimes and Corruption of the Court of BiH. At a second degree trial with the Amended Indictment of the BiH Prosecutor's Office no. KT-293/06, 12 May 2010 Mladen Ivanić was accused exclusively only for the criminal offence of Negligent in Performance of Duty (article 344, paragraph 2 of CC RS) and after the trial all charges were dismissed.¹⁷

¹⁷ Mladen Ivanić X-KŽ-06/282-1, 16. July 2010, second degree trial

Through the analysis of those processes (as well as thought the interviews) I noticed several inconsistencies in significant legal matters which will be addressed in sections that follow. This indicates that precise policies in prosecution of high profile politicians in BiH do not exist. Lack of policies leads to the inconsistent practice in prosecution of high profile politicians and creates opportunities for the politicization of the judiciary system.

3.2 Issues identified by the judges for preliminary hearing

(All the judges who have been interviewed stated that certain problem in general ,as well as with the prosecution of high profile politicians present the work of judge for a preliminary hearing.) According to the statement of all judges interviewed, a substantial issue regarding prosecuting high profile politicians is the work/performance of judge in a preliminary hearing. Namely, according to current organization of the court's work one of the regular duties of all judges is to work on the indictments at preliminary hearing. In most cases those preliminary hearings are assigned to them in the middle of other cases where they work as a presidents or members of panels. The judges stated that due to their work overload and lack of time they do not pay proper attention to preliminary hearing. They also believe that even if they approve the indictment that should have not be approved the corrections can be made during the main trial.

During the interviews the judges attempted to justify this practice, but it must be noted that this practice is against the principle of effectiveness and cost efficiency of courts. This should not be a common practice when taking into account public and media interest for those cases and possible political manipulation.

Therefore, as a step to improve the work of courts in general, and especially prosecution of high profile politician, the number of judges for a preliminary hearing should be appointed solely for this function. Preliminary hearing judges should be selected among existing judges of a court On a rotating basis.

3.3. Evidence

By examining the variables quality and types of evidence used in those three cases I found few problems as well as inconsistencies. Even though the usage of evidence presented below does not represent violation of justice and is a question of prosecutors' and judges' discretionary right, this type of inconsistencies in similar cases would be questioned.



Primarily, in all three cases personal evidence are prevailing, especially statements of the witnesses.¹⁸ Few problems with the use of witnesses' statements in all processes are identified. Furthermore, the common problem was the credibility of the witnesses brought into question during the trials. Key witness in the case against Čović and others was discredited because of his lack of credibility. Some of the witnesses' statements in the case against Bičakčić and Čović were not considered as a proven beyond reasonable doubt because ten years have gone by from the time that alleged criminal offence took place and the time of their testimony.¹⁹ This shows that the criteria for the selection of the witnesses are not adequate and should be precise and clear. The prosecutor should take those problems into account when preparing their indictments. Indictment with flaws, especially in cases of high profile politicians beside cost efficiency rises public doubts in judiciary system and independence.

The second apparent problem is use of uncertified copies of the documents (material evidences). According to the article 274 paragraph 2 CPC BiH: *'to prove the content of writing, recording or photograph, the original writing, recording or photograph is required, unless otherwise stipulated by this Code.'* Furthermore the paragraph 3 states: *'Notwithstanding Paragraph 2 of this Article, a certified copy of the original may be used as evidence or the copy verified as unchanged with respect to the original.'*

It has been identified that this provision has been misused and inconsistently interpreted in all three cases raising issues about what was the motivation for such malpractice. One of two key material evidence in the case against Čović and others was not taken into consideration even though it could have been verified as unchanged through the testimony of the witnesses.²⁰

In the case against Bičakčić and Čović the use of uncertified copies of the documents was resolved differently. *'At the beginning of the evidentiary proceedings, the Court refused that the disputed decisions of the Government of the Federation BiH V.No. 4/99 dated 18 January 1999 and V. No. 5 /00 dated 20 January 2000 is either presented or tendered, since the Prosecution provided only copies of these decisions, without any indication as to the credibility of such documents. Article 274(2) of the CPC of BiH clearly prescribes that only originals are to be used as evidence in criminal procedure, or a certified copy only in exceptional cases. Given that these uncertified copies were proposed as the first Prosecution exhibit, without reference to any evidence in support or an indirect proof to its authenticity, the Court did not allow the adducing of such evidence. Also, the aforementioned provision of the Law allows a possibility to otherwise authenticate documents, which the Prosecution made use of only later, by enclosing the two disputed decisions to the original Record on the examination of the suspect Edhem Bičakčić, who was presented with the alleged decisions of the Government during his interview, and who confirmed their existence. As an enclosure to the authentic Record on examination of the suspect Bičakčić, contested decisions were accepted by the Court and admitted into the case file, as well as the entire body of prosecution evidence, following the classification of evidence in writing, upon Court's order, whereby uncertified copies were marked separately and singled out, aside the adduced index containing the name and date of each document.'* (X-K-09/702, 8 April 2010).

A uniform and strictly observed jurisprudence on this matter is considered an imperative in order to prevent politicization of the BiH judiciary system and to raise public trust.

¹⁸ According the Law of criminal procedures personal evidences are statements of the witnesses, statement of the expert witnesses and statements of the accused.

¹⁹ *'Generally, testimonies of all witnesses heard were not evaluated by the Court as fully credible or particularly useful for evidentiary proceedings, considering that it has been ten years since the incrimination, which resulting in uncertainty in recollection, even partial internal and mutual contradictions in witness testimonies. Therefore, subjective evidence was verified by comparison and confrontation with ample documentary evidence, which in the opinion of the Court has incomparably greater probative value.'* (X-K-09/702, 8 April 2010).

²⁰ *'At the main hearing, the Court was presented with the Exhibit of the prosecution no. 53-a photocopy of the document no. 01-16-2631/00 of 23 June 2006. Given that it was an unverified copy of the said document and that the prosecutor did not manage by the end of a main trial to obtain the original document or a verified copy thereof under Article 274 of the Criminal Procedure Code of BiH and that the defense placed objections as to the lawfulness of this piece of evidence, the Court did not take this piece of evidence into consideration when deciding in this criminal case.'* (X-K-05/02, 17 November 2006).

