

## **Organisation for Security and Co-operation in Europe MISSION IN KOSOVO**

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### **Strategy for Justice**

This strategy for justice outlines a multi-faceted approach to address the challenges and problems facing the criminal justice system. It is recognized that in some areas discussed, such initiatives are under review. However, the process by which legislative, policy and procedural changes are made in the criminal justice system is not formalized or based on short and long-term planning. The current approach to issues in the criminal justice system without concrete follow-up severely hamper the effectiveness of initiatives that are taken and often result in a failure to implement meaningful change. Initiatives for change are often pursued on one level, failing to address other necessary aspects so that changes and measures are successful, maximizing the use of limited resources.

There continues to be recognition that the implementation of a fair and effective justice system is a key to the success of the UNMIK mission. The creation of a new pillar instituting UNMIK police and ADoJ together acknowledges the need for increased coordination, policy development and comprehensive and effective implementation of a strategy for justice. Developing a community in which the rule of law and human rights is respected, requires that legislation, judicial and law enforcement practice and criminal justice policy are not arbitrary but predictable, transparent, consistent and principled. It is with this overall approach in mind that the following multi-layered steps are recommended.

#### **I. STRUCTURES FOR THE IMPLEMENTATION OF A COHERENT AND LONG TERM STRATEGY FOR JUSTICE**

One coordinating body at the highest levels within UNMIK to oversee and guide the development of criminal justice policy, legislation and reform to ensure an effective and coherent approach to criminal justice issues.

Formalization of process and structures in the following areas:

- Process for a Legislative Framework
- The Administration of Justice and Effective Policing: ADOJ and UNMIK Police
- Advisory Committees on Justice Support Systems and Capacity Building
- Accountability: The Kosovo Judicial and Prosecutorial Counsel
- Mainstreaming of coordination and consultation with local experts and actors in the criminal justice system within these structures and processes.

## **II. CO-ORDINATING BODY ON POLICY, RESPONSE AND DEVELOPMENT: Criminal Justice Advisory Group**

A criminal justice advisory group (CJAG) should be established chaired by the PDSRSG to respond to cases under consideration for executive orders, general trends and policy and legislative issues. This group should be directly linked to the SRSG and consist of qualified UNMIK staff with criminal justice experience. As such, the CJAG should consist of the primary agencies, offices and departments concerned with criminal justice experience. As such, CJAG should consist of the primary agencies, offices and departments concerned with criminal justice issues, UNMIK Police Commissioner and Head of ADoJ, OSCE Human Rights and Rule of Law, Office of the Legal Advisor (OLA) to the SRSG and KFOR, that together can provide a coherent and co-ordinated response and develop comprehensively the justice system.

### **A. Oversight and Guidance**

The CJAG would formalise the current initiatives regarding criminal justice issues and meet regularly to review and co-ordinate the policy and legislative development. When reviewing work in multi-disciplinary areas of criminal justice development, the CJAG would invite the head of the relevant agency or department to attend the meeting, such as the Head of UNICEF, the Head of the Department of Health and Social Welfare or the Head of UNHCR.

#### *i. Legislative Framework*

A formalised process for legislative review supervised by the CJAG would ensure that legislative reform is coherent and effective, that such reform complies with human rights standards and that local experts review reform on the basis of a policy for interim and long-term legislative development.

#### *ii. Administration of Justice and Effective Policing*

Working in a new consolidated structure under the CJAG, the co-ordinated duties of ADoJ and UNMIK police regarding the criminal justice system would be developed. This paper outlines recommendations for priority administrative development within the relevant agencies. The CJAG would further ensure that policy development in justice support systems and capacity building as well as legislative reform are implemented through ADoJ and UNMIK Police.

#### *iii. Justice Support Systems and Capacity Building*

The work of *ad hoc* working groups, task forces and committees on multi-disciplinary and co-ordinated responses to criminal justice issues would be formalised into advisory subcommittees under the oversight and guidance of the CJAG. These secondary advisory bodies would be tasked with formulating comprehensive work plans for the effective implementation of legislative and policy change. The subcommittees would work regularly and long-term, continuing to develop policy and initiatives and may also fund-

raise and elicit donor support for particular projects or initiatives to address their areas of concern. Where there is presently a gap in development of criminal justice support systems, the CJAG would task staff from UNMIK and other agencies to form a subcommittee.

