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# BOSNIA JUSTICE SECTOR DEVELOPMENT PROJECT II

# IMPLEMENTATION OF MODEL STANDARD 2.6

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## TABLE OF ACRONYMS

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| EWMI | East-West Management Institute, Inc. |
| USAID | United States Agency for International Development |
| USG | United States Government |

## Background:

The High Judicial and Prosecutorial Council ("HJPC") of BiH adopted at its February 2012 meeting twenty standards in the field of Prosecutors' Offices ("PO") administration, i.e. the Matrix of European Standards (MOS). Each standard is in accordance with a corresponding strategic objective of the revised Strategic Plan of the HJPC BIH for the period 2010-2013 and is further in line with the relevant strategic programs of the BIH Justice Sector Reform Strategy ("JSRS") 2008-2012.

USAID JSDP II, in cooperation with the HJPC BiH and the Swiss project "Support to Judiciary in BIH - Strengthening Prosecutors in the Criminal Justice System", has planned a thorough and detailed implementation of the MOS in nine POs in BIH, selected on the basis of JSDP II project experience and judgment in relation to where assistance is believed will have the maximum impact: District PO Trebinje, Cantonal PO Mostar, Cantonal PO Sarajevo, District PO Eastern Sarajevo, District PO Banja Luka, Cantonal PO Zenica, Federal PO of the FBIH, Republic PO of the R Srpska, and District PO Doboj. JSDP II endeavors to work with Change Management Teams in each PO to implement the reform activities required to implement the standards.

The HJPC regularly collects statistical data on the performance of all of the POs from the offices. Extensive data is gathered annually on the processing of all types of criminal cases through all criminal procedure phases. In accordance with Article 20, item 3 of the Law on the HJPC, the HJPC publishes information as to the performance of POs in attachments to the HJPC Annual Report providing insight into the operations of the POs. After implementation of the Case Management System in courts (CMS) and prosecutors' offices (TCMS), the HJPC started gathering data on the performance of the courts and POs directly from the CMS/TCMS. Statistical data gathered this way is considered to be the official data and is presented in all reports dealing with the performances of the courts and POs. The data on the performance of the courts and POs is presented in the HJPC annual reports, which are available to the general public through the HJPC web portal.

The European Commission (EC) in its recommendations from The Structured Dialogue on the BIH Judiciary emphasizes the importance of timely and efficient backlog reduction. The EC, while acknowledging that certain steps have been made within the process of backlog reduction, requested the HJPC to prioritize urgent adoption of all such measures. In the first set of preliminary recommendations, the European Commission underlined the importance of the HJPC BIH in establishing the rule of law and encouraged technical talks aimed at consolidating the functions of the HJPC BIH by securing adequate balance between independence and accountability. In the second set of recommendations, the HJPC BIH was encouraged to continue initiatives to increase efficiency through adopting proposals for backlog reduction.

The HJPC's Strategic Plan 2010-2013 states as its Strategic Objective 1 to increase the efficiency of courts and prosecutors' offices in BIH: "Increasing the efficiency of the judiciary represents one of the priorities in the process for accession to the European Union. Dedication to the establishment of an efficient judiciary, being a major segment in the implementation of judicial reform, has in the past been defined as one of the four basic principles of operations and strategic direction for HJPC BiH. Neglecting this segment of the reform would not only impede the advancements achieved thus far, it would also carry the

risk that the reasons why the courts and prosecutors' offices are behind with their caseloads would be linked to the basic principles of the reform (e.g. reduced number of courts and judges, but not the number of unresolved cases; this may contribute to the inception of a negative view of the measures carried out so far, as well as impede the efforts for carrying out the reforms until their completion). Therefore, the HJPC shall invest additional effort in strengthening efficiency of courts and prosecutor offices in BiH, with a focus on reducing the backlog, further automation of working processes, and undertaking other measures to rationalize the organization and operations of judicial institutions in BiH".

To date, the HJPC BIH has not developed an instruction that would regulate the drafting of backlog reduction plans for all of the POs in BIH. The HJPC has only addressed backlog reduction plans with regard to war crimes cases. In its session of April 17-19, 2013, the HJPC adopted the "Instruction on Drafting of War Crimes Cases Backlog Reduction Plans in POs" with related forms.

