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FINAL REPORT OF MEMBER STATE EXPERTS

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The views expressed in this report are those of the authors and may under no circumstance be regarded as stating an official position of the European Commission or of any of the EU Member States

List of acronyms

2013 Draft: Draft Law on the Courts of BiH issued by the MoJ of BiH in 2013

2015 Draft: Draft Law on the Courts of BiH issued by the MoJ of RS in 2015

CC: Criminal code

CPC: Criminal Procedure Code

EC: European Commission

FBIH: Federation of Bosnia and Herzegovina

HJPC: High Judicial and Prosecutorial Council of BiH

RS: Republika Srpska

SD: Structured Dialogue

TAIEX: Technical Assistance and Information Exchange

VC: European Commission for Democracy through Law (a.k.a. Venice Commission)

1. Introduction

In the framework of the Structured Dialogue initiative on Justice the revision of the law on the State Court of Bosnia and Herzegovina has been among the key priorities in the last years. Within this law the issue of extended criminal jurisdiction of the Court of BiH has been so far the most contentious topic.

The present two-day workshop is the last chapter of a sequence of previous technical initiatives. It is the intention of MS Experts to build upon the significant work performed so far. In particular:

- In March 2013 a first TAIEX Seminar was called to have a preliminary discussion on the matter and targeted recommendations by the European Commission services were issued, including on the concept, still relevant, for which there is no requirement to limit or expand the current criminal jurisdiction of the Court of BiH but to clarify it.
- In April 2013 the public consultation process on the first version of the draft law on the Courts of BiH prepared by the State Ministry of Justice of BiH (**hereinafter « the 2013 Draft »**) was carried out by the proponent of the legislation;
- In June 2013 the European Commission for Democracy through Law (Venice Commission) adopted an Opinion on the Draft Law on Courts at its 95th Plenary Session;
- In July 2013 a debate on the Venice Commission Opinion was held, in the context of a thematic plenary of the Structured Dialogue in Brussels, also at the presence of the Venice Commission Secretary and experts;
- In February 2014 an additional set of follow-up comments on the revised draft law was submitted by the Venice Commission, which then also presented these comments at its 98th Plenary Session in March 2014;
- In April 2014 a new debate was organised in the context of the second thematic plenary session of the Structured Dialogue in Brussels, again at the presence of representatives from the Venice Commission Secretariat and experts;
- In July 2014 a two-day TAIEX seminar was held in Sarajevo in order to fine tune the provisions contained in the 2013 draft law on courts regarding extended jurisdiction of the State Court of BiH.

Against this backdrop, and in view of the facts that the 2013 Draft had already been the object of several layers of elaboration both by local practicioners and international institutions, with a final mainly positive evaluation both by MS experts (on the occasion of the July 2014 SD Workshop) and by the Venice Commission (by means of the informal evaluation elaborated in February 2014), on the occasion of this workshop MS experts were called to fine tune the 2013 Draft, dedicating particular attention to the core issue of the extended jurisdiction of the State Court.

MS Experts involved were :

- Mr Ferdinando Buatier de Mongeot (Criminal Judge in the Court of Como, Italy), and
- Mr Florian Schlosser (Senior Prosecutor in the General Prosecutor's Office of Munich, Germany).

Both of them had already been part of the July 2014 Structured Dialogue exercise on the extended criminal jurisdiction of the Court of BiH.

Only early september news were broken according that a « new » draft was going to be presented by the Ministry of Justice of the Republika Srpska (**hereinafter the « 2015 Draft** »), in parallel with the 2013 Draft.

During the Ministerial meeting of 10 September 2015 in Brussels the Ministers of Justice of BiH and of the Entities/Brčko undertook to continue the technical and political dialogue aimed at the finalisation of a draft Law on Courts fit for the parliamentary proceeding, using as a basis of discussion *both* the 2013 and the 2015 draft.

The English version of the 2015 Draft was made available to the experts only on the 22nd of september 2015.

As a consequence of the latest developments, MS Experts found themselves faced with a particularly challenging task : their initial mandate (i.e. assessing the 2013 Draft, aiming first and foremost at the clarification of the notion of extended criminal jurisdiction of the State Court) was doubled and from an initial conceptually clear (though technically difficult) assignment (i.e. devising a clearer definition of extended jurisdiction) they were now asked to examine at the same time two legal texts under many respects diverging[1].

In light of the above, MS experts hereby note:

- That their role was and remains of exquisitely technical nature. Therefore throughout the exercise they refrained from expressing views of a political nature, in particular when it came to the adoption of either model proposed in the drafts; this did not prevent them, of course, from highlighting the technical drawbacks of *either* of the solutions tabled;
- That the 2015 Draft, as affirmed by the proponents themselves, is still at a preliminary stage and subject to likely re-elaboration. It received so far no technical evaluations from legal experts (differently from the 2013 Draft).
- As regards the « core business » of the present seminar (i.e. the clarification of the legal definition of extended criminal jurisdiction within the BiH law on State Court) the nature of the mandate of MS Experts was somehow complicated by the existence of two distinct concurring texts. To such topic they will devote here the greatest part of their attention, being in a position to elaborate on the issue with much greater detail on the basis of the former layers of SD exercises (of which they will try to wrap up here a final and comprehensive sum).
- MS Experts will focus as well on a set of specific issues which arose from the analysis of the drafts and the works in the plenary, seeking (when possible) to highlight points of convergence and common grounds between them.
- MS Experts were guided by the following principles throughout the exercise:
  - Not to delete extended jurisdiction, but to clarify it. Every technical suggestion contained in this report must be read in light of this purpose;
  - To build upon the overall positive evaluations of the Venice Commission, refraining from adopting possible (from a technical point of view) alternative options;
  - To take into account the case law of the Court itself, in so far as it can be deemed to be steady and constant enough.

[1] Neither Ministry, when providing the drafts, prepared an explanatory report[1], as it would have been appropriate in order to express the reasons for the chosen structure, contents and terms of the drafts, the intended effects, the interactions with other laws and in order to explain how they intend to implement recommendations, and to respond to (expected or actual) critics when it comes to controversial provisions. Nor was there any synopsis available for a better comparison of the two legal texts.

2. Executive summary

- The Drafts of 2013 (by the State MoJ) and 2015 (by the RS MoJ) present some significant points of contact. The most notable of them consists in the presence in both Drafts of provisions regarding not only the Court of BiH, but also the new High Court of BiH, vested with jurisdiction on appeals against the decisions of the State Court of BiH.
- At the same time the two Drafts contain significant discrepancies and different approaches to various issues. Reference is made first and foremost to the concept of extended criminal jurisdiction, on which the 2015 Draft adopts a radically different discipline compared to the 2013 Draft, expunging altogether such provision from the law on Courts.
- In general MS Experts deem that:
    - a clarification of the scope of extended criminal jurisdiction is needed,
    - such clarification is also possible within the current law;
    - this is compatible with the existence of a reasonable degree of judicial interpretation (always inherent to judicial activity), which must be guided by more objectivised legal parameters.
- the 2015 Draft is at its very initial stage and its approach to the issue of extended jurisdiction needs significant further deepening, whereas the 2013 Draft has already received several layers of opinions and technical evaluations, receiving under most aspects a positive endorsement. The above has to be borne in mind if the swiftness of legislative proceeding is the main interest at stake.
- It is unclear whether and how the proponents of the 2015 Draft intend to address the issue of extended criminal jurisdiction outside the law on the Courts of BiH in order to counterbalance its deletion. Thus:
    - If the intention of the proponents is to merely erase the provision on extended jurisdiction without replacing it elsewhere, then it is impossible to discuss about "clarification" of the scope of extended jurisdiction;
    - If the intention is to "shift » the notion of extended jurisdiction, after its clarification, into a different statute, thus maintaining its nature of a norm attributing subject matter jurisdiction (e.g. placing it in the criminal procedure code of BiH, which already contains some norms on jurisdiction), then there are *in abstracto* no obstacles from a technical viewpoint ;
    - If the intention is to reach the same *practical* effects of the current provisions on extended jurisdiction by introduction in the criminal code of BiH of appropriate norms of substantive criminal nature, then the scenario is more complex (in particular if the aim is to transform each and every possible case of extended jurisdiction currently foreseen by art. 7,2 into criminal provisions of substantive nature). Clarification, in case, would be needed by the Draft proponents.
- When it comes to the "core business" of clarification and objectivisation of extended jurisdiction, it is necessary to elaborate on art. 15 of the 2013 Draft. This is not possible with regard to the 2015 Draft because it does not deal with extended jurisdiction altogether;
- MS Experts reiterate here:
    - That there is overall consensus with regard to the provision of art. 15,2,a of the 2013 Draft (criminal offences of the Entities/Brcko which happen to affect the

fundamental values of the State of BiH: territorial integrity, sovereignty etc), in line with the constitutional provision of art 5.a) of the BiH Constitution. The likelihood of practical occurrence of such cases of extended jurisdiction seems low, in light of the presence of concurrent analogous offences in the Criminal Code of BiH;