## **B. Executive Detentions**

The CJAG would develop the policies and procedures by which a case is considered for executive detention to ensure that this authority is used as a last resort when all other judicial avenues have been exhausted and that all cases for executive orders are evaluated under the three-prong test. The following are recommendations for policy and procedures for the issuance of an executive order to detain:

- To ensure transparency in the use of executive orders to detain, the CJAG would authorize the publication and dissemination of the three-prong test to judges, prosecutors and defense counsel.
- The CJAG itself should make the determination of whether there is a substantial showing that a case meets each of the requirements under the three-prong test. Only cases that satisfy this test should be considered for a recommendation for executive detention to the SRSG. The majority presence of international judges in a case should alleviate any need for an executive order since the third prong will be absent.
- Executive orders to detain should provide the basis for the decision; that is, it should particularise the basis on which each prong of the test is satisfied. Such orders to detain should be immediately provided to the detainee and his counsel.
- All executive orders should be automatically reviewable by a court composed of exclusively international judicial personnel on the basis of a challenge by the detainee, in line with international human rights standards.

## **C. Consultation and Local Involvement**

The CJAG should regularly discuss developments, legislative and policy initiatives with the local authorities in the criminal justice area. In particular, it should meet regularly with the President of the Kosovo Supreme Court, the Presidents of the District Courts and the Chief Prosecutors Offices.

## **III. LEGISLATIVE FRAMEWORK: Standardizing the Legislative Process of Promulgating Regulations**

All legislative initiatives concerning criminal justice should be overseen by the CJAG during the drafting and development stage. Once drafted, they should be passed through a Human Rights Audit Committee and the Joint Advisory Council on Legislative Matters (JAC) which would then review the draft on the basis of a policy regarding interim and

long-term legislative reform. Once translated, new regulations would be given to the SRSG for promulgation and the CJAG would ensure an effective mechanism for dissemination. This process should be able to be expedited where necessary.

#### **A. Formalised Review of Draft Regulations regarding Criminal Justice**

All advisory subcommittees of the CJAG, UNMIK Police, OLA and ADoJ should be required to inform the CJAG of legislative reform, timeframe for reform and plan of effective implementation of new law.

All draft regulations regarding criminal justice should be accompanied by a legislative history, explaining the object and purpose of the law and providing an explanation as to the impact of the new law on the current applicable law by mentioning articles of the law, which are revoked or amended.

All draft regulations should be accompanied with a plan for implementation, which includes a list of all administrative directives, policies and procedures, court circulars and other documents which are necessary for the effective implementation of new law.

#### **B. Human Rights Audit Committee**

The CJAG would distribute **all** draft regulations regarding criminal justice to the human rights components of UNMIK and relevant UN agencies, to ensure that new laws are in conformity with human rights standards.

The human rights components of the UNMIK mission including the SRSG's Human Rights and Community Affairs Unit (HRCA), the OSCE Human Rights Division, the Office of the High Commissioner for Human Rights (OHCHR), the Human Rights Advisor to UNMIK Police, the Department of Civil Society and Good Governance and the Council of Europe would form a Human Rights Audit Committee (HRAC) that is tasked with the *expedited* review of all draft regulations for human rights compliance. HRAC would issue a certification of compliance with human rights standards.

Once formed, the current draft regulation on Access to Counsel would be immediately subject to audit by the Human Rights Audit Committee.

#### **C. Joint Advisory Council on Legislative Matters**

The JAC should be appraised of and record the progress of all legislative reform initiatives regarding criminal justice. This structure would also be consulted prior to draft regulations being finalised.

The JAC would be requested by the CJAG to create a policy on the interim use of legislative reform in the form of Regulations so as to advise the SRSG on Regulations that will need to be amended or rescinded when the criminal code and criminal procedure

code are promulgated. Such a policy would allow for legislative reform at present to more immediately address particular issues while ensuring that the law is not duplicated once the draft codes are in effect.

#### **D. Translation and Dissemination**

New Regulations should be forwarded to the SRSG for promulgation only once they are translated in all three official languages. Regarding the legislative history attached, there should no requirement that it be translated on the date of promulgation. There should, however, be expedient translation of these histories once the Regulation is signed.