3.4 Jurisdiction of Court of BiH

This study identified significant inconsistency in prosecution of high profile politicians in BiH (is regarding the question of) (does not really bring the point across maybe try) doubting jurisdiction of the Court of BiH. In all three cases examined the jurisdiction of the Court of BiH is brought into question and resolved inconsistently.

In the case against Čović and others *'The Court notes that under the Amended Indictments of the prosecutor's Office no. KT-277/04 of 29 May 2008, the accused Dragan Čović has been charged with the commission of the criminal offence Abuse of Office or Official Authority in violation of Article 358, paragraph 3 of CC of FBiH, ... The Panel is satisfied that the Court of BiH is not competent to adjudicate on this criminal matter, since the criminal offence the Accused has been charged with is not within this Court's jurisdiction, nor did the Prosecutor himself invoke Article 13 of LCo BiH in the Amended Indictment. Accordingly, under the final and amended indictment, the Prosecutor charges the accused Dragan Čović exclusively and only with the criminal offence set forth under Article 358 (3) of CC FBiH, which is at the Prosecutor's free will pursuant to Article 275 od CPC BiH when he/she evaluates that the presented evidence indicates a change of the facts presented in the indictment.'*

In the case against Bičakčić and Čović the Court took a different attitude and declared itself competent. *'During the entire proceedings, the defense teams disputed the jurisdiction of the Court. Provisions of Article 7 of the Law on the Court of Bosnia and Herzegovina lead to a conclusion that the primary jurisdiction of the Court was extended in order to ensure effective protection of the general and public interest, and protection from consequences of criminal offences stipulated by the entity codes, provided that the circumstances of the commission of the criminal offence point to a particular level of threat to social values – the very foundation of the structure of the state authorities. Cited article of the Law sets forth relatively vague terms which have been reviewed through objective circumstances of individual cases, to a certain extent defined in jurisprudence so far. In consideration of the issue of subject matter jurisdiction, the Court was guided by specific circumstances that may concern certain essential elements of the criminal offence, including the amount of the unlawfully obtained property gain, the degree of damages incurred to a legal entity where a perpetrator has the status of an official person or person with official authority, the amount of gain that the third party obtains through acts of abuse, as well as the position of official person in the government structure at the time of the commission of the crime. Top ranking position of the accused as officials in the government structure at the time of the commission of the criminal offence was one of the decisive factors in establishing the jurisdiction of the Court of BiH on the grounds referred to in Article 13(2)(b) of the Law on Court of BiH. Contrary to the positions of respective defense teams, the foregoing do not mean that the essential elements of the criminal offence have been hereby extended, thus allowing for the procedural law to intervene with the substantive law. The Court viewed the concrete circumstances of the case through the prism of Article 7 of the Law on the Court and rendered its decision on jurisdiction based on these and such circumstances.'* ((X-K-09/702, 8 April 2010).

In the case of Mladen Ivanić on a second degree trial, where he was accused exclusively and only for the criminal offence of Negligent in Performance of Duty (article 344, paragraph 2 of CC RS) by the Amended Indictment of the BiH Prosecutor's Office no. KT-293/06, 12 May 2010 Mladen Ivanić, the Appellate Division primarily had to clear the question of the competence in this case. As in the case of Bičakčić and Čović the Court also declared itself competent but it



offered different explanation as follows. *'...in a first degree trial Prosecutors' Office charged accused Malden Ivanić among the other offences and for the offence from original jurisprudence of this Court, and thus his authority was unquestionable. Meanwhile in a second degree trial Prosecutors' Office charged accused only for a criminal offence provided in a CC of RS. But regardless that fact, Appellate Division found the Court of BiH competent and in this moment of the process.'* Namely, besides referring to the article 7 of the LoC of BiH Appellate Division refers to the provisions of the article 27 paragraph 1 of the CPC of BiH in which is stated: *'If there are strong reasons, the Court may transfer the conduct of the proceedings for a criminal offence falling within its jurisdiction to the competent Court in whose territory the offence was committed or attempted. The conduct of the proceedings may be transferred not later than the day the main trial is scheduled to begin.'* Based on the above mentioned Appellate Division took the view that the Court of BiH has a certain supremacy regarding the others courts on the territory of BiH and can be considered as a higher court. For fully understanding of this question the provisions of the article 36 paragraph 2 of the CPC of FBiH and article 34 paragraph 2 of the CPC or RS²¹ has to be taken into account. Those articles are stating: *'If during proceedings the court finds that a lower court has jurisdiction over the case, it shall not transfer the case to the lower court but shall conduct the proceedings and render a decision.'* Those provisions clearly show that the higher court has a priority in processing of already started main trials. And finally the verdict is stated that: *'Respecting all above mentioned this division consider that if the Court of BiH once had a jurisdiction in this matter it should keep its jurisdiction until the end of the trial. ... This is consistent to the principles of efficiency and economy of the criminal proceedings considering that the many evidences were presented and that is a question of a same criminal offence that was the subject of previous first degree ruling, regardless the change of law qualification of the of the offence.'* (X-KŽ-06/282-1, 16 July 2010).

Even though the different opinions on court's jurisdiction are relatively normal and court decisions in many countries can be blatantly inconsistent, in a case of the Court of BiH and particularly when it comes to prosecuting high profile politicians this opens a window for possible political influence. As it is stated in Prosecutors' Office media release related to the Court decision in the case against Čović and others: *'It seems that this attitude depends on the composition of the Judicial Council and the names of the defendants'* (Nezavisne Novine 16 Jul 2008).