   - That the cases of extended jurisdiction related to organized crime do not pose particular issues from the point of view of legal certainty. The minor issues stressed by MS Experts in the chapters below can be easily addressed by policy makers.
   - That the cases of extended jurisdiction linked to "interconnected cross entity offences" and "crimes causing detriment to BiH" might be better objectivised, in line with the specific technical suggestions which were already provided in the framework of the SD (and which will be better specified below);

- With regard to issues <u>other than extended jurisdiction</u>, MS Experts concur that the 2013 Draft was in great part brought in line with the outcomes of the previous chapters of SD and was overall positively evaluated by the VC. Some specific points needing additional elaboration were highlighted in the informal follow up of February 2014 of the Venice Commission. To date these issues remain pending (in particular remarks were addressed to art. 4, 7, 8, 13, 53).
- During the last workshop the following issues were highlighted by MS Experts and other practitioners with regard to the 2015 Draft (some of which applying also to the 2013 Draft):
   - The need to avoid that the entry into force of the new law might affect the continuity of work and processing of cases by the Court; this point is strictly linked to the following;
   - The need to guarantee continuity of tenure of Judges;
   - The need to prevent overlapping of the new discipline with other laws and the subtraction of the prerogatives of other bodies, in particular with regard to:
      - Conditions for the selection and appointment of judges;
      - Appointment of Court presidents;
      - Tenure of judges;
      - Evaluation of working performances;
      - Immunity and liability;
      - Role of the HJPC in the preparation of the Rulebook of the Court of BiH;
      - Budget.
   - The need to carefully scrutiny and better deepen the issue of civil liability of judges for damages caused to the State in the exercise of their functions;
   - The importance of providing a body and a discipline for addressing clashes of jurisdiction;
   - The need to guarantee a selection of judges based on professionalism and to avoid that any rule on ethnic balance might bias the impartiality (or perception of impartiality) of the Courts.

3. The issue of extended criminal juridiction of the Court(s) of BiH

Whereas a minor share of practitioners deem that the clarification and objectivization of the scope of extended jurisdiction either amounts to a gordian knot (and it is considered therefore as a vane exercise) or is needless (in that in others' opinion the current definition poses no problems), the most shared view among practitioners is that the current statutory provision needs being improved.

Below MS Experts will try to explain that a clarification of the scope of extended jurisdiction is needed and possible.

As it was clearly stressed during the seminar, this technical analysis is possible only with regard to art. 15 para. 2 of the 2013 of the BiH MoJ Draft, because the 2015 RS MoJ Draft proposes the sheer abolition of the very notion of extended jurisdiction.

It has to be underlined that the mandate received by MS Experts consists in the clarification of the notion of extended jurisdiction, and not in its deminution or demolition.

3.1. The state of play

3.1.1. Article 7.2 of the Law on BiH Court[2] currently in force states as follows :

(2) The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences:

(i) *endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;*

(ii) *may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina.*

3.1.2. The Constitutional Court of BiH (in its « Zivkovic » judgment of 28.3.2009) upheld the formal constitutional compatibility of art. 7,2,b, affirming not only the legality of extended jurisdiction, but also its necessity in order to protect fundamental values of the State[3].

At the same time such judgment called for "*the Court of BiH to determine the contents of the legal standards as provided in the challenged provision, while minding the fact that it should carefully establish whether the stipulated conditions are met in each particular case, depending on the given circumstances", in light of the "obligation on the judiciary to determine, through consistent development of the court case law, the contents of these standards as well as to decide, in each particular case, considering the given circumstances, whether stipulated conditions for jurisdiction of the Court of BiH are met*".

[2] "Official Gazette" of Bosnia and Herzegovina, 49/09

[3] The reasoning of the decision in that regard is as follows: "*In regards to the second question concerning the conformity of the challenged provision with Article III(1)(g) of the Constitution of Bosnia and Herzegovina, the Constitutional Court finds that the text of the provision of Article III(1)(g) of the Constitution of Bosnia and Herzegovina implies an obligation and jurisdiction of the state to generally implement criminal code when it has international or inter-entity character, which was pointed to by the OHR in its opinion. This implies obligation of the state to secure application of the criminal compulsion for certain criminal offences which are international or inter-entity, but also for those offences which are stipulated in criminal codes of the entities and Brčko District of BiH whenever they produce consequences beyond the territorial units. In the Constitutional Court's opinion, the opposite interpretation of this provision would not only be linguistically incorrect but would also lead to a very narrow interpretation of its scope, as it suggests that the state of Bosnia and Herzegovina does not have jurisdiction to take and implement regulations in the criminal field. To the contrary, the Constitutional Court contends that Article III(1)(g) implies and includes jurisdiction of the institutions of Bosnia and Herzegovina over certain criminal offences which are at the same time covered by the jurisdiction of both the entities and Brčko District. This further implies that the challenged provision of Article 13(2) of the Law on Court of BiH essentially stipulates conditions for complete implementation of the obligations of the state arising under Article III(1)(g) of the Constitution of Bosnia and Herzegovina and under which its institutions can assume that jurisdiction*".

In other words, the judgment acknowledged the existence of a significant degree of vagueness of such standard-norm and affirmed that only through consistent case-law elaboration by the Court of BiH could it be possible to fill the vacuum (in terms of legal precision). This means that the judgment considered art. 7,2,b of the Law on Court of BiH as a point of departure (by way of consistent case law) for the attainment of an acceptable level of foreseeability, objectivity and consistency: and when this should not turn out to be possible, legislative amendments are to be considered as the only option. Anyway, regardless of the evolution of the BiH Court case law, a better reshaping of the norm on jurisdiction is a viable option.

3.1.3. The Venice Commission in its Opinion No.723/2013 (sec. 42) clearly states that art. 7.2 of the Law on BiH Court is « *a necessary strengthening of the means to fight crime* ».
On the basis of such opinion, consensus was reached in the framework of the SD exercises on the need to maintain the scope of extended jurisdiction, at the same time revising the wording of Article 7 of the Law on Court of BiH [4]. This conclusion has found confirm in the "reasoned opinion" provided by the HJPC in July 2014 on the case law of the Court of BiH on extended jurisdiction. In fact, it concluded that a clear and steady jurisprudence on the criteria of interpretation of current art. 7.2.b of the law on Court of BiH is yet to come, considering that not only the cases adjudicated by the Court amounted to only 22 and such cases referred to 15 different criminal offences (thence the difficulty to find common terms of comparison): most importantly, the HJPC opinion showed that the criteria adopted by the Court in order to affirm/deny extended jurisdiction were on several occasions conflicting (even when it was about decisions on jurisdiction regarding different defendants accused of the same criminal offence in the same proceeding).