In Standard 2.6 of the HJPC MOS all POs in BIH are requested to develop and implement Case Backlog Reduction plans for all cases. An effective PO case backlog reduction plan should list all backlog cases, separated by case categories and dates of submission, thus enabling the POs to prioritize old cases and to work on cases in the order of date of submission. Development of a standardized backlog reduction plan will provide each PO with a tool to establish and use reliable data about the quantity and structure of their case backlog allowing them to carry out proper analysis thus gaining a full understanding of the problem and allowing them to make subsequent internal decisions and improvements while also giving them information to formulate recommendations to external stakeholders.

## Actions Taken:

First, it was necessary to review the various directions of the HJPC as well as the Model Standards. It was also necessary to obtain and review the Directive of the Federation Prosecutor that required the establishment of a general Backlog Reduction Plan in each of the Cantonal POs. It is noted that the RS Prosecutor did not require such plans in each of the District Pos in the RS.

Next it was necessary to review the literature on backlog reduction by POs in Europe and the United States. This was accomplished by internet research as well as communication with various organizations of prosecutors, such as the National District Attorneys Association and National Association of Attorneys General. While there is much written about backlogs there is very little material on developing plans.

It should also be noted that in reviewing Annual Reports of the HJPC it is clear that the magnitude of "old" cases as defined by the Council (>3 years) varies in the offices of Cantonal and District Prosecutors. In addition, it appears that cases approaching the Statute of Limitations may be a more serious problem in some of the offices.

Then drawing together the research and the directives of the HJPC and Federation Prosecutor, I developed a manual to assist the POs in their work to draw up a plan that would address the specific problems in their offices, Attachment "A". Working with staff in the JSDP II Office we developed the agenda for a two day workshop for the nine selected POs at which they

would be able to examine their efforts up to this time as well as discuss possible additional solutions to their backlog problems, Attachment “B”.

On October 3&4, 2013, we held a workshop at the Termag Hotel attended by all nine of the selected POs. At that workshop, which was held in an interactive fashion requiring participation of each office, certain conclusions and recommendations were reached. Those initial conclusions and recommendations follow:

## Conclusions of Workshop on Implementation of MOS 2.6

1. Each of the Prosecutors’ Offices that attended has seriously addressed the issue of backlog of cases and had taken positive steps to improve the situation. It is noted that some offices no longer have a significant backlog and should not have to prepare separate reduction plans.
2. The Chief Prosecutors agreed that there were steps that could be taken to improve the effectiveness of their offices to reduce those backlog cases. It was suggested that in developing their next backlog reduction plan some or all of these steps be considered for inclusion in that plan. Some of the steps discussed were:
    - Creation within the office of Tables such as those described in MoS 2.6 which would include “old” cases as well as those cases approaching in time the invoking of the Statute of Limitation.
    - A triage or review of all filed reports received by the office by senior personnel (Chief Prosecutor, Deputy Chief Prosecutor or an experienced prosecutor) with comments submitted to the assigned prosecutor suggesting steps that could be taken to resolve the case.
    - A monthly or quarterly review of “old” cases by management to monitor the progress and suggest actions to be taken.
    - Assignment of a team, including an experienced prosecutor and expert associates, to review all “old” cases and recommend actions to be taken to solve those cases.
    - A procedure to review any decisions to decline investigation and/or to terminate investigations before that decision is implemented. (Review by Deputy Chief Prosecutor or assigned experienced prosecutor). This might encourage such decisions by those prosecutors who are timid or inexperienced.
    - Allocation of additional staff assistance to prosecutors who have a large caseload of “old” cases. (Expert associate may be assigned until caseload is reduced).
    - Increase the percentage of expected caseload norm that is comprised of “old” cases.
    - Develop procedures to use alternatives to full investigation and indictment in minor cases involving first time offenders. (Could include referral to treatment, agreement to make restitution, mediation, payment of a fine in place of prosecution, etc.).
    - Assign all “old” cases to only experienced prosecutors.
    - Creation of a TCMS early warning system that would go to all chief prosecutors at intervals as cases approached the Statute of Limitation. This could be monthly or quarterly and would improve the ability to manage these cases.