3.5 Statute of limitations

Question of the statute of limitation arose in the case against Bičakčić and Čović. Namely, as it is stated in the first degree verdict (X-K-09/702, 8 April 2010): *'Considering that the acts of the accused, given the previously outlined reasons, cannot be defined otherwise than as an underlying offence from Article 358(1) of the CC of the FBiH, punishable by imprisonment in term from 6 months to 5 years; therefore pursuant to Article 121(1)(5)²² and Article 122(6)²³ of the CC of the FBiH, an absolute statutory limitation to criminal prosecution is in effect given the lapse of ten years from the date of commission of the offence, that is, the day of rendering unlawful decisions, or more specifically, from 18 January 1999 and 20 January 2000. Thus, even under the assumption that the Prosecution succeeded to prove ... the Court would have grounds to render either an acquittal under Article 284(a) or a verdict dismissing the charges on the basis of Article 283(e) of the CPC of BiH. Following the completion of the evidentiary proceeding, the Court rendered the decision pursuant to Article 284(1) (c) of the Criminal Procedure Code of Bosnia and Herzegovina.'*

²¹ The article 36 paragraph 2 of the CPC of FBiH and article 34 paragraph 2 of the CPC or RS are identical.

²² Article 121 CC FBiH

(1) Unless it is stipulated otherwise in this Code, criminal prosecution is barred after the lapse of:

- 1) thirty five years from the commission of criminal offense for which the law provides long term imprisonment;
- 2) fifteen years from the commission of criminal offense for which the law provides imprisonment for a term exceeding ten years;
- 3) ten years from the commission of a criminal offense for which the law provides imprisonment for a term exceeding five years;
- 4) five years from the commission of criminal offense for which the law provides imprisonment for a term exceeding three years;
- 5) three years from the commission of criminal offense for which the law provides imprisonment for a term exceeding one year;
- 6) two years from the commission of criminal offense for which the law provides imprisonment for a term not exceeding one year or a fine.

(2) If several punishments are prescribed for a single criminal offense, the period of expiry shall be determined in relation to the heaviest punishment prescribed.
Running and Interruption of the Time set by Statute of Limitation

²³ Article 122 CC FBiH

... (6) There shall be an absolute bar to prosecution when twice as much time lapses as required, by provisions of the law, for the bar to prosecution. ...

It is apparent that even if accused were found guilty the provisions of statutory limitations would disable enforcement of such conviction. Furthermore, conducting trials when statutory limitation is about to happen is contrary to the principles of efficiency and economy of the criminal proceedings and definitely raises a question of prosecutor's motivation for the indictment in a first place. This is especially true when prosecuting a high profile politician. Issues related to those trials that draw massive media coverage and produce reactions of influential political figures need to be properly addressed.

3.6 Politicization through High Judiciary and Prosecutorial Council (HJPC)

It has been shown that the BiH judiciary system is vulnerable to politicization through different ways, such as political pressures, interference with judiciary work and attacks on its independence (Azinovic, Bassuener and Weber, 2011). As identified in this study politicization happens through budgeting (discussed in introduction), through media influence as it will be discussed further below, effects of influential political figures and court malpractice.

(Another form of possible political influence on judiciary system of BiH, politicization through HJPC is identified in the interviews with the judged.) Interviews that were conducted with judges revealed that there is another form of possible political influence on judiciary system of BiH, namely politicization of HJPC. HJPC was established in a 2003 during comprehensive reform of judicial sector in BiH with a vision of continuously contribution to strengthening the rule of law in BiH. By ensuring an independent, impartial and professional judiciary in BiH, the HJPC provides for equal access to justice and equality of all before the law. As a part of Strategic plan for period 2010 – 2013 HJPC BiH defined 9 strategic objectives: increase the efficiency of courts and prosecutor offices in BiH, improve and maintain independence and structure of BiH judiciary, continuously improve the system for the selection and appointment of judicial position holders, develop a base for future candidates for judicial and prosecutorial office, improve disciplinary procedure, advance the process for the preparation, lobbying, adoption and execution of adequate budgets for judicial institutions in BiH, advance training for judicial position holders, improve relationship of judicial institutions with partners and the public and further enhance coordination and aid effectiveness in the justice sector.²⁴

²⁴ See more on State High Judicial and Prosecutorial Council (HJPC), web site: <http://www.hjpc.ba/intro/?cid=3479,2,1>

If we take into consideration competences of the HJPC and the membership therein as prescribed in the Law on High Judicial and Prosecutorial Council BiH (Official Gazette of BiH no. 25/04) it is evident that there is a window for a possible political influence. Namely, according to the Article 17 of the Law on High Judicial and Prosecutorial Council BiH, the Council has inter alia the following competences: appointment of judges and prosecutors, imposing disciplinary measures that without proper legal prevention can be politically manipulated.

Namely, according to the article 4 paragraph 1 (i)(m)(n)(o) four members of HJPC are allowed to be members of political parties.

All the interviewed judges pointed out that the HJPC performs very responsible and sensitive job which is visible from article cited in appendix I, and that the current provisions of the article 4 paragraph 1 (i)(m)(n)(o) do not comply with the postulate of independency and depoliticization.



Reason for that attitude lays in the fact that one of the ways of judiciary depoliticization is a prohibition for the judges and prosecutors to be a member of any political party. According to the section II article 2. 2. 3. of The Code of Judicial Ethics and Section II article 2. 2. 3. of Code of Ethics for Prosecutors that are of equal legal force as laws judges and prosecutors 'shall not be members of political parties...'. Furthermore similar provision in respect of members of HJPC is provided in the article 10 of the Law on High Judicial and Prosecutorial Council BiH. According to that provision 'Neither a member of the Council, nor a member of any panel thereof, nor any member of the staff of the Council, shall hold office or perform any duties in a political party, or in associations or foundations connected to political parties.' At the same time article 4 paragraph 1 (n) (o) introduce political figures as a members of HJPC. These rules are illogical and its practical application can cause serious political interference to the work of the judiciary system and should be promptly resolved.

3.7 Media statements

Gary D. Robbins, Ambassador and Head of OSCE Mission to BiH stated: *'If the judiciary is not independent from the executive and legislature, it cannot properly restrain those branches. If courts are not seen as independent and impartial, citizens will not turn to them to resolve their problems, instead seeking recourse through political or extralegal means. I have stated my support for the independence of the judiciary on several occasions. In a report released in January 2010, the Mission expressed concern over the undue pressure of the executive, and the political sphere in general, on the work of judges and prosecutors at the Court of BiH and BiH Prosecutor's Office. The report describes how on several occasions political actors have improperly pressured and criticized the work of judges and prosecutors, particularly those in the Court of BiH and BiH Prosecutor's Office dealing with the most sensitive cases in BiH.'*²⁵

Also in previously mentioned the OSCE Spot report 'Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions' (2009) the same problem is highlighted. In accordance with those observations this research analyzed media reports connected to those trials and counted the number of harsh media statements of the influential figures of both Entities related to these trials.

