



INTERNATIONAL CRIMINAL LAW SERVICES

**FINAL REPORT OF THE INTERNATIONAL CRIMINAL LAW
SERVICES (ICLS) EXPERTS ON THE SUSTAINABLE TRANSITION
OF THE REGISTRY AND INTERNATIONAL DONOR SUPPORT TO
THE COURT OF BOSNIA AND HERZEGOVINA
AND THE PROSECUTOR'S OFFICE OF BOSNIA AND
HERZEGOVINA IN 2009**

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I. Executive Summary

The Court of Bosnia and Herzegovina (BiH Court) and the Prosecutor's Office of Bosnia and Herzegovina (POBiH) are important institutions for Bosnia and Herzegovina (BiH) as a country. They are also innovative judicial institutions and represent a significant effort by the national authorities and by the international community to address critical issues of justice and the rule of law in this post-conflict society.

The BiH Court and POBiH owe much of their original impetus to the International Criminal Tribunal for the former Yugoslavia (ICTY), which as a part of its Completion Strategy and as directed by the United Nations Security Council, sought to transfer certain of its mid- and lower level cases to national jurisdictions for trial, pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence. To safeguard international standards and to build its own national judicial capacities, the national authorities and the international community agreed on international assistance to the BiH Court and POBiH, in the form of international judges, prosecutors and staff, including initially an international Registrar.

These international judges, prosecutors and staff are a part of the national system, working side by side with national judges, prosecutors and staff under the applicable national law, but limited to war crimes and organised crimes prosecutions and trials – the most problematic and sensitive areas that the post-conflict justice system would face. The creators of this system were rightly of the view that the international presence should be of a limited duration and that it should end as soon as the institutions and the country at large had reached a point where it could move forward fully with its own legal professionals. They thus adopted an aggressive transition and integration plan, which provided that by 14 December 2009 the BiH Court and POBiH would become fully national and the remaining international judges, prosecutors and staff would leave.

This Expert Report first looks back at the implementation of the transition plan adopted in 2006 and assesses the progress and efficacy of that plan. In doing so it also examines not only the extent to which the milestones established in the plan were met but also looks at how well the Registry departments have performed during this process and where they stand today.

There is considerable progress to report in terms of the transition, as the applicable targets have been met. Moreover, the Registry, which has been split into two with a Court Registrar and Prosecution Registrar, has done a very good job in making the transition work for the Court. There are several issues that need attention, particularly regarding certain matters of judicial administration, but the record is an impressive one. The record on the Prosecution Registry side is more problematic, as the relationship between the Prosecution management team and the Prosecution Registry borders on the dysfunctional. This stems in part from the unclear role the Management Committee plays in non-financial matters (the Committee's role on financial issues, from almost all reports, is exemplary) but also from a lack of communication between the Registry and the Prosecution. The Report makes a number of recommendations that are intended to address this troubling state of affairs. As part of this section of the Report, the important area of witness protection, where the relevant national authorities need to improve their performance, and public relations and outreach, which are in need of bolstering, are addressed and recommendations are made. Also, defence

issues are touched on and issues, particularly difficulties related to access to ICTY materials, are flagged.

The Report then turns to a discussion of the national political context, as much of the following discussion can only be understood in terms of the current political situation in the country. This discussion is followed by an assessment of the BiH Court's work to date on war crimes and organised crimes and the role that international judges have played. It finds that much has been achieved, but that there are a number of issues that need attention. These include a deeper engagement by judges in non-courtroom activities, via the greater use of committees and the establishment of a bureau to advise the President of the Court and address other issues. The Experts also look at certain procedural issues, including the high rate of 1st instance decisions that are vacated on appeal and the thorny issue of dissenting opinions. They then take an extended look at the roles that international judges play in the Court, concluding that they have provided much in terms of bringing credibility and public trust to the Court but much less in terms of capacity or skills building than might have been expected. A number of recommendations are made in this regard as well as suggestions regarding judgement writing and development of support staff.

The Report also addresses issues in the POBiH, reviewing the rather tortured history of the Office, and examines how the Office, including its Special Departments, is managed. While the international prosecutors play an important role in establishing credibility and carry a substantial workload, there is too little interaction between internationals and nationals. There is also the problem of internationals 'crowding out' nationals from work they could otherwise handle. The Experts have made a number of recommendations to improve the functioning of the Office, including performance based criteria for international prosecutors which is tied to skills building with their national colleagues, and steps for the new Chief Prosecutor,¹ who should be appointed in the coming months, to take to improve the performance of the Office and address issues of the past.

The substantive discussion is then followed by a Risk Assessment of the respective Chambers and Special Departments, assessing separately the risks associated with ending international assistance in terms of international judges, prosecutors and other assistance, e.g., witness support. These risks are measured against specific criteria: the impact on fair trials and international standards; the independence, credibility and efficiency of the BiH Court and the POBiH; public perceptions of the Court and Prosecutions; the impact of the Court in capacity building and 'crowding out'; and for the Prosecution, the impact on its own case selection criteria and strategy.

The Experts then make recommendations regarding the continuation of international assistance beyond 2009. While they do recommend an extension beyond 2009, in an Options Paper, they examine the terms of such an extension based on the functions to be extended, the timeline for such an extension, and the financial issues arising there from, with recommendations on monitoring any such extensions and steps to maximise the usefulness of the extension and minimising the time needed for any extension.

¹ Since the completion of the Report, a new Chief Prosecutor Mr. Milorad Barašin, has been appointed as of 28 January 2009.

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II. Introduction and Working Methods

A. Introductory Comments

1. The BiH Court and the POBiH are unique institutions in the judicial system of BiH. They are the only State judicial institutions with general criminal jurisdiction (other criminal prosecutions and trials are handled at the entity level). These institutions currently have national and international judges and prosecutors working together. Except for the Constitutional Court of Bosnia and Herzegovina, there is no other court or prosecutor's office in the former Yugoslavia in which internationals work together with nationals (often referred to as 'hybrid' judicial institutions, etc). Indeed, the BiH Court and the POBiH are one of the few sets of 'hybrid' judicial institutions² in the world, and perhaps the only one without a direct link to the United Nations system. Thus, in many ways these institutions are part of a bold experiment in a post-conflict society to deal with war crimes and organised crimes.
2. While the BiH Court and POBiH are not directly connected to the United Nations, they are closely linked to The Hague-based ICTY, which has jurisdiction over war crimes and other related crimes committed in the former Yugoslavia since 1991. It was in response to the direction of the United Nations Security Council in its Resolutions 1503 and 1534, directing the ICTY to complete its work by 2010 by among other things referring indictments against lower and intermediate level accused to national courts,³ that the BiH Court acquired much of its impetus. In order to meet the Security Council's direction, national courts have received and tried cases referred by the ICTY.
3. Starting with the case of Radovan Stanković, which was transferred to the BiH Court on 1 October 2005, five other ICTY cases were transferred, involving a total of 10 individuals transferred from The Hague to the BiH Court, and by 1 October 2008 (only three years after the first case was transferred), all but one of these cases had been completed in First instance (and many have finished the appeal process). This is an impressive record, particularly since these cases were handled much more expeditiously than they would have been at the ICTY. Moreover, these cases were carefully monitored by the ICTY and the Organisation for Security and Cooperation in Europe (OSCE), and the proceedings met the applicable international and European standards.
4. In addition, the BiH Court and POBiH have disposed of many other cases, not only in the area of war crimes but also in other areas (general crime, organised crime). In a little more than three years, 43 war crimes cases and 91 organised crimes cases have been completed. This is a solid record of achievement.

² Although the BiH State Court and POBiH are national institutions established under BiH laws, they are 'hybrid' in the sense that they are currently composed of national and international judges and prosecutors, and are thus akin to other such 'hybrid' or 'mixed' institutions.

³ UN Doc.S/RES/1503 (2003), at para. 7 and UN Doc. S/Res/1534 (2004) at art 5.

5. Moreover, in the Experts' view these new institutions have developed quickly and gained real capacity in a short period of time, despite the vicissitudes inherent in a 'hybrid' system and in a fractious national political environment. Perhaps more importantly there has been an underlying strategy followed at the BiH Court and POBiH to move relatively rapidly to a fully national court and prosecutor's office. This is a commendable goal in itself, as there is a tendency with other international and hybrid courts not to pursue integration with the national systems as aggressively as is necessary for these institutions to make a long term difference. The general compliance with the ambitious transition and integration strategy is quite good on the whole, and there is much to be commended in these practices, which can be used as a model for other hybrid judicial institutions.
6. Thus, in many ways the BiH Court and POBiH have had a very successful beginning and transition. There are naturally numerous problems and issues that lie side by side with these positive developments and are at the heart of this Report. These issues also give rise to the principal questions that are addressed herein, notably whether international assistance should continue beyond 2009.
7. In addressing these questions, the Experts have found a number of difficulties, problems and some dysfunctionality in the operations of the BiH Court and the POBiH and much of this Report is critical of aspects of the operations of these institutions. However, it is important to note at the outset that, relatively speaking, given the context and the records of similar institutions, the BiH Court and POBiH have significant achievements and this should not be lost sight of, despite the Experts' various criticisms and recommendations.

B. The Terms of Reference and Purpose of the Report

8. This Expert Report has been produced in accordance with the International Criminal Law Services' (ICLS) 'Proposal to Assess the Sustainable Transition of the Registry and International Donor Support to the State Court and the State Prosecutor's Office 2009', attached hereto as Annex A. ICLS has contracted with David Tolbert and Aleksandar Kontić (the Experts), who are responsible for producing this Expert Report and the Recommendations contained herein. The Experts' qualifications and experience are set forth in the ICLS Proposal.
9. As specified by the Terms of Reference, the purpose of the Expert Report is to assess the current progress of the transition plans and arrangements for the successful transition of war crimes and organised crime prosecutions and trials to national control. In particular, the Terms of Reference focus 'on the sustainability of the [BiH Court] and [POBiH] after 2009, [in particular] if the current transition arrangements are applied'. Relevant factors include 'political constraints, case sensitivity and capacity for continued efficient prosecution of war crimes and organised crimes, national resource allocation, performance indicators, accountability and transparency'. As noted in the Proposal, the key remaining element in the transition plans is the planned phasing out of international personnel, i.e., international judges

and prosecutors and their support staff, in 2009.⁴ Thus, the Experts have concentrated their efforts on evaluating the progress thus far of the BiH Court and the POBiH in achieving the goals set forth in the transition plans and assessing whether there has been sufficient progress to end international assistance to these institutions on the current schedule, i.e., 14 December 2009. Following this assessment, the Experts make specific recommendations, in accordance with the Proposal. These recommendations set forth available options for international donors and other interested parties, based on the evaluation of the Experts.

10. This Expert Report has been submitted in accordance with the Proposal and the Terms of Reference and in a timely manner, i.e., prior to 15 December 2008 (English version; the local language version was submitted on 15 January 2009). The Experts conducted a short follow up mission in February 2009 to discuss the report with stakeholders. As a result of these discussions they have corrected a handful of technical errors and made other minor modifications primarily due to translation considerations. However, the Report covers the period only up to 15 December 2008.

C. Subjects Addressed and Methodology Followed in Preparation of the Expert Report

1. The Subject Areas Addressed in the Report

11. As outlined in the Proposal (including particularly the Supplement to the Proposal), the Expert Report examines three separate but interconnected areas as well as makes recommendations and outlines options in an Options Paper:
 - a) A review of the Registry's Transition Strategy, focusing on whether the goals established in the Transition Strategy have been achieved as well as a review of the results and impact of that Transition Strategy on the work of the substantive organs, i.e., the BiH Court and the POBiH.
 - b) An evaluation of the roles international judges and prosecutors have played in the respective institutions in meeting European and international standards as well as the contributions of international judges and prosecutors to the long-term sustainability of the respective institutions. Moreover, the impact the respective institutions have had on public perceptions as well as on the credibility of the respective investigations and trials is examined. Given the particular situation of victims and witnesses, issues relating to witness protection and support are also addressed.

⁴ It is noteworthy that the Terms of Reference specifically delimit the Experts' Report to the BiH Court's and the POBiH's transition plans and particularly to the planned phase out international assistance, e.g., of international judges and prosecutors. Thus, this assessment is markedly limited in scope in comparison to other evaluations, such as the reports of the Expert Group, established by United Nations Security Council Resolution 53/212 and 53/213 of 18 December 1998, to conduct an assessment of the *ad hoc* Tribunals and the Independent Expert Antonio Cassese's report on the Special Court of Sierra Leone of 12 December 2006, which conducted extensive evaluations of these respective institutions.

In making these evaluations, it is clear that not only are the roles of international judges and prosecutors different, but the above factors may play out very differently between war crimes and organised crimes proceedings. Thus, separate analyses are conducted for Section I Chambers for War Crimes, Section II Chambers for Organised Crime, POBiH Special Department for War Crimes of the POBiH and Special Department for Organised Crime. A 'one size fits all' approach is avoided, and while the factors evaluated overlap, they are analyzed separately for each organ or department. Also, given the Prosecutor's responsibilities in terms of case selection and prosecutorial strategy, this is an additional factor that is reviewed in the analysis of the POBiH's Special Departments.

- c) A risk assessment is then made for both Chambers and each Special Department. Such a risk assessment is obviously critical to donors making determinations on the transition strategy as well as possible continued assistance.

The principal issues posited are the impact on conducting proper investigations and the conduct of fair trials in accordance with European and international standards; the credibility, independence and efficiency of the respective relevant Chambers and Special Departments; and public perceptions of these institutions and the impact of the withdrawal of international judges and prosecutors, under present plans, in late 2009 .

In addition, consideration has also been given to certain issues that cut across all the relevant Chambers and Special Departments which have long-term and systemic implications, including the impact of international assistance on the establishment of a coherent judicial system as well as in terms of integration into European structures. Furthermore, the question of the effectiveness of donor support is touched upon.

- d) The final part of this Expert Report makes recommendations and outlines options regarding international assistance. The Options Paper examines the feasibility of phasing out international assistance in 2009 as provided for in the current transition plans. On the other hand, if the Experts recommend that international assistance should continue, the Options Paper outlines and makes recommendations regarding the criteria that should be applied in providing that assistance as well the appropriate timeline.

2. Methodology Followed

12. In view of the subjects to be addressed and the questions raised by the Terms of Reference and given the extent to which judicial activities involve questions of fairness, lack of bias and credibility, particularly in a post conflict society, the Experts are of the view that a variety of forensic methods are called for in conducting the Assessment. In the case of Bosnia and Herzegovina, if not the former Yugoslavia as a whole, the question of ethnic bias is paramount with respect to almost every aspect of civil life, and this is particularly true of the judicial system where there have been

allegations of abuse of war crimes charges for political ends.⁵ Indeed, the perception that international judges and prosecutors would assist in providing credibility, fairness and transparency to the prosecution of war crimes and other serious crimes was clearly one of the principal reasons for the provision of international assistance in the first place.

13. Thus, while certain more objective measures were consulted (e.g., public opinion surveys, review of judgements, decisions and submissions), these sources provide limited insight into such key questions as to how well the transition strategy has worked to date, what are the public perceptions of the credibility of the BiH Court and the POBiH, and to what extent has capacity building actually occurred in the work of the respective Chambers and the Special Departments.
14. In view of the difficulties of evaluating these important underlying issues, the Experts proposed a forensic approach that relied to a great extent on interviews, both inside and outside the BiH Court and the POBiH. By obtaining written answers to key questions from a wide variety of actors and interviewing them in person and in depth, it was possible to obtain important information regarding the functioning of the international judges and prosecutors as well as the Registries. Moreover, those outside the court, such as civil society, Ministries of Justice, journalists, donors and others provided valuable insights which informed the Experts' perspectives as well as provided an important check on the views offered by those inside the BiH Court and POBiH.
15. In terms of the actual sequence of the Experts' work, it should be noted that the Experts were both already familiar with the BiH Court and the Special Department for War Crimes. Mr. Tolbert, in his previous roles as Deputy Registrar and Deputy Chief Prosecutor at the ICTY, had chaired the Office of the High Representative (OHR)-ICTY Legal Framework Working Group that established the legal architecture for the cooperation between the ICTY and the BiH Court. He had subsequently headed the ICTY Office of the Prosecutor (OTP) Transition Team for a number of years and thus made regular visits to the BiH Court and had frequent interaction with the POBiH. Mr. Kontić has served for many years on the ICTY OTP Rules of the Road team and then as a key member of the OTP Transition Team as well as being the senior lawyer in the OTP from the former Yugoslavia. Using that experience, they initially conducted a review of the legal literature regarding the BiH Court as well as a survey of the decisions of the BiH Court and submissions of the POBiH. In addition, they reviewed the findings of certain public information surveys, particularly those conducted by Prism Research, which measured public perceptions of the BiH Court and the POBiH through July 2008.⁶
16. This review was of some value, in that a general assessment of the Court's and Prosecution's legal product could be made, in terms of whether it was consistent

⁵ It is noteworthy that the Rome Agreement of 1996, which established the Rules of the Road program, stemmed directly from the concern that war crimes prosecutions would be influenced by political and/or ethnic consideration or related factors. See Mark. S. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the Rules of the Road for Bosnia-Herzegovina', 17 *Berkeley Journal of International Law* 1 (1999).

⁶ See 'Public Perceptions of the Work of the Court and Prosecutor's Office of B&H', Final Report, Prism Research, Sarajevo, July 2008, available at www.prismresearch.ba (Prism Report).

and/or moving towards European standards. However, given that the judgements of the BiH Court are not identified by author and public dissenting opinions are not currently provided for, it is not possible, at least on the face of these documents, to obtain information from such a review on the internal workings of the BiH Court or the POBiH regarding capacity building, the interaction of international and domestic staff or the role of international staff. The Prism Research survey provided valuable insights, as is discussed below, but it is necessarily a broad-brush approach and is inconclusive on a number of points.

