Further Support to Strengthening of Collaboration between the Bosnia and Herzegovina Ministry of Justice and High Judicial and Prosecutorial Council on Policy Capacity-Building

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Recommendations and Conclusions

NOTE:
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This report provides an outline of current conditions as to the state of joint policy cooperation between the BiH MoJ and HJPC, identifies the challenges faced and provides six "next step" recommendations.

Introduction:

On May 6th and 7th, 2010 in Sarajevo, I participated in the two day training session, Towards a Consensus on Capacity-building in Justice Policy in Bosnia i Herzegovina, for the benefit of staff from the MoJ and the HJPC. There was a representation from the senior levels of both organization including the Deputy Minister of the MoJ and the Assistant Minister for Strategic Planning, Aid Coordination and European Integration (SSPACEI) for the MoJ and the Deputy Director of the HJPC. The training session culminated 5 days of preparation outside of BiH and a week and a half of interviews and discussions in the country, all in Sarajevo.

The Statement of Work also calls for the Expert to:

> "Compose brief report with recommendations for further support to strengthening of collaboration between the BiH MoJ and the HJPC, i.e. their departments for strategy and policy."

This report discusses the current situation and proposes some recommendations for the creation of a Joint Policy Unit of the MoJ and the HJPC.

Current Conditions:

Both institutions are relatively new: the BiH MoJ was created in 2003 and the HJPC in 2004. They exist at a national level alongside both Entity MoJs and the Entity and cantonal court systems. The relationship among all of them is not well-defined either hierarchically or consultatively, frequently fraught with uncertainties both constitutional and legal and, not surprisingly, prone to suspicion, mistrust and non- or minimal cooperation. The relationship between the BiH MoJ and the HJPC appears cordial but not close, particularly in terms of joint activities. While the Assistant Minister for SSPACEI, Mr. Niko Grubešić, and Amra Jašarević, the Deputy Director of HJPC Secretariat, at the training session had a public and a private discussion. They did agree to work together on possible joint planning which may involve a JPU (a very positive sign). The actual implications and requirements for doing so remain, at least at this time, largely undefined. Even getting the protocol for the training session, itself, seemed to involve a lot of back and forth with considerable revisions due to last-minute changes.

Both the BiH MoJ and the HJPC are currently working on implementing their responsibilities as outlined in the Justice Sector Reform Strategy 2008-2012 (JSRS). The formation of Joint Policy Unit (JPU) is considered part of fulfilling the fifth pillar of the JSRS, "A Coordinated, Well-Managed and Accountable Sector." USAID through its Justice Sector Development Program, Phase Two (JSDP II) is providing training support and strategic guidance for the formation of a JPU through its contractual arrangement with EWMI. A JPU could provide:

- Coordination to ensure legal reform proposals strengthen judicial independence, and
- Coordination to ensure judicial policy plans strengthens the credibility and implementation of new laws.

As well, a JPU could serve as a node of discussion for collaborative efforts to rationalize the justice system, to improve overall efficiency and effectiveness and provide early warnings of upcoming challenges and offer options to meet them. Overall, the rationale for a JPU fits within the scope and intent of the JSRS and is not the issue of concern.

There are nonetheless several issues of concern. I discussed some of these issues in my Day Two presentation though not as candidly as in this memorandum.

National governance uncertain:

The complex governance structure of BiH leads to considerable uncertainty as to whether the Entity and cantonal justice bodies would participate or even choose to acknowledge the joint policy work done between the BiH MoJ and the HJPC. The jurisdictional quagmire does not give reason not to pursue a JPU but does raise the question, "Who is all this policy for?" For the foreseeable future, the answer is probably, "Simply the BiH and HJPC themselves." Perhaps in time the Entity and cantonal bodies may come to rely on a JPU for policy advice and direction. A JPU could provide a focal point of discussion and reform, a so-called centre of excellence.

One gets the sense that if a JPU or even justice policy in general is held hostage to some resolution of the federal (or not) structure of BiH, then very little may actually be achieved. "The perfect should not be the enemy of the good" and accordingly the priority should lie with justice policy functions rather than hierarchical and precedence of law issues.

Adapting to institutional change:

Another concern is that the MoJ and the HJPC have only relatively recently settled into their own institutions. The JSRS is to some degree unsettling even that institutional equilibrium, in part, because the JSRS appears to be very much a donor-written document. It appears that the MoJ, in particular, is just going through the exercise of fulfilling the checklist with limited understanding of the overall goals and objectives. For example, the JSRS identifies 18 policy analyses for the MoJ's SSPACEI to perform and another 10 presumably to be completed by the HJPC's Department of Planning and Strategic Policy (DPSP). To date, the MOJ SSPACEI unit have not completed any analyses, according to a discussion with staff, though working groups have been formed. The SSPACEI staff they said that they hoped to finish three of them by the end of 2010:

- Distribution of state assets,
- Property rights law reform, and
- A new Cadastre law.