Three daily papers (Dnevni avaz, Oslobođenje and Nezavisne novine) and 3 weekly magazines (Dani, Start and Global) were analyzed as well as reports of Independent News Agency (ONASA) and Federal news agency (FENA) for the period when trials took place.

During the analysis 328 media statements related to those trials were spotted. About 26% (85) of those statements contained harsh media statements towards high ranked politicians of different levels of political powers that according to the OSCE present undue political pressure and politicization of judiciary.

For example: In relation to the court process analyzed in this study, Edhem Bičakčić (one of the indicted persons or indictée) in the interview with Global - a weekly magazine of political nature stated as follows: 'According to merits and statement of grounds of this verdict I believe that the Prosecutorial Office of BiH will find it difficult to appeal to these arguments. The indictment is based on the documents that should not be valid in the state with the rule of law. We are talking here about copies and forged documents by the Financial police of FBiH and after this

²⁵ Robbins, G. D., (2010)Interview for the ONASA conducted 23.12.2010, web site: <http://www.oscebih.org/News.aspx?newsid=73&lang=EN>, Retrieved 19 October 2011

verdict based on merits one has to be expert lawyer to be able to write some kind of appeal. Furthermore Bičakčić claims this is the set up indictments based on personal vendetta (Global 15 Apr 2010).

Poignant examples of serious pressure werestatements by public figures from Republika Srpska regarding process against Mladen Ivanić. Vice president of the Party of Democratic Progress (PDP) Branislav Borenović says that the verdict given to the leader of this party Mladen Ivanić is politically motivated and designed representing another farce of that court. Borenović stated further that certain groups in BiH attempted to politically discredit Mr.Ivanic In relation to the same court process the actual president of the Government of Republika Srpska Milorad Dodik also got involved on several occasions. He stressed that the crime for which Ivanic was charged is not under the jurisdiction of the Court of BiH, furthermore stating that this is politically motivated case aimed at demonstrating power instead of furthering justice. The president of executive board of PDP Zoran Đerić, who was freed in the process Ivanic and others said that this is politically set up process with high investment an lots of media speculations. He highlighted that the Court of BiH in this process would have been above politics if it has freed all indicted persons/indictees in this process(Oslobođenje 25 Jun 2008). Furthermore, the president of the Government of RS Milorad Dodik said publically on many occasions that the Court of BiH is established with the intention to discipline Serbs and Croats in BiH (Dnevni Avaz 26 Jun 2008).

Additional pressure for the Court of BiH comes from official statements from the Prosecutors Office of BiH given in daily papers. For examples regarding the jurisdiction by the Court of BiH in the case of Čović and others from the Prosecutors Office of BiH comes a statement that the practice of Court of BiH shows a lack of unified rule regarding jurisdiction: It appears that the ruling depends on the composition of the Court Council and names of the indicted persons/indictees. They further state that the prosecutors Office of BiH cannot ignore that in another case some other judge refused as ungrounded objections of defense regarding authority of the Court of BiH to process the criminal offences stipulated by the Criminal Law of Federation of BiH. From the Prosecutors office it has been said that they do not have explanation for these completely different decisions by different Council of Court of BiH regarding jurisdiction, arguing that their opinion is that the Court of BiH is authorized for the case of Covic as well (Nezavisne Novine 16 Jul 2008).

Thanks to the statements of political figures and their content undue pressure on judiciary system is easily to notice. This number and content of those statements bearing in mind the fact that they came from political figures presents real and undue pressure on the judiciary sector. It is necessary to strengthen judicial sector and to revise all deficiencies in prosecution of high profile politicians so this type of pressure will lose its potential impact on the work of the Court of BiH.

Based on these findings, the study examines appropriate mechanisms that could improve prosecution of a high profile politician in BiH that would directly contribute to the accountability of the BiH judiciary system and the level of public trust.



4. POLICY OPTIONS FOR IMPROVEMENT OF PROSECUTION OF HIGH PROFILE POLITICIANS IN BiH:

4.1 Current policy option

Improvement of performance of judges and prosecutors in all areas within the BiH judiciary system is facilitated through trainings and educational programs organized within Judicial and Prosecutorial Training Centers in the FBiH and RS. Namely, on May 22, 2002, the High Representative passed the Law on the Centre for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina²⁶ and the Law on the Centre for Judicial and Prosecutorial Training of Republika Srpska.²⁷ These laws establish the Centers and regulate the status and activities of both Centers, the management and executive bodies, the funding, and the terms and conditions under which the Centers will be providing training for judges and prosecutors and for those intending to pursue the career of a judge or a prosecutor.

The objective of the Centers is to ensure, under the supervision of the HJPC of BiH, that training programs for judges and prosecutors are designed and implemented in accordance with the criteria of open-mindedness, competence and impartiality, which are bound up with the exercise of judicial and prosecutorial duties.

The headquarters of the Judicial and Prosecutorial Training Centre of FBiH is in Sarajevo, and the headquarters of the Judicial and Prosecutorial Training Centre of RS is in u Banja Luka. Appropriate venues, equipment and annual budget for the Centers' activities are provided by the entity level government.

The activities of the Centers are as follows:

- Organizing, according to the instructions and under the supervision of the Council, the induction training courses for those intending to pursue the career of judge or prosecutor;
- Organizing, under the supervision of the Council, advanced professional training for judges and prosecutors;
- Awarding certificates of graduation on the successful completion of induction training and annual certificates on the completion of any minimum advanced professional training requirement as established under the Law;
- The management body of the Centers shall be their respective Steering Boards, while the executive authority shall be vested in their respective Directors;
- The Council shall confirm election and appointment of nine members in each Steering Board. The membership of the Steering Boards is as follows:
 - One judge of the Supreme Court in the relevant entity to be elected by the general assembly of the Supreme Court;
 - One Entity Deputy Prosecutor to be elected by the collegiums of the Entity Prosecutor's Office;
 - Two distinguished legal experts, having expertise within the field of training, to be appointed by the Entity Minister of Justice after consultation with professional associations, law faculties and other law-related bodies;
 - Two judges and two prosecutors to be elected by the members of the related associations in each Entity;
 - One minor offence court judge to be elected by the members of the Association of Minor Offence Judges in each Entity.