17. In view of the above, the Experts circulated a questionnaire (Annex B) to a wide variety of actors, inside and outside the BiH Court and POBiH, totalling 262 individuals and institutions of which 41 provided written responses. Follow up interviews were then conducted with a large number of these individuals, totalling 65 persons, as indicated on Annex C. As can be seen and was expected, the response from inside the BiH Court and POBiH was relatively good⁷ and from other actors less so. The Experts have endeavoured to take the response rate into account and recognise that certain viewpoints are less represented than others due to the unwillingness or unavailability of some individuals and groups to participate. They have noted this where relevant and have also used other sources, such as public survey information, to fill in the resulting gaps. The Experts also travelled to Banja Luka to interview key actors who they could not otherwise meet. In addition to the interviews noted on Annex C, the Experts met regularly, on a weekly basis, with an Assessment Committee during their stay in BiH, which was composed of key donors. They also addressed a regular meeting of European Union ambassadors in Sarajevo and engaged in a discussion in this forum. Thus, they received input from the international community present in BiH, which is not reflected in the Annexes.

III. Review of Transition Strategy, Including Efficacy of the Strategy and the Results Achieved

A. Review of the Milestones and Goals Established in the Transition and Integration Strategies

18. Since the establishment of the BiH Court and the Special Departments of the POBiH, a transition plan (see para. 24 below) has been in effect to transfer, over a period of time, the management, judicial and prosecutorial responsibilities from international officials and staff to national officials and staff. In budgetary terms, this ‘refers to the process of national institutions employing national judges and prosecutors and their support staff - as international judges, prosecutors and support staff gradually phase-out of the Registry.’ This also conjointly is referred to as the ‘integration process’, i.e., ‘the process of transferring financial responsibility from the Registry budget to the budgets of the national authorities.’⁸

⁷ However it is worth noting that the participation rate was considerably lower on the national side.

⁸ The General Budgets for the Judicial Institutions of Bosnia-Herzegovina, June 2006, at p. 1.

19. There have been a number of phases in this transition and integration plan and strategy. The first milestone was in 2006, when the Registry began transitioning from international to national staff and a plan was adopted to over time integrate these positions from international support to national responsibility. The second key date is 2009, with the planned phasing out of the international judges and prosecutors. While much of this Expert Report will focus on the latter date, it is useful to review and assess the transition in the Registry, in terms of the efficacy of the process, continuing issues and lessons learned.
20. The Registry for the BiH Court and the Special Departments was established by an Agreement between the OHR and the State of BiH of 1 December 2004. This Agreement, *inter alia*, provided that the High Representative would appoint a Registrar⁹ for a period of five (5) years, subject to the Registrar submitting a transition plan within three (3) years of the commencement of the Agreement. In 2006, a transition plan was put forward and agreed to by OHR and BiH and incorporated in an Amended Agreement, providing for the replacement of the international Registrar with two national Registrars, one of whom would provide the requisite service to the BiH Court and the other for the Special Departments (subject to the proviso that an international could act as Registrar for a period of one year under certain conditions). In an annex, an integration plan was agreed to, which provides for the absorption of all Registry posts by the national authorities and budgets by 2009, with most of the staff integrated before that date.
21. In addition, the Amended Agreement provided for a Transition Council which has a monitoring and advisory role on a variety of issues affecting the transition and integration plan, including fundraising and planning. More importantly for the overall financial and administrative management of the respective institutions, a Management Committee was established, composed of the two Registrars, the Head of Finance (an international) and one other senior Registry staff member (currently the national head of finance). This Committee was ceded with, e.g., responsibilities over personnel, adoption and oversight of a budget and finances, providing support to staff, fundraising and related activities.
22. The Amended Agreement calls for the complete integration of all personnel including notably judges and prosecutors by 14 December 2009. Thus, under the current arrangements, these and all remaining posts supported by international funds would be integrated and the role of international prosecutors and judges would end; this aspect of the transition plan is, of course, the focus of this Expert Report and will be addressed in depth below.

⁹ The mandate of the Registry is to manage and provide administrative, legal and other support services to Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina as well as to provide support services to Special Departments of the Prosecutor's Office, which include, but are not limited to, support to international judges and prosecutors in their work. The support services range from organising and coordinating, in cooperation with relevant national authorities, detention related activities, criminal defence and support to and protection of witnesses.

B. Assessing the Transition and Integration Plan to Date

1. In General

23. In view of the fact that under the Amended Agreement there are two separate Registrars, providing support to the BiH Court and the POBiH respectively, the transition and integration plans for each organ will be addressed separately. However, there are several areas in which the functions overlap or touch on each other and thus a few observations should be made that apply to the common aspects of the transition plan that apply to both Registries. There are two critical areas - witness protection and outreach/public relations - that affect both the BiH Court and the POBiH and are thus addressed in separate sections below.
24. From a purely technical point of view the targets of the transition plans have clearly been met on the BiH Court side; they have also been met, in substantial part, on the POBiH side.¹⁰ This is an important achievement in that the transition strategy followed was a very aggressive one; almost all of the Registry functions and staffing have been transitioned in less than three years, and much of the work and responsibility were transferred in the early parts of this period. The staff positions have, at this point in time, been transitioned on both sides of the Registry, except in certain key areas, e.g., a limited number of international lawyers in the respective Legal Departments, the Chief Financial Officer, language services and personnel department. In this sense the transition process is fully on track.
25. The transition plan has worked well in the BiH Court but less so for the POBiH. Moreover, it also must be noted that the transition plan, as set forth in the Amended Agreement, contains certain mechanisms and elements that are not defined clearly and have led to issues that might have been avoided if managerial arrangements introduced in the transition strategy had been more fully thought through or spelled out at the time. Indeed, the Amended Agreement appears to have advanced the transition, particularly the replacement of the international Registrar, at a much earlier date than might have been anticipated – being negotiated and signed less than two years from the execution of the original agreement – but in terms of drafting appears to be a rather hurried affair. While this may have been the result of a desire to move quickly to replace the then international Registrar, there have been some deleterious effects.
26. On its face, the primary drafting difficulty in the Amended Agreement is the role and functioning of the Management Committee. The original Agreement placed all of the administration and financial responsibilities on the Registrar, with an

¹⁰ According to the most recently available quarterly report on the BiH Court's website, in terms of overall posts, the transition plan is on target; however, the Prosecution Registry's part of the report does not explicitly state this and uses language that can be open to interpretation. Registry officials indicated that the targets were subject to only minor deviations on the Prosecution side, but several interviewees indicated that the Prosecution remains further behind on transition planning. It is, therefore, not entirely clear to the Experts as to how close the Prosecution is to meeting the targets of the transition plan.

Oversight Committee¹¹ providing an advisory role. Of course, the Registrar was appointed by the High Representative, who could also remove the Registrar or take disciplinary action against him, etc. This approach mirrors, in substance, the position of other international registrars, e.g., the ICTY Registrar.

27. The Amended Agreement first divides the Registry responsibility between two Registrars, one for the BiH Court and one for the POBiH. There are certainly arguments to support such an approach, in that some aspects of a common or unified administrative platform could be seen as creating conflicts of interest or at least the appearance of such conflicts. Indeed, such a division between services provided to the Court and Prosecution is envisaged by Articles 42 and 43 of the Statute of the International Criminal Court. Moreover, given that there will be some services provided in common to both the Court and to the Prosecution, there may well need to be a mechanism to address those shared services.
28. The Amended Agreement is nonetheless less than clear on the respective responsibilities of the Registrars vis-à-vis the Management Committee, particularly the role of the Registrar for the POBiH, which was a new creation. This is exacerbated by other issues, including a less than complete rulebook on the Prosecution side. In particular, the Amended Agreement lacks clarity regarding key aspects of the Management Committee mandate. The budgetary and financial aspects of the Management Committee's mandate are straightforward and appropriate, and the handling of finances appears to be quite satisfactory¹² and indeed commendable. On the other hand, other administrative and personnel issues that fall under the Management Committee are not well defined, and the Management Committee does not provide a proper forum to resolve these issues and actually creates additional difficulties. This may result in the Registrars, in view of such uncertainty, taking issues to the Management Committee which would naturally fall into their own competence or to be determined in conjunction with the President or Chief Prosecutor respectively, thus leading to inefficiencies and delay. The Amended Agreement is not clear regarding at which point the Registrars' responsibilities end and the Management Committee's begin. Moreover, the Chief Financial Officer and the other senior staff person on the Committee could, at least in theory, overrule their supervisor, i.e., the respective Registrar, in the event that they agree on an administrative or financial matter and the other Registrar abstains or votes with them (see Article 5 (3)). Finally, the conflict of interest provisions are quite weak, with very little guidance given, except basically to rely on one's common sense.¹³
29. While these issues may appear to be more theoretical than real, in actual practice the mandate of the Management Committee has led to confusion and has not assisted the transition planning in certain respects. If the BiH Court and the POBiH were starting anew, then a complete revision of the Management Committee structure

¹¹ The Oversight Committee actually never came into existence.

¹² This conclusion is based on reports received by the Experts, as the Experts have not conducted an examination of the relevant financial records.

¹³ Registry officials contend that additional rules have been set forth in the applicable Rulebooks and that the Management Committee's role is clear. Based on their review of the matter, the Experts remain of the view that while many of the problems in the Registry – Prosecution relationship stem from other issues, some part of the difficulties result from the weak drafting in the Amended Agreement on the Management Committee, as the role of the Management Committee itself is a source of differing interpretation, resulting in considerable tension.

might well be called for. However, given that the transition process has moved a long way towards completion and the apparently excellent job that has been done on finances as well as on some other administrative matters, and the lack of any significant problems on the BiH Court side, a less radical re-structuring is called for.

30. The Experts would recommend that if international assistance continues either an amendment to the Agreement should be made or understandings reached clarifying the role of the Management Committee, particularly with respect to personnel matters. The amendments or understandings should spell out in clear terms the powers of the Management Committee as well as the limits of those powers. Moreover, the circumstances in which Registrars take issues to the Management Committee should be clearly defined, e.g., substantive personnel decision rest with the line supervisors. The amendments should provide for rights of redress for staff members aggrieved by personnel or administrative actions that affect their employment rights taken by the Management Committee or by the line manager, e.g., the Chief Prosecutor or Department Head. In the view of the Experts, these matters could be referred to the Transition Council or an appropriate body, with clear provisions regarding conflicts of interest for Council members.¹⁴
31. It should be noted that other substantive criticisms from some members of the POBiH have been levelled at the system established in 2006, regarding the Registry, the Management Committee and the relationship between the Registry and Office of the Prosecution management. Since these issues arise only to the relationship between the Registry and the POBiH, these matters are addressed in detail in the discussion below relating to the POBiH Registry.

2. Impact of Transition and Integration Strategy on the BiH Court

32. As noted above, given that there are two distinct Registries under the Amended Agreement, they will be examined separately.
33. The Registry of the BiH Court receives high marks for the services it provides, both by the judges and judicial staff. Almost all interviewees as well as those outside the Court made positive comments about the general work of the Registry and the Court Registrar herself. Judges uniformly said that the Registry has been ‘supportive’, with comments that it has ‘facilitated the work of the court in a 1000 ways’, ‘utmost support’ and ‘great’. Thus, it appears that the transition and integration strategy has generally worked quite well regarding the services that the BiH Court’s Registry is providing.
34. With respect to court management, some judges raised issues concerning the assignment of cases and trial scheduling. The President and Registrar explained that cases are assigned through an automatic system by which a computer programme assigns cases to judges on a random basis. If due to a conflict or other circumstance the automatic allocation is not appropriate (for example a judge from an established panel has already acted as a Preliminary Proceedings Judge or a judge from an

¹⁴ The Registry is of the view that this would not be appropriate.

established panel is not present and a suspect is in custody and a decision must be taken immediately), the matter is referred to the Judicial Assignment Committee, which is composed of the Registrar, the Head of Court Management, an international judge and a national judge. The Committee then makes a recommendation to the President to re-assign judges accordingly. The purpose of this process is to ensure that these assignments did not result in judicial or scheduling conflicts. This appears to be a sound system. However, this system is not applied on appeal, which is the responsibility of the President of the Appellate Division, as provided in the BiH Criminal Procedure Code (CPC), who then refers the case to the Presiding judge of an appellate panel. Some concern was expressed regarding the latter approach, and the Experts would strongly recommend that the same system used in trials be applied in appeals, as it is a clear and transparent system that operates fairly. Furthermore, the inclusion of judges on the Judicial Assignment Committee has helped dispel any questions or doubts about the process and thus should also be applied in appeals.

35. Regarding judicial management, another issue that was raised by some judges and prosecutors is that some international judges have much heavier caseloads than others. While this issue lies within the President's authority and is outside the Registry's direct purview, it does impact on court management, so it is commented on here. Some international judges apparently are assigned to multiple cases and are in court constantly while other international judges have cases in court much less frequently. This appears to relate, at least in part, to the fact that some international judges are on one year contracts and thus can be assigned only to cases that can be completed within that time period while other international judges have multi-year contracts. The Experts, therefore, strongly recommend that if international assistance is continued in the future that international judges be given contracts and make commitments to stay at least two years and preferably three years. Additional steps should be taken to try to harmonise work schedules. There were also reports that some courtrooms are frequently empty in the afternoon; according to one interviewee, the courtrooms were only occupied approximately 25% of afternoons in late 2007 and early 2008. Another source also noted that the courtrooms were not fully occupied and that trial days are indeed short, resulting in part from some international judges being too frequently absent from the court. The Experts reviewed this matter with the Chief of Court Management. While satisfied that the courtroom statistics reflected actual courtroom usage, which is on the BiH Court's website and can be reviewed by donors and interested parties, the Experts do not discount these interviewee reports and recommend that the President and Registry redouble their efforts and keep a close eye on courtroom usage, as these reports do raise legitimate concerns.

36. The Registry also provides witness support services, through its Witness Section (N.B.: witness protection services are discussed separately). These services include logistical assistance as well as psychological and emotional support during the trial sessions. There is little in terms of follow up and/or services provided pre-trial due to lack of resources, although the Witness Section does make a follow up call fifteen (15) days after the witness testifies. While some witnesses and civil society groups express the desire for more follow up, in view of the amount of staffing and resources, the level of support appears to be reasonable and does not seem to be adversely impacted by the transition. This conclusion is buttressed by the Prism

Report which concluded that most participants surveyed were satisfied with the services provided.¹⁵

37. There are two specific concerns that were expressed regarding the work of the Witness Section. First, there has been some dispute as to whether Witness Section personnel are responsible for informing witnesses of courtroom procedures or if this is the duty of the parties. In the case of defence counsel, they are in contact with their witnesses and are responsible for informing the witnesses of what to expect in court, e.g., in relation to cross-examination and judicial atmosphere. With POBiH witnesses, there has been some disagreement on who has this responsibility, with the POBiH now undertaking this task. However, this issue should be put to rest with a written confirmation of the process between the POBiH and the Witness Section. A more general concern is that civil society groups and others believe that the Witness Section should provide more services and better follow up to witnesses. The Section argues it is doing what it can with limited resources. While no doubt services could always be improved, and the Section should continue to look for ways to provide additional and improve existing services, the level of services appears to be reasonable in terms of the current level of resources. It should, however, be noted that a number of the services that are provided will end at the point of full transition and integration, e.g., witness support services, and this would clearly be a loss for witnesses as services would fall off considerably. It is difficult to measure the actual consequences of such a reduction of services, but it is likely that some witnesses may be less likely to participate or may suffer consequences from the lack of these services, particularly from a psychological point of view.
38. Overall, it must be said that the BiH Court's Registry and Registrar enjoy good reputations for providing services to the BiH Court, according to both observers inside and outside the BiH Court. As noted above, improvements can be made in terms of certain aspects of court management and witness support. Moreover, the BiH Court Registry should work with other organs of the BiH Court to improve communications both internally and externally, a subject that will be addressed in more detail below. Nonetheless, the BiH Court Registry's work to date has been impressive, and the transition and integration plans have been carried out in a highly satisfactory manner.

3. Transition Strategy Impact on the Special Departments of the Prosecution

39. As noted above and in accordance with the transition plan, in 2006 the Registrar position was divided, with a separate position of Registrar established for the POBiH. Initially, as allowed for in the Amended Agreement, one of the international prosecutors was the Acting Registrar and was responsible for carrying out the tasks of the Registrar for the POBiH. In September 2007, in accordance with the transition plan, a national was appointed as the POBiH Registrar. A principal benefit of having a national Registrar is that there is the opportunity for greater cooperation and integration with national institutions, which is an essential part of the

¹⁵ Prism Report, p. 11.

transition arrangements. The reasons for this are obvious, in that a national with the appropriate background knows the national system much better, speaks the language and can integrate in that system more easily. In the view of several interviewees, cooperation and coordination did improve and they were satisfied with the performance of the Registry.