- Any backlog reduction plan should provide for a periodic public report on the progress being made in achieving reduction goals.

3. It was agreed that additional tools would be helpful in enhancing the ability of the prosecutors' offices in addressing backlog cases. In this regard the workshop endorsed several **recommendations**:
    - Recommend to the High Judicial and Prosecutorial Council that effective support is given to seeing adopted amendments to the Law on Prosecutors in the Federation so as to allow Expert Associates to perform additional competencies in cases involving potential sentences of up to 5 years.
    - Recommend to the High Judicial and Prosecutorial Council that it consider providing an internal method to recognize and reward those truly exceptional prosecutors who exceed their norm and also resolve a large number of "old" or priority cases (these may include those cases approaching the Statute of Limitations). The Council could award a letter of commendation to those prosecutors who meet these criteria and are recommended by their chief prosecutor. The letter would be placed in the prosecutor's file at the HJPC and should receive some weight in considerations for assignment.
    - Recommend to the High Judicial and Prosecutorial Council that it should direct the IT Department to enhance TCMS to provide all chief prosecutors with a report listing all pending cases in their office that are approaching the Statute of Limitations. Such a list should be issued on a monthly or quarterly basis. It should include all cases that have 9 months or less pending before the statute becomes effective.
    - Recommend to the High Judicial and Prosecutorial Council consider in developing its Annual Report Tables that columns be developed for the following categories: "Cases that cannot be resolved because of objective procedural reasons" (Unavailable suspect, etc.) and "Reports that cannot be resolved because outside the control of the prosecutor" (Reports where the prosecutor has requested additional information from other agency and it is not produced).
    - Recognizing the current financial situation we recommend to the High Judicial and Prosecutorial Council to consider advocating in the future for a plan that would allow financial incentives to be awarded truly exceptional performance by a prosecutor as well as the legislation necessary to accomplish that plan.

These conclusions and recommendations were circulated to all of the POs who attended the workshop for comments. Upon receipt of all of the comments a modified version of the recommendations will be developed and sent to the HJPC.

## Observations:

All of the POs participated actively in the discussions at the workshop. It is obvious when we discussed backlog that there are widely different situations in different offices. In a number of offices the number of "old" cases is small enough that it can easily be handled without having a special plan. In others, Sarajevo being the most serious, the problem needs to be aggressively addressed. Indeed, the RS Prosecutor has not directed the District POs to adopt reduction plans because in his estimation the problem is under control. Certainly the number

of “old” cases in some offices would indicate no need for the plan. In this regard, the MoS 2.6 should possibly be examined to recognize that some offices do not need these plans and award a point for demonstrating that cases are current.

## Next Steps:

The first step staff should take is to review all comments to the conclusions and recommendations and refine that document to reflect the consensus reached.

Staff at JSDP II should encourage all POs to update their Backlog Reduction Plans and provide assistance in doing so. This assistance may be in designing or developing charts or tables that would assist the offices in both meeting the requirements of MoS 2.6 and in better operating their offices with respect to “old” cases and those with Statute of Limitations problems.

JSDP II should offer assistance to the HJPC in developing the “early warning” system as part of TCMS. Perhaps, short term IT assistance could be provided.

JSDP II should look at the standards and see if any changes need be made to recognize that some offices may not need Backlog Reduction Plans.

JSDP II should request that the POs submit their plans for next year to the project to determine if they have used any of the ideas that were discussed at the workshop.

## Conclusion:

I wish to thank JSDP II for the opportunity to assist POs as they address the serious work they do in investigating and prosecuting criminal conduct. While the formal end of my consulting agreement come with the submission of this report, I would appreciate the opportunity to work with JSDP II staff in compiling the comments from POs and amending the conclusions and recommendations. This would of course be without charge to the project.

Respectfully Submitted,

Richard S Gebelein

**Attachment "A"**

# Manual for Development of a Backlog Reduction Plan for Prosecutors' Offices in Bosnia and Herzegovina

## 1.1 Introduction:

The Purpose for this Manual is to provide assistance to the Prosecutors' Offices in Bosnia and Herzegovina that are preparing "Backlog Reduction Plans" to address their caseloads. It is designed to provide a general framework to allow the offices to develop their own plans to address the specific problems that exist in each office. The manual recognizes that each office has had to develop a plan to address the special problem of war crimes cases in accordance with the direction and instructions of the High Judicial and Prosecutorial Council.