Other priority projects included:

- Harmonization of bar exams,
- Role of Prosecutors' Office,
- Law on enforcement procedures and
- Use of mediation by the courts.

It is only an impression but I did think this was a very ambitious agenda for even the most sophisticated of legal research and policy bodies in large developed countries. The effort to do all of them at the same time, even with an emphasis on just three of them, could easily get bogged down. That said, the 18 policy analyses and particularly the top three would benefit substantially from input by the HJPC if only on the level of understanding the capacity of the judiciary to adjust to new and likely far more complex laws. At the very least, the judiciary should be consulted informally to develop an understanding of what has worked and what has not worked with the current legal regime regarding property issues.

The HJPC DPSP, though smaller, appeared to be better organized and have greater capacity albeit on a far more limited number of topics. Their work agenda appeared to be better defined and more project-oriented than the MoJ. As well, the HJPC did not give the

impression that they had the same hierarchical issues as sometimes evidently slows down the work of the MoJ.

Concern for European Union Accession:

To a degree, the intense interest of the BiH MoJ to advance towards Accession to the EU has a potentially distorting effect. A great deal of effort appears to be made towards fulfilling the conditions with a somewhat unrealistic appreciation of the time it will take and the demands necessary to be met. To a point,more effort appears to be placed on securing donor assistance to help to fulfill the *Acquis Communtaire* conditions of EU accession than on the actual implementation of reforms of less direct relevance to the EU but still vital to an effective and efficient justice system. The MoJ needs to consolidate the gains it has made (or will make) in policy development through rigorous implementation planning, a process that does require a closer working relationship with the HJPC.

The HJPC may be actually holding up its responsibilities for EU accession more transparently than the MoJ. The HJPC, for example, appears to have an institutional mission both more defined and more independent of political and other pressures than the MoJ.

The general point one could make is that concentrating on improving the efficiency and effectiveness of a transparent, impartial and accountable justice system throughout Bosnia I Herzegovina will lead to faster accession to the EU than just trying to tick off the EU checklist.

Funding: Arrangements and Analysis

Potentially the funding arrangement poses the greatest single difficulty. One can appreciate that the justice sector is both under-funded and the funding available comes from a bewildering array of 14 different budgets.

There are a number of funding arrangements possible though the easiest would be to see HJPC personnel assigned to SSPACEI to work on joint projects. A stand-alone agency runs the risk of receiving the full support of neither the MoJ nor the HJPC.

The potential contribution of the donor community would require careful planning. The expectation may be that donors, in particular USAID, may fund positions; however, this is not possible in the current JSDP II terms of reference. JSDP II can provide training and guidance, but it is not meant to provide government-to-government block transfers even for specific functions. That said, JSDP could provide a robust program of training and mentoring which is clearly needed to improve the capacity of the MoJ and HJPC personnel to perform meaningful in-depth policy analysis.

One related area which deserves further attention is policy-based budget analysis. In my second presentation on Day Two of the training session, I briefly outlined the basics of a quantitative approach to budget planning and justification. The usefulness of such a capacity to the Bosnian justice sector lies in both providing an empirical approach to internal budget discussions and also establishing a set of statistical monitoring and evaluation measures to indicate progress to the donor community. Simply put, the credibility of measurable progress indicators will assist the Bosnian justice sector in raising funds and improving its political and public profile.

The usual M&E statistical measures have concentrated on judicial performance, but there are some innovative measures designed to capture the performance of a line justice ministry. I may be mistaken, but I did not perceive any familiarity among the participants of

the statistical use of justice records.

Political Will:

As I said in my Day Two presentation, the problems with "political will" usually can be attributed to poor communications. A principal-agent analysis can sometimes provide a clearer picture of who is not either communicating or understanding expectations, monitoring and evaluations procedures and the range of rewards/sanctions. A fair bit of discussion will be necessary for the MoJ and the HJPC to identify their respective roles and responsibilities for joint policy planning.

As to the will of the politicians themselves, I came away with the impression that they are just not that interested in the nitty-gritty of justice policy, though on occasion will seek to intervene but usually just on specific cases in which a political interest is at stake. A lack of political attention and oversight, of course, is an all-too-familiar lament of institutional justice personnel. In and of itself, that lack of attention is not a great cause for concern if the political leaders grant sufficient leeway for the institutions to operate more or less independently yet still within a framework of accountability.