40. On the other hand, there were conflicting views – some strongly held - on the POBiH Registry’s performance during the transition. The principal complaints about the Registry were that it lacked initiative and was overly bureaucratic. Concern was also expressed that too many issues were delegated or taken to the Management Committee even in those instances when it would be expected that the Registrar should decide those issues. Another concern was expressed that having a separate Registrar created a dual management system in that the line Prosecution management, i.e., the respective heads of the Special Departments, were not in a position to renew contracts and address other staff needs and that these matters went to the Management Committee and were handled in a non-transparent manner.
41. For these reasons, it was suggested by several interviewees in the POBiH that if the international presence were to be prolonged beyond 14 December 2009, the Prosecution’s Registry should be abolished and replaced by staff reporting to the Chief Prosecutor, covering accounting, administration and personnel. They also argued that in any event, since the Registry was not designed to last beyond 2009, it would be simpler to abolish it and replace it with the above system. One interviewee pointed to Prosecution Team 6 (the ‘Srebrenica team’) which is funded primarily by earmarked international contributions and which funds are subject to the direction of an international prosecutor, and argued that this model functions much better than the teams that must depend entirely on the Registry.
42. On the other hand, it was reported that the Registrar had been undermined by international prosecutors in certain instances, e.g., by effectively cutting the Registrar out of all contacts with the ICTY, despite the fact that contact with the ICTY is the Registrar’s responsibility under the Amended Agreement (Article 3(2) (a)). There were also reports of other instances where the Registrar had not been provided information or was kept in the dark on matters that were related to the Registrar’s responsibilities.
43. Without trying to adjudicate the merits of these disputes, it is clear that the relationship between the Registry and some of the staff in the POBiH, particularly a number of the international prosecutors, is not functioning properly. A number of interviewees described the relationship between key prosecutors and Registry as dysfunctional, marred by lack of communications, lack of understanding and personality clashes.
44. While the Experts would, as noted above, recommend adjusting the role of the Management Committee, they would not, at least at this stage, recommend a radical re-structuring of the POBiH’s Registry. Conflicts between Registry or administration and substantive departments and offices are common in other international and ‘hybrid’ systems and in some ways ‘go with the territory’, and a similar system works relatively well on the BiH Court side. Moreover, putting financial matters under the direct control of the Chief Prosecutor would raise concerns for donors regarding

checks and balances and proper financial management; thus, this proposal appears not to be workable. Nonetheless, the problems described are serious and need to be addressed immediately.

45. The Experts would recommend that a number of steps be taken to try to put the working relationships between the POBiH Registry and the substantive departments on track. First, regular meetings with the Chief Prosecutor and the Heads of the Special Departments with the Registrar and other key Registry staff should be instituted, as part of the problem has been a lack of communications. While this is now happening to some extent with the acting Chief Prosecutor, such meetings should be regularised. Moreover, with a change in the Management Committee structure, the role of the Registrar should be clearer on both sides. The duties and responsibilities of the Registry must be stated clearly and shared with all prosecutors. Internal rules in the POBiH should be adopted to make it clear that only the substantive department head can evaluate the performance of staff and that his/her recommendations on the extension of contracts are to be honoured unless funds are not available or the recommendations are not in accordance with applicable rules, and in any event, the department Head is to be consulted and kept fully informed. Other rules should be put in place clarifying the roles and duties of the Registrar. These rules should also address the funding situation with the Srebrenica team to ensure that the Registrar gives appropriate oversight to this arrangement
46. The new Chief Prosecutor should, as a priority, carefully examine, and take steps to remedy the problems that have arisen in the past. Moreover, shortly after the appointment of a new Chief Prosecutor, a team building exercise should be put in place, using an outside facilitator. Finally, the Registrar and her key staff as well as the prosecutorial leadership should undertake a 360 degree managerial course. If these steps do not result in significant progress, then the Chief Prosecutor should make the appropriate personnel changes; if these steps are unsuccessful, then the structure itself will need to be re-examined.
47. The dysfunctional relationship between the Registry and significant parts of the prosecutorial staff is causing substantial difficulties in the work of the POBiH and addressing these issues must be a top priority of the new Chief Prosecutor.

4. Witness Protection

48. As noted above, while a section in the BiH Court Registry handles witness support issues, witness protection is not a part of that Section's mandate. Since witness protection involves the parties as well as outside agencies, it is being addressed separately. Moreover, in war crimes and organised crime cases, witness protection is essential to the process, as the very nature of the crimes expose the witnesses to risk. Proper witness protection not only increases the possibility that justice will be done, it is an important element of public confidence in a justice system. If witnesses are not protected in an appropriate fashion and either are intimidated or suffer harm as a result of providing evidence, etc., public confidence in the judicial system will suffer and the rule of law will be undermined. Thus, adequate witness protection is essential to the credibility of both the BiH Court and the POBiH.

49. It is important at the outset to note that witness protection arises in three (3) different areas. The first phase is witness protection during the conduct of investigations.¹⁶ In this phase, the Prosecution, in particular investigators, is responsible, together with the relevant authorities, in this case the State Investigation and Protection Agency (SIPA), for taking steps to protect vulnerable potential witnesses. A similar responsibility rests on the defence in its investigations, although as a practical matter such issues arise much less often. The second phase is witness protection during judicial proceedings, generally as witnesses for the prosecution or defence during trial. Vulnerable witnesses are, usually at the request of the parties, given procedural protection measures during these proceedings by the chamber in which the case is being tried. The protection measures are designed to limit the exposure of the witness's identity to the outside world, particularly those who would do him/her harm. These measures include, e.g., late disclosure of the witness's identity to the other party (usually the defence), using a pseudonym when testifying, having his/her voice and/or facial features distorted on any video recordings used in the proceedings and, in some cases, testifying in a closed court session without attendance of the press or public (or behind a screened area so that the witness cannot be seen by the public). The third phase is post-trial when efforts are made to protect the witness and his or her family from threats of retribution for testifying.
50. Witness protection measures in the first and third phases involve similar considerations and are thus addressed together below. Regarding procedural protection measures in the courtroom, these now seem to be handled in an appropriate manner at this stage by the respective Chambers. There were a number of problems, caused by the inadvertent mentioning of witnesses' names or identifying information in the early trials and proceedings. Moreover, there was also some possible judicial overreaction in early cases whereby due to an overabundance of caution, the public was unnecessarily restricted from trials due to witness protection concerns.¹⁷ The OSCE has played a helpful role in bringing to the BiH Court's attention these lapses, and it appears that practices have improved over time. The BiH Court itself established an ad hoc Working Group on Witness Protection that developed a number of internal steps, including procedures and checklists for judges that clearly have contributed to the improvement of witness protection in the courtroom. Most of the interviewees reflected this view, and it appears that with more familiarity with the concept of witness protection and the new measures imposed, witness protection in the courtroom has become more effective. In the Experts' view, based on extensive experience in this area, it is important to constantly underline the importance of these protections measures.
51. While there appears to be progress in the application of witness protection measures in the courtroom, there is considerable criticism of the witness protection in the other phases of the proceedings. These complaints fall into three categories. First, several respondents think that the witness protection law itself is inadequate. Second, and more significantly, the POBiH in particular finds that SIPA, which is responsible for providing direct protection to vulnerable witnesses, does not provide

¹⁶ Given the Prosecution's role in dealing with witnesses during investigation, the suggestion has been made that it needs its own witness support unit. In the Experts' view, this is a suggestion worthy of exploration.

¹⁷ For a discussion of these cases and the issues raised, see Bogdan Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Centre for Transition Justice, pp. 18 – 19.

adequate services. This is primarily due to inadequate training and funding. In particular, SIPA has been criticised for not being able to react quickly in an emergency situation, notably in the investigative phase, and for the fact that some witnesses' names have leaked¹⁸. It should be noted that others contend that services that SIPA provides are adequate when the level of funding and the historical context are considered. Third, and finally, considerable frustration is also expressed at the fact that there is no relocation programme. In the ICTY and in a number of countries which deal with organised crimes (e.g., Italy), there are witness protection programmes that afford vulnerable witnesses a change of identity and relocation to another geographical area. In a small country such as BiH, with tight knit communities, internal relocation will generally not be effective. Thus, only international relocation would provide the additional protection needed.

52. The Experts discussed these issues with the Head of SIPA's Witness Protection Department. He expressed frustration that none of the witnesses met the criteria which would allow for them to enter into the country's witness protection programme. He also expressed disdain for the services that SIPA is required to provide under the Vulnerable Witnesses Law, saying that these services, which relate to transport and logistical support, could be done by local police or court police. The Experts do not agree and believe that SIPA should realise that this type of service is essential to its work and that its expectations regarding doing 'more interesting' work is dependent on doing its primary work properly. Fortunately, the Experts also received reports that SIPA staff generally carry these essential services out in a professional manner.

53. In view of the above, it is clear that witness protection has improved to some extent but still falls short of what is needed. There are two possible approaches. One is to say that the situation is not dire and that witness protection has worked about as well as can be expected. While this approach may appear satisfactory, in the Experts' view it is not. Vulnerable witnesses should not have to face these risks; moreover, if incidents occur to these witnesses, particularly victim-witnesses, public confidence in the BiH Court would suffer. Thus, the Experts recommend that the BiH Court, the POBiH and the donor community redouble their efforts to ensure that SIPA officials receive further training and increased resources and that BiH officials are made aware of SIPA's deficiencies and resource limitations and are strongly encouraged to address these limitations. Prosecutors and others who believe that the current laws are not adequate to provide sufficient protection should make proposals to amend the relevant laws. Finally, the donor community should seriously consider committing to providing short-term relocations to extremely vulnerable witnesses, at least on an ad hoc basis. This would afford the most vulnerable witnesses an important safety net that could be critical in certain cases.

5. Public Information and Outreach Efforts

54. As noted elsewhere in this Report, a key element of the BiH Court's and POBiH's mission is to address the crimes of the past and other serious crimes in a manner that is seen and perceived by the public to be fair and not biased or subject to outside influences. Indeed, this is a cornerstone for the rule of law and a *sine qua non*

¹⁸ SIPA officials dispute that it was a fault in this regard.

of courts and prosecution offices. In post-conflict societies, this is a more difficult task, and one of the principal reasons for the inclusion of international judges, prosecutors and staff in the BiH Court and POBiH.

55. For the BiH Court and POBiH to meet these important goals, the public needs to have some understanding of their respective roles, the work they are performing and the results achieved. Given the political context (which is discussed in more detail below), the new procedures created by the CPC and the nature of the crimes under the BiH Court's jurisdiction, the public is bound to have at least some ignorance and some outright misperceptions of these new institutions.
56. This ignorance and certain misperceptions are identified in the Prism Report, which has surveyed public perceptions in BiH and provides a partial view of how the public perceives the BiH Court and the POBiH. While the picture that emerges from the report is mixed in terms of the public's overall view of the BiH Court and the POBiH, there are serious misunderstandings about their work. For example, when asked about whether the work of the BiH Court was successful, 60% said that it 'not successful' or 'very unsuccessful', with a majority in all ethnic groups agreeing with that conclusion, a view shared by some journalists as well. Similar results were found regarding whether the BiH Court was successful in providing 'fair and just trials'.
57. These conclusions are sharply at odds with the views inside the BiH Court and POBiH as well as NGOs and informed observers, including the Experts. Other survey results were more positive, e.g., a majority of those surveyed believe the judges and prosecutors are not ethnically biased, and it is not possible to give a fair accounting here of all the data that the Prism Report has produced. Nonetheless, it is clear that there is a wide gap in terms of the public's understanding about the BiH Court and POBiH, and the general public has many misconceptions about the work being done.
58. Given the political and historical context in which the BiH Court and POBiH are working, these public perceptions are hardly surprising. Moreover, other institutions, such as the ICTY, the Special Court for Sierra Leone (SCSL) and other war crimes and serious prosecution units in post-conflict environments faced similar difficulties. In those situations, these institutions recognised that they must directly address the public and explain the institutions' work and fight against misperceptions. This has been best achieved via an outreach and public relations strategy, which is intended to explain the BiH Court's and POBiH's work and directly address misconceptions and falsehoods about their work.
59. While the BiH Court, and the POBiH in particular, have made some efforts to reach out to the public and explain their work and plans, and the Public Information Offices of both institutions provide regular press information to the media, there is no overall outreach strategy. Civil society groups have played a role in educating the public, but they can be much more effective if they are acting in support of an overall strategy, rather than simply developing their own initiatives. The lack of an outreach strategy was criticised by NGOs and journalists.
60. Fortunately, with support from the United Kingdom, draft Public Information and Outreach Strategies have been created for both the BiH Court and the Office of the Prosecutor by a leading expert in the field. The Experts have reviewed these draft

strategy documents and are of the view that they create an excellent basis on which to move forward. Given these developments, the Experts will not make further substantive recommendations in this regard but would instead strongly urge the BiH Court and the POBiH to adopt these or similar strategies.¹⁹ Moreover, donors will need to provide additional funding for these efforts to be fruitful. This will be money well spent, as without an effective outreach and public information strategy and campaign, many of the benefits of work the BiH Court and the POBiH will go unrealised.

6. Defence

61. Bar associations in BiH have been organised on the entity level and there is no state level bar association. As the BiH Court is the only State level judicial institution in the country, the system that operates regarding defence counsels who represent clients before the BiH Court is unique in the country
62. This system has been organised through the Odsjek Krivicne Odbrane (OKO Criminal Defence Section), which is a part of the BiH Court Registry, although for sound reasons it is not located at the BiH Court and occupies separate premises. Unlike at other ‘hybrid’ courts and tribunals, OKO does not administer the legal aid system (which is provided directly by the relevant governmental departments) but instead provides legal and administrative support to individual advocates defending cases before the BiH Court, as well as a detailed training programme for lawyers and those involved in the trial process. OKO also conducts other activities in the legal community in order to ensure widespread dissemination of information about war crimes in the region and also provides support for the legal profession.²⁰ Since this Expert Report is focussed on the progress of transition arrangements and the question of continuing international assistance, the Experts have not attempted to comprehensively examine defence issues but instead flag certain concerns raised in the interviews for the information and consideration of donors and other interested parties.²¹ They would note that interviewees gave various opinions on the quality of defence provided to accused before the BiH Court, with the predictable conclusion that the quality of defence mainly depends on the quality of individual advocates, although it should be noted that defence counsel who had ICTY experience were generally seen as superior to those who did not. However, there were a number of positive comments made about OKO’s role in providing assistance, particularly regarding legal issues, to defence counsel. While OKO received positive evaluations for its work, it appears that the assistance is somewhat underutilised, as some defence counsels do not make effective use of OKO’s services, although this situation has improved over time.
63. A more serious concern arises with respect to the fact that there are international prosecutors and no real possibility of international defence counsel. This raises potential ‘equality of arms’ issues. In addition to skills obtained in the

¹⁹ Since the completion of the report the referenced outreach strategy was adopted by the Plenum of judges. The Experts understand that the POBiH will be addressing this issue in the near future.

²⁰ Information available at www.okobih.ba.

²¹ For more information on the work of OKO and defence, see the ICTJ report noted at note 17 above.

adversarial system (e.g., experience in cross-examination), the international prosecutors' command of the English language, which is superior to almost all local defence counsels, puts the prosecution in a much better position when it comes to the understanding and use of, for example, ICTY generated material, which formed the bulk of the evidence in the Rule 11 *bis* cases and is important in many other cases as well. This is exacerbated by the defence counsels' frustrations in obtaining ICTY evidence.

64. Unlike the POBiH which can directly request evidentiary material from the ICTY OTP, the only way for defence counsels to get such material is through OKO, which requests it from the ICTY on behalf of the defence if the material is not confidential. If the material is confidential the defence must follow the procedure pursuant to amended Rule 75 (H) of the ICTY Rules of Procedure and Evidence with all the difficulties described below.
65. In June 2007 the ICTY amended its Rules of Procedure and Evidence and added a new Rule 75 (H) which was meant to provide to outside parties a possibility to directly request a variation of protective measures granted by the Tribunal in one of the Tribunal's cases. One of the main aims was to provide a smoother pathway for outside parties (courts, prosecution and defence counsels) to obtain ICTY material, but the revised Rule has not lived up to its promise, as these requests take considerable time to process. ICTY officials have explained that due to the confidentiality issues involved and the requirement that witnesses must first be contacted as well as the time pressures facing the ICTY due to its completion strategy, the Rule 75 (H) process does take more time than originally envisaged. They agree that the process can be lengthy and are taking steps to expedite the process.
66. OKO, which has English-speaking staff, has worked closely with defence counsel to mitigate these issues and with some success. Judges also are attuned to these concerns and take appropriate steps in the courtroom to protect the rights of the accused. Nonetheless, issues remain. In particular, new efforts should be made both by the Registry and OKO together with the relevant ICTY offices to address the access to ICTY information issues, protecting confidentiality, so that these concerns are minimised.
67. OKO has done exemplary work with defence counsel, including support and trainings on the use of international humanitarian law as well as adversarial procedures introduced by the 2003 CPC and the techniques necessary to be effective in this type of procedure. This role is critically important to ensure that the accused receive adequate representation, a cornerstone of due process. This is all the more important in the absence of a state bar association. International donor support as well that of the BiH Ministry of Justice is crucial to maintain these efforts; it is essential that defence not be seen merely as an afterthought. Not only are defence rights fundamental to fair trials but effective defence counsel actually make those proceedings more efficient.

IV. Political Context and Environment in which the BiH Court and the PoBiH Operate

68. Before turning to a discussion of the work of the BiH Court and POBiH, it is important to note briefly the political context and environment in which they operate, as these circumstances are relevant to the underlying goals of these institutions, how effective they are in achieving those goals and how they are perceived. Of course, this discussion is intended only to highlight certain important issues that affect the BiH Court and POBiH, as the political situation in BiH is ever-changing and complicated and has been extensively analysed elsewhere.²²
69. In this regard, almost all of the interviewees strongly feel that political pressure and influence continue to impact on the public perception of the proceedings, and there are considerable and understandable fears by the public that the process will be shaped by political factors. This view is supported by the Prism Report which found that approximately 37% of those surveyed thought the Court was ‘fully under political influence’ and another 26.7% believed it is under ‘some political influence’.²³
70. The interviewees were virtually unanimous in their view that the presence of international personnel at the BiH Court and in the POBiH’s reduces the general perception that political influences are determinative in the judicial process and takes pressure off national judges and prosecutors, allowing them to do their jobs more effectively. It is worth noting that many also expressed the view that the political situation looked considerably different in 2007 when the situation appeared to be more stable. In that context, it had been more likely that the planned transition, at least in terms of the political situation in the country, was more realistic. This also seems to have been the view of the international donor community.
71. While all informed interviewees agreed that during the course of 2008 the political environment has worsened considerably, with increased tensions between the ethnically-based political parties and actors, two schools of thought were present among those with whom the Experts met. Some argued that the political situation had deteriorated due to domestic factors and heightening tensions. Others believed that a crisis situation had been manufactured and then manipulated by certain politicians for their own purposes, in effect to create a construct to distract the international community from underlying corruption and malfeasance by certain politicians. Nonetheless, there was general agreement that regardless of the causes of the current political climate the political situation had changed for worse, and that these changed circumstances favoured continuation of the international presence in the BIH Court and POBiH beyond 2009, with the only significant issue remaining being the number of internationals which should continue and in which capacity.
72. Taking into consideration all the various views, several interviewees persuasively argued that there is a heightened political crisis in the country at present and that it would thus be unwise over the coming year to end international assistance to the BiH Court and POBiH. There was also general and wide support for the

²² See, e.g., ‘Fears of New Ethnic Conflict in Bosnia’, *New York Times*, 14 December 2008.