3.1.4. Art. 15 para 2 of the 2013 Draft (revised after the 2013 opinion of the Venice Commission), regarding extended jurisdiction, reads now as follows :

2) *The Court shall have jurisdiction for criminal offences as determined with the laws of the Federation of Bosnia and Herzegovina, Republika Srpska and the Brcko District of Bosnia and Herzegovina :*
   a) *When the criminal offences endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; or*
   b) *When the criminal offences have been committed by joined action of an organized group from the territory of Bosnia and Herzegovina, or the two entities; or the territory of one or two entities and Brcko District of Bosnia and Herzegovina, or the criminal offences are interconnected and committed in the territory of the territory of two entities; or at the territory of one or two entities and Brcko District of Bosnia and Herzegovina; or at the territory or outside the territory of Bosnia and Herzegovina; or when consequences of these criminal offences are harmful for Bosnia and Herzegovina or institutions of Bosnia and Herzegovina, and the criminal offences are: terrorism, financing of terrorist activities, organized crime ond crimes against health of people and general security,*

3.1.5. The Venice Commission in its additional informal follow up opinion in February 2014 on the revised version of the Law on Court of BiH expressed in general positive remarks with some recommendations, which will be considered below.

4 Third meeting of the "*Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina*", http://www.delbih.ec.europa.eu/News.aspx?newsid=5389&lang=EN -

3.2. Art. 15 of the 2013 Draft.:

3.2.1. Foreword

The former outcomes of the SD have shown significant consensus among practitioners[5] on the fact that art. 7 para 2 letter b of the law on Court of BiH does not provide a sufficient degree of precision. Reference is made, in particular, to the vague terminology of such norm when referring to the generic possibility (« *may* ») of unclear "*detrimental consequences*" for BiH as a possible criterion for the « centralisation» of jurisdiction at the level of the Court of BiH. MS Experts take note of the 2014 HJPC « Reasoned Opinion" (above mentioned) and of the fact that so far BiH legal practitioners were not offered consistent and steady criteria of interpretation of art. 7.2.b of the law on Court of BiH[6]. This shows that the standard of legal certainty (in terms of foreseeability, objectivity and consistency) required by the Zivkovic judgment is *de facto* not attained. This leads to think (several years after the enactment of art. 7.2) that such uncertainty does not depend merely on the (physiological) reasonable degree of uncertainty inherent to every judicial interpretation, but rather on the vagueness of the norm.

Thus, the clarification by way of legislative amendment of the scope of extended jurisdiction becomes all the more urgent.

The aim of the following exercise is to try a comprehensive final wrap-up of the hints, opinions and suggestions obtained so far on the issue of extended jurisdiction.

3.2.2. Analysis of the cases of extended jurisdiction foreseen in the 2013 Draft

MS Experts will not touch upon the cases of extended jurisdiction decribed in current art. **7,2,a)** of the Law on BiH Court/15,2,a of the 2013 Draft. All opinions rendered so far to that extent clearly state that such provision, though broad in scope, is important in that it protects the very fundamental values of BiH and poses no particular problems of a technical nature (besides being of likely scarce practical application, in view of the fact that several provisions contained in the BiH Criminal Code also deal with the same issues).

Therefore MS Experts will focus now on art. **15 para. 2 lett. b**) of the 2013 Draft.

It considers (in general terms) 3 areas of extended jurisdiction, depending:

i. On the existence of a BiH wide (or cross-entity wide) criminal organization.
ii. On the perpetration (also by single perpetrators) of several serious offences which are interrelated between them in a qualified manner and are committed in more than one Entity/Brcko district or partly in the territory of BiH and partly outside;
iii. On the perpetration of specific (or serious) criminal offences at Entity/Brcko level, causing damage to BiH.

A first remark is necessary: art. 15,2,b contains (at least in its English version) several sub-sentences, all of which connected by the disjunctive « *or* ».

In order to make its reading clearer, a first useful and simple amelioration consists in a clearer graphical separation of the three above mentioned areas of extended jurisdiction, starting a new separate sub-paragraph for each of them. This will be useful, in particular, to separate clearly the

[5] With the notable exception of representatives of the State Court.

[6] The HJPC opinion is provided with adequate reference to decisions rendered by the State Court on jurisdiction and on the underlying critera.

first hypothesis of « organised crime related » extended jurisdiction from the second of «cross entity interrelated » extended jurisdiction (thus better expliciting that extended jurisdiction for « interconnected offences » under 15.2.b.ii does not need to involve organized crime).

Thus the layout of art. 15,2,b) would become as follows:

> ***a)*** *……..*
> ***b) i.*** *When the criminal offences have been committed by joined action of an organized group from the territory of Bosnia and Herzegovina, or the two entities; or the territory of one or two entities and Brčko District of Bosnia and Herzegovina,*
> *or*
> ***ii.*** *the criminal offences are interconnected and committed in the territory of the territory of two entities; or at the territory of one or two entities and Brčko District of Bosnia and Herzegovina; or at the territory or outside the territory of Bosnia and Herzegovina;*
> *or*
> ***iii.*** *when consequences of these criminal offences are harmful for Bosnia and Herzegovina or institutions of Bosnia and Herzegovina, and the criminal offences are: terrorism, financing of terrorist activities, organized crime ond crimes against health of people and general security,*

In the following paragraphs MS Experts will elaborate on the contents of each of the above items and on possible amendments aimed at their better objectivisation.

3.2.2.i. Extended jurisdiction related to organized crime

The 2013 Draft considers offences related to BiH-wide organized crime as *per se* affecting BiH interests, regardless of the type of criminal offences aimed at by the criminal organization.

MS Experts share this view. They concur that in similar cases the very fact that a State wide (or cross-entity) organized group is active cross-Entity constitutes a sufficient reason for the centralization of jurisdiction, in light:

- of the evident threat posed by such a kind of criminal organizations for the structures of the State, often reverberating in corruptive activities and other phenomena of serious criminal relevance.
- of the importance to centralise the investigative action, in light both of the existence at central level of more dedicated and specialized police forces and, above all, of the fact that only centralizing the analysis of criminal intelligence is it often possible to acquire full awareness of the true organized dimension of criminal offences which, at first sight, might be mistakenly considered of local/individual relevance.

It is important to add, with regard to drafting technique:

- The 2013 Draft refers to « *criminal offences … committed by joined action of an organized group from the territory of Bosnia and Herzegovina, or the two entities; or the territory of one or two entities and Brčko District of Bosnia and Herzegovina ».*
- First of all, it is clear that the norm refers to organized groups aiming at the commission of criminal offences set forth in the criminal codes of the Entities/Brčko (because otherwise the conduct would fall directly under the scope of art. 250 of the criminal code of BiH[7]). It appears – based on the english version available to MS Experts - that the

[7] "*Whoever perpetrates a criminal offence prescribed by the law of Bosnia and Herzegovina*".

2013 Draft affirms the jurisdiction of the State Court in the case of offences committed by an « *organized group* » according to the definition of art. 1.19 of BiH Criminal Code[8] (and not to the definition of « organized criminal group » referred to in the following art. 1.20 of BiH Criminal Code[9]). Still, in the opinion of MS Experts it would be appropriate to clarify this by adding an explicit cross reference to either of two notions[10].

- the notion of « *organized group* **from** *the territory of BiH*» is unclear. The issue was pointed out during the plenary meeting of the SD exercise not only by MS Experts, but also from local practitioners. In fact, it is not possible to understand whether the Draft refers to the location of the « structures » of the organized group (if any), or to the « residence » of its member, or to the place of commission of the criminal offences. A simple but important clarification is needed and possible and can be easily obtained by referring to the places of commission of the criminal offences (a view shared also by local practicioners during the plenary meeting of the last SD exercise).

- In light of the above, this section of art. 15,2,b might be rewrited as follows : « *criminal offences … committed by joined action of an organized group in the territory of two Entities; or in the territory of one or two Entities and Brčko District of Bosnia and Herzegovina* »

3.2.2.ii Cases of interrelated cross-entity offences.

The 2013 Draft establishes extended jurisdiction when « *the criminal offences are interconnected and committed in the territory of the territory of two entities; or at the territory of one or two entities and Brčko District of Bosnia and Herzegovina; or at the territory or outside the territory of Bosnia and Herzegovina*».

MS Experts agree on the rationale for such case of extended jurisdiction, because only the centralization of prosecution and adjudication can guarantee complete and swift evidence gathering, resource saving and adjudication in a reasonable time.