The CJAG would direct the revision of the current system of dissemination of Regulations by ADoJ to ensure the immediate and direct dissemination of new Regulations and their histories to all appointed judges and public prosecutors.

For defence counsel, the Criminal Defence Resource Centre in co-ordination with the Kosovo Bar Association should be requested to ensure the immediate dissemination of new Regulations and their histories to all practising defence lawyers.

### **IV. ADMINISTRATION OF JUSTICE AND EFFECTIVE POLICING**

The following are recommendations for priority administrative and operational goals for ADoJ and UNMIK Police in a consolidated structure:

#### **A. Appointments and Remuneration**

An international should be appointed to the Chief Prosecutors Office of the Kosovo Supreme Court. The international prosecutor should be authorised to review all war and ethnically-motivated criminal cases and genocide indictments and, where appropriate, the indictment should be amended or abandoned.

Particular judges should be appointed within the District and Municipal Courts to be criminal family judges who will handle cases of domestic violence, sexual offences when related to family, criminal child abuse and neglect. These difficult cases require judges with particular training in and sensitivity to the issues as with juvenile judges.

The tenure of appointment of international judges and prosecutors should be increased to 12 months.

There should be a remuneration increase for local judges and public prosecutors, for forensic pathologists of the Forensic Institute and for KPS officers.

## **B. Policy on International and Local Work Distribution and Regulation 2000/64**

There should be the development of a coherent approach to the work distribution between international and local judges and public prosecutors involving ways to enhance working relationships and professional courtesy. For example, the use of international and local prosecutor teams would be effective in capacity building of local public prosecutors particularly in difficult cases such as organised crime prosecutions.

There should be an immediate formalization of the criteria upon which *Regulation 64* petitions are reviewed. These criteria should be disseminated to defense counsel with the assistance of the Criminal Defense Resource Centre and the Kosovo Bar Association. These criteria should be likewise disseminated directly to all appointed judges and public prosecutors.

Attached to the criteria should be an explanation as to the reasoning and purpose behind *Regulation 64* to increase understanding and cooperation on this issue between international and local actors.

There should be a formal process through which the Presidents of the District Courts and relevant local judges and public prosecutors are made aware of the granting of a *Regulation 64* petition or the use of *Regulation 2001/02*.

The restriction on the scope of *Regulation 64*, namely that it does not apply to trials that have begun, should be reviewed and removed in light of the fact that it reduces the effectiveness and impact in certain cases.

## **C. Case Management in the District Courts**

A pre-trial review procedure for all district court cases should be established. This should involve the assignment of a case management assistant to all five of the district courts to assist the courts in setting trial dates and pre-trial review hearings. This person would also be designated as a contact for counsel.

Pre-trial review hearings should be instituted and be held within a limited period post indictment. In these hearings, the **presiding judge** of the trial panel would review, with the public prosecutor and defense counsel, the case to identify outstanding issues: the availability of counsel, expected length of trial, witnesses required including issues with proper service as well as identifying any outstanding forensic or other issues that require expert evidence. The **public prosecutor/court administrator** would be responsible for contacting the police liaison officer, prior to the pre-trial review hearing to **confirm** the service of summons and availability of witnesses. The Presidents of the District Courts should be required to ensure that presiding judges on indicted cases hold pre-trial review hearings on a regular basis.

#### **D. Criminal Investigations**

Standard law enforcement investigation techniques should be pursued such as establishing a program for international and local (KPS) undercover police officers and joint international and local criminal investigation teams.

The recruitment of informers should be initiated with the establishment a centralised network for information collection.

The development of surveillance techniques and funding for the necessary equipment should be initiated including the establishment of the appropriate limitations and supervision to ensure that the use of such techniques are lawful and in conformity with international standards regarding criminal justice.

The establishment of crime hotlines should be also pursued accompanied by a public awareness raising campaign and community outreach regarding anti-crime measures.