²³ Prism Report, p.56.

continuation of an international presence, especially in the form of international judges and prosecutors, in these institutions. A number of interviewees underlined that international assistance was important in view of the progress towards adopting a State War Crimes Strategy, particularly if that strategy were to entail significant war crimes prosecutions and trials at the entity and cantonal levels. They were of the view that an international presence at the BiH Court would be important to ensure that any such process works properly. Others argued that the presence of international judges and prosecutors will keep the executive 'honest' and prevent it from unduly influencing judicial institutions; moreover, they believe that the international presence provides the opportunity for national judges and prosecutors to develop in a protected zone that is less impacted by political factors.

73. Given the history of the country, the political context of BiH and its impact on the judicial system should not be underestimated. Thus, the views expressed by actors within the country as well as public opinion must be taken into consideration in making any decision regarding the transition of the BiH Court and POBiH.

V. Assessment of BiH Court's Work to Date and the Role of International Judges and Personnel

A. General Considerations

1. Issues of Judicial Administration, Organisation and Management

74. The BiH Court has three divisions: criminal, administrative and appellate. The Criminal Division consists of three sections: Section I for War Crimes, Section II for Organised Crime and Section III for General Crimes. The Administrative Division deals with civil cases and consists of one panel. The Appellate Division includes Section I for War Crimes, Section II for Organised Crime and Section III for General Crime and appeals lodged against the decisions of the Administrative Division.
75. The BiH Court occupies a unique place in the national judicial infrastructure, in that it is the only court in the country exercising general jurisdiction on the state level (the Constitutional Court having limited subject matter jurisdiction). There is currently no Supreme Court on the state level. While there has been significant progress recently on a State War Crimes Strategy, it has not yet been adopted.²⁴ Thus, for the future it is not yet completely clear what the relationship will be in terms of war crimes prosecutions between the BiH Court and entity courts or if the BiH Court and/or the POBiH will play a supervisory role of some sort in this process. Given that this situation is currently in flux, the Experts have focussed primarily on the operation of the BiH Court itself in terms of international assistance but would

²⁴ The National War Crimes Strategy was subsequently adopted by the BiH Council of Ministers on 29 December 2008 after the completion of the Experts' work.

note that the adoption of a State War Crimes Strategy will have an impact on the work of the BiH Court and POBiH. Other institutional changes, such as the creation of a Supreme Court or revisions of the institutional judicial arrangements in the country would also affect the work of the BiH Court. Given that it would be speculative to comment further on these issues, the Experts would simply note them and point out that they could not be fully taken into consideration in preparing this Report.

76. In terms of the work of Sections I and II of the BiH Court, i.e., the War Crimes Chamber and the Organised Crimes Chamber, these are currently composed of a combination of international and national judges. From its inception until 2008, trial panels in both war crimes and organised crime cases contained two international judges and one national. This has now shifted, in accordance with the transition plan, with war crimes panels composed of one international and two national judges and the phase out of international judges on organised crime trial panels. International judges continue to sit on appeals panels for both war crime and organised crime cases. The President and the Chief Prosecutor have proposed that international assistance should continue past 2009.
77. The administrative authority for Sections I and II lies with the President²⁵, who is assisted by the Registrar and other Registry staff, particularly the Court Management Section. The President appears to bear the administrative burdens of the Court with little assistance, involvement or input from other judges, many of whom show little interest in these matters. Some judges were of the view that the administrative power and responsibility of the President were too great and should be subject to checks and balances. Other judges were more satisfied with the current arrangements and did not want to be involved in administrative or management issues.
78. It is noteworthy that very little is required of judges other than their judicial work. There is a Judicial Education Committee which has done good work in establishing an annual 'judicial college' in which specific judicial issues are discussed and addressed, led either by outside experts or the judges themselves. This is a welcome development. Moreover, as noted above, there has been an ad hoc Working Group on Witness Protection in which judges participated and which produced constructive proposals and raised awareness of protection issues amongst judges and others. There are also Plenum meetings in which all judges participate; however, these meetings appear to meet primarily when statutorily required, e.g., on the disqualification of a judge. Another initiative was the Presiding Judges' Commission, which brings presiding judges together to discuss important legal and procedural issues. While this Commission was an excellent idea and was quite useful for some time, with the transition there are many more presiding judges, and the Commission is now unwieldy and duplicative of other meetings held across the entire BiH Court.

²⁵ The President of the Court, inter alia, has the following responsibilities:

- * representing the Court of BiH in relations with the state-level bodies and organisations;
- * assignment of judges to Divisions and Chambers;
- * appointing replacements for judges in cases of recusal/disqualification of judges;
- * scheduling Plenum sessions, management of cases and assignment of cases among members of the Court of BiH, and if necessary assigning the Division/Section in charge;
- * convening and chairing the Plenum of the Court of BiH;
- * Court of BiH budget execution;
- * managing the staff of the Court of BiH.

There is also an Informal Forum, which allows for issues to be informally discussed by prosecutors, judges and others, but after a promising start, this forum has not produced results. Therefore, except for the Judicial Education Committee and the required Plenums, it is not clear to the Experts that the other structures are actually taking root or whether they simply were the initiative of a particularly dedicated and motivated international judge who has since left the BiH Court. New judges were only vaguely aware of these fora, and the Experts found out about these initiatives only indirectly. These or other committees need to be part of the BiH Court as an institutional matter, not simply reliant on an energetic and committed judge.

79. In the Experts' view, much is lost by not encouraging or requiring judges to make contributions to the Court's work outside the courtroom. While there is little or no tradition of such activities in the BiH judiciary, the Experts would note that at the ICTY, there are a number of structures and committees that have proven quite useful. For example, there is a Bureau, composed of the President, Vice-President and the Presiding Judges, which facilitates the consultation of the President with other members of the Bureau on all major questions relating to the functioning of the court.²⁶ In addition, the ICTY judges have a standing Committee on Rules and Procedures and on Speeding Up Trials, to name just two. Other international, 'hybrid' and domestic courts have also very usefully had similar arrangements.
80. While the ICTY and other international and other 'hybrid' courts obviously function in a different manner than the BiH Court, it could usefully adopt some of these practices. For example, in addition to the Judicial Education Committee, a Legal and Procedural Issues Committee could examine practices at the Court and identify problems and issues with the CPC and propose solutions or amendments to the CPC. The BiH Court judges are in the best position to identify issues with the CPC and, given their blend of national and international expertise, to make proposals to the relevant authorities to make amendments to the law. Apparently previous proposals by the judges in this regard have not been given serious consideration; however, the Experts raised this matter with the Minister of Justice, who welcomed the judges' input. If issues of the CPC were examined on a sustained basis and proposals then put forward, the Legal and Procedural Issues Committee might well be seen as an important contributor on these issues and be taken seriously by the relevant authorities, donors and other actors. Such a Committee could also look at other issues that face the BiH Court, including standards of appellate review (discussed in more detail below).
81. Another area where committee work would be useful would be on legal technology issues, as properly implemented legal technology programmes can prove very useful in a variety of ways in streamlining the work of courts. There are, of course, other committees that might prove useful as well. In any event, committee work can potentially not only improve the functioning of the BiH Court but can also contribute to the cooperation and communication between judges and also with their support staff.
82. In addition to committees, the Experts would recommend the creation of a Bureau or similar body, composed of both national and international judges, and

²⁶ ICTY Rules of Procedure and Evidence, Rule 23, IT 032, Rev42e, 4 November 2008.

which would meet regularly. This body should not be too large, perhaps the President plus four or five colleagues (both national and international) elected by the judges; the details would need to be debated and determined by the judges themselves. The purposes of this body would be twofold. First, it would be advisory to the President in terms of being a forum for discussion and would also facilitate a better understanding on certain administrative issues and more communication with colleagues. The President indicated that she would find it useful to have an advisory group to consult with on some of the issues that she faces but that the law might have to be amended in order to create such a body.

83. Second, certain executive authority could also be profitably given to this Bureau. This could include certain responsibilities currently placed in the Plenum, such as requests for the recusal of a judge and guidance on ethical issues. Also, depending on the arrangements put in place for international judges after 2009, the Bureau could play a role in making decisions or recommendations on which cases they would be assigned to. This latter point is discussed in more detail below. Regardless of the specific authority given to the Bureau, it can play a useful role in prodding greater involvement of all judges in non-courtroom aspects of the BiH Court and create channels of communication. It is clear from the interviews with judges that there are gaps both in communication and in judges' engagement on issues that affect the work of the BiH Court, and the Bureau is a form of 'in reach' that would increase involvement of judges generally.

2. Procedural Issues

84. There are two general matters of procedure that were raised in the interviews and bear noting. First, there is a very high rate of judgements that are vacated at 2nd instance. Court Management Services confirms that over 60% (62% of war crimes verdicts and 66% of organised crime verdicts) of 1st instance decisions are vacated.
85. Without touching the specifics of the actual cases, frustration was expressed by all at the high rate of 1st instance verdicts that were vacated, which resulted in considerable expenditure of time. According to some judges, a part of the reversal rate was attributable to some international prosecutors not following the national laws in drafting indictments. More commonly, the complaint from all sides was that the process was time consuming and repetitive and, according to a number of judges and other observers, the CPC has created an appellate process that married the worst features of the civil and common law systems. Broadly speaking, in the civil system, a limited re-trial of the charges is the purpose of the appeal whereas in common law systems only errors of law are reviewed on appeal and great deference is shown to the trial courts factual findings and conclusions. The current system is a combination of the two systems that has led to a high rate of vacated judgements with the judges re-hearing the same evidence and substituting their judgements for that of the trial court. This is not a very effective system of appellate review.
86. In the view of the Experts, judges, via the Legal and Procedural Committee proposed above, should look seriously at the CPC and any internal mechanisms available to them, such as practice directions, to ensure that appropriate standards of review are incorporated either into the applicable law or the practices of the BiH

Court. It appears that a fairly straightforward solution is available – the adoption of appellate standards of review – and the best mechanism of establishing these standards and putting them in place should be examined and acted on quickly. Otherwise, not only are scarce resources diverted to appeals but also public confidence in the BiH Court may be undermined by such a high reversal rate.

87. Another contentious issue was raised by a number of international judges regarding the issuance of dissenting opinions. In international courts, such as the ICTY, International Court of Justice (ICJ), International Criminal Court (ICC) European Court of Human Rights (ECHR) as well as other ‘hybrid’ tribunals, judges frequently issue dissenting opinions which state their disagreement to all or part of a judgement and decisions that have been joined by a majority of their colleagues. Dissenting opinions are also a feature of common law systems. In BiH, judges may disagree in writing with the majority’s decision but this document is provided only in a sealed envelope to the appellate chamber; there are no public dissents either at trial or in appeals. Many national judges contend that it would be a violation of the national law to issue publicly issues a dissenting opinion.
88. The issue takes on more weight as trial panels move from a majority of international judges to a majority of nationals and perhaps the subsequent phase out of international judges from trials and sitting only in 2nd instance cases. Some international judges fear that they will be on panels that issue decisions that they disagree with for fundamental reasons of fairness based on international human rights standards. National judges did not have the same fear but did express concerns about dissenting opinions on two fronts. First, they do not believe the law allows dissenting opinions; moreover, there was concern that in the current political atmosphere, which is characterised by inter-ethnic tension, judges would actually be undermined by the issuance of dissenting opinions, in that they would find themselves under increased pressure.
89. These are all legitimate concerns. In the Experts’ view, this issue needs to be debated openly and fully by the judges. One approach that the Experts would support would be to allow dissenting opinions where certain criteria are met. Thus, they would propose that dissents be allowed only on 2nd instance judgements and only on legal issues, not on factual issues, and could not touch on the deliberations of the chambers or criticise colleagues. In these cases, the dissents could serve a useful purpose without the adverse consequences that concern some judges. The above criteria could be further refined and developed by the proposed Bureau and then put forward to the Plenum, which would also recommend any necessary amendments in the national laws. Regardless of the approach taken, as sensitive issues of judicial culture and questions of judicial independence are involved, this matter should be fully aired by the judges before proposals are finalised.

B. Work of the War Crimes and Organised Crimes Chambers to Date

90. In reviewing the work of both Sections I and II of the BiH Court, the Experts found that, in general, the quality of the national judges is seen to be of a high

standard by their international colleagues and civil society. Obviously, there are individual exceptions to this, but the overall view expressed is one of respect for the work that they do. Most of the weaknesses that have been identified with respect to national judges would be expected when one takes into consideration that they have been confronted with a new system of procedural law (the CPC) and the application of laws that are unfamiliar to them. Thus, the introduction of adversarial practices such as cross-examination and the leading roles of the parties have required adjustment. Moreover, the application of unfamiliar criminal law concepts, particularly joint criminal enterprise (JCE) and command/superior responsibility, has raised issues for some national judges. One of the issues that clearly faces national judges and prosecutors is that the salaries that they receive should be sufficient to attract national judges and prosecutors from throughout the country; this would help counter the argument that the BiH Court is a Sarajevo dominated court. Thus, the Experts would urge the national authorities to bring the working conditions up to a standard that would attract judges and prosecutors from throughout the country. It is also important that legal officers continue to receive the supplemental pay that is a feature of international assistance. Otherwise, the best and brightest are likely to depart.

91. International judges have been of a somewhat mixed quality. Many international judges have been excellent professionals, bringing management skills, knowledge of the adversarial system and/or human rights law or international humanitarian law. Others have brought much less in terms of relevant experience, skills and/or commitment. Over time there has been some improvement in this regard. In the BiH Court's initial phases, international judges were primarily seconded by their respective governments and thus vetting of the judges for the respective judges was left principally to the relevant government. This process of appointing judges has given way to appointment by the High Judicial and Prosecutorial Council (HJPC), which advertises, interviews (by telephone) and then appoints international judges. This more transparent process appears to have led to the recruitment of a greater percentage of international judges who bring requisite skills and abilities, including judges who have ICTY, ECHR or other international experience (e.g., Kosovo), which experience can be quite useful to the Court.
92. Interviews with civil society groups and journalists showed they were well aware of international judges who did not bring the requisite skills to the job or did not take their jobs as seriously as they should have (e.g., were in engaged in 'judicial tourism'), and there was disgust and bitterness in this regard.
93. The HJPC now applies specific criteria in the recruitment of judges and prosecutors established in the Registry Agreement. These include at least eight (8) years of experience as a judge, prosecutor or defence attorney in complex criminal matters; specific experience in war crimes, economic and fraud cases is particularly desirable; knowledge of international criminal law is desirable; and a proven record of impartiality and excellent performance record in previous employment.²⁷
94. These criteria are appropriate but could be strengthened further by the inclusion of qualification for trial judges to have actually presided over, or

²⁷ Agreement on the Registry, Article 8, 26 September 2006.

participated in, a significant number of criminal trials, with weight being given to the complexity of such trials. Moreover, the process could be further improved by requiring finalists for both international judge and prosecutor posts to be interviewed in person. Currently, candidates are interviewed over the telephone. While this approach can save costs and is certainly useful in reducing the number of candidates to a small group, a face to face interview for finalists is critical to the process, as candidates can look good on paper and sound credible on the telephone but have flaws that are more likely to come out during face to face interviews. While the initial costs are greater, they are very small when compared to the costs of a judge or prosecutor who does not perform up to standards or who create conflicts amongst their colleagues.

95. One of the reasons proper selection is so important is that due to judicial independence, it is not generally possible to formally evaluate the performance of judges, thus the hiring decision is all the more important. Once a judge is in place, there is not much that can be done regarding his or her performance, absent an ethical lapse or dereliction of duty issue. Therefore, sound hiring practices as well as the pressure of collegial expectations are the primary tools to be used regarding judges' performance, hence underlining the importance of having committees and other structures in which judges must interact outside the courtroom.
96. Turning to the contributions that international judges are (or are not) making, it is important to first turn to the reasons they (and international prosecutors) were introduced as an integral part of the two Chambers. The proposal for utilising international judges in the BiH Court arose in the Joint Conclusions between the High Representative and the ICTY in 2003. There is no indication in the Joint Conclusions of the reasons for proposing international judges and prosecutors. There are, however, some indications given in the report on which the Joint Conclusions were premised.²⁸ These reasons are consistent with the use of international judges and prosecutors, not only in the BiH Court and the POBiH's but also in other 'hybrid' systems, e.g., the SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC). These were also reflected in the answers given by interviewees.
97. One reason frequently given for providing for the presence of international judges is to 'safeguard the judicial process', that is, international judges provide credibility to the court and its judgements in a highly politicised post-conflict society where accusations of ethnic bias are rife. Given that the international judges are seen as impartial and independent, without ties to any particular ethnic group, the public's perception is that the process is, therefore, more credible. While the national judges are seen as fair and impartial by their international colleagues and informed observers, public perception does not yet fully accept this. This is reflected in the Prism Report, where a clear majority are of the view that international judges contribute to impartiality whereas there is an even split on whether national judges are fully qualified.²⁹ Moreover, those interviewed, with a few exceptions, agreed that the presence of international judges contributed significantly to the public's perception that the BiH Court's decisions were credible and not biased. Closely connected with

²⁸ International Criminal Tribunal for the Former Yugoslavia, *Report of the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Cases to National Courts*, P. 21, U.N. Doc. S/2002/678 (Jun 19, 2002).