Three issues arise :

- In the opinion of MS Experts, art. 15,2,b of the 2013 Draft encompasses within the scope of « cross-entity extended jurisdiction » also offences committed by individuals. Such is the preferable interpretation of its syntaxis, even though, as already noted, it can be misleading (see above sub **3.2.2**) : indeed, the « Informal opinion » of February 2014 on the revised version of the 2013 Draft seems (in the opinion of MS Experts) to have been misled, in that it deems that the current layout does not refer to «offences perpetrated by individuals »[11]. Therefore, a simple reshaping of the layout of the article, art. 15,2,b would be beneficial in terms of clarity (this can be attained, as already exemplified above, by graphically separating the provision on organised crime from the provision on « interconnected

[8] « An *organized group* is a group that is formed for the purpose of direct perpetration of an offence and that does not need to have formally defined roles of its members, the continuity of its membership, or a developed structure ».

[9] « An *organized criminal group* is a group of three or more persons, existing over a certain period of time and acting in concert with the aim of perpetrating one or more criminal offences which carry a punishment of imprisonment of over three years or more severe punishment, for the purpose of material gain ».

[10] Bearing in mind that, if the intention of the drafters is to focus the jurisdiction of the State Court on more serious offences, then the reference to « organised criminal group » would seem more appropriate, in that it refers organized groups aiming at the commission of offences carrying a punishment of imprisonment of over three years.

[11] Where they affirmed (uncorrectly, in our opinion) that the current version of art 15(2)(b) of the 2013 Draft "*was redrafted to only refer to criminal offences committed by organised groups, leaving individuals out completely*".

offences »).
Such clearer separation is also in line with the opinions of the Venice Commission, according to which « *individuals and organised groups (*should*) be covered by separate provisions* ».

- MS experts deem that the requirement of « interconnection » between criminal offences needs better definition, possibly by recourse to comparative analysis. The mere reference to « *interconnection* » appears, in fact, excessively vague and as such exposed to the risk of arbitrary interpretation.
On the occasion of the SD Workshop of July 2014 comparative examples were discussed, and the following examples of notion of "interrelation" were shown:

  - objective connection: when *the same offence* was committed by several offenders jointly or when more persons with independent actins caused the event;
  - subjective connection: when *the same person* is accused of several offences committed with a single action , or committed with several actions in the furtherance of the same criminal plan;
  - theleological connection: when a criminal offence was committed in order to commit or to conceal another ;
  - evidentiary connection: when the proof of a criminal offence or its circumstance influences the proof of another offence.

Thence the recommendation from MS Experts to BiH MoJ to specify the notion of interconnection by reference to some or all of the above categories. This can be made very easily adding to art. 15 of the Draft a paragraph containing some or all of the above notions[12]

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[12] Some of the participants in the SD Workshop argued that the criminal procedural code already contained provisions providing a definition of « interrelated » or « connected » offences. They were, though, not able on the spot to provide MS Experts with a precise indication of such norms. So if, as MS Experts guess, they were referring to art. 23 para 2 of the CPC and art. 25 paragraphs 1, 2 and 3 of the CPC, it must be said that such norms still lack a sufficient level of precision, in that :

- art. 23 refers to an excessively broad notion of monosubjective connession, because it refers to the commission by the same person of « *several criminal offences* » regardless of their nature, the time in which they were perpetrated, the ontological interrelation between them, their level of seriousness.

- Art. 25 paragraph 1, while containing a satisfactory definition of objective connection, does not contain a satisfactorily precise notion of subjective connection. Art. 25 paragraph 2 merely refers to « *mutual relation* » between criminal offences, but again fails to define that notion.

It has to be added that the provision of art. 25 refers to joinder of proceedings, which is different from norms attributing jurisdiction: normally the requirements needed for the joinder of proceedings are less stringent than the requirements related to jurisdiction, for the simple reason that in the case of joinder of proceedings no issues of « shift » of jurisdiction arise, in that the joined proceedings already fell within the scope of jurisdiction of the same court (which, for reasons of opportunity, decides to conduct a single trial rather then several separate proceedings).

Below, for convenience, the text of such articles:

Article 23 of the Code of Criminal Procedure of BiH . "Material Jurisdiction of the Court

(1)…

(2) If a person committed several offenses and if the Court is competent with respect to one or more of them, while other courts are competent for the other offenses, in that case the priority shall be given to the trial before the Court. » « Article 25 - Joinder of Proceedings

(1) The Court shall decide, as a rule, to conduct joint proceedings and render a single verdict if the same person is charged for several criminal offenses, or if several persons participated in commission of the same criminal offense.

- it is not conceivable that each and every case of interrelated cross-entity criminal offences (also the most trivial ones) be prosecuted at BiH Court level.
  Therefore an additional requirement of seriousness of the criminal offences falling within the scope of extended jurisdiction is needed, lest the Court of BiH be flooded with petty proceedings.
  The issue is of relevance because if the 2013 Draft remains as it is now (i.e. referring in general to all cases of interrelated offences) it would mean that the Court always has to proceed in so far as criminal offences are « interrelated » (and, this being the case, it would be against the rule of law to adopt - against the letter of the law - an approach of « self restraint » by the court with regard to petty offences).
  Therefore an express clarification of the Draft thereon is needed and it is possible to refer below (**3.2.2.iii**) in order to elaborate on the legal definition of the seriousness of the offences[13].

3.2.2.iii. Entity/Brcko criminal offences causing detrimental consequences to BiH.

The third category envisaged by art. 15 of the 2013 Draft affirms extended jurisdiction « *when consequences of these criminal offences are harmful for Bosnia and Herzegovina or institutions of Bosnia and Herzegovina, and the criminal offences are: terrorism, financing of terrorist activities, organized crime ond crimes against health of people and general security »*.

Thus this provision refers to crimes which are not linked to organized crime and are not in connection with other offences perpetrated in different Entities/Brčko or abroad.

MS Experts note the following :

- A strong rationale for the « centralization » of jurisdiction in such cases is paramount and it needs being clearly expressed in the law.
  This implies logically that the criminal offences/damage at stake have to be of a serious nature : only the existence of significant State values affected by criminal offences committed in the Entities/Brčko can justify the « centralization » of adjudication. And it is difficult to conceive such a damage to BiH institutions in the case of petty Entity/Brčko criminal offences. Otherwise reasoning, leaving the draft as it is would imply an undefined scope of jurisdiction of the State Court, which would risk to be

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(2) The Court may decide to conduct joint proceedings and render a single verdict even if several persons have been charged with several criminal offenses on the connection that there is a mutual relation between those criminal offenses.

(3) The Court may decide to conduct joint proceedings and render a single verdict if, before the same Court, separate proceedings are currently conducted against the same person for several criminal offenses or against several persons for the same criminal offenses ».

MS Experts note that the provision of art. 25 is related to the joinder of proceedings: usually in procedural codes the requirements needed for the joinder of proceedings are less stringent than the requirements related to jurisdiction, for the simple reason that in the case of joinder of proceedings no issues of « shift » of jurisdiction arise, in that the joined proceedings already fell within the scope of jurisdiction of the same court (which, for reasons of opportunity, decides to conduct a single trial rather then several separate proceedings).

[13] MS Experts note that such amendment would be in line with the existing jurisprudence of the Court of BiH, thus it is not likely to cause any "shock" in the case law. See below 3.2.2.iii with regard to the HJPC reasoned opinion of July 2014) very often in interpreting the potentially unlimited scope of jurisdiction set forth by art. 7.2.b of the Law, the Court affirmed its jurisdiction only if the cases brought to its attention were of "serious" material or immaterial damage for BiH. Once more, if MS Experts understand the rationale underpinning such decisions, at the same time they affirm that such "self restraint" cannot be contrary to the law (in so far as it affirms the jurisdiction of the State Court regardless of the seriousness of the damage).

flooded by minor proceedings, being subsequently obliged to adopt an approach of « self restraint » without having a legal basis thereto.