## 1.2 Background:

It has been recognized by the High Judicial and Prosecutorial Council as well as by reporters for the European Union that there exists a serious problem of old or backlogged cases within the judicial system of BiH. That backlog or delayed justice reflects poorly upon the image of the judicial system to the public at large as well as to the international community. The third meeting of the "Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina" specifically noted the need for "continued support for the reduction of the backlog of cases". Likewise the Fourth meeting singled out the issue of war crimes cases and that that backlog needed special attention. The HJPC concurred and in fact required the development of reduction plans for the backlog of war crimes cases. It should be noted that all aspects of the system have backlog problems including the offices of prosecutors.

It should be recognized that backlogs exist in most systems and that steps can be taken to reduce these backlogs. There are, however, no magical tools to be employed that will solve this problem. Rather the reduction of backlog involves hard work and the wise use of all resources. It involves management developing an intelligent plan that will address all cases in the system, while placing an emphasis on resolving older and more difficult cases. The HJPC has recognized the need for each prosecutor's office to adopt a plan or strategy to address their backlog. In the Book of Rules on Orientation Measurements for Performance of Prosecutors in Prosecutors' Offices in Bosnia and Herzegovina, the HJPC mandates that:

(3) In drafting of work plans, Chief prosecutors must take into account the number of pending crime reports and investigations at the end of previous reporting period, and ensure that the total number of completed cases for each prosecutor includes a certain percentage of old cases, in accordance with the Backlog Reduction Plan for each prosecutors' office.

This provision clearly indicates the importance of the Backlog Reduction Plan for each prosecutor's office.

## 2.1 Identify the Backlog that must be addressed:

The first step in creating a Backlog Reduction Plan is to identify the "backlog" that must be addressed. Just as in addressing any problem, the first step is to identify or define the problem that must be solved. Every office will have pending cases or a caseload. In the prosecutors' office that will consist of crime reports and investigations. Clearly "backlog" does not have the same meaning as "caseload". Usually, the term backlog is associated with the number of cases that have pending for an amount of time that exceeds the normal processing time for cases of that type and complexity. In some systems a legally mandated standard time has been established for cases and when that mandated time has been passed a case moves into the backlog.

In BiH the HJPC has created the definition for "old" cases to be those that have not been resolved within three (3) years of the first paper being filed. See Instruction for Implementation of the Book of Rules on Orientation Measurements for Performance of Prosecutors in BiH. One way to define backlog would be to use the definition of old cases pending. In some systems the term "backlog' would include all those cases pending in excess of the number disposed of in any given time period. In yet other systems the term has been used to describe those cases pending at the end of the measured time period. And in some systems the term is used to describe caseload in relation to expected capacity to resolve cases. So if a prosecutor is expected to resolve 300 cases and has 400 assigned, this system would say he has a backlog of 100.

In most systems the expected resolution time of differing types of cases is based on the type of case, numbers of persons involved, complexity of issues, legal procedures applicable to that type of case, and other variables. Thus, simple cases involving one person that can be resolved at a lower court level are expected to be processed faster than serious cases involving multiple people and numerous criminal acts that must be tried at a higher level.

Finally, it should be noted that determining the nature of the problem that exists may require a relative analysis. For example, a prosecutor's office that has 100 "old" cases may be doing very well or very poorly. If it has 1500 cases pending and 100 are old, its backlog is 6.7%; but if it has 12000 cases and of those 300 are "old" its backlog is only 2.5%. Clearly, backlogs should be judged in percentage terms rather than simple numbers.

Therefore, before addressing solutions to a backlog it is essential to agree upon a definition for the term "backlog".

## 2.2 What do the Numbers Show? :

The Second step in addressing the issue of backlog requires an analysis of the caseload statistics. Does the office have reliable statistics as to pending cases, and their age? Are there statistics on how long it normally takes to resolve each type of case? Are there statistics available as to the method of resolution, and the time required for each method of resolution for each type of case? Can the TCMS provide reports that are helpful for managing caseloads in each office? Do statistics show how each prosecutor's office is doing in relation to numbers of old cases in relation to the national statistics as well as other offices?