²⁹ Prism Report, pp. 60, 61.

the above argument for the presence of international judges is that their presence shields national judges from criticism in making their decisions and rulings.

98. The other primary reason put forward for the use of international judges is that they bring relevant experience that can be very useful to their national colleagues, which can be shared to help develop and build the skills of national judges and staff, often referred to as ‘capacity building’. The record on this front is mixed and has depended largely on the quality and commitment of the international judges. Those international judges who have experience at the ICTY or the ECHR have been able to impart important knowledge of the law and principles to their national colleagues. Examples include taking decisions on detention (i.e., shorter periods of detention) that are closer to European standards and a number of decisions that take into account the ECHR. International judges have played a useful role in explaining and ensuring concepts such as JCE that are now part of customary international law and are applied properly by the Chambers. Moreover, they have explained aspects of the CPC to their national colleagues which are based on the adversarial system and helped craft solutions to issues of procedure and practice. Certain other international judges have introduced concepts of judicial management and administration that have proven valuable. Nonetheless, it is clear that even where there has been a sharing of knowledge; it has been more by accident than design. The Experts would recommend a systematic approach to skills building and knowledge transfer. Fortunately, steps have been taken by the Judicial Education Committee to provide that international judges are introduced to the best approaches and best practices on transferring their knowledge, including via a written guide or manual that assists them in fulfilling this role. The Judicial Education Committee could continue to play a very useful role in this regard, in updating such a guide and the accompanying training or discussion sessions.
99. On the other hand, a number of international judges who have little or no international or relevant experience have not provided much in terms of such assistance in building the skills of their colleagues. This is particularly true where they have stayed for short periods of time, i.e., one year, and/or where they have made little effort to learn the CPC and other relevant aspects of BiH law. It is clear that for this form of capacity or skills building to work, it must operate as a ‘two way street’ in that international judges can make a much more significant impact if they have mastered the relevant law, as the BiH Court is, after all, a national court applying national law. In order to address this problem, international judges now receive an introduction to the relevant national law as well as to other important matters, such as cultural sensitivity, when they first arrive at the BiH Court. They also should be given regular updates on both legal issues and those of cultural awareness. On the other hand, there were a few reports that the national judges were not interested in the input of international judges. While this feeling does not appear to be widespread, it is important for national judges also to be cognisant of the potential contributions that international judges can make and to try to take advantage of these opportunities.
100. Another aspect of the work of the judges is the quality of the judgements produced. In this regard, the form of the judgements follows a strict format that is in accordance with national practices. These judgements are difficult to read for outsiders and often discuss the applicable legal principles in a manner that is difficult for those outside the system to understand. This is a real loss in that the judgements

being produced are dealing with important legal principles, particularly in the war crimes area. They are significant to this developing body of law, nationally as well as internationally, in no small part because of the serious crimes with which they deal. They are also of obvious significance to the parties and victims. While the judgements may be in compliance with local practice, the international community is losing out on many of the legal developments and other benefits that could flow from well written judgements.³⁰ The Experts recommend that judges, through either a standing committee or an ad hoc working group, examine their judgement writing practices and adopt new formats and styles which will make the BiH Court's judgements accessible and meaningful to a broader audience.

101. Legal officers from the Legal Department assist the judges' research and drafting work. These young lawyers appear to do a very good job in the circumstances, but many of them do not have particular training for this type of work and should receive more guidance and training from their supervisors and from judges. In particular, the national legal officers represent an important part of the country's future, and both international and national judges have a professional duty if not an ethical responsibility to ensure that these young lawyers receive training in judgement writing and on the legal issues they are dealing with. At present, these efforts appear to be sporadic at best. International judges, many of whom come from countries where continuing legal education is a common feature of, if not a requirement in, their domestic systems should take it upon themselves to provide leadership in this important area, either by stressing the importance of the development of legal officers to their national colleagues or working directly on this issue via the Judicial Educational Committee.

102. The above discussion has not distinguished between the Chambers for War Crimes and for Organised Crime, for the reason that the issues and concerns overlap. The one distinction (which is made elsewhere in this Report in another context³¹) which was made by a number of interviewees is that international judges played an important role in the Organised Crime Chamber because they were seen as not being subject to political pressure, as they would not permanently live in the country. In the case of the war crimes judges, the more important factor was the international judges' lack of connection to any particular ethnic group. While this is a distinction between the two Chambers, it does not have much bearing on the above discussion.

VI. Assessment of the POBiH's Work of Special Departments for War Crimes and Organised Crime to Date and the Role of International Prosecutors and Personnel

103. The POBiH has been organised in three departments. The Special Department for War Crimes (Section 1), the Special Department for Organised Crime, Economic

³⁰ European standards on quality of decisions are helpful in this regard. See Opinion No. 11 [2008] of the Consultative Council of European Judges on the Quality of Judicial Decisions, at www.coe.int.

³¹ See discussion at para.135.

Crime and Corruption (Section 2) and Section 3 which covers all other crimes under the jurisdiction of POBiH. This report is focused on Sections 1 and 2. According to the law on the POBiH, the Chief Prosecutor is a national who is appointed for a term of 6 years (renewable) and the Heads of departments at present are internationals. Currently there are 37 prosecutors working in the POBiH (19 in the Section 1, 11 in the Section 2 and 7 in the Section 3). In Sections 1 and 2 there are 5 international prosecutors in each department, for a total of 10 international prosecutors. There are no international prosecutors in the Section 3. For purposes of this part of the Report, the Special Department for War Crimes and the Special Department for Organised Crime face similar issues, and the discussion that follows applies equally to both, unless otherwise noted.

104. As with international judges, there was no clear justification or enunciation of principles for bringing on board international prosecutors when the Special Departments were established, but the general reasons are well known. When interviewees were asked about what the international prosecutors had contributed or brought to the process of prosecuting war crimes or organised crime, a number of qualities or effects were described. First, a cluster of attributes arises from international prosecutions not having a stake in the process, i.e., since the international prosecutors were not from the region, they were not seen as biased and thus they made the investigations and prosecutions more credible and independent in the eyes of the public. Connected to these points, it was also argued that their presence provided some shelter (some interviewees used the term ‘shock absorbers’) to national prosecutors, as in BiH questions regarding the ethnic background of prosecutors are inevitable. Virtually all interviewees mentioned these two conceits, and there was widespread agreement that international prosecutors made important contributions to the process by playing these roles.
105. Another reason given by many interviewees supporting the presence of international prosecutors was capacity building, that is certain skills and techniques were being passed from international to national prosecutors, e.g., on the adversarial system, on investigative techniques, on aspects of the law. However, on closer examination it is not clear that much in terms of traditional capacity building is actually happening. In Special Department I (war crimes) the staff is divided into teams, and the fact is that except for one team in which an international and a national prosecutor work closely together, in all other teams national and internationals prosecutor work on separate cases; this situation speaks for itself. The situation in Special Department II (organised crimes) is similar. Some of the national prosecutors state that there are exchanges and consultations that do build their capacities, including particularly on conducting cross-examination and developing legal theories. Nonetheless, while there have been some transference of knowledge and capacities, it is fair to say these have not been systematic and that no comprehensive plan for skills building exists. On the other hand, there were a number of trainings that were conducted by international prosecutors for the benefit of their national colleagues that were unanimously considered as very useful and successful.
106. It is clear that there is only one prosecution team (Team 6 in the War Crimes Department – Srebrenica team) in which national and international prosecutors work closely together. In this team, the prosecutors work much more closely, than in other teams, preparing the strategy of cases together, although the prosecutors generally

appear individually and not together in court. In all other teams, whether in the War Crimes or Organised Crime Departments, national and international prosecutors work on their cases separately and the mutual cooperation exists only sporadically.

107. In examining the role of international prosecutors and the functioning of the Special Departments, it must be borne in mind that the BiH Court and the POBiH function in a very different manner. Whereas judges sitting on a panel must try to reach a decision together, taking each other's views into account, discussing and compromising on various points in order to reach a judgement, prosecutors operate in a different fashion. While prosecutors sometimes work in teams in complicated cases, in simpler cases they often work alone or with a senior prosecutor supported by other staff. Thus, some of the dynamics that exist in the BiH Court do not exist to the same extent in the POBiH, for either of the Special Departments.

108. It appears to the Experts that international prosecutors are handling many of the more complex cases as well as those that are politically charged and sensitive. While this approach may well be defensible in the short-term, it raises questions regarding the long-term viability of the Special Departments, as international prosecutors will, even if extended, not continue indefinitely. This practice also raises the 'crowding out' issue, in that international prosecutors may take work away from national prosecutors who are capable of doing the work, thus hindering the national prosecutor's development. Therefore, there are good reasons to begin to ensure that national prosecutors start to be more deeply engaged in the complex and sensitive cases. National prosecutors appear to be by and large competent and capable, and it is in the long-term interest of the country to develop their skills while the opportunity exists for them to work closely with international prosecutors. In this connection, like national judges, those from outside Sarajevo need additional support for the increase in costs of maintaining two residences, and this situation needs to be addressed by the national authorities.

109. It should be noted that there was criticism of the performances of international prosecutors by some interviewees. The prosecutorial record of the Special Department for Organised Crimes shows the loss of a number of significant cases, particularly on appeal. While the record on war crimes is more positive, there have been some disappointing results as well. Those who are critical of prosecutorial performance point to the indictments and other legal pleadings filed by international prosecutors and contend that these are not in accordance with the requirements of national law and this has led to acquittals and reversals on appeal. In the Experts' view, it is difficult to generalise in this manner, and especially in organised crime cases there are other circumstances that may be at play (e.g., fearful witnesses, circumstantial evidence). Moreover, based on a review of the cases it is not possible to draw a conclusion that the Prosecution has suffered a number of reversals due to issues with its indictments. Nonetheless, in the Special Department for War Crimes a practice has developed that all indictments are reviewed by both international and national prosecutors, and to the extent that this practice is not formally followed, it should be instituted as an office-wide policy.

110. As with the international judges, the quality of the international prosecutors varies, and the recommendations made in terms of recruitment of international judges made above are equally applicable to international prosecutors. Moreover,

international prosecutors' performance should be evaluated on a regular basis. In addition to work performance factors, such as the quality of legal work, supervision, etc., individual prosecutors should be assessed on their demonstrated commitment to learn and master relevant national BiH law. They should also be further evaluated on their efforts to pass on knowledge of international humanitarian law, adversarial techniques, such as cross-examination, and modern management practices, where applicable. By the adoption of these evaluation criteria, which is linked to the recruitment criteria, the performance of individual prosecutors can be monitored against the purposes for which they are hired, and this should help ensure better practices amongst this group. It also assists in ensuring that international prosecutors are performing the jobs they are hired to do and helps counter some local perceptions of 'judicial tourism' noted earlier. As with international judges, international prosecutors should also receive training on how to best pass on their skills along with a written guide on this subject as well as on the relevant parts of national substantive and procedural law and on cultural sensitivity.

111. The application of these criteria will encourage better work across the international/national divide and should be accompanied by increased efforts to have a truly mixed composition on the teams. The creation of more mixed teams and the application of the above criteria will assist in addressing the mistrust and completion that can arise out of divisions between national and internationals, which have occurred in some (but not most) teams.
112. As noted briefly above, the Srebrenica Team (Team 6) apparently has its own budget, with the international prosecutor having more flexibility to allocate the budget than is the case in the rest of the office. While the circumstances of this case are unique and the practice is perhaps precipitated or justified on these grounds, this practice should not be expanded, as it could result in creating further divisions within the POBiH or result in directed funding that could undermine management's substantive decisions on the selection and prosecution of cases. While at present there is no evidence that this has occurred, the practice of separate funding should be avoided in other cases.
113. There are a number of management issues that face the POBiH and need to be addressed; some of these have been addressed in the discussion on the Registry but others are within the Special Departments themselves. It is important to note the background of the establishment of the Office and its early years because the Office has been deeply and adversely affected by these developments. In the Experts' view, the Office got off to a poor start. The first Chief Prosecutor did little in terms of providing an overall vision for the POBiH and there was considerable in-fighting between staff and amongst the leadership, and little direction provided from the top. In Section II (Organised Crime), there was not much leadership or direction provided prior to the appointment of the current incumbent. Similarly, in Section I (War Crimes), the same is true; there was little leadership (and this was exacerbated by the early resignation of the first Head of the Department) until the current Head was finally appointed. Moreover, this period of managerial drift was exacerbated by the first Chief Prosecutor's extended sick leave and subsequent resignation. There has been some general improvement in the management under the current Acting Chief Prosecutor.

114. The Special Department for War Crimes has been further hampered by ongoing issues related to strategy. First, there has been a long, drawn out process involving a war crimes strategy at the State level, which, if resolved, would assist in determining the POBiH's responsibility and role vis-à-vis entity and cantonal prosecution services; this overall strategy now seems to be making headway and will be useful to the Special Department, once it is adopted.³² There is the related but separate issue of prosecutorial strategy for the Special Department, e.g., case selection, prioritisation. Some interviewees stated that in the early days there was an unwritten and unpublished strategy of the POBiH to prosecute as many persons as possible, meaning suspects who were 'available', i.e. who are within the reach of the national judicial and police authorities, regardless of the gravity of the crimes. In this manner, the prosecutors would be able to satisfy a quota of cases they needed to prosecute in order to get positive assessment of their work by the HJPC. Other interviewees referred to 'sensitivity' being the basis of case selection.
115. Such approaches, if actually followed, were flawed and counterproductive. Fortunately, under the leadership of the Acting Chief Prosecutor and the Head of the Special Department on War Crimes, a coherent case selection strategy is emerging. This is based on the so-called 'yellow book', which is a comprehensive catalogue of situations, events and acts organised by municipality, which is then used together with a comprehensive inventory of existing files related to war-time conduct. Although coming rather late in the process, this approach appears to be sound (the Experts have not reviewed the 'yellow book', so this conclusion is based on reports). However, there continues to be some confusion regarding this approach in the Special Department, particularly amongst national prosecutors, and a lack of clarity in the general public regarding the approach to be taken. Thus, the Experts would strongly recommend that the staff of the Special Department be further educated on the approach and that a clear public relations strategy be followed with respect to civil society and the general public.
116. The Special Department on Organised Crime (SDOC) also functioned without a strategy or case selection criteria in its early years. Under the current Department Head, a strategy was developed and submitted in 2007 to the then Chief Prosecutor, who took no decision on it. The strategy was then re-submitted in 2008 to the Acting Chief Prosecutor, who indicated his agreement with most of the proposals but has not formally approved it. While not as important perhaps as on the war crimes side, a strategy for organised crimes is also of significance, as the Department has limited resources and should use/assign them appropriately. Thus, the new Chief Prosecutor should review, amend as needed and adopt the SDOC strategy as a very high priority. The Experts would underline that they are not commenting on the substance of the strategy, as this is matter for the responsible officials.
117. As the above discussion indicates, the POBiH has suffered considerably from management issues from its inception. This has improved to some extent with the current Acting Chief Prosecutor and Department Heads. Nonetheless, communication between and within the Special Departments is still poor and should be improved. Regular meetings amongst the principals should be established as well as frequent

³² The Working Group, led by the State Prosecutor, agreed on the Draft Strategy for Processing of War Crimes in Bosnia and Herzegovina on 19 November 2008, <http://www.bim.ba/en/142/10/14915/>, and it was adopted on 29 December 2008 by the BiH Council of Ministers.

meetings with the line prosecutors in the respective departments. Moreover, an outside consultant should be brought in to assist in communications and all staff with management responsibilities should undergo management training. The problematic history of the Office and its first Chief Prosecutor no doubt play a role in these issues, but there is now an internal inter-office cultural dimension that causes some of these issues to endure. While the Experts are fully aware that such issues occur frequently with prosecution offices, steps, along the lines noted above, should be taken to ameliorate this difficult situation and help put in place a structure and an atmosphere that is not only more open and transparent for the present but also for the future when the international presence has departed.

VII. Risk Assessment of Ending International Assistance on Current Schedule, i.e., 2009

A. General Considerations

118. In terms of assessing the risks of ending international assistance on the current schedule in 2009, it should be recalled at the outset that the BiH Court and POBiH have had a number of real achievements thus far. The Court has rendered judgements in 43 cases involving war crimes and 91 cases related to organised crime. These include the processing of almost all of the ICTY *11bis* referral cases, which were handled in a manner satisfactory to the ICTY Chambers and Office of the Prosecutor. The *11bis* cases were given close scrutiny by the OSCE, the ICTY and other observers. Thus, in these cases, international and European standards were clearly met. Moreover, in its handling of other cases as well, there is every indication that the Court has met the relevant European and international standards. Indeed, compared to the situation five years ago, this is an impressive achievement.
119. There are, of course, a number of weaknesses in the Court and the POBiH, but this is hardly surprising in the case of such a new institution, operating in a difficult political context. Thus, despite the issues noted above, BiH and the donor community have much to safeguard and a substantial positive legacy to protect.
120. In terms of conducting the risk assessment, the two Special Chambers and the two Special Departments are each examined separately; though the issues overlap to an extent, there are also different risks that require separate consideration and measurement against the current plan to end international assistance as of 14 December 2009.
121. In making the following risk assessment, the Experts have taken into account the views expressed by interviewees, the written feedback received as well as other reports. From this information and taking account the underlying purposes of the BiH Court and POBiH as well as the reasons for the introduction of international judges and prosecutors, the Experts have identified key risk factors that relate to respective sections or departments of the BiH Court and POBiH.