- The requisite of « seriousness of the offence » might, in general, be defined either by indicating a threshold of penalty (in terms of maximum years of imprisonment foreseen, triggering the jurisdiction of the Court of BiH), or by providing a list of specific criminal offences which (for reasons of criminal policy) are considered worthy of State jurisdiction.
  The current version of art. 15 of the 2013 Draft opts for the latter path, referring to a list of offences (« *terrorism, financing of terrorist activities, organized crime and crimes against health of people and general security »).* The crimes selected by the 2013 drafters are undoubtedly of a serious nature. MS Experts, while endorsing the positive development of the 2013 Draft compared to the current definition of art. 7,2,b, cannot comment on the choice (of an exquisitely political nature) of the Entity/Brčko offences to be adjudicated at State level[14]. At the same time they note :

  - that the reference to « *terrorism* », « *financing of terrorist activities* » and to « *crimes against health of people* » has a *pendant* in specific criminal offences (or at least to specific chapters) of the criminal codes of the Entities/Brčko, and this is positive in terms of clarity of the cross reference of the norm.

  - That the notion of « *crimes against general security* » (at least in the english version of the codes available to MS Experts) seems to refer to chapters 27 of the Brčko criminal code, 30 of FBIH criminal code and 31 of RS criminal code. If that is the case, then no issues arise in terms of precision of the legal definition.

  - that it would be advisable to specify the notion of « *organised crime* ». It is not completely clear whether it refers :

    - solely to the specific provisions on « *organized crime* » contained in para 342 of the FBIH criminal code

    - or also to the ones on « *organized criminal group* » contained in para 383 of the RS criminal code and 359 and 361 of the Criminal Code of Brčko District (labelled therein as « *Criminal association* [15]» and « *group* »),

    - and/or also to any other offence of same codes committed by the perpetrator «as a member of an organized criminal group[16]».

  Therefore the drafters might consider adding a definition of what is considered « organized crime » in the meaning of this norm. Alternatively, it would be left up

[14] Still it is important to stress out that the offences referred to in the 2013 Draft have very close links with similar offences contained in the Criminal Code of BiH, so that the residual scope of application of this category of extended jurisdiction remains limited.
During the SD Workshop of July 2014 MS Experts hypothesized by way of example the possibility to refer to the so called "list of European crimes" contained in the European Framework Decision on the European Arrest Warrant n. 2002/584: a set of criminal offences on whose seriousness there is such a level of consensus at European level that member States undertook to surrender suspects (even nationals of the executing States) regardless of the requirement of double criminality which normally is deemed necessary for traditional extraditions. In any event, it is advisable that the explanatory report of the Draft provide reasons for the legislative choice.

[15] It has to be noted that the Brcko Criminal Code, as far as MS Experts could ascertain, does not provide a legal definition of criminal "*group*" or "*association*".

[16] See e.g. art. 295 para 2 of the criminal code of FBIH on extortion or the similar provision on kidnapping.

to the jurisprudence of the State Court to specify the notion of « organized crime » here commented[17].

- Art. 7,2,b merely and generically refers to vague "*possible or actual detrimental consequences*" for BiH. Differently, art. 15 of the 2013 Draft introduces a better definition of this category of extended jurisdiction, specifying that the detriment to BiH must be actual and not merely potential. MS Experts endorse such proposal and anyway stress that, whatever the legislative option, it is advisable:

    - to avoid reference to the vaporous concept "possibility" of damage for BiH. MS Experts strongly advise to keep the Draft as it is, affirming that damage for BiH must be actual and not merely potential[18].

    - to foresee that damage for BiH must be of serious relevance. MS Experts note, once more, that the Court of BiH itself, in most of the available reasonings of decisions rendered so far, affirmed extended jurisdiction in so far as the crimes brought to its attention caused "serious" material or immaterial damage to BiH. Expliciting in the law such requirement, thus, far from causing any "shock" in the case law of the Court would formally align the law and the current jurisprudence.

3.3. The 2015 Draft and its approach to the issue of extended jurisdiction

The 2015 Draft does not contain any provision on extended jurisdiction. It opts for the sheer abolition of extended jurisdiction from the Law on Courts.
In the view of the 2015 drafters this "radical" solution is the only one allowing a clarification of the scope of jurisdiction of the Court of BiH, considering the very concept of extended jurisdiction an intractable problem
It is clear, though, that by altogether deleting the provision on extended jurisdiction, the problem of clarifying its notion is not solved, but removed.
MS Experts, while reiterating that in their opinion a better clarification of the notion is possible, cannot but stress that the fundamental principle of certainty and predictability of law does not (and cannot) exclude a reasonable degree of judicial interpretation also with regard to issues pertaining norms of action/jurisdiction of the courts, as affirmed by the European Court of Human Rights[19]. Judicial interpretation is an ineludible step in the application of every provision of law.
With the above in mind, and coming back to the 2015 Draft, the following scenarios can be hypothesized:

3.3.1. Scenario 1: Erasure of extended jurisdiction

If the 2015 Draft is to be interpreted as a proposal to altogether erase extended jurisdiction *from the BiH legal system as a whole,* without introducing it elsewhere, it is not possible to express any

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[17] MS Experts underline that the practical application of this norm seems to be in practice quite limited, if one considers that organised groups to which this part of art. 15 refers are exclusively those which (i) operate within one single Entity or Brcko and (ii) cause damage to BiH: indeed, all other cases are already covered either by the norms of primary competence of the Criminal Code of BiH or by the provision (above commented) of art. 15,2,b,i of the 2013 Draft.

[18] As a minimum (as it was hinted during a previous session of SD) there must be "*substantial likelihood*" that a damage to BiH will derive as a consequence of the criminal conduct.

[19] Therefore, on the one side it is necessary that jurisdiction be attributed through norms (*nullum judicium sine lege*) which are "*characterised by a sufficient degree of precision, so to enable a rigorous interpretation and exposed to the lesser extent possible to discretionary interpretation* », but on the other side "***this does not mean that the courts do not have some latitude to interpret the relevant national legislation***" : see European Court of Human Rights, judgment Coeme vs Belgium 18/10/2000, http://hudoc.echr.coe.int/eng?i=001-59194#{"itemid":["001-59194"]}.

technical opinion on the issue of "clarification" of extended jurisdiction, because in such scenario the object of the exercise does not exist anymore. It is not any more an issue of technical nature ("*how to define extended jurisdiction*"), but rather of political nature ("*whether or not to have extended jurisdiction in the system*").
The only thing MS experts can do in this case is to recall the above mentioned judgment of the Constitutional Court and the previous layers of Structured Dialogue/opinions of the Venice Commission on the legality of extended jurisdiction[20] and on the existence of viable solutions for its clarification.

3.3.2. Scenario 2: Relocation of provision on extended jurisdiction

If the intention of the proponents of the 2015 Draft is, on the contrary, to remove the provision on extended jurisdiction from the law on Courts in order to transfer it into another State level legal provision of the same rank[21], then two additional sub-scenarios open up. It has to be noted that MS Experts are reasoning only by way of assumption, because it was impossible during the plenary meetings to obtain a clarification on this regard by the proponents of the 2015 Draft.

Now, if the option is to shift the notion of extended jurisdiction (after clarifying it - possibly on the basis of art. 15 of the 2013 Draft) into a different statute, maintaining its nature of a norm on subject matter jurisdiction[22], there seem to be *in abstracto* no legal obstacles[23].
During the plenary sessions of the SD Exercise it was voiced, among the possible statutes in which to relocate the provision on extended jurisdiction similar to the current one, the Code of Criminal Procedure of BiH[24].

3.3.3. Scenario 3: Transformation from extended to "primary" jurisdiction

If the intention of the drafters is to « substantivize » the current norms on extended jurisdiction, i.e. to reach the same practical effects of the current provision of art. 7,2,b of the Law on Courts

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[20] Opinion No.723/2013, sec. 42

[21] As it was argued during the plenary meetings of the Structured Dialogue exercise and seems to be hinted in the Protocol of 10 September 2015 signed in Brussels by the Ministers of Jursice of BiH and of the Entities/Brcko.

[22] I.e. a norm establishing the judge in charge of deciding certain cases.

[23] Though the current location seems to MS Experts the most logical and there appear to be no "technical" reasons to remove the provision on jurisdiction.