²⁶ Law on the Centre for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina Official Gazette of the FBiH, 22/02

²⁷ Law on the Centre for Judicial and Prosecutorial Training of Republika Srpska, Official Gazette of RS, 34/02

The Council is directly involved in some of the competencies of the Steering Boards in both Centers, through supervision or consultations. These competencies are:

- The Steering Boards establish, in accordance with the instructions and under the supervision of the Council, the induction training programs for those intending to pursue the career of judge or prosecutor;
- The Steering Boards establish, in consultation with the Council, programs of advanced professional training for judges and prosecutors, including minor offence court judges;
- The Steering Boards establish specialized training programs in consultation with the Council;
- The Steering Boards appoint and dismiss the Directors of the Centers in consultation with the Council;
- The Steering Boards appoint, in consultation with the Director and with the President of the relevant court or cantonal or municipal prosecutor and with approval of the Council, judges and prosecutors to serve as trainers;

Each year, the Centers organize advanced professional training for judges and prosecutors. The Centers establish, under the supervision of the Council, the curriculum and implement the courses of advanced professional training, guaranteeing to judges and prosecutors the maintenance and broadening of their technical, social and cultural knowledge needed to perform their duties.

Judges and prosecutors are provided with courses on interpreting and applying laws and procedures, ethical standards for judges and prosecutors, the latest scientific and professional developments in the field of law, the practices of judges and prosecutors from other countries and other topics determined by the Steering Boards.

The Council, in consultation with the Steering Board, determines the minimum requirements for advanced professional training that each judge and prosecutor must receive annually to satisfy this professional obligation. The Centers shall award annual certificates to those judges and prosecutors who satisfied the minimum advanced professional training requirements.²⁸

²⁸ For further information on Judicial and Prosecutorial Training Centers and their training programs see the web sites of the Centers: <http://www.fbih.cest.gov.ba/> and <http://www.rs.cest.gov.ba/>

It seems that the trainings do not take into consideration issues related to the prosecution of high profile politicians, nor do these training critically examine those cases. Learning about interpretation of law can be beneficial if there are appropriate court policies and mechanisms to sanction legal malpractices. Taking into account previously explained state in a matter of a prosecution of high profile politicians in BiH it is evident that the current policy option to improve judicial practices (trainings of judges and prosecutors) is not functioning well and it does not meet requirements necessary for adequate prosecution of those cases.

4.2 Policy option I

Having in mind the complexity of socio-political structure of BiH it is evident that the present problem of inadequate prosecution of high profile politicians can cause serious public mistrust in impartiality, independence and transparency of judiciary system. Therefore, based upon this research it several policies options can be proposed.

The first policy option is to create a set of guidelines that can use both prosecutors and judges for cases at Section II for Organized Crime, Economic Crime and Corruption of the Court of BiH.



In long term, application of these guidelines can lead to the creation of a common and unified policy including prosecution of high profile politicians in BiH and ultimately contribute to a higher level of internal accountability of the entire judicial system.

These guidelines should contain resolution of all problems identified through case studies in this research as previously described in the section of problem definition.

As to the question of the evidences used before the Court it has been noted that the most common problem presents reliability of the witnesses used as a personal evidences and a question of usage of unverified copies of documents. Therefore the guidelines should suggest that the prosecutor, when preparing the case, should pay a special attention to the reliability of witnesses he/she is planning to call at trial. Prosecutor should be aware of the fact of time passed since the alleged criminal offence occurred and a trial in progress. The witnesses should be always adequately prepared and examined as well. If a prosecutor determines that the witness statement is contradictory or uncertain it should not be used before the Court. Furthermore, material evidences should be prevailing in the indictments since the '*... subjective evidence was verified by comparison and confrontation with ample documentary evidence, which in the opinion of the Court has incomparably greater probative value.*'²⁹

In addition, the use of uncertified copies of documents should be subsume under the article 274 paragraph 3 CPC BiH where it is stated that: '*Notwithstanding Paragraph 2 of this Article, a certified copy of the original may be used as evidence or the copy verified as unchanged with respect to the original.*' Prosecutor should determine before the indictment if there is evidence in support or an indirect proof to document's authenticity or other possibility to authenticate documents. If those possibilities do not exist the evidence should not be proposed as one in the inducement and inducement should be strong enough even without that evidence. Otherwise if authenticity of the document can be proven indirectly it should be allowed as a proof.

²⁹ Edhem Bičakčić and Dragan Čović first degree verdict X-K-09/702, 8 April 2010

On the question of jurisdiction Guidelines should suggest unified policy on that mater. Since the prosecution of high profile politicians is extremely sensitive and it causes enormous public and media interest Court's jurisdiction should be determined in the accordance with the article 7 and 13 of the LCo of BiH and article 27 paragraph 1 of the CPC of BiH which states as follows: '*If there are strong reasons, the Court may transfer the conduct of the proceedings for a criminal offense falling within its jurisdiction to the competent Court in whose territory the offense was committed or attempted. The conduct of the proceedings may be transferred not later than the day the main trial is scheduled to begin.*' Based on that it is evident that the Court of BiH has a certain supremacy regarding the other courts on the territory of BiH and can be considered as a higher court. Furthermore, the provisions of the article 36 paragraph 2 of the CPC of FBiH and article 34 paragraph 2 of the CPC of RS should be taken into account. Those articles are stating: '*If during proceedings the court finds that a lower court has jurisdiction over the case, it shall not transfer the case to the lower court but shall conduct the proceedings and render a decision.*' Those provisions clearly show that the higher court has a priority in processing already started main trials. When deciding on a meter of jurisdiction Court should be always guided with those provisions which will create unified practice.