B. War Crimes Chambers (BiH Court Section I for War Crimes)

1. Impact on Conduct of Fair Trial and Adherence to International and European Standards

122. A key element of any credible court is its ability to conduct fair trials. Given that war crimes law is clearly linked to international laws and convention, e.g., the 1949 Geneva Conventions, the Genocide Convention and customary international law, it is also of critical importance that the BiH Court adheres to these key international standards as well as applicable human rights norms. The latter are particularly important in view of BiH's stated desire to enter the European Union, which is a widespread goal of the donor community as well. Thus, there are two critical and interrelated criteria for which the risk must be taken into account.
123. Given that the national judges are generally perceived to be good professional judges and have presided over fair trials and appeals, there appears to be little risk concerning actual fair trial standards being met without international judges; thus, on this score the risks of ending international assistance are **minimal**.
124. As to adherence to international and European standards, there is no doubt that international judges are making contributions in this area, as they have brought a greater awareness to the Court of international standards and European standards, including those enunciated by the ECHR (e.g., an international judge who formerly served on the ECHR has made significant contributions in this regard). This contribution is on-going. Moreover, international judges with an ICTY or international law background are bringing an understanding of international humanitarian law that is often lacking for judges at the national level. This is particularly true of such concepts as command responsibility and JCE, which are now clearly a part of customary international law but which are not familiar to national judges. There still appears to be some resistance or lack of understanding in this regard by some national judges. Thus, the role that international judges play in this respect continues to be important. While progress is being made on this front, there is a risk that these standards may not be adhered to in some cases without the safeguard of the intervention of international judges. The risk regarding adherence to international standards, while diminishing, still exists and would best be characterised as **moderate to serious**.

2. The Independence, Credibility and Efficiency of the Court

125. Closely connected to the principle of fair trial is the conceit that the BiH Court must be seen as independent and not subject to outside influences. In the case of BiH, it is clear that the principal concern relates to bias. With regard to concerns regarding bias and independence, there is no doubt that both national and international judges are independent and without bias. However, there is a complicating factor in that those inside the country will see BiH judges as biased regardless of their own lack of

bias and their own fairness. This puts considerable additional pressure on judges, as their decisions are attributed to bias regardless of the fact that the decision is fully justified, based on the relevant evidence fairly evaluated.

126. In such a situation, the presence of international judges provides a buffer to the work of the national judges, as the decisions that they make have the imprimatur of international judges. This is a different although related point than the one that will be addressed below regarding public perceptions. The presence of international judges in the highly politicised atmosphere of post-conflict BiH helps allow the national judges, at least for a period of time, to do their work under the shield of international judges. This is an important factor in safeguarding the independence and credibility of the national judges and hence the process. It is a factor not to be underestimated, and the risk factor regarding the independence and credibility to the process at this point in time must be taken seriously and is a **substantial** risk.
127. Another important consideration in the working of the BiH Court is its efficiency. The BiH Court has been relatively efficient in terms of processing cases in comparison to the ICTY, with the caveat that the complexity and gravity of these cases is greater at the ICTY. Nonetheless, it is clear that the presence of international judges generally makes the Court less efficient. While it is true that international judges have made a number of contributions in terms of judicial administration, e.g., the ad hoc Working Group on Witness Protection, and have no doubt assisted in finding ways to make the CPC work more efficiently, the time and costs associated with translation and interpretation is significant. In terms of day to day efficiency of the Court, the international judges are a net negative in this regard. Thus, there are actually efficiency gains by having the international judges and their support staff leaving on the current schedule and there is **no risk** associated with efficiency.

3. Public Perceptions of the Court and its Work

128. One of the key factors of the work of a court is that it be seen to do justice in a fair and even handed manner. Being perceived to be fair is all the more important in the BiH context where virtually every public part of life is viewed through the prism of ethnicity. As discussed above, this situation is worsening with current political developments. If the BiH Court is not perceived by the public to be doing its work fairly and without bias, the good work that it is doing will be lost and the rule of law will ultimately be undermined. Thus, this is an extremely important issue.
129. It is clear from almost all of the interviewees and from the Prism Report that the public perception of the BiH Court is that the international judges are trusted to be unbiased to a significantly greater extent than their national colleagues. Thus to proceed with the current transition plan would result in a serious risk regarding public perceptions regarding the BiH Court that would undermine its purposes. This risk must, therefore, be assessed as **grave** to the BiH Court and its work.

4. Impact on ‘Capacity Building’; ‘Crowding Out’ Issue

130. As has been previously discussed, one of the purposes for introducing international judges to the BiH Court was to assist in building the skills of the national judges, through the building of skills and the passing on of knowledge. With judges, this type of skills building has primarily occurred collegially when working through issues in applying the CPC or JCE, but less so on other matters. While this kind of capacity building has been valuable in some instances, it has not been systematic and the risk of losing such interchanges is not particularly great, as training could be increased to overcome some of the knowledge lost. The risk factor could best be characterised as **limited**.
131. There is the somewhat related issue of the possibility that capable national staff and judges are ‘crowded out’ by international staff and judges and are not allowed to develop. This issue probably exists to a greater extent in the POBiH, but national staff mentioned it in relation to the BiH Court as well. It is a genuine concern in that nationals can end up taking a back seat to internationals. However, with the transition already taking place to a great extent on the staff level and the national judges becoming the majority on trial panels, the risk **if international assistance were to be continued** is **minimal** with respect to the Court.
132. There is another risk that does not fit easily into this discussion but should be highlighted. The salaries and benefits of national judges apparently do not take into account that those who are not resident in Sarajevo will have additional costs and expenses that result from travel back and forth between their principal residencies and Sarajevo as well as the additional costs that arise from maintaining two residencies. If judges decide not to apply to the BiH Court due to these factors, and there is some indication that the BiH Court is losing out on qualified national judges as a result of this situation, the BiH Court will be increasingly seen as a Sarajevo-centric court and will lose credibility and perhaps face further criticism in this regard. A similar situation exists with respect to the supplemental pay received by national legal officers who are more likely to depart if such pay is discontinued. This situation is likely to be further exacerbated if the international presence ends and thus is a **serious** risk that needs to be addressed in the context of transition planning.

5. Witness Support and Protection

133. Since witness support and protection cuts across all phases of the BiH Court’s and POBiH’s work, these issues are being addressed at this point. As the discussion above shows, there has been progress on witness support and protection. Much of the credit must go to the initiative of an international judge who was instrumental in the formation of the ad hoc Work Group on Witness Protection. It is also clear that international judges, particularly those with ICTY or international experience, have brought sensitivities to witness protection that have been very helpful. The same can be said of some of the international prosecutors who have brought similar valuable experience (also from national systems that deal with organised crime and mafia cases) to the POBiH. While much of this experience is now embedded in the BiH Court’s and the POBiH’s work, there would be some loss in not having this expertise

available, particularly the sensitivity to the issues. However, national judges and prosecutors have made progress on these issues, so the risk is only **moderate or less**.

134. Regarding witness support, international assistance has been essential to maintaining the current level of witness support. Given the trauma that many of these witnesses have suffered, the unique nature of the BiH Court and the psychological issues that arise for many of the witnesses, it is important to maintain these services as long as possible, particularly in such cases as Srebrenica where the trauma that witnesses experience is quite severe. It is clear that most of or all the psychological and logistic support will disappear with the ending of international assistance. In view of the fact that the current level of witness support will end when international assistance ends, the risk associated with loss of such support is **serious**.

C. Organised Crimes Chamber (BiH Court Section II)

135. The comments and conclusions reached above in relation to the War Crimes Chamber are equally applicable for the Organised Crimes Chamber with several key qualifications and exceptions. First, the political dimensions of organised crime trials are different from those for war crimes. In the case of war crimes, the primary issue is the ethnic dimension, and the political ramifications related thereto. Judges are assumed by much of the general public to be in favour of an accused coming from their particular ethnic group; therefore, the presence of international judges tends to militate against this. In the case of organised crime, the political dimension is different in the sense that those accused of the crimes often are political or powerful figures or have ties to political parties or leaders or other powerful leaders. Thus, while bias may play a role, the larger concern is political interference in the process and/or fear of the consequences of ruling against strong political figures.
136. These concerns are documented in the Prism Report, which points to public distrust in the process because the public generally believes the judicial process is subject to political influence, and also the public is not convinced of the efficacy of the Organised Crime Chambers. Moreover, many of the interviewees expressed the concern that the present political environment makes it an inauspicious time to end the participation of judges in organised crime cases. While an argument can be made that it is on the Prosecution side that international staff is particularly important, as prosecutors are the ones most likely to come under threat or pressure in organised crime prosecutions, nonetheless a number of judges, both national and international, stressed the importance of maintaining international judges in organised crime cases. Thus, given the totality of the circumstances, the Experts would assess the risk as **serious** if all international judicial involvement ended in organised crime cases in 2009.

D. Special Department for War Crimes of POBiH

137. The risk assessment for the POBiH includes many of the same factors that arise with respect to the BiH Court; but these factors play out in differing ways due to the different roles of the court and the prosecution.

1. Impact on Investigations and Prosecution in Adherence with International and European Standards

138. The general consensus is that national prosecutors know the BiH law well and are capable prosecutors. Over the last several years they have become more familiar with applicable human rights norms and international law standards. They have, however, had to grapple with new techniques in court proceedings, particularly cross-examination, as well as an entirely new approach to prosecutor-led investigations (as opposed to the previous system when investigative judges were responsible for carrying out investigations, working with the police). Thus, national prosecutors have arguably had more to learn and master than national judges.

139. This significant learning curve, combined with the above-described management issues in the POBiH, has resulted in national prosecutors not gaining as much from their international prosecutor colleagues as anticipated. Nonetheless, they are adapting well to the new system and generally doing good work in many of the less complex cases. It is important to note that international prosecutors are handling many of the more complex cases. Thus, while the national prosecutors are fully capable of gradually taking responsibility for these cases in accordance with a well thought out plan, there would be considerable risk if they were to take full responsibility for all cases in 2009, in accordance with the transition plan. Moreover, from a management perspective, an international prosecutor is currently heading the Special Department and providing important leadership. A national replacement should be identified in due course, but this will have to await the appointment of a new Chief Prosecutor. The eventual national Head of the Special Department will also need considerable time working side by side with the current Head to prepare for this arduous position.

140. As a result of these factors, some of which stem from management problems in the office, if international prosecutors were to leave on the current schedule, there would be a **substantial to serious** risk to the adherence to international and European standards in a number of ongoing and future prosecutions.

2. Impact on the Independence, Credibility and Efficiency of Special Department

141. For a prosecution office, the independence and credibility of the office and its prosecutors is essential to its work and indeed to the rule of law in that society. If prosecutions are perceived as motivated by other factors, e.g., bias or political factors, public trust will be betrayed. There are two elements that must be considered regarding the independence and credibility of the office and its prosecutors, first is the question of the actual independence and credibility of the prosecutors and secondly, the public perception of their credibility and independence. There is no question that national prosecutors are fully independent and professional; this is confirmed by their international colleagues, international judges and informed elements of civil society. The risk posed by the termination of international assistance in 2009 on the issue of independence and internal credible is **minimal or less**. Public perceptions in this regard are a different matter and are discussed below.
142. As to the efficiency of the Special Department, the managerial and administrative issues facing the Department have already been discussed. At this stage, an international prosecutor is providing critical leadership and the office should be re-organised along performance-based lines. While national prosecutors could clearly take over at some point following implementation of these steps, the departure of all international prosecutors from the Special Department in line with the current plan would cause significant medium-term disruption. Therefore, the risk at this stage is **substantial** in terms of efficiency.

3. Public Perceptions of the Special Department and its Work

143. Like the international judges, international prosecutors are seen as independent and unbiased by the public. For purposes of public perception their role is critical in ‘safeguarding’ the system. Although this is no doubt due to unfair assumptions about their national colleagues, this is a fact of life in a post-conflict society riven by ethnic strife.
144. It must be said that there was less confidence expressed by those interviewed in international prosecutors than in international judges. These concerns appear to relate more to disappointments about results obtained in court though and not to international prosecutors’ independence. The Prism Report provides evidence that international prosecutors are viewed by the public in much the same way as international judges in making a contribution to the impartiality of the proceedings.³³ Given that under the CPC, prosecutors are responsible for overseeing the investigations of crimes, as well as prosecuting cases in court, they actually may well play a more important role regarding public perceptions than judges do. This factor may be even more important in the case of organised crime cases, as considerable

³³ Prism Report, p. 80.

independence and courage is needed to open investigations against political and organised crime figures.

145. In view of these factors, and the current political climate in the country, the risk of ending their presence in 2009 must also be assessed as **grave**.

4. Impact on Capacity Building in the POBiH – ‘Crowding Out’ Issue

146. One of the purposes for the presence of international prosecutors is to build the skills and capacities of their national counterparts. While there has been some skills building, particularly through training, the results have been disappointing overall. There has not been a strategy or sustained efforts in this regard. In the Srebrenica team there has been more cooperation and sharing of knowledge between national and international prosecutors, but these practices have not extended to other teams. Given the limited efforts and results in this regard, the risk factor regarding the departure of international prosecutors is **minimal or less**.

147. A somewhat related issue is the ‘crowding out’ problem, whereby capable national staff are not able to fully develop because the more challenging work is taken by internationals. This has no doubt happened to some extent in POBiH, and it is a real and legitimate concern. **If international assistance is continued**, then there is a **substantial risk** of this issue remaining a continuing concern unless measures such as those recommended herein, e.g., a clear strategy on the development of national staff, are adopted

5. Consequences on the Development and Implementation of Prosecutorial Case Selection Criteria

148. As has been noted earlier, the Special Department for War Crimes is also finalising its own case selection criteria and internal strategy. These are all important matters.³⁴ In terms of the development of the Special Department’s internal case selection methodology, the principal conceptual and technical work is being done by international staff, led by the Head of the Special Department, an international. Without this leadership, little progress would have been made internally on this issue.

149. Given the importance of completing this project of implementing the internal criteria and methodology in the Special Department, as well as explaining it to the public, it would be serious blow to these efforts if international prosecutors depart in 2009. While every effort should be made to bring nationals fully into the process, this will take considerable time and effort. Therefore, the risks regarding the POBiH’s internal case selection criteria and strategy is **very serious** if international prosecutors depart in 2009.

³⁴ This selection criteria should be distinguished from the State War Crimes Strategy, the work on which has been admirably performed by national staff.

E. Special Department for Organised Crime of POBiH

150. The elements and factors noted above apply with equal force to the Special Department for Organised Crime, except for the discussion on war crimes case selection criteria. There is one factor that is particular to the prosecution of organised crimes. As previously noted, investigating and prosecuting political and organised crime figures takes considerable independence and courage. In the interviews, the opinion was expressed that while international prosecutors are quite familiar with the pressures related to such high profile prosecutions, national prosecutors were still coming to terms with these pressures. Therefore, it would appear that national prosecutors need some additional time before they are ready, in substantial numbers, to assume these risks. Moreover, international prosecutors simply face fewer risks and less pressure because they will not live in the country for the long term. Therefore, there is a **substantial** risk that national prosecutors are not ready to take on the full burdens and pressures associated with high profile organised crime prosecutions in the absence of international prosecutors.

F. Recommendations and Options Paper

151. The Experts have made a number of recommendations throughout this Report, regarding a variety of concerns and issues. For the specific recommendations and suggested actions, attention should be directed to the applicable parts of the Report. For ease of reference, a non-exhaustive list of the areas in which recommendations were made include:

- Registry – revision of the OHR-BiH Agreement by appropriate means to clarify the role of the Management Committee, particularly with respect to non-financial matters.
- Relations between Registry and Prosecution – a number of steps to address this relationship which is not working properly including team building, skills development and clarification of roles.
- Witness Support – clarification of responsibilities with the Prosecution and need for continued international support.
- Witness Protection – additional training for SIPA staff and new approach to issues by SIPA management; strengthening the law on vulnerable witnesses.
- Outreach – a new outreach strategy that needs to be implemented as a priority.
- Defence – improvement of access to ICTY materials via steps to be taken by the ICTY. Continuation of support for OKO.
- Chambers – steps to provide greater involvement of the judges in judicial administration and management as well as checks and balances and ‘in reach’ by better communications, through the creation of additional internal structures, e.g. standing committees and a Bureau; devote more attention to national legal staff development.
- Chambers – review of high percentage of reversals on appeal, including the development of appellate review standards and the introduction of dissenting opinions on appeal under strictly defined criteria; review judgement drafting practices to ensure wider accessibility of judgements to international audience.
- Prosecution – introduction of performance criteria that includes skills building and knowledge transfer from international to national prosecutors, and international prosecutors developing familiarity with national law; this criteria should be integrated into the hiring process and followed through as part of an overall management plan.
- Prosecution – completion of case selection criteria and related strategy and clear communication of these policies to the entire office.
- National authorities – review terms and conditions of national judges and prosecutors based outside Sarajevo to ensure that their additional costs are covered, in an effort to attract top judges and prosecutors in the country. Supplemental pay for national legal officers needs to be continued.
- HJPC – strengthen recruitment procedures to include in-person interviews with finalists for international judge and prosecutor posts; hire

international judges and prosecutors on at least two (preferably three) year contracts, if international assistance is continued.