[24] To this extent, it has to be noted that in several legal systems the issue of subject matter jurisdiction is addressed in procedural codes.
Notably, *also the BiH Code of Criminal Procedure already contains provisions attributing subject matter jurisdiction*, so that embedding an additional provision on jurisdiction would not be "eccentric". It is sufficient to examine, for instance, art. 23 of the Procedural Code:

" *(1)The Court shall have jurisdiction to:*

a) adjudicate in first instance criminal matters within the scope of its material jurisdiction set forth by law;

b) decide appeals against first instance decisions;

c) decide the reopening of criminal proceedings in such instances as provided for under this Code;

d) decide any conflict of jurisdiction in criminal matters between courts of the Federation of Bosnia and Herzegovina and Republika Srpska and between courts of the Entities and the District of Brčko of Bosnia and Herzegovina;

e) decide any issue relating to international and inter-Entity criminal law enforcement, including relations with Interpol and other international police institutions, such as decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign states or international courts or tribunals;

f) carry out other tasks as stipulated by law.

(2) *If a person committed several offenses and if the Court is competent with respect to one or more of them, while other courts are competent for the other offenses, in that case the priority shall be given to the trial before the Court".*

by way of introduction in the Criminal Code of BiH of norms of material criminal nature[25], then the scenario is definitely more complex.
In other words, if the aim is to keep unaltered the scope of cases adjudicated by the Court of BiH, then (while abolishing extended jurisdiction) policy makers will have to introduce in the Criminal Code of BiH substantive norms, directly criminalizing all possible current hypotheses of extended jurisdiction, thus in practice transforming the current cases of extended jurisdiction into cases of « primary » jurisdiction.
A specific, in depth study will be necessary in this case, in order to assess the practical feasibility and the possible constraints of such very wide scope of « substantivization ».
MS Experts were informed that a working group is being set up for this reason under the coordination of the HJPC (in particular with the task to explore the possibility to transform into cases of primary jurisdiction the cases described above sub 3.2.2.iii, and possibly others) and they cannot but welcome the initiative.
In the opinion of MS Experts :

- the working group should explore first and foremost the feasibility of such « substantivization » by means of « general clauses», i.e. norms apt to transform into BiH State criminal offences all those criminal offences set forth in Entity/ Brčko codes which meet the additional requirements (corresponding to the criteria which currently justify extended jurisdiction). This, if possible, would allow a swifter drafting process[26].
  At the same time, MS Experts argue (and suggest the working group to ascertain) the existence of areas of extended jurisdiction and/or specific criminal offences with regard to which the process of « substantivization » can be technically easier[27].
  In any event, it is important to note that the recent amendments to the BiH criminal code in the field of money laundering (art. 209 para 1 BiH CC[28]) have shown the possibility to attribute direct or indirect relevance in the BiH State level criminal legislation to criminal offences established in Entity/ Brčko codes.

- In alternative, intermediate solutions can also be explored.
  This means maintaining only some of the current areas of extended jurisdiction, while at the same time transforming the criminal jurisdiction of the Court of BiH into substantive norms (i.e. « substantializing ») for the « remaining » part.

- In any event, drafters will have to pay particular attention to a proper coordination between the criminal code of BiH and the criminal codes of the Entities/ Brčko (which most likely

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[25] I.e. a norm imposing a punishment in the case of commission of certain conducts.

[26] This kind of legislative technique is the one adopted, e.g., by art, 250 para 1 of the BiH CC organised crime, punishing "*Whoever perpetrates a criminal offence prescribed by the law of Bosnia and Herzegovina as a member of an organized crime group*". Or the norm on attempt (art. 26 BiH CC). As it can be noticed, in both cases the technique consists in applying a different discipline/sanction to *any possible offence when specific additional conditions are met.* Further examples of the above can be found in every for instance in the Italian experience (Law Decree 152/1991 art. 7, which introduces a special discipline for any criminal offence committed in order to favour Mafia organizations; or Law Decree 122/1993 introducing a special discipline in case a criminal offence is committed for reasons or racism).

[27] Reference is made, for instance, to the cases which currently fall within the scope of extended juridiction related to « *organized crime* » (**above, 3.2.2.iii**). They could suitably be « substantivized » into the BiH criminal code through amendment of art. 250 of the criminal code, for instance by adding after paragraph 1 the following : « *The same punishment shall be imposed on whoever perpetrates a criminal offence prescribed by the law of the Entities or the Brčko District of BiH, if those criminal offences causes a (serious) damage to BiH* ».

[28] The innovation consists in the fact that also criminal offences punished by the Entities/ Brčko codes (and not only offences punished by the BiH criminal code) can be the predicate offences of money laundering at BiH State level. In other words, crimes punished by Entity/Brčko codes acquire now direct relevance (though indirect, as predicate offences) for the integration of the subsequent crime of money laundering. A similar amendment was recently brought to the criminal offence of human trafficking.

will need to be amended with parallel provisions, reciprocal to the ones introduced in the State criminal code).

- MS Experts deem that the transposition of part or all of the cases of extended jurisdiction into material provisions of the State criminal code would raise no significant issues with regard to the principle of non-retroactivity[29], or anyway they could be easily solved by way of introduction of appropriate transitional provisions. In fact:

    - The principle of non-retroactivity comes into play only in so far as a new law criminalizes a conduct that previously was not criminally relevant. In the cases at stake, though, the facts which before were punished by the court of BiH (by way of extended jurisdiction), continue to be punished by the same Court of BiH (by way of primary jurisdiction). So it appears that there is continuity of the criminal relevance of the same conducts, thus no issues of retroactivity.

    - In any event, in order to wipe out any possible legal uncertainty among practitioners about non-retroactivity, it is possible (and commonly practiced in similar cases) to implement clear transitional norms of jurisdictional nature, clearly stating that the current norms on extended jurisdiction keep applying to all criminal offences perpetrated before the enactment of the amendments to the State criminal code.

Summing up, the hypothese of turning some of the areas covered by the so-called extended jurisdiction in material provisions of the State Criminal Code is worth exploring and – if wished so – such an approach could be even combined with a 'residuary' (extended) jurisdiction based on clearer and more objective criteria.

At the same time MS Experts note that the time needed for this path is likely much longer than pursuing the approvation of the Draft of 2013 (on which there was already a long elaboration among all interlocutors), most of all if the aim is to transform all cases of extended jurisdiction into cases of primary jurisdiction

[29] Such principle, which constitute a general principle of international law (and is also enshrined all Human Right international legal instruments, e.g. art. 7 of the ECvHR), is dealt with by art. 4 of the BiH criminal code, which not only introduces the principle of non-retroactivity of criminal law, but also the principle of retroactivity of the most favourable criminal provision. It reads as follows :

Article 4 - Time Constraints Regarding Applicability

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.
(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

The following art. 4 a) of the BiH criminal code was introduced in order to introduce the principle contained in art. 7 para 2 of the ECvHR regarding crimes considered by general principles of international law (so called *criminal juris gentium*):

Article 4a) Trial and punishment for criminal offences pursuant to the general principles of international law

Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.

4. Other issues related to the 2013 Draft

The Venice Commission expressed the view that the 2013 Draft Law on Courts presented by the State Ministry of Justice is a suitable basis for amendments.
The brief informal commentary provided by the Venice Commission in February 2014 further elaborated on the issue, taking note of the fact that the latest revised version of the 2013 Draft had addressed great part of the previous recommendations.
At the same time, MS Experts point out that no further elaboration on the side of BiH MoJ took place after the last VC informal opinion and the 2014 Structured Dialogue exercise, in particular with regard to the issues which remain pending according to the 2014 informal opinion.
In particular, the following must be noted:

4.1. Accountability (Art. 6, 7, 40 of the 2013 Draft; Art. 15, 16 of the 2015 Draft)

4.1.1. With regard to the regulation proposed in the 2013 Draft, MS Experts note that the VC in its 2014 follow-up comment clarified that from a formal viewpoint no particular issues arise with regard to the accountability of judges and staff, i.e. artt. 6, 7 and 40 of the Draft.

MS Experts stress the fact that such provisions of the 2013 Draft set forth total immunity of judges for opinions expressed or votes cast in the exercise of their functions[30]. Furthermore the same norm excludes civil liability of judges for damages caused to citizens or legal persons in the exercise of judicial duties.