Recommendations:

1. **Consolidate existing verbal commitments to a JPU by the MoJ's SSPACEI unit and the HJPC.**

Progress was made through the course of the planning session for a mutual commitment for joint policy development. EWMI's Mr. Muhamed Sušić performed "yeoman duty" in order to get the parties to agree to the Memorandum of Understanding for the training session itself. I would expect that he will continue his diligent and diplomatic efforts to bring a more formal agreement for closer cooperation to fruition.

The key players in the MoJ and the HJPC appeared to amenable to a more precise commitment. In particular, Mr. Arnaut, the Deputy Minister of the MoJ, should continue to be consulted on a regular basis.

2. **Build a broader base of support.**

Perhaps not immediately, but relatively soon, the MoJ and the HJPC should canvass various stakeholders as to their support for and ideas for joint policy planning. First, of course, would be the relevant internal political actors who have an interest. That would range from the President's Office, the Council of Ministers and select MPs. To avoid future suspicions, officials should also at least inform the Entity and cantonal authorities of what they are planning to do if only in general terms. Non-governmental stakeholders such as civil society, the bar association and law schools could also profitably be canvassed. EWMI may be able to assist in providing contacts within the international justice community willing to support and encourage a cooperative approach to justice planning in BiH.

3. **Define the scope of joint policy planning both on current analysis requirements in the JSRS and for potential new projects.**

As noted above, the MoJ has 18 policy analyses required by the JSRS Action Plan and the HJPC has 10 analyses. (See Appendix 3 of the JSRS attached to the end of this memo.) The two parties should start to review the list and identify those which would benefit from some degree of cooperation. Each joint analysis probably requires a different level of cooperation. Therefore, a range of options for joint activities could be developed, from simple consultation to shared drafting. As the preparations of the policy analyses required

appear to be at a preliminary stage, there is time and opportunity for collaboration.
Completing the Action Plan of the JSRS is a clear priority. Nonetheless, some initial discussions could take place as to potential new or complementary analysis projects. As discussed above, policy-based budget and funding analysis could be considered.

4. **Identify future training needs.**

From the exercise of defining the scope of joint policy planning should flow a better understanding of the specifics areas of analytic capacity in need of strengthening. Or more simply put, "What do they respective staffs need to know in order to more effectively perform useful justice policy analysis?" There is a challenge in that some skills are not quickly transferred. For instance, quantitative skills will probably require a more prolonged period of training and mentoring. One expects that USAID, EWMI and the parties will have to negotiate the range of training and the various durations. Resources available will guide the selection of local, regional and international trainers and mentors. Certainly some instruction could be provided through internet-based and video technologies, as well as old-fashioned books and articles.

5. **Put together a joint Work Plan with resource allocations.**

With the groundwork covered in terms of roles and responsibilities and the scope of joint planning, the parties should be able to proceed to developing a joint work plan that would include a series of deadlines, milestones, monitoring and evaluation procedures and "feedback" opportunities. Resource planning, both in terms of personnel and funds, should flow from and inform the joint work plan. There may not be enough resources to do everything. It will likely be an iterative process to reconcile the work plan with the resources available. It may take several months, likely the end of 2010, to begin detailed work planning and resource allocations. Donor contributions will influence the size and scope of the undertaking.

6. **Engage USAID and other donors on potential resource and training requests.**

As the MoJ and the HJPC will both be looking for donor support for joint policy work, and many other aspects of justice reform, the sooner the better it is to communicate clear and realistic expectations of USAID and donor support. `USAID and EWMI could likely give a relatively complete picture of the resources that will be committed over the next year. For its part, EWMI should start fairly soon to block out a schedule for training and mentoring on specific topics likely to arise in discussions with the MoJ and HJPC in terms of capacity-building.
Probably the immediate "next step" for EWMI is a more intensive round of discussion and planning as to the scope of work for joint policy planning. With the consolidation of verbal commitments by the MoJ and the HJPC, this activity could proceed this autumn. Sufficient preparation on the part of EWMI in terms of defining the options would make the scope planning exercise go smoother and faster.