Basically each prosecutor's office must determine what management tools are available to assist in managing caseload resolution. This may require the design of reports that can be run from TCMS or be provided from the office records. These reports must be current and helpful to the Chief Prosecutor and staff in management decisions.

In addition, Standard 2.6 of the Model Office Standards requests that each office develop a plan that will include at least two ongoing reports or tables of cases. The first table must list all "old" cases by type and year of initiation. The second table must be done on a quarterly basis and display the number of "old" cases at the beginning of the quarter, the number to be resolved during the quarter, the number actually resolved during the quarter and the number of "old" cases at the end of the quarter (including those that have become old during the quarter). The Chief prosecutor should determine what other tables or reports will be helpful to his office in managing these cases.

### 3.1 Identify Possible Solutions:

The Chief Prosecutor and staff should determine if there exist any practices or methods that could lead to a more prompt resolution of cases. These methods may apply to all cases or only certain types of cases. The goal of this exercise is to see if there is any way to minimize staff effort on cases that would allow for more productivity. Some of the questions that should be addressed are:

- Are there cases that because of their nature could easily be resolved through arbitration, mediation or party settlement? (If so, how do we recognize and screen for these cases to be put on a fast track?)
- Are there cases where treatment (Substance abuse, mental health, alcoholism) is preferable to criminal prosecution? (If so, how do we identify these cases, and how can we divert them with a resolution of the matter?)
- Are there cases that clearly will not lead to prosecution? Can they be quickly identified and resolved?
- Is it possible to use associates more widely to allow prosecutors more time to accomplish their duties? (Are there barriers to such use?)
- Can workload in balance be quickly addressed?
- Is creation of an "old case" position or positions desirable?
- Should each prosecutor be assigned a certain quota of "old" cases? How can this be done in a fair manner?
- Can TCMS be programmed to warn prosecutors when cases are a certain time period away from entering the "old" category?
- Can TCMS be used to report workload disparity to the Chief Prosecutor every month?
- Are there additional ways to promptly resolve cases?

Once these questions have been explored it is possible to begin to develop a strategy or plan to address the backlog issue that exists in the individual prosecutor's office.

### 4.1 Structure a Plan:

Policy decisions must be made to address a case backlog. Those decisions will govern the nature of the plan developed. The policy decisions are based on an understanding of the nature of the backlog problem. The level of emphasis that will be placed on resolving "old" cases will depend on the seriousness of the problem. Steps will be authorized by the Chief Prosecutor and staff to improve results:

- The Chief Prosecutor makes the reduction of "old" cases pending in the office a high priority. The prosecutors will be rewarded in their annual evaluations for resolving more than a set number of "old" cases.
- The Chief Prosecutor will require more reports from TCMS, if possible, detailing the age of the pending cases, and the rate and speed with which each prosecutor resolves cases. These reports will be produced on a timely basis. (Monthly, every other month).
- The Chief Prosecutor will authorize legal associates to perform more duties now handled by prosecutors if legally permitted.
- The Chief Prosecutor will explore the possibility for resolution of cases through other means. (Arbitration, treatment, etc.)
- All "old" cases will be reviewed by a team to determine if there exists a real possibility that they will lead to a prosecution.
- The Chief Prosecutor will establish a time table as to how often he/she will review the statistical reports and adjust or modify assignments.
- The Chief Prosecutor will request additional resources if the statistics demonstrate that his/her office is resolving cases better than the national norm and there remains a backlog of "old" cases.
- The Chief Prosecutor will direct that the reports contemplated in Rule 2.6 are prepared on a yearly and quarterly basis. In addition reports indicating the performance of each prosecuting attorney in resolving "old" cases will be prepared on a quarterly basis. (An attorney's old cases resolved number will be reduced by any of that attorney's cases entering the "old" category).

In physical structure the plan should contain a statement of the problem addressed including the office numbers, a statement of the emphasis placed on reduction, the policy decisions that have been made, the number or percentage of "old" cases to be resolved by each prosecutor, authorization of any new resolution methods, and then the table formats for the reports to be generated.