Regarding this last point, MS Experts, it would be advisable to use, instead of the word "citizens", the definition "natural persons", regardless of their citizenship (because otherwise there might be doubts about a different discipline depending on citizenship).

4.1.2. Article 16 of the 2015 Draft reads as follows:
"*(1) Bosnia and Herzegovina shall be held accountable for any damage suffered by a party during the proceedings or any damage suffered due to the failure to ensure the right to fair trial.*
(2) Bosnia and Herzegovina may recover the damages paid in line with the rules governing liabilities taken on behalf of another party".
Such provision seems to introduce a form of civil liability of judges for damages incurred by parties in proceedings.
The norm makes reference to "the rules governing liabilities taken on behalf of another party". MS Experts were not made aware of the existence and precise contents of such norms referred to by the draft legislation.

At the same time they cannot but note :

- the potentially extremely wide extent of the scope of liability of judges.
- The proportionally wide exposition of judges to possible civil lawsuits from the State.

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[30] ***Article 7 (Immunity)***

(1) A judge shall not be held accountable for any opinion expressed or vote cast when rendering a court decision.
(2) For any damages caused by a judge, in the exercise of judicial duties, caused to a citizen or legal person, Bosnia and Herzegovina shall be accountable.

More in general, MS Experts are of the idea that the whole issue of civil liability of judges for actions committed in the exercise of their functions bears such a significant and sensitive systemic relevance (in terms of affecting the independence of judiciary) that much greater deepening of the issue seems necessary, also in coordination with the other relevant pieces of legislation existing in BiH (other codes and criminal codes, law on HJPC).

In any event, MS experts stress that, in line with the principles constantly affirmed in all international *fora*, judicial liability has to be strictly limited, as underlined by the CoE[31] and the VC[32].
Furthermore, with a view to a swifter parliamentary proceeding, it would be advisable not to burden the package with such highly sensitive and potentially contentious issue.

4.2. Continuity of work and tenure of judges (Art. 58, 59 of the 2013 Draft; art. 66 ff Rs draft)

4.2.1. The 2013 Draft

Articles 58 and 59 are aimed at guaranteeing the continuity of the Court's work (in particular with regard to the introduction of the new "Higher Court of BiH" and its taking over the cases so far dealt with by the Appellate Division of the Court of BiH), at regulating the processing of cases during the transitional phase and the rights and tenure of judges during the transitional phase. They have to be read together with art. 54 (related to the selection and appointment of the judges of the Higher Court).

The VC did not express recommendations related to these provisions.

Art. 59 states that cases falling within the scope of jurisdiction of the new High Court which were filed with the Court of BiH up to the implementation of the High Court shall be taken over by the High Court. This might lead to interruption of proceedings pending at the appellate division of the Court of BiH, causing at least serious delay, most of all if we consider the fact that the judges in charge of each case might change.

From a technical point of view it might be advisable to maintain (by way of a very simple transitional norm) the appellate division of the Court of BiH alive and in charge of all the cases pending at the date of the implementation of the new law. The appellate division should keep on working until the last proceeding has ended, thus not changing the judge in the middle of a running proceeding. The experience in the German and Italian judiciary shows that it is a <u>viable solution to have individual judges covering simultaneously functions in two courts at the same time</u>[33].

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[31] See e.g. the Consultive Committee of European Judges' "Magna Charta of Judges": " *It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default*".

[32] Opinion No.723/2013, sec. 29

[33] In Germany, repeatedly judges get appointed judges at the High Appellate Court (Oberlandesgericht), at the same time covering the functions of Judges of a lower Court until their pending proceedings there are all terminated. Similarly, a judge working for the appellate division of the Court of BiH could be appointed judge of the Higher Court, staying nevertheless in duty for his running proceedings as member of the appellate division of the Court of BiH. When in Italy the office of "Pretore" was suppressed, the law expressly foresaw that the office of "Pretore" remained in force in order to terminate the pending proceedings and that the judges covering functions of "Pretore" maintained it (in several cases in addition with the new functions introduced by the law) until all pending cases were adjudicated.

4.2.2. The 2015 Draft

The relevant provisions of the draft provide a clear but radical approach: the Court of BiH shall terminate its operations as of the date of the commencements of the Court and the High Court under the new law[34]. Art. 68 ff. provide that the staff of the (new) Courts has to be appointed, the staff of the current Court of BiH being only possible applicants.

During the seminar, the representatives of the Court of BiH expressed concerns that by these provisions the right of the actual judges to maintain their current position be violated, their life tenure hollowed, and no continuity of work provided.

In fact, MS Experts cannot detect the benefit underpinning the radical approach chosen by the draft, nor were there any suggestions towards this radical approach during the previos SD sessions, nor did the VC issue any recommendation in favour of a complete replacement of the staff of the Court of BiH. The detrimental effect of such legislative option for the continuity of the work of the Court of BiH is obvious. Similarly, it is the firm contention of MS Experts that no issue related to the structural changes of the Court can bear any consequence in terms of tenure of the judges of the Court.

Therefore, MS Experts recommend to amend the provisions regarding the transitory phase on basis of the draft of 2013, taking into account what has been outlined above with regard to Art. 58, 59 of the 2013 Draft of the State Ministry.

4.3. Seat of the appellate court

While in the Draft of 2013, Art. 3 (1) it is stated that the seat of the High Court shall be in Mostar, the Draft of 2015 from the Rs in Art. 4 (2) sets forth that it should be in Banja Luka. During the seminar, the Court of BiH expressed its favour towards the idea of have the seat in Sarajevo. The concerns of the Court of BiH are expressed with great detail in the commentary handed out during the workshop.

From an economic, logistical and technical point of view, there are several points in favour of allocating the seat in Sarajevo, considering:

- the infrastructures already in place both with regard to the Court and the Prison;
- the difficulty to transfer bulky case files from a city to another within the short timeframe of detention related appeals;
- the difficulty to transfer prisoners.

Such logistical constraints cannot be underestimated.

On the other hand, a certain spatial distance between the Court of BiH and the High Court can be helpful to strengthen the reception of the two institutions and its judges as independent from each other.

MS Experts thus refrain from expressing a clear preference for either of the proposals, while at the same time highlighting that if the decision should be that of allocating the Court in the territory of RS, a viable option saving all issues at stake might consist in choosing a <u>location in the RS closer to Sarajevo than Banja Luka</u>.

[34] Art 66 (2) of the draft

4.4. Budget

The VC, in its 2013 opinion (regarding at that time Art. 48), stated that the role of the various actors in the process is not clearly defined[35]. After amendments being made, in its follow-up comments to the provision then found under Art. 53, it stated that the lack of clarity remained unchanged.
No further amendments have been made since.
MS Experts, therefore, cannot but refer here to the VC Opinion. Furthermore, due to the limited time given, they are not in a position to deepen the issue.
The Court of BiH indicated that the procedure should be in line with the law on financing of the institutions of bih, according to which currently the Court submits its budget proposal directly to the BiH Ministry of Finance.
If a change of the current situations is considered necessary, the drafters should provide an analysis of the current situation and disadvantages possibly detected, and an analysis on the benefits to be expected from the drafted (more complex) procedure.
The 2015 Draft adopts an approach which is in line with the general idea of the provisions foreseen in the draft provided by the State Ministry. Therefore, the same observations apply for both proposals. The new draft is slightly more precise, insofar as the role of the Ministry of Justice is described ("*shall provide its opinion*"). Nevertheless, the observation of the VC, that the role of the various actors in the process is not clearly defined, remains valid for the RS draft.

4.5. Overlapping with other laws

As a general rule, overlaps should be avoided, for juridical reasons (transparency, legal certainty) as well as because it seems easier to achieve a broad political support if the draft Law does not cover (potentially controversial) issues that do not belong to its core subjects.

The VC did not specifically address the issue of possible overlaps of the 2013 Draft with other laws, but pointed out several times, that overlapping should be avoided as, for instance, regarding issues regulated in the Law on the HJPC[36].

The 2015 Draft touches upon several issues which currently are dealt with by other laws. This applies for the 2013 Draft as well.