152. These recommendations are made with the knowledge that if international assistance is not continued past the end of 2009, then many of them would be for naught, as they relate, in substantial part, to the role of international judges, prosecutors and staff.
153. In this regard, the question of the continuation of international assistance and whether it should continue beyond 14 December 2009 will be addressed. In reaching their recommendation, the Experts have taken into account the views expressed in interviews and written responses to questions, public opinion surveys and particularly the views of the President and Chief Prosecutor.
154. The Experts would note that of the individuals interviewed, all but a handful supported, and the majority strongly supported the continuation of both international judges and prosecutors beyond 2009. Some of these individuals had obvious self-interest in the outcome, which must be discounted, but there were still a large majority of those without any self-interest motive who supported the international presence continuing beyond 2009.
155. Of course, this is not a democratic process, so the fact that certain proposals are widely supported does not necessarily mean that they should be adopted. Nonetheless, the reasons given were remarkably consistent across a wide variety of groups and thus are worth taking into account. Regarding international judges, the political context was frequently mentioned, and this was linked to the credibility and independence that international judges bring to the judicial process; these interviewees argued that it would be dangerous for the BiH Court to lose this credibility at this particular moment in time. Public perceptions were also cited, and many of those interviewed believed that international assistance was needed for several more years for the BiH Court to establish itself. They also argued that while the BiH Court had made excellent progress over its short life, national judges need the assistance of their international colleagues for a longer time for this progress to further develop. On the other hand, much less emphasis was placed on capacity building, as national judges are generally believed to be capable in their own right.
156. As for international prosecutors, most interviewees put forward arguments similar to those made in support of the continuation of international judges. However, particularly on organised crime, it was posited frequently that international prosecutors were in a position to investigate political figures without some of the pressures a national prosecutor might feel. It does bear pointing out that there was more criticism of international prosecutors than judges, in part because of the nature of their role but also due in part to unhappiness regarding the POBiH's case selection and a number of cases that did not result in convictions or resulted in low sentences.
157. There were a handful of voices that were much more sceptical about the role of international judges and prosecutors. Their concerns related in part to the 'crowding out' issue. Several interviewees were of the view that the national judges and prosecutors were fully capable of carrying on the tasks and that the presence of internationals made it more difficult for the nationals to move into positions of

authority and responsibility. There is merit in this view, and the Experts have taken this concern into account in making their recommendations. It is a point that the donor community and the international judges, prosecutors and staff should be ever mindful. There was also at least one contributor who was of the view that national judges were no longer interested in the contributions of international judges and that, therefore, it no longer made sense to continue with international assistance, but this was a minority view.

158. In making recommendations on the extension of international assistance beyond 2009, particular weight must be given to the views of those responsible for managing and administering the BiH Court and POBiH. In this regard, the President and acting Chief Prosecutor have now been on the record for some time. They wrote the Minister of Justice in May 2008,³⁵ calling for the continuation of international judges and prosecutors. They have since repeated that call, and the President has informally put forward a concrete plan. Given that the President and Chief Prosecutor positions are occupied by nationals and given that they are reviewing and managing their respective departments on a day-to-day basis, their views are entitled to considerable deference.

159. Taking the above considerations into account, the Experts recommend the continuation of international assistance beyond 2009. In doing so, they point to the risk assessment that they have carried out and documented above, which shows that there are considerable risks in ending international assistance in 2009. Moreover, they agree with most commentators that while the BiH Court and POBiH have had significant achievements, the fragile political and social situations in the country make it more risky to end international assistance at this stage. They also would underline the contributions of international assistance in supporting the BiH Court and POBiH to date and the concern that these could be lost by ending international assistance on the current timetable

160. Of course, finding that international assistance should continue raises a number of other questions, including which components of international assistance should continue and for how long. These issues are addressed in the Options Paper that follows.

OPTIONS PAPER

161. Given their recommendation that international assistance should continue, the Experts put forward the following options to be considered by international donors. In view of the recommendations, the Report does not address a decision not to extend beyond 2009.

162. Assuming agreement with the Experts' recommendation to extend international assistance beyond 2009, the relevant considerations are: functions to be extended; timeline for extension; and financial issues. These are addressed in turn.

³⁵ Letter of 9 May 2008 to the Minister of Justice.

I. FUNCTIONS

163. The first question is which functions should be extended beyond 2009 and, if so, how many internationals should they be extended. These will be analysed separately.

A. BiH COURT

164. In terms of the BiH Court, the starting point for an extension of international judges must be the President's and Court Registrar's informal proposal that international judges should continue beyond 2009 but only in 2nd instance /appeals proceedings. In line with this proposal, the Registry has drafted an informal paper that was circulated to the Transition Council during its meeting of 9 July 2008 that proposes that five (5) international judges continue beyond 2009, with three (3) judges sitting in war crimes cases and two (2) sitting on organised crime benches in 2nd Instance (appeals) cases. The view expressed is that such an approach would both demonstrate that 'great progress' has been made 'in terms of [the Court's] staffing and quality,' without sacrificing the contributions that international judges can continue to make.³⁶
165. There is merit in this proposal, in that there has indeed been progress toward the establishment of a fully functioning national court and that this achievement should be recognised; moreover, there are arguments that for reasons of public confidence and perception it is more important to have international judges on appeals decisions, as the 2nd instance Chamber is the court of last resort. This argument would be further buttressed, if judges were allowed to dissent on appeals decisions in line with the criteria and the recommendation made in this Report.
166. While the Experts would generally agree with this proposal, they are of the view that it would be important to have the presence of international judges on certain complex and sensitive cases at trial as well. In this regard, they would note that public perceptions of the judicial process are often shaped more by trial proceedings which are much more accessible to the public, than by appellate proceedings and judgements. Moreover, the factual evidence is adduced at trial and witnesses (particularly victim-witnesses) will only experience trial proceedings. In these proceedings, international judges can play an important role in terms of public perception and in vouchsafing the credibility of the proceedings, both for the public and for witnesses. From a more technical point of view, international judges have a contribution to make on the interpretation of the CPC, which contains many adversarial system elements; these issues are much more likely to arise during trial proceedings.
167. In view of the above, the Experts believe that the use of international judges should also be extended to certain trials after 2009. However, they are of the view that not every trial needs international judges, and international judges should only be

³⁶ Registry Paper, p. 3 (on file with Experts and also available from Court Registrar). While this paper has not been formally circulated, its contents have been discussed with donors and others.

assigned in cases that are of particular significance and complexity. This requires the adoption of criteria that would be applied to determine on which cases they should sit and would need to be done in a manner that the cases could be distributed in accordance with the automatic assignment of judges system, thus the details of the method of such assignments would need to be worked out by the Registry with the input of the judges.

168. As to the criteria for the cases on which international judges would sit, that is best left in the hands of the judges themselves. The Experts would put forward the following parameters on which the criteria could be based: the size of the case, including the requirement that the case be a multi-accused case involving three or more accused (although the criteria could provide exceptions for very sensitive cases involving fewer accused); the number of witnesses to be called, i.e., a substantial number of witnesses; the charges would have to relate to very serious and/or sensitive crimes (e.g., multiple victims, particularly heinous crimes). In addition, in cases where a genocide charge is going forward, an international judge would automatically be included in the panel. In the case of organised crime cases, an international judge would be included in the panel on cases of a senior political figure, e.g., government minister, other political officer holder or a person in a leadership of a political party. These are suggested criteria, but it should be left to the judges themselves to adopt such criteria. The actual application of the criteria would be done by the President following the recommendation of either the Judicial Assignment Committee or the Bureau. While the Registry would need to make the actual calculations, it is the view of the Experts that no more than a handful of international judges, in addition to the five (5) international judges proposed for 2nd instance, would be sufficient to meet the requirements resulting from the above proposal. This would represent a significant fall off of international judges, although not as steep a decline as in the President's and the Registry's informal proposal.

B. POBiH

169. Unlike the Court Registry, the Experts are not aware of any analysis or proposal that the POBiH has made regarding the number or functions of the international prosecutors beyond 2009. The transition plan calls for reductions in international prosecutors during the course of 2009, with the departure of the Head of the War Crimes Special Department in June. This would be a bad result, as the current Head has been providing much needed leadership to that department, and the timing is particularly unfortunate with the new Chief Prosecutor's appointment only taking place in February.
170. In view of the myriad of issues and problems that are affecting the work of the Special Departments, the Experts would recommend the continuation of the current level of international prosecutors for a period of at least 18 months from December 2009. Over the next six (6) months, the recommendations that have been put forward in this Expert Report, particularly the performance based criteria and evaluation system, should be put in place, and the new Chief Prosecutor should be given the opportunity to put the Special Departments on a more stable footing under his or her leadership and in line with his or her vision.

171. The new Chief Prosecutor would then have a period of approximately one year after putting these systems in place to make his or her own evaluation and be in a position to make recommendations and proposals regarding the continuing presence of international prosecutors. Depending on the situation at that time, another assessment by outside experts might well be useful to international donors in determining whether international assistance will continue to be necessary.

C. REGISTRY

172. If the recommendations of the Experts are accepted and international assistance is continued, then the full transition and integration of the Registry functions into the national systems will have to be postponed. Key functions, including the Registrars' positions, Conference Language Services and Support, and those financial and related administrative functions directly connected to the support of international judges and prosecutors as well as other international staff will need to be continued. This includes legal support staff for the Chambers and the Special Departments, although with the reduction of international judges, there can be a corresponding reduction of international support on the Court Registry side.

173. The Experts would also recommend, for the reasons previously given, that the international support to the Witness Section continue.

II. TIMELINE

174. If international assistance is to continue, it is important for the international donors to have a clear plan that the BiH authorities and public can understand and rely on. In view of the other recommendations made above, the Experts' view is that the international assistance should continue for two additional years beyond the end of the current date of 14 December 2009, thus until December 2011.³⁷

175. This date is chosen for several reasons. First, by the time this Report has been fully discussed and digested, it will be 2009. A period of extension to 2010 would not allow enough time for the reforms that have been proposed to take root, nor an adequate amount of time to assess how these reforms are working, much less make mid-course corrections. It is also important to take the political context into

³⁷ The Experts note that since the initial submission of the Report, on 25 February 2009, the HJPC recommended the extension of international judges and prosecutors; however, its recommendation runs quite contrary to the recommendations presented in the Report. The HJPC recommends the extension for 6 international judges only on the appellate level and only for war crimes department (one judge in each Chamber of the Appellate Section of the BiH Court). As for the international prosecutors, the HJPC noted that the Chief Prosecutor has not made any specific recommendation but it supported the proposal to appoint national prosecutors as chiefs of the two special departments. The HJPC further recommended that the number of international prosecutors should be reduced to initiate the process of a final transition. The HJPC also recommended that the President and Chief Prosecutor design a detailed plan for phasing out international judges and prosecutors and that this plan would incorporate international presence in a monitoring capacity. The Experts must note with real concern, that as of early March 2009, no substantial progress on any decision regarding further international presence in the BiH Court and POBiH has been made.

consideration and the continuing desire of much of the international community to see BiH make strides toward European integration. Given that the BiH Court and POBiH are important institutions in this regard, these processes need adequate time to play out.

176. However, it should be made clear that 2011 is the outer limits of international assistance and that the Chambers, POBiH and Registry should be developing plans to fully transition by that time. In these plans, it is important that they make the best use of internationals to pass along relevant experience and expertise but also to be more cognisant of the 'crowding out' phenomena, that is when nationals take a backseat to internationals and are not given adequate opportunity to develop their own potential and skills.

177. In connection with these transition plans, the Experts are of the view that the international donors should consider a follow up assessment by an outside expert during the course of 2010, so that they can gauge the progress being made toward full transition and integration. Depending on the progress, adjustments could then be made to the relevant dates. This step is particularly important, as staff need notice as to their contractual positions. If they do not have such notice, then they are likely to either leave prematurely or there will be a negative impact on morale. The current assessment and Report is late in this respect, as a number of staff expressed frustration and uncertainty over the future. The Experts would stress that unless the extension of internationals is addressed immediately, there will be a huge opportunity cost, as the best of the international staff, prosecutors and judges will depart for other positions in an atmosphere marked by such uncertainty. Thus, it must be underlined that a clear decision must be made post-haste, if the great progress that the BiH Court and POBiH is to be maintained.

III. FINANCIAL ISSUES

178. The Experts are not financial experts, but there are a number of financial issues that are connected with their recommendations. The process of undertaking the reforms necessary to correct some of the deficiencies in the BiH Court and POBiH require some additional resources as well as the costs of extending international assistance for a number of years.
179. The larger question is one of the financial stability of the BiH Court and POBiH when international assistance ends. If, as recommended, international assistance continues, this is a lesser issue than if such assistance would terminate in 2009. Nonetheless, there are real issues of the sustainability of the institutions. The Minister of Justice indicated that questions of finance were high on the agenda for his Ministry, and although there had been no decisions as of yet, it is clear that that financial issues will loom large in the future. As a possible precursor to those difficulties, the Court Registrar reported that there were indications of a \$1, 6 million reduction on the national side in the coming fiscal year.³⁸
180. Thus, the Experts would strongly recommend that the international donor community begin to engage seriously with the relevant BiH government departments to see where planning stands for the coming years. It is important that the BiH government stand behind the BiH Court and POBiH, both politically and financially during the coming years, if the donors' investment is to be protected and to have the effects that were intended. Given the budgetary cuts that are now being implemented, the BiH Court and POBiH will not be sustainable at their current levels, unless these reductions are reversed. Thus, the Experts would urge the national authorities to reconsider these budgetary reductions and the international community to provide its support in this regard.

³⁸ This has been confirmed during the follow up mission in February 2009.

NOTE OF ACKNOWLEDGEMENTS AND THANKS

The Experts would like to express their thanks and appreciation to all of those who assisted them in the project. Mr. Erik Illes of the Swedish Embassy was particularly helpful and supportive as were his colleagues on the Assessment Committee. The officials of the BiH Court and notably in the Registry were extremely generous to the Experts, particularly Ms. Danijela Gutović who provided excellent assistance to us. The Court Registrar, Ms. Biljana Potparić-Lipa, was of great assistance throughout the time that the Experts were working on the report, including providing information well after the Experts departed Sarajevo. Many thanks also to the library staff of the BiH Court, who kindly hosted us during our visit. Mr. Gabriël Oosthuizen, ICLS Executive Director, provided very useful input on the Report, which was much appreciated. A special note of thanks goes to Ms. Kanita Halilović, our translator and interpreter for the excellent job that she did and for her general good spirits.

ANNEX A

TO ASSESS THE SUSTAINABLE TRANSITION OF THE REGISTRY AND INTERNATIONAL DONOR SUPPORT TO THE STATE COURT AND STATE PROSECUTOR'S OFFICE IN 2009

Tender proposal by
International Criminal Law Services Foundation

1. Proposed Assessment Team

- David Tolbert, senior expert
- Aleksandar Kontić, junior expert

CVs are attached.

2. Qualifications of Assessment Team

The ICLS assessment team is particularly qualified to make an assessment of the prospects for successful transition of war crimes prosecutions to local control, particularly in light of the projected withdrawal of the international presence in the BiH State Court. The sustainability of the State Court and State Prosecutor's office, given the extreme demands of the war crimes and organised crime prosecutions, is an open question that will require close scrutiny by highly informed and highly skilled experts. The assessment team must be positioned to assess operational concerns, political sensitivities, the severe problem of resources (mostly financial), independence and accountability of the individuals and institutions, and transparency of operations. Public confidence in a justice system is the hallmark of its power and legitimacy. In this case, that confidence must resonate not only with the local community the system serves, but with the rest of the world, which is certainly watching. A thorough knowledge of the State Court and the other relevant actors, including particularly the ICTY, civil society, the national judicial institutions and the other relevant international and local actors are required.

The CVs included in this tender proposal speak for themselves, but several points are worth highlighting. The senior expert, a U.S. citizen, has over 25 years' professional experience, including the following:

- Currently Assistant Secretary-General and Special Expert to the United Nations Secretary-General on United Nations Assistance to the Khmer Rouge Trials (UNAKRT), providing direction and advice to all parts of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid court consisting of international and domestic judges, prosecutors, registry and administrative staff as well as defence counsel. Responsible for revising the court's budget and restructuring

the management team following a through assessment of the capacities and limitations of the court. Widely credited (e.g., by the Wall Street Journal, the international judges), as being responsible for the ‘re-birth of the ECCC’.

- Served as Deputy Registrar, Deputy Chief Prosecutor, Chef de Cabinet to the President and Senior Legal Adviser, Registry at the ICTY, during the years 1996 – 2001, 2003 – 2008.
- Headed the successful efforts to refer cases under ICTY Rule 11*bis* to the State Court of BiH, including chairing the Legal Framework Working Group, working closely with all the relevant international and local actors and dealing with all of the relevant issues, e.g., applicable laws, transfer procedures, detention facilities, witness protection.
- Led the ICTY Office of the Prosecutor (OTP) Transition Team, which was responsible for transferring the Rule 11*bis* cases, handing over Category 2 cases and making available the EDS (Electronic Disclosure Suite) and other materials to the BiH State Court Prosecutor. Worked closely with all of the prosecutors in the region to develop strategies, share information and overcome legal and political impediments to cooperation.
- Has had frequent contact with all parts of the State Court, i.e., judicial, prosecution, registry, offices and knows State Court and its issues well. Worked extensively with OSCE on monitoring of court proceedings and other issues, in BiH and throughout the region.
- Extensive experience with budgetary and financial matters with ICTY and UNAKRT.
- Also served as Executive Director of ABA-CEELI (2000 – 2003), which had an active programme in BiH and conducted extensive rule of law programming in BiH, including a number of visits to BiH and consultations at the highest levels.
- Frequent contacts with senior government and judicial officials.

The junior expert, a citizen of both BiH and the Netherlands, has 17 years’ professional experience, including the following:

- Has extensive experience at the ICTY, including as the senior lawyer from BiH in the Office of the Prosecutor.
- Was a key member of the Rules of the Road team and programme in the ICTY OTP, including preparation of hundreds of dossiers and evaluations of these dossiers, thus one of the best informed persons on the crime bases and cases in the region.
- Prepared the written pleadings and submissions for the Prosecutor and Deputy Prosecutor in all of the 11*bis* applications at the ICTY and appeared in court and argued many of the substantive and procedural motions and appeals in 11*bis* cases.