Guidelines should also provide instructions for both prosecutors and judges that preliminary hearings should, when creating or confirming the indictment, always take into consideration statute of limitations. This is necessary because of the principles of efficiency and cost effectiveness.

In addition to the said Guidelines, full fledged depoliticization of the judiciary system requires certain amendments to the article 4 paragraph 1 (i)(m)(n)(o) of the Law on High Judicial and Prosecutorial Council BiH according to which 4 members of HJPC are advocates who can be members of any political party. It is not sufficient only to rely on their professionalism and moral principles but it is necessary to completely forestall those possibilities by new legal provision.

Furthermore, in improving the courts work in general and in particular when prosecuting of high profile politician, a certain number of judges in a preliminary hearing should be appointed on a rotating basis.

Once created the Guidelines can be adopted as obligatory and distributed to all judges and prosecutors by HJPC. The training centers can support implementation of this policy option by organizing trainings for judges and prosecutors on the Guidelines. This policy option does not require significant additional resources and the capacities of already established bodies within the judiciary system in BiH, such as HJPC and Training Centers for Judges and Prosecutors in FBiH and RS can be utilized in implementing this policy option.

4.3 Policy option II

One of the aspects of this research was a review of variety of literature relevant for the prosecution of high profile politicians worldwide, whilst different models of dealing with these issues were analyzed. This research identified an Indonesia's model for combating the corruption that as a model if modified could be applied in BiH conditions for prosecution of high profile politicians. The model is 'Komisi Pemberantasan Korupsi - Corruption Eradication Commission' (KPK).

The KPK was formed after special consideration on the extraordinary nature of corruption in Indonesia, which has become systemic and widespread, and has violated the human rights in Indonesia. The KPK was formed under Law No. 30 of 2002 on the Corruption Eradication Commission. Before the KPK was formed, only Police and Prosecutors had the authority to conduct anti-corruption activities under Law No. 31 of 1999 on Eradicating Criminal Acts of Corruption as amended by Law No. 20 of 2001, and under Law No. 28 of 1999 on State Officials who are Clean and Free of Corruption, Collusion, and Nepotism.³⁰

³⁰ KPK: The Corruption Eradication Commission of Indonesia, Independent Commission against Corruption (Hong Kong), web site: <http://www.icac.org.hk/news/issue22eng/button3.htm>, Retrieved 12 December 2009.

The KPK was formed with the expressed intent of bringing about positive change in a stagnant national anticorruption effort. Corruption eradication is by no means a new concept in Indonesia, as anticorruption activities have actually existed since the 1950s. One of the main reasons why these previous efforts have not been successful is that they only focused on repressive actions: pre investigating, investigating, and prosecuting corrupt acts. Although repressive operations are vital for the success of corruption eradication, these past efforts failed in the medium to long term due to the lack of significant preventive actions. The KPK is therefore a fresh start, a new way of looking at the corruption epidemic: the agency shall not monopolize the anticorruption effort, but merely act as a trigger mechanism to empower authorized institutions to become more effective. Selected cases are handled by the KPK, in order to show the public that it is serious, prevention activities such as socialization, education, research into the potentials for corruption of each government institution, and so on, provide the basis for a long term anticorruption strategy.



Duties and Authority of the KPK work in coordination and are supervised by institutions authorized to eradicate corruption, conduct pre investigations, investigations, and prosecutions against corrupt acts, conduct preventive actions against corruption and monitor state governance.

The KPK coordinates its activities through the Prosecutor's Office, the Police, and various financial supervisory and regulatory bodies. The KPK has also supervisory role that includes surveillance, research, or studies on authorized corruption eradication institutions and those that perform public services. The KPK may also take over the investigations or prosecutions conducted by the Police or the Prosecutor's Office in the certain circumstances (a public corruption report is not acted upon, incompetence or delays in corruption cases without sufficient reason, suspected bias in favor of perpetrator or indications of corrupt elements in conduct of investigations, obstructions to the handling of a corruption case due to executive, judicial, or legislative intervention or other circumstances which have hindered the capability of the Police or the Prosecutor's Office to conduct a proper investigation).³¹

The KPK's purview in corruption investigation includes these circumstances: involvement of law enforcers, state officials, and other connected individuals, significant public concern and/or at least one billion Rupiah in value (approx US\$100,000).³²

Based upon that model and according to the opinion of the interviewees, it would be beneficial to create an independent body for prosecution of high ranked politicians. The body should be constituted out of the investigative bodies, prosecutors and a set of different judges for the previous hearing and trials. Depoliticization and effective work of that body should be provided by the following steps: independent budgeting, adequate choice of personnel (appropriate background checks, absence of political action, nonmembers of political parties, etc.), provision of adequate powers, provision of adequate cooperation with other bodies (supremacy of this body) and appropriate Law regulation.

4.4 Comparison of policy options

This study comprised of three in depth case studies regarding prosecution of high profile politician, includes series of interviews with key stakeholders, literature review and analysis of key policy documents. Based upon the research three policy options were considered:

1. A current policy option consists of the trainings and educations organized within Judicial and Prosecutorial Training Centers in the FBiH and RS;
2. Policy option I is creation of a set of guidelines for a prosecution at Section II for Organized Crime, Economic Crime and Corruption of the Court of BiH in general and especially in a case of high profile politicians in BiH and the changes in the institutes of HJPC and 'judge for a preliminary hearing'
3. Policy option II is creation of the independent organization for investigation and prosecution of cases involving high profile politician based on Indonesian practice.

Comparing those three policy options in relation to criteria for improvement in prosecution, effectiveness, cost efficiency and personnel necessary for their implementation I came to the conclusion that policy option I is the best solution for BiH context.

³¹ Komisi Pemberantasan Korupsi/Corruption Eradication Commission (KPK), web site: <http://www.assetrecovery.org/kc/node/855f5e3a-a346-11dc-bf1b-335d0754ba85.0.jsessionid=77D9F74CD879128411CA718CAAC4A8FA>, Retrieved 28 September, 2011

³² Corruption Eradication Commission (KPK), web site: <http://www.aca-forum.org/board.do?command=searchDetail&menuId=08030203>, Retrieved 30 September, 2011

Namely, even though current policy option is most cost efficient and does not require any further action, lack of the efficiency in current prosecution of high ranking politicians demonstrate all its shortcomings. Bearing in mind statement of the Gary D. Robbins, Ambassador and Head of OSCE Mission to BiH: *'Central to these reforms is the independence and impartiality of the judiciary. These principles are prerequisites for the rule of law and the fundamental right to a fair trial. Interference and pressures on the work of the judiciary seriously undermine these principles.'*³³ is evident that present state is causing serious damages to the judiciary system of BiH.