MS Experts concur (in line with the concerns expressed by the President of the HJPC during the workshop) that the following issues, which are regulated in the 2015 Draft, need being carefully scrutinized in order to avoid the risk of contradictory discipline:

- Conditions for the selection and appointment of judges;
- Appointment of Court presidents;
- Tenure of judges;
- Evaluation of working performances;
- Immunity and liability;
- Role of the HJPC in the preparation of the Rulebook of the Court of BiH;
- Budget.

4.6. Decisions on clashes of jurisdiction pursuant to art. 7,3 of the Law on Courts

[35] Opinion No.723/2013, sec. 79
[36] Opinion No.723/2013, sec. 20, 89

MS Experts agree on the extreme importance of introducing/srteamlining the body entrusted with the decision of conflicts of subject matter jurisdiction between Entity/ Brčko Courts and the Court of BiH.

As of today, the provision of art. 7 para 3 lett. D[37] of the law on Court of BiH states that the State Court itself is the organ competent to regulate such conflicts. MS Experts have the following remarks:

- the current norm diverges from the (partly overlapping) provision of art, 23 para 1 lett. D of the CPC of BiH : the latter, in fact, states that the Court of BiH has jurisdiction (only) with regard to conflicts of jurisdiction between Entities /Brcko. A better coordination between the norms is highly advisable;

- it was not possible to spot in the CPC any procedural description of the steps necessary for such actions.

MS experts strongly welcome the provision contained in art. 18, para. 2), lett c) of the 2013 Draft according to which the BiH High Court will be the body vested with the task to solve clashes of jurisdiction between the Court of BiH and the Entities/Brcko[38]. This solution, in fact :

- provides better guarantees of impartiality and prevents the risk that the Court of BiH be regarded as having domestic jurisdiction on cases concerning the Court itself ;

- will likely foster the creation of a more comprehensive case law on jurisdiction;

- will help reduce the risk of appearance of arbitrary decisions on jurisdiction.

Unfortunately, the 2015 Draft adopts on the issue a restrictive approach, unexplicably limiting the jurisdiction (of the Court of BiH) to the conflicts of jurisdiction between Basic and Appellate Court of Brčko District (see art. 22 of the 2015 Draft) and not seizing the opportunity of vesting the High Court with such a kind of general task.

4.7. The jurisdiction to express "legal positions" of the (High) Court of BiH

Art. 7,3,a of the Law on Court of BiH states its power to "*take a final and legally binding position on the implementation of Laws of Bosnia and Herzegovina and international treaties on request by any court of the Entities or any court of the Brčko District of Bosnia and Herzegovina entrusted to implement the Law of Bosnia and Herzegovina*".

The above task has now been shifted (in the 2013 Draft) to the High Court of BiH. In the latest version of the BiH MoJ Draft the reference to the binding force of the "positions" was expunged.

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[37] *(3) The Court shall have further jurisdiction as follows:*

…

(d) decide any conflict of jurisdiction between the courts of the Entities, between the Courts of the Entities and the Courts of the Brčko District of Bosnia and Herzegovina ***and between the Court of BiH and any other Court.***

[38] See art. 18 paragraph 2 letter C:

…

C) preside over conflicts of jurisdiction between courts from different entities, between courts of the entities and the Brcko District, as well as between the Court and any other court, and appeals are not permitted against such decisions;

MS Experts found it difficult to understand the exact meaning of such provision, which seems to introduce an "advisory" competence of the Court upon request from other courts on a rather undefined potential array of cases ("*on the implementation of laws of BiH*").

The same perplexities were shared beforehand by the Experts of the Venice Commission (Opinion 723/2013, n. 53 and informal follow up of February 2014). First of all, it has to be ensured that such provision does not conflict with the jurisdiction of the Constitutional Court of BiH[39].

Furthermore, it has to be clarified what the legal consequences of the "positions and opinions" taken by the High Court of BiH would be.
The same perplexities were shared during the SD Workshop by practitioners of the FBIH Supreme Court, who argued that it is debatable from a constitutional point of view that the State Court (or High Court) be vested with such "advisory" tasks.

In such a case, it seems be advisable (despite the contrary advice expressed by the representatives of the Court of BiH) to expunge such a provision from the law, in line with the 2015 Draft approach (in that its art. 22 does not contain any reference to such jurisdiction), also in view of the fact that the latest version of the 2013 Draft erased any reference to the binding force of the "legal positions" (this *de facto* devoiding of practical relevance the issue).

4.8. Ethnic composition of the Courts

Both Drafts (art. 4 of the 2013 Draft and Art. 6 of the 2015 Draft) state that the Court of Bosnia and Herzegovina and the Higher Court of Bosnia and Herzegovina shall have an equal number of judges from the ranks of each constituent people and an appropriate number of judges from the ranks of others.

This provision raises concerns from the point of view of the independence and impartiality of judicial organs (which not only must be impartial, but must also *appear* as such to the general public): it is clear that setting forth a rigid numeric provision on ethnic provenience of the members of the Courts risks to convey the message that the outcome of judicial proceedings is strictly dependent on and (intertwined with) the ethnicity of the judges rather than on the strict application of the law and on the professionalism of the judges.

The same advice was given by the Venice Commission both in the 723/2013 opinion and in the informal follow up of 2014.

MS Experts note that Article IX.3 of the BiH Constitution provides that *"Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina,* not introducing strict requirements on numeric proportions within the Court are foreseen, but only a « *general representation* ».

Such remarks, despite the of the Venice Commission were so far left unheeded and MS Experts cannot, therefore, but call on policy makers to reconsider the issue in the final version of the Draft.

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[39] As described in Article IV. 3 "c": "*The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.*"

5. Summary of recommendations

5.1. With regard to art. 15.2.b. of the 2013 Draft

- To introduce a clearer graphical separation of the three areas of extended jurisdiction set forth in art. 15.2.b of the 2013 Draft, in the way suggested above under **3.2.2** ;
- To clarify the notion of « crimes committed by joined action of « *organized group* » in line with the remarks contained above in chapter 3.2.2.i
- To clarify the notion of « *organized group* **from** *the territory of BiH*» by referring to the places of commission of the criminal offences (chapter 3.2.2.i above).
- To better define the notion of « interconnection » relevant to art. 15.2.b.ii (see above chapter 3.2.2.ii) ;
- To foresee an additional requirement of seriousness of the criminal offences falling within the scope of extended jurisdiction due to « interconnection » of offences committed cross-Entity (see chapter 3.2.2.ii).
- To foresee (with regard to criminal offences causing damage to BiH, above 3.2.2.iii) :
  - that such offences be of a serious nature or, *in alternative* that such offences be comprised in a list considered worthy of State jurisdiction. The latter was the choice of the current version of the 2013 Draft. In this case it is advisable to clarify in the explanatory report the principles of criminal policy which led to the selection of offences: see above 3.2.2.iii
  - that the damage caused to BiH by Entity/ Brčko criminal offences falling within the scope of extended jurisdiction be of a significant entity and actual;
- To specify the notion of « *organised crime* » contained in art. 15.2.b. last part (see above 3.2.2.iii) ;

5.2. With regard to the 2015 Draft and related legislation (see above 3.3)

- To clarify if extended jurisdiction is to be replaced by other statutory provisions ;
- In the affirmative case, to clarify whether this is by way of norms on jurisdiction/procedure or by way of norms of substantive criminal nature ;
- In the latter case :
  - to explore first and foremost the feasibility of such « substantivization » by means of « general clauses» (see above 3.3.) ;
  - to consider as examples the recent amendments to the BiH criminal code in the field of money laundering (art. 209 para 1 BiH CC).
  - To consider the possibility of intermediate solutions, maintaining only some of the current areas of extended jurisdiction while transforming the remaining part in cases of primary jurisdiction.
  - to pay particular attention to a proper coordination between the criminal code of BiH and the criminal codes of the Entities/Brcko.

- To introduce a norm of transitional nature in order to clarify that every offence committed until the enactment of the amendments to the criminal code of BiH remains punishable under current art. 7,2 of the Law on Courts

5.3. With regard to other issues, MS Experts refer to the list of recommendations contained above (paragraph 4).