- An unparalleled knowledge of the jurisprudence of the ICTY and BiH jurisprudence as well as underlying crime bases in BiH.
- As the senior lawyer from the region on the ICTY OTP Transition Team is familiar with the work of the BiH State Court and has:
 - Excellent understanding of the jurisprudence of war crimes and international criminal law.
 - Familiarity with how judges function in an independent and transparent court that meets international standards for the rule of law, and how large war crimes cases are managed.
 - Knowledge of the procedural and substantive law of BiH.
- As a lawyer represented clients in all phases of civil and criminal matters before the courts of Bosnia and Herzegovina and drafted legal pleadings and legal memoranda for submission to courts.
- Speaks a variety of languages including Bosnian/Croatian/Serbian, his native language.

***PROPOSED PROJECT PLAN
TO ASSESS THE SUSTAINABLE TRANSITION OF THE REGISTRY AND
INTERNATIONAL DONOR SUPPORT TO THE STATE COURT AND STATE
PROSECUTOR'S OFFICE IN 2009***

1. THE ASSIGNMENT

The project will assess the sustainability of the State Court and State Prosecutor's office after 2009 under the terms of the current transition arrangements, most notably the phasing out of direct international support. Factors to be considered include political constraints, case sensitivity and capacity for continued efficient and effective prosecution of war crimes and organised crime, public interest and support for the judicial institutions, national resource allocation, performance indicators, accountability and transparency.

The key audience for this assessment is composed of international donors, who need to know whether the current transition process represents a significant risk to the substantial investment they have already made. The question is whether the transition will leave national institutions capable of enforcing the rule of law and applying European judicial standards effectively.

2. OBJECTIVE AND EXPECTED RESULTS

The objective of this assessment is to:

- Confirm the long-term sustainability of capacity transitioned to the national institutions. This includes the full transfer of financial and administrative responsibilities to the national institutions;
- Assess the consequences and challenges the State Court and Prosecutor's Office of BiH would face if the transition of international presence is carried out as presently scheduled, and propose mitigating measures for risks identified. This includes a review of the strategic roles and responsibilities of international judges and prosecutors within the capacity building and transition processes and the effects of the phase out of international judges and prosecutors on the viability and credibility of the State Court after 2009. Confirm that the post-transition judicial institutions will have the capacity to conform to international and regional standards for rule of law and the efficient delivery of justice.

In order to achieve the project objective, the following results need to be reached:

- A risk-based assessment on the impact of the current transition plan and recommendations to mitigate these risks. This should cover:
 - The conduct of fair trials, including the ability to deal effectively with the current and expected caseload;
 - The sustainability of capacity including a financial impact assessment of transition;
 - The efficiency and the independence of the Court;
 - The effectiveness of the international donor investment.
- Provide an assessment of international support and presence within the national justice system. This should include:
 - The strategy for international presence in the form of judges and prosecutors, the strategy for transition in relation to building sustainable capacity in the form of acceptance and ownership of new working practices and functions by national officials and personnel;
 - The impact of the participation of international judges and prosecutors in the national judicial institutions and the impact of such participation on the development of a coherent judicial system and proceedings;
 - The impact of new systems and procedures built within the national institutions;
 - The analyses of the capacity built within the national institutions, which includes the transferred support mechanism and the sustainability of it;
 - The analyses of witness protection and witness support mechanisms;
 - The impact of potential continuation of international support on integration into European structures.

- Depending on the outcome of the above:
 - Prepare an option paper for the expected effects of complete withdrawal of international support by the end of 2009.
 - Prepare an option paper exploring the consequences of a possible decision to prolong the international support and presence which should focus on what form this assistance should take.

3. SCOPE OF WORK

3.1 Proposed Time Frame

The team would begin immediately with a review of selected judgements and proceedings of the BiH State Court as well as reviewing key documents outlining the strategy of the Prosecutor and the court itself. These documents would be measured against relevant European standards. An assessment of the written work and public product of all organs of the court, including particularly that of the national judges, would be conducted and an examination of how much these judgements and proceedings have improved over the time period when international assistance was provided would be conducted. In addition a template of questions would be developed, which questions would be intended to address the principal issues raised by the requested assessment. Key questions would be provided in advance to the key interviewees (identified below), to allow them to prepare for the interview and save time. This period of assessment would commence as of 7 October and would continue until the field work began as of 27 October with Mr. Kontić traveling to Sarajevo. Mr. Tolbert would continue to assess the written products until he deployed to The Hague and Sarajevo as of 6 November.

The assessment team would begin its field work with Mr. Kontić traveling to Sarajevo as of 27 October to make preparations for the mission, including establishing all support needed, and ensuring that the relevant meetings and interviews would be scheduled. Mr. Tolbert would then travel to The Hague as of 6 November and would conduct several days of meetings with the OTP Transition Team, the Registry, including particularly the Victims and Witnesses Section and the Outreach Programme, and the Chambers. Mr. Tolbert would then join Mr. Kontić as of 9 November in BiH. A series of interviews would then be conducted with the key stakeholders. These include, among others:

- Prosecutor's Office: Prosecutor, Deputies, 2/3 international prosecutors; 2/3 national prosecutors; a couple of investigators and analysts.
- Court: President, all international judges, a significant cross-section of national judges and key legal officers.
- Defence - selected defence counsel.
- Key donors: EU, Sweden, Netherlands, US, UK, Germany, France, USAID, DIFID, World Bank.
- Key international organizations: OSCE, EU, OHR, relevant UN programs

- NGOs: Humanitarian Law Centre, Helsinki Watch, Mothers of Srebrenica
- Victims' Groups, including those representing victims of sexual assault
- Select Cantonal Court Judges and Prosecutors
- Key Opinion Makers: Journalists, Law Schools, Bar Associations
- Governmental Departments: Presidency, Ministry of Justice,
- ICTY Outreach Liaison Officer and ICTY BiH Field Office

The team proposes to work intensively consulting with the above named and other stakeholders and other knowledgeable observers (e.g. NGOs working on related issues) over the course of the following three to four weeks. This fact-gathering exercise will include not just high-level individuals with a stake in the outcome, but also those who are responsible for daily operations in the Registry and in the Prosecutor's office, including those administering budgets.

Those involved in negotiating the original transition plan will be consulted as well, to assess whether their expectations for the State Court and Prosecutor's Office have been fulfilled – whether the circumstances that led them to believe this transition was viable still exist. ICTY officials who have lent support to the creations of the State Court – at least its war crimes capacity – may also be in an excellent position to comment on the capacity of the State Court to meet the considerable practical and political challenges of the *11bis* prosecutions – as well as the “Rules of the Road” prosecutions – without international participation. Separate attention will have to be paid to the particular demands of organized crime cases, which may or may not reflect the same concerns as the war crimes cases.

The assessment team will require extensive support and participation from State Court and State Prosecutor staff to identify budgetary needs and sources over the past several years, and the degree to which international funding has been essential to maintain operations. It will be necessary to collect and compile caseload data, including filings and terminations over the past several years, for purposes of projecting future caseload as well.

Key distinctions will have to be drawn between the question of adequacy of resources (i.e. can the BiH government afford to fund these institutions adequately, and does it have the political will to do so?) and the problem of the integrity and transparency of the State Court and Prosecutor's offices themselves. Public confidence is vital for any system of justice, so the integrity of the system must also carry sufficient indicia of credibility to inspire that confidence, a particularly daunting challenge for war crimes prosecutions in a society still scarred by the ethnic tensions and mistrust that defined the war itself. Interviews with public and political figures outside the judicial branch will be necessary to assess how the judicial institutions are viewed, and whether that confidence is present, strong, or at risk.

Another key measure of public confidence is how the witnesses react to subpoenas, and the opportunity/obligation to testify. A thorough discussion with the witness protection staff is

essential, not just to determine the functionality of that office, but as a surrogate for the confidence the public is showing in the institution. It may even be advisable to speak to witnesses as well – although it will not be possible to interview a statistically significant sample for purposes of assessing the state of public confidence.

After this period of intensive work, meeting with stakeholders and the many others who can offer information relevant to the assessment, the senior expert will then return home to begin compiling all the information into the final report. The junior expert will remain in Sarajevo for an extra week in late November and early December to tie up loose ends, and follow up on any unresolved issues. Notwithstanding the physical separation, they will be in close contact during the analysis of the information gathered and the drafting of the report.

Work on the report and any other outputs will throughout the period, with a report being completed by the second week in December.

4. REPORTS

A draft Final Report will be submitted to the Assessment Committee no later than 15 December 2008. Final reports will be submitted in hard copy in both English and local language. An electronic version of the report will also be submitted to SIDA.

The final report will include a complete overview of the activities implemented during the assignment, a summary of outputs, and the identification of any major problems, which may have arisen during the performance of the Contract.

ANNEX B

- How do you assess the overall work of each of the organs/institutions, i.e., the court, the prosecution, the registry, of the State Court to date, measured against their respective mandates? In what ways have they succeeded? In what ways have they not?
- Do you believe the court has conducted fair trials? Has it shown independence?
- Has the presence of international judges been successful? How? Do international judges play a role in capacity building? What would be lost, if anything, with the phasing out of international judges in 2009? 2010? Beyond? [Specifically, any concerns about fair trials or independence]
- Has the presence of international prosecutors contributed to the work of the State Court institutions? In what ways have they been beneficial? In what ways not? What would be lost if they were phased out in 2009 as planned? 2010? Beyond?
- What are the principal drawbacks of ending the international presence in the State Court? What are the principal drawbacks in ending the support of these international judges and staff? In terms of quality of proceedings? In terms of capacity building?
- What are the principal drawbacks in continuing international assistance beyond 2009?
- Much criticism has been made of the Prosecution in terms of its prosecution strategy. Is this justified? Do the current proposals regarding "mapping" address the criticism? If not, what is needed? Are international prosecutors essential to developing a prosecutorial strategy, i.e., could the strategy be developed without them?
- Has the Registry facilitated the work of the Court? How or in what ways not?
- Does your office interact with civil society? If yes, in what way? How could the relationship be improved? Is civil society playing its proper role or should they be more or less involved?
- Is the level of witness protection being offered adequate? How, given current resources requirements, could it be changed or improved, if at all?
- How do you assess the level of public confidence in the court? What steps could be taken to improve the current situation?
- Do you have a view on the financial sustainability of the State Court? If yes, is BiH capable of sustaining the institutions at present? If not, when?
- Are the rights of the defence sufficiently protected? If not, why not?

- Has the relationship with the ICTY been constructive and productive? If not, how should it change
- The internal organization of the BiH State Court is different from other courts in BiH. Is this organization, in your view, functional? Is it better (why) or is it worse (why) than in other BiH courts? Are there changes that should be considered or that you would recommend?
- Kako ocjenjujete opšti rad svake od institucija tj. Suda, tuzilaštva i ureda registrara do danas u odnosu na njihove mandate? Na koji način su uspješne? Na koji način nisu?
- Da li mislite da su suđenja bila fer? Da li je sud nezavisan?
- Da li je prisustvo međunarodnih sudija bilo uspješno? Kako? Da li su međunarodne sudije imale ulogu u izgradnji kapaciteta suda? Šta bi bilo izgubljeno, ako bilo šta, sa postepenim smanjenjem broja međunarodnih sudija tokom 2009, kako je planirano? 2010? Iza toga? (specifično bilo kakva primjedba u vezi sa fer suđenjima ili nezavisnošću suda)
- Da li je prisustvo međunarodnih tužilaca bilo uspješno? Kako? Da li su međunarodni tužioci imale ulogu u izgradnji kapaciteta tužilaštva? Šta bi bilo izgubljeno, ako išta, sa postepenim smanjenjem broja međunarodnih sudija tokom 2009 kako je planirano? 2010? Iza toga?
- Koje su osnovne problemi u slučaju završetka međunarodnog prisustva u institucijama državnog suda? Koje su osnovni problemi u slučaju da međunarodne sudije, tužioci i drugo osoblje prestanu sa radom n kraju 2009? U vezi sa kvalitetom procesa? U vezi sa izgradnjom kapaciteta suda?
- Koji su osnovni problemi u slučaju da se međunarodna pomoć nastavi iza 2009?
- Bilo je dosta kritike na račun tužiteljstva u vezi sa strategijom tužiteljstva. Da li je ona opravdana? Da li projekat "žuta knjiga" odgovor na ove kritike? Ako ne, šta je potrebno? Da li su međunarodni tužioci važni za razvoj strategije tužilaštva tj. da li se ona može razviti i bez njihovog prisustva?
- Da li je ured registrara potpomogao rad suda? Kako da ili na koji način ne?
- Da li vaša organizacija saraduje sa organima civilnog društva? Ako da, na koji način? Na koji način se taj odnos može popraviti? Da li organi civilnog društva imaju dobru ulogu ili da li oni trebaju biti više ili manje uključeni?
- Da li je nivo ponuđene zaštite svjedoka adekvatan? Kako, uzimajući u obzir, sadašnje kapacitete, bi mogao biti izimijenjen ili poboljšan, ukoliko bi uopšte trebao biti poboljšan?
- Kako ocjenjujete nivo javne podrške državnom sudu? Koji koraci bi trebali biti napravljeni da bi se sadašnja situacija popravila?

- Imate li mišljenje o finansijskoj održivosti državnog suda? Ako da, da li je Bosna i Hercegovina sposobna podržati ove institucije u ovom momentu? Ako ne, kada mislite da bi mogla?
- Da li su prava optuženih dovoljno zaštićena? Ako ne, zašto?
- Da li je odnos sa MKTJ konstruktivan i produktivan? Ako ne, na koji način bi ovo trebalo izmijeniti?
- Unutrašnje uređenje državnog suda BiH je drugačija od drugih sudova u BiH. Da li je ovo uređenje, po vašem mišljenju, funkcionalno? Da li je bolje (zašto) ili je gore (zašto) od drugih sudova u BiH? Da li bi nešto trebalo promijeniti ili nešto što biste vi preporučili da se treba promijeniti?

ANNEX C

List of interviewees for the ICLS project

BiH State Court

- Meddžida Kreso, BiH State Court, President, National Judge
- Dragomir Vukoje, BiH State Court, National Judge
- Hilmo Vučinić, BiH State Court, National Judge
- Azra Miletić, BiH State Court, National Judge
- Almiro Rodriguez, BiH State Court, International Judge
- Botusharova-Doicheva Snezhana, BiH State Court, International Judge
- Brilman Paul Melchior, BiH State Court, International Judge
- Whalen Patricia Ann, BiH State Court, International Judge
- Carolan Robert, BiH State Court, International Judge
- David Re, BiH State Court, International Judge
- Philip Weiner, BiH State Court, International Judge
- Marie Tuma, BiH State Court, International Judge
- Biljana Potparić-Lipa, Court Registrar
- Alma Taso, Registry, Witness Support Unit
- Maja Kapetanović, Registry, Legal Advisor
- Brankica Bjeloš, Registry, Head of Translation Unit
- Amra Hodžić, Registry, Head of Court Management Unit
- Kevin Hughes, BiH State Court, International Legal Associate
- Brendan Wright, Registry, Chief Financial Officer
- Lucia Dighiero, Registry, Consultant

BiH State Prosecutor's Office

- Milorad Barašin, POBiH, Acting Chief Prosecutor
- David Schwendiman, POBiH, Head of SDWC
- Drew Engel, POBiH, Head of SDOC
- Božidarka Dodik, POBiH, SDWC, National Prosecutor
- Sanja Jukić, POBiH, SDWC, National Prosecutor
- Behaija Krnjić, POBiH, SDWC, National Prosecutor
- Ibro Bulić, POBiH, SDWC, National Prosecutor
- Jasmina Gafić, POBiH, SDWC, National Prosecutor
- Paul Flynn, POBiH, SDWC, International Prosecutor
- Kwai Hong Ip, POBiH, SDWC, International Prosecutor
- Philip Alcock, POBiH, SDWC, International Prosecutor
- Jude Romano, POBiH, SDWC, International Prosecutor
- Heikki Wendorf, POBiH, SDOC, International Prosecutor
- Peter Korneck, POBiH, SDOC, International Prosecutor
- Dubravka Piotrovski, POBiH Registrar
- Iriša Čevra, POBiH, Head of Legal Advisory Section

Other judicial authorities:

- Bariša Čolak, BiH Minister of Justice
- Amor Bukić, RS Prosecutor
- Branko Mitrović, Banja Luka Prosecutor's Office,
- Milorad Novaković, HJPC President
- Zoran Glušac, SIPA, Witness Protection Unit, Head
- Jasmina Pjanić, Criminal Defense Section (OKO), Head
- Shireen Avis Fisher, former International Judge, BiH State Court
- Amir Jaganjac, Supreme Court of the BiH Federation, President

Non-Governmental Organisations

- Mirsad Tokača, Research and Documentation Center (IDC), President
- Branko Todorović, The Helsinki Committee for Human Rights in Republika Srpska, Executive Director

Victims' Organisations

- Murat Tahirović, Association of camp inmates BiH, President
- Obrad Bubić, Association of camp inmates RS, President of the Kotor Varoš municipal association

Journalists

- Anisa Sućeska Vekić, Balkan Investigative Reporting Network (BIRN), Sarajevo
- Denis Džidić, Balkan Investigative Reporting Network (BIRN), Sarajevo
- Duška Jurišić, RTV BiH Federation, Information Program Editor in Chief

International Organisations:

- Margriet Prins, OHR
- Andreja Šporer, OHR
- Lucio Valerio Sarandrea, EUSR
- Pipina Katsaris, OSCE
- James Rodehaver, OSCE
- John Furnari, UNDP
- Toby Cadman, EUPM
- Refik Hodžić, ICTY, Registry
- Gabrielle McIntyre, ICTY, Chambers
- Hans Holthuis, ICTY, Registrar
- Liam McDowell, ICTY, Registry
- Marie-Ursula Kind, ICTY, OTP
- Patrick Lopez-Terres, ICTY, OTP
- Frederick Swinnen, ICTY, OTP