³³ Robbins, G. D., (2010) Interview for the ONASA conducted 23.12.2010, web site: <http://www.oscebih.org/News.aspx?newsid=73&lang=EN>, Retrieved 19 October 2011

Policy option II is found possibly very efficient in a matter of prosecution of high profile politicians. This option provides depoliticization of such institution and entire process of investigation, indictment and prosecution of those cases. The problem with this policy option lies in the fact that enormous financial means are necessary for its complete realization. Also, there is a need for adequate personnel for all stages of the process, the question of funding once organization is established etc. Taking into account world practice it is enforceable but it requires a lot of political will for dealing with this meter which obviously currently is not present.³⁴

³⁴ See the most media statement of high profile politicians about prosecution of analyzed cases.

Policy option I is most realistic for implementation according to all criteria. Its implementation can improve prosecution in general and especially prosecution of high ranked politicians in BiH without excessive material cost. It does not require any new personnel, and can be easily subsumed under the current policy option. Guidelines can be introduced to the prosecutors and judges within the usual mandatory trainings. Establishment of the judge for a preliminary hearing as a sole function can be managed by an internal reorganization in the Court of BiH in the form of Rulebook. Certain complexity of this policy option is present only in the matter of changes of the article 4 paragraph 1 (i)(m)(n)(o) of the Law on High Judicial and Prosecutorial Council BiH which can be also resolved in the form of the amendments on mentioned Law.

5. CONCLUSIONS AND RECOMMENDATIONS:

Taking into account all previously explained issues this research proposes the following recommendations for depoliticization and improving prosecution of high profile politicians in BiH:

- Creation of a set of guidelines for prosecution at Section II for Organized Crime, Economic Crime and Corruption of the Court of BiH and in a cases of prosecution of high profile politicians in BiH;
- Changes of the article 4 paragraph 1 (i)(m)(n)(o) of the Law on High Judicial and Prosecutorial Council BiH;
- Introduction of the institute of a 'judge for a preliminary hearing' as the sole function of the judge in the Court of BiH.

Guidelines for prosecution of high profile politicians in BiH should resolve identified problems in the current prosecution of high profile politicians regarding:

- Evidences:
 - statements of the witnesses
 - use of uncertified copies of the documents (material evidences);
- Jurisdiction of Court of BiH and
- Statute of limitations.



The Guidelines should be introduced to the prosecutors and judges within the usual mandatory trainings in training centers of FBiH and RS and trainings on a state level.

Changes to the article 4 paragraph 1 (i)(m)(n)(o) of the Law on High Judicial and Prosecutorial Council BiH should be conducted through the regular procedure in the form of the amendments on the Law.

And finally appointment of a 'judge for a preliminary hearing' as his/hers sole function in the Court of BiH should be managed by internal reorganization in the Court of BiH in the form of Rulebook without introducing new personnel.

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APPENDIX I - Article 17 (Competences) of the Law on High Judicial and Prosecutorial Council BiH

The Council shall have the following competencies:

- Appointment of judges, including Court Presidents, lay judges and reserve judges in all courts at the State, Entity, Cantonal, District, Basic and Municipal levels in Bosnia and Herzegovina, including the Brcko District of Bosnia and Herzegovina, but excluding the Constitutional Courts of the State and Entities of Bosnia and Herzegovina;
- Appointment of Chief Prosecutors, Deputy Chief Prosecutors and prosecutors in all prosecutors' offices at the State, Entity, Cantonal and District levels in Bosnia and Herzegovina, including the Brcko District of Bosnia and Herzegovina;
- Making proposals to the relevant authorities in relation to, their proposal and election of judges to the Constitutional Court of Republika Srpska and their nomination of judges to the Constitutional Court of the Federation of Bosnia and Herzegovina. When exercising its competence under this paragraph, the Council shall seek a written opinion of the relevant Constitutional Court before it makes its proposal;
- Receiving complaints against judges and prosecutors, conducting disciplinary proceedings, determining disciplinary liability, and imposing disciplinary measures on judges, lay judges, reserve judges and prosecutors;
- Deciding upon appeals in disciplinary proceedings;
- Deciding upon suspensions of judges, lay judges, reserve judges and prosecutors;
- Supervising the advanced professional training of judges and prosecutors and advising the Entity Centers for Judicial and Prosecutorial Training and the Brcko District of Bosnia and Herzegovina Judicial Commission in their adoption of programs of advanced professional training for judges and prosecutors;
- Determining the minimum amount of advanced professional training to be undertaken by every judge and prosecutor each year;
- Determining the induction training for candidates chosen for judicial and prosecutorial office and supervising the provision of such training;
- Approving the annual report of the Steering Boards of the Entity Judicial and Prosecutorial Training Centers and of the Brcko District of Bosnia and Herzegovina Judicial Commission insofar as it relates to the induction training and the advanced professional training of judges and prosecutors;
- Deciding upon issues of incompatibility of other functions performed by judges and prosecutors;
- Deciding upon the temporary assignment or transfer of judges and prosecutors to another court or prosecutor's office;
- Deciding upon leaves of absence for judges and prosecutors;
- Participating, at the Council's discretion, in the drafting process of annual budgets for the courts and prosecutors offices;
- Making recommendations upon, at the Council's discretion, the annual budget proposals made by governmental bodies and/or governments for courts and prosecutors offices;
- Making and presenting recommendations, at the Council's discretion, for amendments to the proposed budgets made by governmental bodies and/or governments and/or the Brcko District of Bosnia and Herzegovina Judicial Commission before the relevant legislative bodies;
- Collecting and analyzing reports and relevant budget and revenue data for courts and prosecutors offices, in order to provide statistical data for the effective operation of courts and prosecutors offices;