Annex 3: Policy Analyses Required by JSRS

Pillar of reform	Strategic issue	Policy analysis required	Timeline for development[6]
Judicial System	Independence and Harmonisation	Analysis of the implications of harmonising the procedures for the selection of BiH Constitutional Court judges with the existing procedures for the selection of judges for the RS and FBiH Constitutional Courts developed and implementation measures proposed	months 1 -12
Judicial System	Efficiency and Effectiveness	Analysis of the required changes to legislation, to decrease the number of backlog cases in the enforcement procedure initiated on the basis of "authentic documents" (such as unpaid utility bills) and propose appropriate measures	months 1 -12
Judicial System	Efficiency and Effectiveness	Analysis of backlogs in the prosecutors offices and recommend the necessary measures for resolving this issue (legislative or other measures)	months 1 -12
Judicial System	Efficiency and Effectiveness	Analysis of number of judges in relation to case inflow and identify instances in which changes in numbers are needed	months 1 -12
Judicial System	Efficiency and Effectiveness	Analysis of prosecutorial staff (especially the ratio of expert associates and trainees in relation to prosecutors) in comparison to the existing number of cases and case inflow in order to determine the appropriate ratios	months 1 -12
Judicial System	Accountability and Professionalism	Investigation about the establishment of harmonised criteria and programmes for bar exams in BiH reflecting needs and best practices	months 1 - 12
Judicial System	Accountability and Professionalism	Analysis of possible foreseeable timeframes in processing cases in courts, based on type of cases and courts	months 12 – 24
Support to Economic Growth	Mediation and Other Forms of Alternative Dispute Resolution	Analysis of experiences to date in the application of mediation in BiH	months 12 - 24
Judicial System	Independence and Harmonisation	Study of the realistic financial needs of the judicial institutions in BiH, taking into consideration priorities of the judiciary	months 12 – 36
Access to Justice	Care of Court Users and Role of Civil Society	Explore modalities for a more active engagement of the NGO sector in BiH in monitoring the justice sector work in BiH	months 12 – 36

Pillar of reform	Strategic issue	Policy analysis required	Timeline for development
Judicial System	Efficiency and Effectiveness	Analysis of comparative experiences in using alternative measures of criminal prosecution including the implications for introducing these mechanisms in the legal practice of BiH	months 12 - 48
Execution of Criminal Sanctions	Application of International Standards	Analysis of existing and possible alternative measures of custody and proposal for introducing these alternatives	months 12 - 60
Execution of Criminal Sanctions	Application of International Standard	Analysis of existing and possible alternative measures of custody with suggested ways of introducing alternatives	months 12 – 60
Execution of Criminal Sanctions	Application of International Standard	Analysis of existing standards relating to procedures of incarcerating individuals and keeping incarcerated individuals and suspects by police and prosecutors	months 12 - 60
Execution of Criminal Sanctions	Prison Overcrowding	Analysis on the development of a probation system in BiH	month 36
Well-Coordinated and Managed Sector	Coordination of Competencies	Analysis of the impact of the MoJ restructuring at the cantonal level	months 36 - 48
Support to Economic Growth	Mediation and Other Forms of Alternative Dispute Resolution	Study on modalities of the wider application of mediation and other types of alternative dispute resolution in BiH	months 48 - 60
Access to Justice	Free Legal Aid and Access to Legal Information	Analysis of the established free legal aid system in criminal and civil law matters in terms of the effectiveness and efficiency of the free legal aid system	month 60
Execution of Criminal Sanctions	Prison Overcrowding	Study on introduction of other types of alternative sentences	month 60
Pillar of reform	**Strategic issue**	**Policy analysis required**	**Timeline for development**
Judicial System	Efficiency and Effectiveness	Analysis of comparative experiences in using alternative measures of criminal prosecution including the implications for introducing these mechanisms in the legal practice of BiH	months 12 - 48
Execution of Criminal Sanctions	Application of International Standards	Analysis of existing and possible alternative measures of custody and proposal for introducing these alternatives	months 12 - 60
Execution of Criminal Sanctions	Application of International Standard	Analysis of existing and possible alternative measures of custody with suggested ways of introducing alternatives	months 12 – 60
Execution of Criminal Sanctions	Application of International Standard	Analysis of existing standards relating to procedures of incarcerating individuals and keeping incarcerated individuals and suspects by police and prosecutors	months 12 - 60
Execution of Criminal Sanctions	Prison Overcrowding	Analysis on the development of a probation system in BiH	month 36
Well-Coordinated and Managed Sector	Coordination of Competencies	Analysis of the impact of the MoJ restructuring at the cantonal level	months 36 - 48
Support to Economic Growth	Mediation and Other Forms of Alternative Dispute	Study on modalities of the wider application of mediation and other types of alternative dispute resolution in BiH	months 48 - 60

	Resolution		
Access to Justice	Free Legal Aid and Access to Legal Information	Analysis of the established free legal aid system in criminal and civil law matters in terms of the effectiveness and efficiency of the free legal aid system	month 60
Execution of Criminal Sanctions	Prison Overcrowding	Study on introduction of other types of alternative sentences	month 60