#### **V. SUPPORT SYSTEMS: Advisory Subcommittees on Justice Support Systems and Capacity Building**

Advisory subcommittees to the CJAG would be tasked to address particular areas of criminal justice policy, which require a co-ordinated and multi-disciplinary response. In this framework, operational and administrative units of ADoJ and UNMIK Police should work with other essential components of UNMIK on policy development, legislative change, Administrative Directives, Memorandums of Understanding, Manuals, internal policies and procedures, protocols and ensuring effective implementation of these initiatives.

Advisory subcommittees should be required to provide the CJAG with a comprehensive and detailed work plan laying out short, medium and long-term goals and multi-level outputs and reporting as indicators of work progress. Eventual overlap between subcommittees will require intervention by the CJAG.

These subcommittees should be obligated to schedule regular meetings with relevant local actors to ensure local input in the development of initiatives.

##### **Subcommittee on Criminal Procedure and Judicial Support**

***Participants:*** ADoJ, UNMIK Police, OSCE Rule of Law and OLA.

***Purpose:*** examine interim legislative changes to the Code of Criminal Procedure (during the period of reform by the JAC), court circulars, systematic support needs of the courts such as effective summoning procedures and court security, in order to increase the efficiency, effectiveness and fairness of proceedings.

***Priorities:***

*Right to Challenge Detention*

To meet basic international human rights standards, ensure the promulgation of a *habeas corpus* regulation.

*Ensuring a speedy trial*

To expedite proceedings where witnesses and victims are at risk of intimidation and/or harassment, allow the public prosecutor in serious criminal cases to proceed directly to indictment based on law enforcement investigations as permitted by the FRY CPC in cases under the jurisdiction of the municipal court.

A court circular should be distributed that interprets Art. 279 (2) FRY CPC requiring the court to schedule a trial within two months of the indictment. Only the defendant should be able to waive this requirement if he requires more time to prepare his defence.

*Evidentiary concerns*

To assist in guiding the proper and effective development of cases and limit the abuse of judicial discretion, consideration should be given to the development of appropriate evidentiary guidelines expanding on the evidence rules in the FRY CPC.

*Accurate investigations and trial records*

Until the summarising of testimony improves, *verbatim* trial records should be taken in all criminal trial and investigative proceedings.

*Sentencing Guidelines*

Assess sentencing approaches and the need for guidelines to assist in bringing objectivity and consistency to sentencing, including, the development of the Law on Penal Sanctions to include detailed ranges and aggravating and mitigating factors.

**Subcommittee on Legal Training and Capacity Building**

***Participants:*** KPSS, UNMIK Police Trainers, the Kosovo Judicial Institute, ADoJ and OSCE.

***Purpose:*** co-ordinate training and capacity building initiatives, ensure consistency in training for the police and the courts and respond with training initiatives in identified areas of need and legislative reform.

***Priorities:***

*Pre-requisite Training*

All judges and prosecutors, before they assume their official positions, should be obligated to attend training in addition to the professional bar exams. For international judges and prosecutors there should also be mandatory pre-entry training on domestic applicable law and compulsory continuing legal education on, amongst other things, the ECHR.



### *Continuing Legal Education*

Such education should be mandatory for all judges, public prosecutors and, in the case of defense counsel, a requirement of the Bar. Focus of continuing legal education should be: legal drafting; legal reasoning and the use of evidence to support decisions; the questioning of witnesses as a tool for to develop evidence; the treatment of vulnerable victims and witnesses, in particular victims of sexual or intra-familial violence in the courtroom. Continuing legal education programs should be facilitated by experts and use practical learning techniques, such as mock trials and videotaping.

### *Professional Development*

The creation of professional development opportunities may include overseas practical training for selected judicial actors (including the observation of investigative and trial proceedings) and judicial mentors for local judges and public prosecutors wherein experienced professionals could provide tangible guidance on real issues as they arise in the courtrooms.

### *Lay Judges*

A basic legal training course for lay judges should be implemented by the Kosovo Judicial Institute.

### *Training in specialty areas*

There is particular need for coordinated training in specialty areas, such as the use of forensics in the courts, sexual violence, juveniles in conflict with the law, domestic violence and child abuse. In these areas, training initiatives should be coordinated and integrated with the Department of Health and Social Welfare.

## **Subcommittee on Forensics and Investigative Tools**

***Participants:*** ADoJ forensic specialist, the UNMIK Police Crime Lab representatives, UNMIK Police, representatives of the Forensic Institute, KPSS, the Department of Health and Social Welfare and OSCE.