- Advocating for adequate and continuous funding of courts and prosecutors' offices in Bosnia and Herzegovina;
- Participating in the drafting of, and approving, Books of Rules for the operation of courts and prosecutors offices in Bosnia and Herzegovina;
- Monitoring and advising courts and prosecutors offices on appropriate and effective budget, administration and management techniques and procedures and initiating training in this regard;
- Initiating, overseeing and coordinating projects related to improving all aspects of the administration of courts and prosecutors offices, including seeking national and international funding therefore;
- Setting criteria for the performance evaluations of judges and prosecutors;
- Setting criteria for the performance of courts and prosecutors offices, and initiating enquiries concerning administrative or financial conduct;
- Initiating, coordinating and supervising the use of information technology by courts and prosecutors' offices in order to achieve and maintain uniformity in this area between and among courts and prosecutors' offices throughout the country. No court or prosecutors' office shall adopt an automated case-tracking registration, tracking or related system, including backup and storage systems, without obtaining the prior approval of the Council;
- Determining the number of judges, prosecutors and/or Deputy Chief Prosecutors of each court or prosecutor's office within the Council's competence, after consultation with the relevant Court President or Chief Prosecutor, relevant budgetary authority, and the relevant Ministry of Justice;
- Collecting information and maintaining documentation on the professional status of judges and prosecutors, including their date of appointment, termination of office, statistical information relevant to their work performance, and any other information which the Council considers relevant to the work of Court Presidents, Chief and Deputy Prosecutors, judges and prosecutors;
- Providing opinions on complaints lodged by a judge or a prosecutor who considers that his or her rights provided for by this or other law, or more generally his or her independence are threatened;
- Providing opinions on draft laws, regulations, or issues of importance that may affect the judiciary, initiate the adoption of relevant legislation and other regulations and to provide guidance to courts and prosecutors' offices on matters falling under the Council's competence;
- Issuing codes of ethics for judges and prosecutors;
- Exercising other competencies as determined by this or other Law.

APENDIX II - Article 4 (Membership) of the Law on High Judicial and Prosecutorial Council BiH

- (a) one (1) member who shall be a judge from the Court of BiH, elected by the judges of that Court;
 - (b) one (1) member who shall be a prosecutor from the Prosecutor's Office of BiH, elected by the prosecutors of that Office;
 - (c) one (1) member who shall be a judge from the Supreme Court of the FBiH, elected by the judges of that Court;
 - (d) one (1) member who shall be a prosecutor from the Prosecutor's Office of the FBiH, elected by the prosecutors of that Office;
 - (e) one (1) member who shall be a judge from the Supreme Court of the RS, elected by the judges of that Court;
 - (f) one (1) member who shall be a prosecutor from the Prosecutor's Office of the RS, elected by the prosecutors of that Office;
 - (g) one (1) member who shall be a judge from either a Cantonal or Municipal level court of the FBiH, elected by the Cantonal and Municipal court judges of the FBiH, through written ballot to be organized by the President of the Supreme Court of the FBiH;
 - (h) one (1) member who shall be a prosecutor from a Cantonal level prosecutor's office of the FBiH, elected by the Cantonal prosecutors of the FBiH, through written ballot to be organized by the Chief Prosecutor of the FBiH;
 - (i) one (1) member who shall be a judge from a District or Basic level court of the RS, elected by the district and basic court judges of the RS through written ballot to be organized by the President of the Supreme Court of the RS;
 - (j) one (1) member who shall be a prosecutor from a District level prosecutor's office of the RS, elected by the district prosecutors of the RS, through written ballot to be organized by the Chief Prosecutor of the RS;
 - (k) one (1) member who shall be a judge or prosecutor elected by the Brcko District of BiH Judicial Commission;
 - (l) one (1) member who shall be an attorney, elected by the Bar Association of the FBiH;
 - (m) one (1) member who shall be an attorney, elected by the Bar Association of the RS;
 - (n) one (1) member who shall not be a member of the judiciary or a member of the Parliamentary Assembly of BiH, elected by the House of Representatives of the Parliamentary Assembly of BiH, and
 - (o) one (1) member who is not a member of the judiciary and who is not a member of the Council of Ministers of BiH, elected by the Council of Ministers of BiH upon the proposal of the Minister of Justice of BiH.
- (2) Members of the Council shall be persons of high moral standing and integrity, and shall have a reputation for efficiency, competence and integrity.
- (3) Members of the Council shall be independent and impartial in the exercise of their functions.
- (4) The membership of the Council shall be generally representative of the peoples of Bosnia and Herzegovina and shall reflect the gender balance in Bosnia and Herzegovina. The Book of Rules of the Council shall regulate the procedures necessary to ensure compliance with applicable provisions of the Constitution and laws of Bosnia and Herzegovina regulating this issue.
- (5) References in this law to judges and prosecutors shall, unless otherwise indicated by the context, be construed to include judges, prosecutors, Court Presidents, Chief Prosecutors and Deputy Chief Prosecutors.



(6) The President of the Court of Bosnia and Herzegovina shall convene the first meeting of the Council to be held no later than 15 days after enough members to form a quorum under Article 14 (1) of this Law have been elected.



Marija Lučić-Čatić was Born 1979 in Sarajevo. At the Faculty of Criminal Justice Sciences and Security, University of Sarajevo she received her PhD where she is also currently employed. As a coauthor she has published several scientific papers in national and international publications. Also, as expert associate she has participated in drafting of the strategic-planning documents and initiatives of the Ministry of Security of BiH. She was a participant of many national and international seminars, conferences and workshops, and she is a member of the Association of Criminalists of Bosnia and Herzegovina, Professional Association of Criminalists of Republic of Croatia and the European Associations of Criminology.



A "Policy Development Fellowship Program" has been launched by the Open Society Fund BiH in early 2004 with the aim to improve BiH policy research and dialogue and to contribute to the development of a sound policy-making culture based on informative and empirically grounded policy options. The program provides an opportunity for selected fellows to collaborate with the Open Society Fund in conducting policy research and writing a policy study with the support of mentors and trainers during the whole process. Eighty one fellowships have been granted since the starting of the Program.