***Purpose:*** ensure the co-ordinated and comprehensive development of forensic services, including speciality areas of forensic expertise, and the effective collection and utilisation of forensic evidence by the police, courts and health institutions.

### ***Priorities:***

#### *Scenes of Serious Crime Unit*

A “Scenes of Serious Crime” Unit, including a local forensic pathologist and KPS officers, should be developed for immediate and 24 hour response to serious criminal cases throughout Kosovo.

#### *Forensic equipment*

All UNMIK police stations should be regularly provided sufficient basic evidence collection equipment, e.g., for fingerprinting, taking bodily fluids, drug analysis etc.

### *Speciality Forensic evidence*

A sexual violence suite should be established at the Forensic Institute, along with the development of protocols for the collection and preservation of evidence in cases of sexual violence and child abuse. The provision of modern rape and assault evidence kits to hospitals and clinics are necessary for the implementation of such protocols including the training of specialised personnel in the use of such kits and appropriate treatment of victims of sexual violence and child abuse.

### **Subcommittee on Victim and Witness Protection and Support Services**

***Participants:*** UNMIK Police, ADoJ, SRSG's HRCA Unit, Department of Health and Social Welfare and OSCE

***Purpose:*** address legislative changes already under review, ensure that the various levels of witness and victims protection and support needs are effectively implemented and resourced including the required equipment, create appropriate safe housing for witnesses and victims and develop victim support services, which include psychological, social services and referrals to legal assistance.

### **Subcommittee on Juveniles in Conflict with the Law and Criminal Child Abuse and Neglect**

***Participants:*** UNICEF, SRSG's HRCA Unit, the Department of Health and Social Welfare, the Department of Youth/ Education, ADoJ, UNMIK Police, KPSS and OSCE.

***Purpose:*** advise on and develop legislation, inter-agency co-ordination and programs to effectively prevent juvenile crime, the implementation of alternatives to detention for juveniles, and formulate policies and procedures for a justice response to criminal child abuse and neglect.

### **Subcommittee on Sexual Offences and Domestic Violence**

***Participants:*** ADoJ, UNMIK police, the Department of Health and Social Welfare, the Department of Youth/Education, UNICEF/UNIFEM, KPSS and OSCE.

***Purpose:*** advise on and address a co-ordinated criminal justice and social service response to violence against women, including domestic violence and sexual offences and formulate a multi-disciplinary approach to combat the increase in juvenile/young adult sexual crime.

### **Subcommittee on the Mentally-ill and Prisoners with Special Needs**

*Participants:* ADoJ, Department of Health and Social Welfare, WHO, KPSS and OSCE.

*Purpose:* advise on legislation and mechanisms to effectively address the issue of the mentally-ill and prisoners with special needs, including the development of the institutional capacity to ensure appropriate treatment of the mentally ill/special needs prisoners and effective out-patient treatment and drug rehabilitation programs for persons sentenced to receive such treatment as well as increasing capacity for the provision of adequate expert evidence on mental health issues.

### **Subcommittee on Organised Crime Policy**

*Participants:* SRSG's Political Advisor, UNMIK Police, Pillar IV representatives, OSCE Rule of Law Department, ADoJ.

*Purpose:* address the need to create a multi-faceted policy on organised crime prosecutions, anti-corruption measures, legislation and tax control systems, strict regulations of business and financial transactions and search and seizure legislation with regards to the closure of business and the forfeiture of assets.

### **Subcommittee on Minorities in the Justice System**

*Participants:* OSCE, ADoJ, UNMIK Police, UNHCR, SRSG's HRCA Unit.

*Purpose:* advise on, among other things, a plan for renewed efforts to recruit minority judges and public prosecutors, address the issues of minority judicial personnel, such as security and discrimination, and ensure that criminal justice mechanisms are accessible to minority communities.

## **VI. ACCOUNTABILITY: The Kosovo Judicial and Prosecutorial Counsel**

It is recommended that the drafting of a Code of Ethics for judges and public prosecutors be expedited and that international judges and prosecutors be subject to the same Code of Ethics, discipline and removal provisions as national judges and prosecutors.